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## Beyond NIL

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# Beyond NIL

William W. Berry III\*

## ABSTRACT

*The name, image, and likeness (NIL) changes and shifting landscape obscure more existential threats to the student-athlete model on the horizon. The television money that Power Five conference teams receive still comprises much of the budget of athletic departments. The football and basketball players—the revenue sport athletes—may have a claim to a greater share of this revenue.*

*Some athletes argue that they are employees of their universities, which would entitle them not only to additional benefits but also to other tools, such as collective bargaining. All of these advantages could make universities responsible for increasing the amount of remuneration available to revenue sport athletes. Other athletes are advancing antitrust lawsuits in an attempt to remove the barriers to a free market in order to eviscerate the grant-in-aid limit on remuneration a university can pay to its athletes.*

*The consequence often ignored in conversations surrounding a future where either or both efforts are successful relates to non-revenue sports—sports that do not generate enough money to cover their expenses. While Title IX protects women's sports to a degree, the overall consequence of increased compensation for revenue sport athletes will be the diminishment and even loss of many non-revenue sports. This is because revenue sports such as football and basketball largely cover all the costs of non-revenue sports.*

*This Article maps the current landscape without adopting a normative view. Certainly, a college sports future decided by university administrators and athletic directors remains preferable to one mandated by courts. To that end, this Article offers several different paths to a new status quo in light of the imminent threats of litigation grounded in employment and antitrust law.*

*Part II of this Article describes the effect of NIL on the pay-for-play conversation. Part III assesses the current litigation in employment*

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and antitrust law. Lastly, Part IV maps some possible responses of universities to this changing landscape.

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## I. INTRODUCTION

Intercollegiate athletics is in the midst of a generational revolution.<sup>1</sup> The National Collegiate Athletic Association (NCAA)’s long-held amateurism principle still exists, but only as a shell of its former self.<sup>2</sup> The NCAA rules still limit university remuneration to

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1. See generally *NIL: The Revolution in US College Sports*, FIN. TIMES (Mar. 17, 2022), <https://channels.ft.com/en/ft-scoreboard/nil-the-revolution-in-us-college-sports/> [<https://perma.cc/6G7V-4XH7>]; *A Series of Conversations on Name, Image, & Likeness and the Future of Intercollegiate Athletics, 2021–2022*, UNIV. MISS. SCH. L. (last visited Nov. 5, 2023) (a series of conversations organized by Professor Berry exploring the consequences of NIL in a variety of areas of law).

2. See NCAA DIVISION I MANUAL 2021–2022, CONST. art. 2 § 2.9 (2021), <http://www.ncaapublications.com/productdownloads/D122.pdf> [<https://perma.cc/EM3X-7S5H>]. Prior to the adoption of the new Constitution in January 2022, Article II of the NCAA Constitution provided the following:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

*Id.*

college athletes.<sup>3</sup> Universities may pay athletes' tuition, room, board, books, cost of attendance, and costs related to education (collectively, grant-in-aid benefits).<sup>4</sup> If a university provides any other benefits to college athletes that are not available to other students, the institution violates NCAA amateurism rules.<sup>5</sup>

The contemporary difference is that third-party payments to athletes no longer violate NCAA amateurism rules.<sup>6</sup> This change, which took effect on July 1, 2021, resulted from a supermajority of states passing statutes that barred the NCAA from penalizing athletes for receiving remuneration for the use of their names, images, and likenesses (NILs).<sup>7</sup> The NCAA adopted a default rule that made such

3. NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022) (“Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by their NCAA division.”).

4. *See id.* § 15.02.6. Historically, the grant-in-aid included only tuition, room, board, and books. NCAA DIVISION I MANUAL 2013–2014, BYLAWS § 15.02.5 (2013). The Ninth Circuit’s decision in *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1075 (9th Cir. 2015), allowed schools to add the cost of attendance to the grant-in-aid. And the Supreme Court’s July 2021 decision in *Alston v. Nat’l Collegiate Athletic Ass’n*, 141 S. Ct. 2141, 2165 (2021), allowed schools to provide other benefits related to education such as computers, graduate school tuition, and summer abroad programs.

5. *See* NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022). This applies to both economic and non-economic benefits. *Id.*

6. Effective July 1, 2021, the NCAA adopted an interim NIL policy that suspended the application of NCAA bylaws to NIL activities, consistent with the many state laws that went into effect that day. NCAA INTERIM NIL POLICY (July 21, 2021). Specifically, the Interim Policy provided as follows:

NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following:

- For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, the individual’s eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12 (Amateurism and Athletics Eligibility).
- For institutions in states with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual’s eligibility for and/or the membership institution’s full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.
- Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.

*Id.*

7. Thirty-four states had adopted NIL laws as of October 26, 2023. *See NIL Legislation Tracker*, TROUTMAN PEPPER (2023), <https://www.troutman.com/state-nil-legislation-tracker.html> [<https://perma.cc/6BQR-2UTJ>]. Alabama and South Carolina have repealed their NIL laws. *Id.*

payments permissible in all jurisdictions, irrespective of the presence or absence of a state NIL law.<sup>8</sup>

Metaphorically, these rules limit what an athlete's "parents" (university) may pay them but do not limit what an athlete's "rich aunt" or "rich uncle" (athletic booster) may offer them, as long as the payment is in exchange for the use of the athlete's NIL.<sup>9</sup> Practically, this means that college athletes can receive previously forbidden pay-for-play,<sup>10</sup> as long as the payor is a third party (not the university), and the payment is technically for NIL (as opposed to pay-for-play).<sup>11</sup>

The simultaneous rule changes regarding transfers have altered the landscape of revenue sports—college football and college basketball.<sup>12</sup> Where the old transfer rules<sup>13</sup> dissuaded transfers by requiring the athlete to sit out a season, the new transfer rules allow for immediate eligibility.<sup>14</sup> This means that coaches now recruit athletes from other schools, with a significant number of transfers each

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8. See NCAA INTERIM NIL POLICY (2021).

9. See *id.*

10. Pay-for-play means compensating athletes solely for their participation in sports. See Leonard Armato, *Pay for Play is Alive in College Sports and Free Agency Has Arrived*, FORBES (Dec. 16, 2022), <https://www.forbes.com/sites/leonardarmato/2022/12/16/pay-for-play-is-alive-in-college-sports-and-its-time-to-realize-that-free-agency-has-arrived/?sh=4293347a638e> [<https://perma.cc/J2YD-9AKF>].

11. See NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022); NCAA INTERIM NIL POLICY (July 21, 2021).

12. See Jason Fuller, *Welcome to the Portal—Where College Athletes Can Risk It All for a Shot at Glory*, NPR (May 19, 2023), <https://www.npr.org/2023/05/19/1173134544/college-football-transfer-portal-ncaa-student-athlete> [<https://perma.cc/6EUK-QTXL>].

13. Prior to 2018, athletes in revenue sports (football, basketball, baseball, and hockey) had to sit out a year upon transferring without either a release from the Athletic Director or a hardship waiver from the NCAA. NCAA DIVISION I MANUAL 2017–2018, BYLAWS §§ 14.5.5.1, 14.6.1 (2017). For a discussion of the rule and its flaws prior to the adoption of the transfer portal, see William W. Berry III, *The Transfer Litmus Test*, 18 VA. SPORTS & ENT. L.J. 151, 157 (2019).

14. NCAA DIVISION I MANUAL 2022–2023, BYLAWS § 14.5.1 (2022).

year.<sup>15</sup> While NCAA rules<sup>16</sup> and federal fraud statutes<sup>17</sup> technically prohibit using the promise of NIL deals as an inducement to accept a scholarship at a particular school, the practice of alumni collectives suggests that this is exactly what happens.<sup>18</sup> A decision to enroll as a freshman in a particular program or to transfer to a particular program relates, at least in part for some athletes, to the amount of NIL revenue the athlete is likely to receive.<sup>19</sup>

But the NIL changes and shifting landscape obscure the more existential threats to the student-athlete model on the horizon.<sup>20</sup> The television money Power Five conference teams<sup>21</sup> receive still supports

15. See Jeff Tracy, *College Football's Transfer Portal is in Overdrive*, AXIOS (May 11, 2023), <https://www.axios.com/2023/05/11/ncaa-football-transfer-portal-record> [<https://perma.cc/K3SF-MHFT>] (finding that a record 8,699 football players entered the transfer portal between Aug. 1, 2022, and May 1, 2023).

16. The NCAA's May 2022 Guidance on NIL provided as follows:

An NIL agreement between a SA and a booster/NIL entity may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.

- NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner) or membership on a team.

NCAA, Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement (May 2022), <https://image.mail2.ncaa.com/lib/fe5715707d6d067e7c1c/m/7/38f59518-6731-4fde-983a-310d6468ef8f.pdf> [<https://perma.cc/32VJ-GQLE>].

17. 18 U.S.C. § 1343 (prohibiting wire fraud); *United States v. Gatto*, 986 F.3d 104, 109–10, 130 (2nd Cir. 2021) (upholding the fraud convictions of James Gatto, Merl Code, and Christian Dawkins for arranging for payments to prospective college athletes and thereby depriving the university of their amateur status and thus defrauding the university).

18. See Leonard Armato, *NIL Collectives and Jaden Rashada Show NCAA Rules Are In Shambles*, FORBES (Jan. 24, 2023), <https://www.forbes.com/sites/leonardarmato/2023/01/24/nil-collectives-and-jaden-rashada-the-ultimate-snob-of-ncaa-rules/?sh=20cab46828eb> [<https://perma.cc/B7VR-6Y9B>]; Dennis Dodd, *Inside the World of 'Collectives' Using Name, Image, and Likeness to Pay College Athletes, Influence Programs*, CBS SPORTS (Jan. 26, 2022), <https://www.cbssports.com/college-football/news/inside-the-world-of-collectives-using-name-image-and-likeness-to-pay-college-athletes-influence-programs/> [<https://perma.cc/V2N5-M9QP>].

19. Christopher J. Brooks, *In Choosing Colleges, Top Young Athletes Say: "Show Me the NIL"*, CBS NEWS (June 3, 2022), <https://www.cbsnews.com/news/nil-college-athletes-boosters-collectives-nick-saban-coaches/> [<https://perma.cc/454C-WK62>].

20. Brad Wolverton, Ben Hallman, Shane Shifflett & Sandhya Kambhampati, *Sports at Any Cost*, HUFF. POST (Nov. 15, 2015), <https://projects.huffingtonpost.com/ncaa/sports-at-any-cost#:~:text=The%20HuffPost%2FChronicle%20analysis%20found,the%20most%20to%20support%20them> [<https://perma.cc/95FS-EFVK>]; See Associated Press, *Coaches of Non-Revenue Sports Fret over Athlete NIL Compensation*, ESPN (June 1, 2020), [https://www.espn.com/college-sports/story/\\_/id/29251627/non-revenue-sports-fret-athlete-nil-compensation](https://www.espn.com/college-sports/story/_/id/29251627/non-revenue-sports-fret-athlete-nil-compensation) [<https://perma.cc/4ZMG-DWS2>].

21. Historically, the Big 5 conferences are the SEC, Big 10, ACC, Big 12, and Pac-12. See Bryan Armetta, *Who Put All the "Power" in College Football's Power 5?*, GMTM.COM,

much of the budget<sup>22</sup> of athletic departments.<sup>23</sup> Revenue sport athletes, though, may have a claim to a share of this revenue.<sup>24</sup>

Some athletes argue they are employees of their universities, which would entitle them not only to additional benefits but also to other tools such as collective bargaining, all of which could make the university responsible for increasing the amount of remuneration available to revenue sport athletes.<sup>25</sup> Other athletes are advancing antitrust lawsuits in an attempt to remove the barriers to a free market and the grant-in-aid limit on remuneration the university pays.<sup>26</sup>

The consequence often ignored in conversations surrounding a future where either or both efforts are successful relates to non-revenue sports.<sup>27</sup> While Title IX protects non-revenue women's sports<sup>28</sup> to a degree, the overall consequence of increased compensation for revenue sport athletes will be the diminishment and even loss of many non-

<https://gmtm.com/articles/why-does-the-power-5-have-so-much-power> [https://perma.cc/E45F-L8BU]. The Power Five have arguably become the Power Four with the recent collapse of the Pac-12 conference. David Cobb, *Pac-12 on Brink of Collapse: How College Football's Premier West Coast Conference Fell Behind in Realignment*, CBSSPORTS.COM (Aug. 11, 2023), <https://www.cbssports.com/college-football/news/pac-12-on-brink-of-collapse-how-college-football-premier-west-coast-conference-fell-behind-in-realignment/> [https://perma.cc/U6Y9-3KTD].

22. See Wolverton et al., *supra* note 20 (showing how universities use tuition revenue to cover costs of athletics at non-Power Five schools); *College Athletic Departments Financial Database*, SPORTICO, <https://www.sportico.com/business/commerce/2023/college-sports-finances-database-intercollegiate-1234646029/> [https://perma.cc/6WCV-NAAM] (hereinafter Sportico database).

23. See Dean Straka, *Big Ten Leads Power Five Conferences with \$845.6 million in Revenue in 2022 Fiscal Year, Per Report*, CBS SPORTS (May 19, 2023), <https://www.cbssports.com/college-football/news/big-ten-leads-power-five-conferences-with-845-6-million-in-revenue-in-2022-fiscal-year-per-report/> [https://perma.cc/2HSL-43AY].

24. See *Johnson v. Nat'l Collegiate Athletic Ass'n*, 556 F.Supp.3d 491, 491 (E.D. Pa. 2021); *House v. Nat'l Collegiate Athletic Ass'n*, 545 F.Supp.3d 804, 808–10 (N.D. Cal. 2021).

25. See *Johnson*, 556 F. Supp. 3d at 491.

26. See *House*, 545 F. Supp. 3d at 808, 810.

27. See Aaron Beard, *Non-Revenue Sports Fret Over College Athlete Compensation*, DENVER POST (June 1, 2020), <https://www.denverpost.com/2020/06/01/non-revenue-sports-college-athlete-compensation/> [https://perma.cc/AKZ6-HUPL].

28. See Aaron Beard, *Title IX: NCAA Report Show Stark Gap in Funding for Women's Sports*, ASSOCIATED PRESS (June 23, 2022), <https://apnews.com/article/sports-college-education-basketball-52394389d64d251d0e65a55cb800ea88> [https://perma.cc/SQP2-FHWU]. At a few schools, women's college basketball is an exception and falls in the category of revenue sports. See Lev Akabas, *March Madness 2023: UConn Women Beat Football Team in Ticket Cash*, SPORTICO (Mar. 24, 2023), <https://www.sportico.com/leagues/college-sports/2023/uconn-womens-basketball-football-ticket-revenue-1234717145/> [https://perma.cc/3KA6-P5W8].

revenue sports.<sup>29</sup> This is because the revenue sports of football and basketball largely cover all non-revenue sports costs.<sup>30</sup>

This Article maps the current landscape and the threats to the television money that currently funds non-revenue sports. Certainly, a future decided by university administrators and athletic directors is preferable to one decided by court mandate.<sup>31</sup> To that end, this Article offers several different paths to a new status quo in light of the imminent threats of litigation grounded in employment and antitrust law.

Part II of this Article describes the effect of NIL on the pay-for-play conversation. Part III assesses the current litigation in employment and antitrust law. Lastly, Part IV maps some possible responses of universities to this changing landscape.

## II. HOW NIL CHANGED THE PAY-FOR-PLAY CONVERSATION

For over a decade prior to the adoption of state NIL laws, fans and journalists engaged in an ongoing debate as to whether college athletes should receive compensation for playing sports.<sup>32</sup> Athletes, of course, receive a significant amount of remuneration in the form of tuition, room, board, and books.<sup>33</sup> But the NCAA prohibits the sharing

29. See Beard, *supra* note 27.

30. See Alex Kirshner, *Football Has Been College Sports' Golden Goose Since the 1800s*, BANNER SOC'Y (Apr. 8, 2020), <https://www.bannersociety.com/2020/4/8/21211241/college-athletic-budgets-football> [<https://perma.cc/UGV3-S96T>].

31. Cf. Nicole Auerbach, *Why 2023 Has All the Makings of College Sports' Wildest, Most Significant Year Yet*, THE ATHLETIC (Dec. 30, 2022), <https://theathletic.com/4044912/2022/12/30/ncaa-college-sports-rule-changes-laws/> [<https://perma.cc/3BVY-ASN7>] (explaining athletic directors' attempts to educate and persuade Congress to act rather than let the courts make decisions via antitrust litigation).

32. See, e.g., Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Dec. 30, 2011), <https://nyti.ms/2kgO9w9> [<https://perma.cc/WG9T-T3BE>] [hereinafter *Let's Start Paying College Athletes*]; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643> [<https://perma.cc/JVT2-YZDD>]; Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No Pay Rules Violate Section One of the Sherman Act*, 64 CASE W. RESV. L. REV. 61, 77, 88–89 (2013).

33. Two antitrust cases expanded this list of payments permitted by the NCAA to also include cost of attendance and costs related to education. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1054, 1079 (9th Cir. 2015) (adding payment of the cost of attendance); *Alston v. Nat'l Collegiate Athletic Ass'n*, 141 U.S. 2141, 2144, 2153, 2165–66 (2021) (adding remuneration related to education). At some private universities, this total amount of compensation can exceed \$300,000 over four years. See generally Ron Lieber, *Another Admissions Advantage for the Affluent: Just Pay Full Price*, N.Y. TIMES (Mar. 15, 2019), <https://www.nytimes.com/2019/03/15/your-money/college-admissions-wealth.html> [<https://perma.cc/N6LZ-AZ8P>].



of money generated by television contracts, attendance at games, and college merchandise.<sup>34</sup>

As college sports moved from a multimillion- to a billion-dollar industry, the cry for revenue sharing increased, often during football bowl games and the NCAA men's basketball tournament.<sup>35</sup> These pay-for-play advocates argue that athletes are responsible for generating revenue and deserve to share in it.<sup>36</sup>

The NCAA and traditionalists, on the other hand, have advocated for the continuation of the student-athlete model, arguing that the amateur status of college athletes makes college sports unique.<sup>37</sup> Athletes participate in college sports for the love of the game, with athletics being part of a larger college educational experience leading to most athletes "going pro" in a vocation other than sports.<sup>38</sup>

The passage of the NIL laws in 2021 tabled this conversation, as it allowed athletes to receive compensation from third parties without requiring the NCAA or universities to compensate the athletes beyond

34. See NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022).

35. See *Let's Start Paying College Athletes*, *supra* note 32; Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES, (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/sports/away-to-start-paying-college-athletes.html> [<https://perma.cc/Z8EC-8K7N>] [hereinafter *A Way to Start Paying College Athletes*]; Daniel Libit, *March Madness 2023: CBI Leader Hails Pay-for-Play for Athletes*, SPORTICO (Mar. 18, 2023), <https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-cbi-tournament-pay-for-play-1234716286/> [<https://perma.cc/6UN9-HFGD>].

36. See *Let's Start Paying College Athletes*, *supra* note 32; *A Way to Start Paying College Athletes*, *supra* note 35; Libit, *supra* note 35.

37. See Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014), <https://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid> [<https://perma.cc/Y8T9-KVH6>]; Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn't Be Paid*, THE NEW YORKER (Oct. 14, 2015), <http://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid> [<https://perma.cc/62AS-WQNV>]; Dan Duggan, *Charles Barkley: Paying College Athletes is 'Ridiculous,'* NJ.COM (Mar. 10, 2015), [http://www.nj.com/rutgersfootball/index.ssf/2015/03/charles\\_barkley\\_paying\\_college\\_athletes\\_is\\_ridicul.html](http://www.nj.com/rutgersfootball/index.ssf/2015/03/charles_barkley_paying_college_athletes_is_ridicul.html) [<https://perma.cc/JE2Y-C5F7>]; Victor Lipman, *Why Considering College Athletes Pro Athletes Is a Really Bad Idea*, FORBES (Apr. 1, 2014), <http://www.forbes.com/sites/victorlipman/2014/04/01/why-considering-college-athletes-pro-athletes-is-a-really-bad-idea/#7c361a664b31> [<https://perma.cc/LFB2-MUD5>].

38. NCAA, *NCAA Student-Athlete Commercial*, YOUTUBE (Apr. 2, 2011), <https://www.youtube.com/watch?v=9UzO4DJBOWw> [<https://perma.cc/9PSW-Y4TQ>]; Dan Levy, *NCAA Is Looking for a Marketing Makeover, Here Are Some Terrible Ideas*, BLEACHER REP. (Apr. 12, 2012), <https://bleacherreport.com/articles/1143312-ncaa-is-looking-for-a-marketing-makeover-here-are-some-terrible-ideas> [<https://perma.cc/6PBT-CHGP>].

amounts related to education.<sup>39</sup> But confusion remains concerning the scope of what should be permissible under NCAA amateurism rules.<sup>40</sup>

### A. Reframing “Cheating”

Historically, financial gifts or other nonmonetary benefits third parties provided to college athletes violated NCAA infractions rules.<sup>41</sup> The idea that compensating athletes gives the team an unfair competitive advantage over other teams motivated these rules.<sup>42</sup> Compliance officers in athletic departments were responsible for self-policing this “cheating.”<sup>43</sup> Indeed, providing compensation to an amateur athlete not only violated NCAA rules prior to 2021, but also, at least in some instances, constituted a federal crime.<sup>44</sup> Such compensation defrauded a federally funded institution of the economic benefits accompanying the amateur status of an athlete.<sup>45</sup>

The new NCAA rules, however, allow third-party boosters<sup>46</sup> to pay athletes for the use of their name, image, and likeness.<sup>47</sup> Initially, many believed that these arrangements would be similar to endorsement deals like those professional athletes enjoy.<sup>48</sup> Within a year, though, groups of boosters began to pool their money to form

39. NCAA DIVISION I MANUAL 2022–2023, BYLAWS § 16.11.1.1 (2022). See generally Dan Murphy, *Universities, NCAA See Pros and Cons of New State NIL Laws*, ESPN (July 1, 2023), [https://www.espn.com/college-sports/story/\\_id/37940566/universities-ncaa-nil-laws-texas-texas-am](https://www.espn.com/college-sports/story/_id/37940566/universities-ncaa-nil-laws-texas-texas-am) [<https://perma.cc/82DW-BLRX>] [hereinafter *Universities, NCAA See Pros and Cons*] (explaining Texas’s new NIL laws).

40. See Armato, *supra* note 18.

41. The NCAA Committee on Infractions gave Southern Methodist University the “death penalty” for such violations in 1987. See Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), <https://time.com/3720498/ncaa-smu-death-penalty/> [<https://perma.cc/7VSC-PDND>].

42. See Brennan Thomas, *Pay for Play: Should College Athletes Be Compensated?*, BLEACHER REP. (Apr. 4, 2011), <https://bleacherreport.com/articles/654808-pay-for-play-should-college-athletes-be-compensated> [<https://perma.cc/VS2P-W258>].

43. See, e.g., Jerry Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Process*, 12 WYO. L. REV. 215, 225 n.42 (2012).

44. See, e.g., U.S. v. Gatto, 986 F.3d 104, 109–10 (2d Cir. 2021).

45. *Id.* at 130.

46. Boosters are any athletic supporter of the college team. See Compliance, *Role of Boosters*, NCAA (Nov. 27, 2013), <https://www.ncaa.org/sports/2013/11/27/role-of-boosters.aspx> [<https://perma.cc/SS4C-HLWG>].

47. See Dan Murphy, *NCAA Name, Image and Likeness FAQ: What the Rule Changes Mean for the Athletes, Schools and More*, ESPN (June 30, 2021, 11:36 PM), [https://www.espn.com/college-sports/story/\\_id/31740112/rule-changes-mean-athletes-schools-more](https://www.espn.com/college-sports/story/_id/31740112/rule-changes-mean-athletes-schools-more) [<https://perma.cc/TTE7-E3AK>].

48. See, e.g., Ross Dellenger, *Behind the Scenes as the Cavinder Twins Became The Faces of Day 1 of NIL*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/hanna-haley-cavinder-twins-nil-deal-basketball-tiktok> [<https://perma.cc/QSL7-73XH>].

collectives.<sup>49</sup> These collectives pay athletes and, in return, require a series of public appearances or social media posts.<sup>50</sup> The athletes are not necessarily endorsing a particular product but instead allowing boosters to buy interactions with them.<sup>51</sup>

While some boosters do enjoy increased access to star athletes, these arrangements seem more about compensating athletes to encourage them in their current athletic roles. NCAA rules explicitly prohibit boosters from paying athletes as an inducement to attend a particular school.<sup>52</sup> And yet, many collectives walk dangerously close to this line, with some perhaps crossing it already.<sup>53</sup>

Indeed, the collective payments seem to have transcended the old world of barring booster payments to athletes.<sup>54</sup> What once was cheating is now not only acceptable, but also central to attracting and keeping top players.<sup>55</sup> The October 2022 NCAA guidance provides a partial framework for the role of universities in helping athletes receive NIL money.<sup>56</sup> While universities and coaches cannot be parties to NIL contracts, they can arrange meetings for boosters and athletes, provide space for such meetings, and otherwise facilitate the development of business relationships between athletes and boosters.<sup>57</sup> Collectives have made such connections even easier by centralizing the boosters of a university into one or more groups.<sup>58</sup>

Universities may push even further to blur the line between booster funding of athletes and university involvement in such arrangements. As of early 2023, some Southeastern Conference (SEC) schools are exploring folding their collectives into university athletic

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49. See, e.g., Peter Nakos, *What Are NIL Collectives and How Do They Operate?*, ONE NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [<https://perma.cc/W6TG-NFWG>]; *Tracker: University-Specific NIL Collectives*, BUS. OF COLL. SPORTS (Oct. 4, 2023), <https://businessofcollegesports.com/tracker-university-specific-nil-collectives/> [<https://perma.cc/73D5-MTRT>].

50. See, e.g., Dodd, *supra* note 18.

51. *Id.*

52. See Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement, *supra* note 16.

53. See Dodd, *supra* note 18.

54. See *id.*

55. See *id.*

56. See NAT'L. COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I INSTITUTIONAL INVOLVEMENT IN A STUDENT-ATHLETE'S NAME, IMAGE AND LIKENESS ACTIVITIES (Oct. 26, 2022), [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL\\_InstitutionalInvolvementNILActivities.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf) [<https://perma.cc/5LAN-HMDW>].

57. *Id.*

58. See Nakos, *supra* note 49.

foundations.<sup>59</sup> It remains to be seen whether the NCAA will legislate on this issue.

### *B. The Transfer Portal*

New transfer rules have accelerated the role of NIL in the revenue sports of football and basketball.<sup>60</sup> Better teams in higher profile leagues regularly recruit the stars of college football and basketball teams at lower caliber institutions.<sup>61</sup> Coaches also often choose not to use their allotment of scholarships on high school seniors, instead leaving spots for transfers to fill.<sup>62</sup>

While tampering and recruiting have historically occurred, the requirement that a transferring athlete sit out for one year in revenue sports deterred widespread transferring.<sup>63</sup> With the removal of this restriction, the “transfer portal” has amounted to a free agency of sorts, with players openly seeking out better opportunities.<sup>64</sup>

The decision to switch universities is not just about increased playing time or more visibility.<sup>65</sup> Given that less than one percent will be able to “go pro,” the amount of NIL money an athlete will receive is increasingly driving the market for transfers.<sup>66</sup>

## III. CURRENT CHALLENGES TO THE STUDENT-ATHLETE MODEL

While the rise of NIL has reshaped the economics of college sports, at least for athletes, the NCAA has largely preserved the student-athlete model.<sup>67</sup> Academic requirements remain and institutions are still limited to education-based grant-in-aid as

59. Andy Staples, *The 12th Man+ Fund Pushes the NIL Envelope. Will Texas A&M Opponents Push Back or Join In?*, SPORTS ILLUSTRATED (Feb. 15, 2023), <https://theathletic.com/4207307/2023/02/15/texas-am-nil-12th-man-foundation/> [<https://perma.cc/SA92-DPXZ>].

60. See Bill Wasinger, *New Rule Could Pop the NCAA Transfer Portal Wide Open*, STACK (July 26, 2022), <https://www.stack.com/a/new-rule-pops-the-ncaa-transfer-portal-wide-open/> [<https://perma.cc/FL6A-3UKS>].

61. See Tracy, *supra* note 15.

62. See Wasinger, *supra* note 60.

63. *Id.*; NCAA DIVISION I MANUAL 2017–2018, BYLAWS §§ 14.5.5.1, 14.6.1 (2017).

64. See Wasinger, *supra* note 60.

65. See *id.*

66. See Bruce Capers, *How Many NCAA Players Actually Go Pro?*, EXACTSPORTS (Feb. 15, 2023), <https://exactsports.com/blog/how-many-ncaa-players-actually-go-pro/2023/02/15/> [<https://perma.cc/8SN2-PJDF>].

67. See NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022).

remuneration for athletes.<sup>68</sup> Two strands of litigation, however, pose existential challenges to the future of this model.<sup>69</sup>

### A. *Employee Athletes*

Several athletes have brought employment law challenges to the student-athlete model.<sup>70</sup> These claims, brought under the Fair Labor Standards Act (FLSA), have historically failed.<sup>71</sup> Courts have held that college athletes are students, not employees, thus embracing the NCAA's conception of student-athlete.<sup>72</sup>

The increasing demands universities place on college athletes and the increased amount of money revenue sports generate have led some to rethink this understanding.<sup>73</sup> A regional National Labor Relations Board (NLRB) judge<sup>74</sup> and a federal district judge<sup>75</sup> have both concluded that athletes are university employees, and the current NLRB general counsel has recently echoed this interpretation.<sup>76</sup>

Continued challenges in this area will likely persist until the Supreme Court addresses this issue. Certainly, the consequences of such a determination would be significant, if not paradigm-destroying.<sup>77</sup> If college athletes are university employees, then all basic

68. *See id.*, *see also id.* § 15.02.6.

69. *See, e.g.*, *Johnson v. NCAA*, 556 F. Supp. 3d 491 (E.D. Pa. 2021); *Nat'l Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 102 (1984).

70. *Johnson v. NCAA*, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021), *appeal filed*, Case No. 22-1223 (3d Cir. 2022); *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 288, 293 (7th Cir. 2016) (holding that student-athletes are not employees for purposes of the FLSA); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 250 F. Supp.3d 401, 402–03, 408 (N.D. Cal. 2017) (holding the same).

71. *See, e.g., Berger*, 843 F.3d at 293 (holding that student-athletes are not employees for purposes of the FLSA); *Dawson*, 250 F. Supp. 3d at 408 (holding the same).

72. *See, e.g., Berger*, 843 F.3d at 288 (holding that student athletes are not employees for purposes of the FLSA); *Dawson*, 250 F. Supp. 3d at 408 (holding the same).

73. *See Northwestern U.*, Case 13-RC-121359, 2014 NLRB LEXIS 221, at \*10 (N.L.R.B. Mar. 26, 2014), *petition dismissed*, *Northwestern Univ. & Coll. Athletes Players Ass'n*, 2015 NLRB LEXIS 613 (N.L.R.B. Aug. 17, 2015).

74. *Northwestern Univ. & Coll. Athletes Players Ass'n*, 2015 NLRB LEXIS 613 at \*67–\*68 (N.L.R.B. Aug. 17, 2015).

75. *Johnson*, 556 F. Supp. 3d at 512. This case is pending before the Third Circuit Court of Appeals. *Johnson v. NCAA*, Case No. 22-1223 (3d Cir. 2022).

76. Nat'l Labor Rels. Bd., General Counsel Memorandum GC 21-08 (Sept. 29, 2021), [https://www.nacua.org/docs/default-source/new-cases-and-developments/2021/statutory-rights-of-players-at-academic-institutions-\\_student\\_athletes\\_-under-the-national-labor-relations-act.pdf?sfvrsn=991440be\\_2](https://www.nacua.org/docs/default-source/new-cases-and-developments/2021/statutory-rights-of-players-at-academic-institutions-_student_athletes_-under-the-national-labor-relations-act.pdf?sfvrsn=991440be_2) [<https://perma.cc/V7AK-FDRF>] (finding that college athletes are employees for purposes of the NLRA).

77. Dan Murphy, *Everything You Need to Know About the NCAA's NIL Debate* (Sept. 1, 2021), [https://www.espn.com/college-sports/story/\\_/id/31086019/everything-need-know-ncaa-nil-debate](https://www.espn.com/college-sports/story/_/id/31086019/everything-need-know-ncaa-nil-debate) [<https://perma.cc/UZ4Z-5M76>] [hereinafter *Everything You Need to Know About the NCAA's NIL Debate*].

protections and requirements of employment and labor law could apply.<sup>78</sup>

Practically, this could potentially mean that college athletes would receive minimum wage under the FLSA,<sup>79</sup> health care benefits,<sup>80</sup> workplace health and safety protections,<sup>81</sup> and workers' compensation.<sup>82</sup> Under this regime, college athletes would also be taxed on their earnings<sup>83</sup> and possess the right to organize and collectively bargain.<sup>84</sup> Universities could define these employment positions in a way that limits or minimizes benefits, but given the hours athletes dedicate to their sports, they would most likely be full-time employees.<sup>85</sup>

The cost here could be incredibly expensive and may possibly go far beyond the current grant-in-aid.<sup>86</sup> Administrative costs would also be burdensome.<sup>87</sup> Finally, Title IX could require that universities provide equal benefits to employee athletes of each gender.<sup>88</sup> Even if Title IX did not apply, Title VII and the Equal Pay Act would be applicable.<sup>89</sup> Those laws could mandate equality in pay and would forbid gender discrimination.<sup>90</sup>

One other issue implicated in the employment context is termination. Under the current four-year agreements that most schools use, some employment standard higher than at-will would define when universities could "fire" athletes.<sup>91</sup> Initially, such arrangements might

78. See General Counsel Memorandum GC 21-08, *supra* note 76.

79. See generally 29 U.S.C. § 201 (mandating a minimum wage of \$7.25 per hour and allowing for overtime pay).

80. See generally Glynn Hill, *College Athletes Can Now Earn Money and Other Benefits. Are Unions Next?*, WASH. POST (Sept. 30, 2021), <https://www.washingtonpost.com/sports/2021/09/30/nlr-memo-ncaa-college-athletes-employees/> [https://perma.cc/C4PM-8W5E].

81. 29 U.S.C. § 654 (Occupational Health and Safety Act). See generally 29 C.F.R. §§ 1910, 1926 (providing the regulations under OSHA).

82. 5 U.S.C. § 8102 (federal workers compensation statutes).

83. See generally 26 U.S.C. § 1 (tax code).

84. 29 U.S.C. § 158 (National Labor Relations Act).

85. See *Northwestern Univ.*, Case 13-RC-121359, 2014 NLRB LEXIS 221, at \*21 (N.L.R.B. Mar. 26, 2014).

86. See John Thelin, *Paying College Athletes*, INSIDE HIGHER ED (Feb. 11, 2018), <https://www.insidehighered.com/views/2018/02/12/impact-college-sports-programs-if-athletes-are-paid-opinion> [https://perma.cc/VK47-DVLC].

87. See generally *id.*

88. See 20 U.S.C. § 1681 (Title IX).

89. 42 U.S.C. § 2000e-2 (Title VII); 29 U.S.C. § 206(d) (Equal Pay Act).

90. 42 U.S.C. § 2000e-2; 29 U.S.C. § 206(d).

91. At-will employment allows firing for any non-discriminatory reason, but the standard here would likely be higher. See, e.g., *At-Will Employment—Overview*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/labor-and-employment/at-will-employment-overview> [https://perma.cc/3QUP-VKML] (last updated Apr. 15, 2008).

mirror the current model but over time could evolve to incorporate other common contractual tools such as contracts beyond four years, rights of refusal, and covenants not to compete. The current NCAA architecture of rules prohibit innovations such as these, but an employee-athlete model that usurps the current student-athlete model could lead to a different kind of relationship between institutions and athletes.<sup>92</sup> Such an employee-athlete regime would effectuate a system in which student-athletes are able to more easily reap the benefits of their sports careers.

### *B. Antitrust Limits on NCAA Rules*

Antitrust law provides another, albeit different, existential threat to the student-athlete model. Section 1 of the Sherman Act bars horizontal restraints of trade, particularly when all market participants act in concert, as universities do with the NCAA.<sup>93</sup> The Supreme Court has used the “rule of reason” to assess such challenges in the context of college and professional sports largely because of possible confusion arising between the concepts of athletic competition and economic competition.<sup>94</sup> This doctrine allows for anti-competitive horizontal restraints on markets when such restraints are necessary to generate pro-competitive benefits in other markets and restraints are not broader than necessary to achieve those benefits.<sup>95</sup>

In *Alston* in 2021,<sup>96</sup> the NCAA relied on dicta from the Court’s *Board of Regents*<sup>97</sup> decision to argue that amateurism provided a shield

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92. For an in-depth exploration of possible consequences, see generally Marc Edelman, Michael McCann & John T. Holden, *The Collegiate Employee-Athlete*, ILL. L. REV. (forthcoming 2023).

93. 15 U.S.C. § 1; see also *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 244 (1918). The NCAA arguably engages in a horizontal restraint of trade by forming a cartel that includes all of the companies (universities) in the market for college athletics. See 15 U.S.C. § 1.

94. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984); *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 186 (2010). The law is less applicable with respect to how the games are played and more applicable with respect to how the money is made. So, restricting the number of coaches would not violate the Act, but restricting the coach salaries would. See *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1024 (10th Cir. 1998).

95. See *American Needle, Inc.*, 560 U.S. at 203.

96. *Alston v. Nat’l Collegiate Athletic Ass’n*, 141 S. Ct. 2141, 2164–66 (2021).

97. *Bd. of Regents of the Univ. of Okla.*, 468 U.S. at 120 (“The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”).

against antitrust challenges to the student-athlete model.<sup>98</sup> The Court rejected this idea in *Alston*, meaning that the NCAA's anti-competitive restraints on the market for paying athletes more than the amount of the grant-in-aid can only survive to the extent that they protect the market for college sports.<sup>99</sup> The idea here was that the possible harm to the market for amateur intercollegiate athletics did not justify the NCAA restrictions in question.<sup>100</sup>

The consequence of NIL and the concurrent expansion of the market for college sports suggests that paying athletes will not impair this market—and might help it grow further.<sup>101</sup> As Justice Kavanaugh's concurrence in *Alston* implies, many of the current NCAA rules, to the extent that they limit the amount of compensation schools pay their athletes, violate antitrust law.<sup>102</sup> It is hard to believe that the source of the compensation of the athletes—schools as opposed to boosters—would convince fans to abandon college sports. Non-economic rules, such as requiring athletes to remain academically eligible and pursue a degree, might be less susceptible to challenge because the market for college athletes could suffer if the players on the field for universities are not students.<sup>103</sup>

The antitrust threat thus has the capacity to destroy the student-athlete model, and not just because successful claims yield treble damages and attorneys' fees. Denying revenue-sport athletes a share of the profits from television, tickets, and merchandise violates antitrust law to the extent that the NCAA mandates that all institutions limit their compensation to the amount of the grant-in-aid.<sup>104</sup> The result, then, will be economic competition in the open market for athletes—a broader version of what is happening with NIL currently.

### C. Will Congress Rescue the NCAA?

NCAA leadership as well as major conferences continue to lobby Congress to pass an NIL law.<sup>105</sup> Their argument for a federal law relates

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98. *Alston*, 141 S. Ct. at 2157–58.

99. *Id.* at 2158.

100. *See id.*

101. *See id.* at 2167–68 (Kavanaugh, J., concurring).

102. *See id.* at 2167.

103. *See id.* at 2158–59.

104. *See* NCAA DIVISION I MANUAL 2022–2023, CONST. art. 1 § B (2022); *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring). Conferences adopting their own sets of rules with respect to this issue could alleviate this tension, but only if there are competitive alternatives between conferences.

105. *See, e.g.*, Amanda Christovich, *Charlie Baker Will Turn The NCAA Into a Lobbying*



to the challenges of meeting the requirements of different state NIL laws in different jurisdictions.<sup>106</sup> Specifically, they claim that it would be difficult to adapt their rules to satisfy the different legal rules.<sup>107</sup>

The real concern, however, is that antitrust or employment law will enable athletes to have an economic claim on the revenue the university receives from athletics. Whether through antitrust immunity, a mechanism disallowing student athletes to obtain an employee classification, or courts barring athletes from receiving remuneration from their university beyond grant-in-aid, universities are hoping for a lifeline.<sup>108</sup>

Given the divided nature of Congress and the wide variety of views on college athletics, federal action seems unlikely. But the NCAA and college presidents are not wrong to believe that Congress could protect open market competition for the revenue college athletics generates.

#### IV. BEYOND NIL

The economic revenue college football and college basketball produce is not insubstantial.<sup>109</sup> These are multibillion-dollar industries that continue to grow.<sup>110</sup> The schools in Power Five conferences, in particular, receive unprecedented amounts of revenue annually, currently in excess of \$60 million.<sup>111</sup> Indeed, with new television contracts, schools receiving \$100 million annually from college sports will likely become standard within the next decade.<sup>112</sup>

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*Firm*, FRONT OFF. SPORTS (Mar. 1, 2023, 3:39 PM), <https://frontofficesports.com/charlie-baker-will-turn-the-ncaa-into-a-lobbying-firm/> [<https://perma.cc/XBM7-BYME>]; Andy Wittry, *NCAA's NIL Lobbying Strategy Calls for Unity, Yet Messages Still Vary*, ON3NIL (July 25, 2023), <https://www.on3.com/nil/news/ncaas-nil-federal-congress-lobbying-strategy-calls-for-unity-yet-messages-vary/> [<https://perma.cc/64DU-RM95>] [hereinafter *NCAA's Lobbying Strategy*].

106. See *Everything You Need to Know About the NCAA's NIL*, *supra* note 77; *Universities, NCAA See Pros and Cons*, *supra* note 39.

107. See generally *Universities, NCAA See Pros and Cons*, *supra* note 39.

108. See generally Brooks, *supra* note 19. But see *Universities, NCAA See Pros and Cons*, *supra* note 39.

109. Sportico database, *supra* note 22.

110. See *id.*; Andrew Zimbalist, *Analysis: Who is Winning in The High Revenue World of College Sports?*, PBS NEWS HOUR (Mar. 18, 2023, 7:14 AM), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports> [<https://perma.cc/64YD-386M>].

111. See Straka, *supra* note 23.

112. See Cork Gaines, *The 27 Schools that Make at Least \$100 Million in College Sports*, BUS. INSIDER (Nov. 25, 2017, 1:42 PM), <https://www.businessinsider.com/schools-most-revenue-college-sports-texas-longhorns-2017-11#:~:text=In%20all%2C%20there%20are%20now,ago%20and%2013%20in%202014> [<https://perma.cc/U9VM-VS4F>].

### A. Advertising v. Revenue

Given that most university presidents are not former college athletes, but are instead career academics, one might suspect that the effect of such an economic windfall would be a more robust academic program, professor salaries no longer lagging behind the cost of living, and large investments into research. But this is not the case.<sup>113</sup> Almost no college sports revenue contributes to the academic operations of universities.<sup>114</sup> Instead, this revenue returns directly into athletics departments to fund their annual budgets.<sup>115</sup>

Presidential acquiescence to the current status quo relates to the other, perhaps more important, benefit of college sports: advertising. Public universities, particularly in the SEC, have thrived over the past decade by attracting more and better students to their institutions.<sup>116</sup> The advertising that college sports provide directly correlates to enrollment increases.<sup>117</sup>

Pouring the money back into athletics to ensure competitive teams—which increases attendance, television exposure, and increased merchandise sales—seems to be the safer bet than the university using those funds to improve the academics of the institution if the goal is to expand enrollment. To the extent that the money both football and basketball generate supports the future success of football and basketball, this makes sense, but a significant part of the athletics budget at most institutions supports other sports.<sup>118</sup>

### B. Revenue v. Non-Revenue Sports

Indeed, the justification for universities using monies from revenue sports to improve revenue sports seems legitimate, to a point. The past decade has seen an arms race of sorts, with institutions putting money into facilities in amazing ways while also exorbitantly

113. See *The American College President Survey*, AM. COUNS. EDUC. (2023), <https://www.acenet.edu/Documents/American-College-President-IX-2023.pdf> [https://perma.cc/LW5M-QZKQ].

114. See Wolverton et al., *supra* note 20. See generally Andy Wittry, *College Athletics Spending and the Movement Towards Revenue Sharing*, ADU, <https://athleticdirector.com/articles/student-athlete-revenue-sharing/> [https://perma.cc/BE3Q-HDQ7] [hereinafter *College Athletics Spending*] (last visited Oct. 5, 2023).

115. See Wolverton et al., *supra* note 20; *College Athletics Spending*, *supra* note 114.

116. See generally KRISTI DOSH, *SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES* (2013).

117. See generally *id.* at 17.

118. See Sportico database, *supra* note 22.

compensating coaches.<sup>119</sup> With the advent of NIL, however, the money is now going to the increasing cost of recruiting athletes, both to initially join the program and to disincentivize transferring.<sup>120</sup>

But a significant amount of the revenue universities receive from football (and at some schools, basketball), serves to fund all non-revenue sports.<sup>121</sup> These non-revenue sports embody the NCAA ideal of the archetypical student-athlete.<sup>122</sup> The non-revenue athletes tend to be better students, have higher graduation rates, and probably have a greater degree of balance between athletics and academics.<sup>123</sup>

This revenue, however, comes from the revenue sports.<sup>124</sup> If antitrust or employment law allows access to these monies for revenue sport athletes (beyond the grant-in-aid), the future of non-revenue sports will be in jeopardy.<sup>125</sup> When faced with the choice of paying football players more and retaining a non-revenue sport, universities will probably favor the football players.

The only real bulwark against the relegation of varsity non-revenue sports to a club level is Title IX, which requires gender equity among athletes.<sup>126</sup> Specifically, it requires that the number of

119. See Chase Goodbread, *Could NIL Deals End Facilities Arms Race in College Football? Alabama AD Greg Byrne Weighs In*, THE TUSCALOOSA NEWS (July 17, 2022, 9:01 PM), <https://www.tuscaloosaneews.com/story/sports/college/football/2022/07/18/alabama-football-nil-college-sports-arms-race-greg-byrne/10030571002/> [https://perma.cc/V3MW-343A]; Tom McMillen & Brit Kirwan, *The 'Arms Race' in College Sports is Out of Control. Here's How to Stop It*, L.A. TIMES (Apr. 11, 2021, 3:05 AM), <https://www.latimes.com/opinion/story/2021-04-11/ncaa-alston-professionalization-coaches-salaries> [https://perma.cc/JGQ5-TY45].

120. See Goodbread, *supra* note 119; see also David Hale & Kyle Bonagura, *How College Football's Transfer Portal is Changing Spring Practice*, ESPN (Apr. 18, 2022, 7:00 AM), [https://www.espn.com/college-football/story/\\_id/33739451/how-college-football-transfer-portal-changing-spring-practice](https://www.espn.com/college-football/story/_id/33739451/how-college-football-transfer-portal-changing-spring-practice) [https://perma.cc/R32V-AGXW].

121. See also Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits from Amateurism? Rent-Sharing in Modern College Sports* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27734, 2020), <https://www.nber.org/papers/w27734> [https://perma.cc/JT8Y-SK4R].

122. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OREGON L. REV. 329, 355 n.120 (2007); see, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2023-2024 4 (2023), [http://fs.ncaa.org/Docs/eligibility\\_center/Student\\_Resources/CBSA.pdf](http://fs.ncaa.org/Docs/eligibility_center/Student_Resources/CBSA.pdf) [https://perma.cc/2QRF-TA82].

123. Brandon Bowens, *Revenue v. Non-Revenue Sports, Who is Most Likely to Graduate?*, LINKEDIN (Feb. 26, 2019), <https://www.linkedin.com/pulse/revenue-vs-non-revenue-sports-who-most-likely-graduate-brandon-bowens/> [https://perma.cc/HG9B-QZ87]; see also *Let's Start Paying College Athletes*, *supra* note 32. But see Amanda L. Paule-Koba & Todd A. Gilson, *Does Athletic Participation Benefit or Hinder Academic Performance: Non-Revenue Sport Athlete Experiences*, 5 J. CONTEMP. ATHLETICS 203 (May 2011).

124. See Garthwaite et al., *supra* note 121.

125. Wolverton et al., *supra* note 20.

126. See 20 U.S.C. § 1681 (Title IX).

scholarships for each gender reflect the gender breakdown of the students body as a whole.<sup>127</sup> Alternatively, Title IX mandates the athletic department fall under the safe harbor of moving toward proportionality or demonstrating that current gender allocation satisfies the interest in sports.<sup>128</sup> Interestingly, Title IX does not mandate that athletic departments spend equal amounts of money on men's and women's sports.<sup>129</sup> Indeed, men's sports constitute roughly 97 percent of athletic department budgets.<sup>130</sup> Classifying athletes as employees of the athletics foundation might be a way to circumvent the Title IX requirement as well, but that remains uncharted territory.<sup>131</sup>

Assuming Title IX restrains elimination of non-revenue sports, men's non-revenue sports may be the first to cut costs. Part of the argument for funding non-revenue sports relates to their connection to the NCAA ideal of the student-athlete.<sup>132</sup> For some, these sports can be a path from poverty to education. This narrative seems more accurate when discussing a track star from a low socioeconomic status (SES) background than a golfer from the higher SES background.<sup>133</sup>

Indeed, clear economic redistribution exists here, with low SES football students generating the revenue. Query whether universities comprehend the policy implications of such redistribution, particularly when it covers the college costs of wealthier students or international students.

The broader policy choices facing college presidents with respect to football and basketball revenue underscore this point. Should the extra \$10 million grow the academic departments and schools of the

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127. 34 C.F.R. § 106.41(c)(1); Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) ("Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments"); *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEPT. OF EDUC. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> [<https://perma.cc/G78R-ZAM5>].

128. 34 C.F.R. § 106.37(c); 34 C.F.R. § 106.41(c)–(d); U.S. DEPT. OF EDUC., *supra* note 127.

129. NAT'L. COLLEGIATE ATHLETIC ASS'N, THE STATE OF WOMEN IN COLLEGE SPORTS: TITLE IX 50TH ANNIVERSARY REPORT 27 (2022), [https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022\\_State\\_of\\_Women\\_in\\_College\\_Sports\\_Report.pdf](https://s3.amazonaws.com/ncaaorg/inclusion/titleix/2022_State_of_Women_in_College_Sports_Report.pdf) [<https://perma.cc/MZK9-B7HK>].

130. *See generally* Sportico database, *supra* note 22.

131. *See generally* 20 U.S.C. § 1681; 34 C.F.R. § 106.37(a)–(c).

132. *E.g.*, Lazaroff, *supra* note 122, at 355 n.120.

133. *See* Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 839 (2014); Paule-Koba & Gilson, *supra* note 123; *see also* Eligibility Center, *Want to Play College Sports?*, NCAA, <https://www.ncaa.org/sports/2021/2/8/student-athletes-future.aspx> [<https://perma.cc/22X9-DSTT>] (last visited Oct. 2, 2023).

university? Or should it fund non-revenue sports? Athletic departments have been highly successful in siloing these funds and keeping them away from academic units, but one wonders if that will change if antitrust or employment litigation requires a different allocation of these funds.<sup>134</sup>

The conversation here has focused on the Power Five conferences, but the situation is dire for schools not a part of that group. Most schools outside of the Power Five charge their students fees to cover the costs of athletics.<sup>135</sup> Where athletics are not playing a significant role in attracting non-athlete students, one wonders how sustainable such a model might be in light of the growing commercialism of intercollegiate athletics.

### *C. Revenue-Sharing Models*

Colleges could use labor law as a shield with respect to antitrust law. If college athletes formed labor unions and entered into collective bargaining agreements, schools could impose some caps on the amount of revenue athletes could receive from revenue sports. Taking that step has its own obstacles, starting with the restriction many states impose on public employees forming unions.<sup>136</sup> As considered above, one way around this problem would be classifying the athletes as employees of the university's athletics foundation.

If either the antitrust or employment law litigation results in no cap on payments to athletes, universities will need some limit on the proportion of the athletics budget they can allocate to football and basketball players. Coaches will be keen to encourage such a model, as multimillion-dollar coaching salaries would be a likely source of additional athlete revenue in a competitive market.

### *D. The Role of Conferences*

The conferences, in particular, have an important role to play in this kind of future. First, labor agreements could be negotiated on a conference-wide level, as opposed to on an institution-specific basis,

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134. See Yankah, *supra* note 37; Paule-Koba & Gilson, *supra* note 123; Ian Crouch, *Are College Athletes Employees?*, NEW YORKER (Mar. 27, 2014), <https://www.newyorker.com/sports/sporting-scene/are-college-athletes-employees> [<https://perma.cc/245D-GSMQ>]; Wolverton, *supra* note 20.

135. See Wolverton, *supra* note 20.

136. *Right-to-Work Resources*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 9, 2023), <https://www.ncsl.org/labor-and-employment/right-to-work-resources> [<https://perma.cc/4FPA-4V2R>].

which would promote stability.<sup>137</sup> Second, each conference could shape its own set of rules allowing it to be competitive in the market but also attempt to preserve academic baselines for college athletes.

The NCAA, in theory, could play a similar role, but the diversity of interests and market power among its member institutions makes such cooperation seem less likely. Indeed, the March Madness basketball tournament seems to be the only tie holding the NCAA and its member institutions together.<sup>138</sup>

The conferences have already started to develop strong brands in the marketplace, and these brands are what will help them navigate the future. Interesting questions remain as to the allocation of institutions across conferences, particularly with the addition of west coast schools to the Big Ten and the ACC. One wonders whether solidarity among members will survive as the institutions with stronger brands seek to maximize their revenue going forward, particularly if they have to share it with revenue sport athletes.

## V. CONCLUSION

While the media conversation focuses on NIL, the more interesting questions relate to intercollegiate football and basketball revenue. Both antitrust and employment litigation threaten the student-athlete model. If either front is successful, the compensation that revenue athletes will be able to command introduces a series of economic challenges for universities and athletic departments. College presidents would be wise to develop solutions before legal judgments mandate change.

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137. See, e.g., *NCAA's Lobbying Strategy*, *supra* note 105.

138. The recent decentralization of the NCAA with the adoption of its new constitution and bylaws shows that it recognizes these challenges. Ralph D. Russo, *NCAA Ratifies New Constitution, Paving Way to Restructuring*, N.Y. TIMES (Jan. 20, 2022, 5:42 PM), <https://apnews.com/article/college-football-sports-business-football-mark-emmert-03fde65e4190e5697a268a5a45d97538> [<https://perma.cc/4G26-BY4V>].