FEDERAL LEGISLATION AND COLLEGE SPORTS: WHICH WAY FORWARD?

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INTRODUCTION

The National Collegiate Athletic Association (NCAA) and its members have often opposed the use of law to protect athletes and ensure their fair treatment.[1] Two arguments support this behavior. First, the NCAA's constitution emphasizes athlete welfare. The NCAA can, therefore, be trusted to protect athletes and treat them fairly.[2] Second, the NCAA consistently states that using law to protect athletes by allowing them to earn money or mandating their equal treatment will ruin college sports. In the NCAA's estimation, legal regulation on behalf of athletes will change college sports by destroying their commercial appeal and creating untenable

* Thank you to Kayla Siletti Brown and the members of the *Fordham Law Review* for supporting an excellent symposium and this work. The authors also greatly appreciate the research support provided by Christina Charikofsky.

** This Essay was prepared for the Symposium entitled *Reforming College Sports* hosted by the *Fordham Law Review* on November 1, 2024, at Fordham University School of Law.

1. *See infra* Part III.
2. *See* NCAA, DIVISION I 2024-25 MANUAL 2 (2024) (constitution article 1D).

financial burdens.[3] These arguments have helped the NCAA enjoy decades of essentially unfettered control over college athletes, especially their ability to earn money from their athletic skills.

Today, this hegemony faces attack. States have passed laws prohibiting the enforcement of NCAA rules against athletes earning money from endorsement deals.[4] Athletes have successfully sued the NCAA for violating antitrust laws.[5] And athletes have taken action to gain the benefits and protections of employee status, such as wages and the right to collectively bargain over the terms and conditions of their employment.[6]

These challenges to the NCAA's authority exist because people no longer trust the NCAA and its members to treat college athletes fairly. Division I college sports (or at least some parts of it) have become a significant commercial pursuit earning billions of dollars every year. For example, the Big Ten Conference's media deal with CBS, Fox Sports, and NBC pays each conference member $80 million or more per year.[7] The NCAA itself earned $1.29 billion in fiscal year 2023, largely from the men's NCAA March Madness basketball championship, and it recently struck a media deal with ESPN for an additional $115 million per year that covers broadcasting for championships in the remaining NCAA sports.[8]

This lucrative stream of revenue requires the talent, skill, and commitment of athletes who compete for NCAA member institutions. However, the NCAA maintains that these athletes must not earn anything beyond an athletic scholarship because, according to the NCAA, the athletes are "amateurs"[9] who play for the love of sport.[10] Allowing athletes to earn

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3. *See infra* Part III.B.

4. *See infra* note 37 and accompanying text.

5. *See infra* note 38 and accompanying text.

6. *See infra* note 39 and accompanying text.

7. Vincent Pensabene, *How Much Does Big Ten TV Deal Pay Per School?: Exploring Tony Petitti's Exclusive Agreements with CBS, NBC and FOX*, SPORTSSKEEDA (Aug. 3, 2024, 6:40 PM), https://www.sportskeeda.com/college-football/how-much-big-ten-tv-deal-pay-per-school-exploring-tony-petitti-s-exclusive-agreements-cbs-nbc-fox [https://perma.cc/2FQ6-LY3K].

8. *NCAA, ESPN Extend Broadcast Deal 8 More Years*, ESPN (Jan. 4, 2024, 10:49 AM), https://www.espn.com/college-sports/story/_/id/39241071/ncaa-espn-extend-broadcast-deal-8-more-years [https://perma.cc/2HEN-FK3E].

9. The authors have chosen to use the term "amateur" (with quotation marks) because college athletes at the Division I level do not play with no expectation of remuneration. If nothing else, the existence of athletic scholarships significantly problematizes any assertion that college athletes play strictly for recreational purposes. In addition, as Professors Marc Edelman, Michael McCann, and John T. Holden point out:

> the NCAA's concept of amateurism and the so-called 'student-athlete' model is not essential to the viability of collegiate sports . . . the myth of the amateur 'student-athlete' sustains to this day, thanks to the extreme amount of lobbying and public relations money NCAA member schools have placed into perpetuating this myth.

Marc Edelman, Michael McCann & John T. Holden, *The Collegiate Employee-Athlete*, 2024 U. ILL. L. REV. 1, 12.

10. *See* NCAA, *supra* note 2, at 33–66 (article 12).

compensation would fundamentally change the nature of NCAA sports and, among other things, damage its commercial appeal.[11]

This "amateur" description may have been apt decades ago when college sports were not a multibillion-dollar-a-year industry, but it is not today. As Justice Kavanaugh noted in his concurring opinion in *National Collegiate Athletic Ass'n v. Alston*,[12] NCAA Division I sports are now a "massive money-raising enterprise" built and sustained "on the backs of student-athletes who are not fairly compensated."[13] This perception that the NCAA cares more about money than the fair treatment of athletes drives legal efforts to force change upon the NCAA.

Predictably, the NCAA opposes these efforts. However, the efforts have compelled the NCAA to stop enforcing some of its rules against athlete earnings.[14] To get relief, the NCAA has begun lobbying Congress to pass legislation exempting the NCAA and its members from antitrust and labor laws.[15] In short, the NCAA now believes that it should not have to comply with laws that almost all other sports enterprises follow.[16] Passage of the NCAA's desired legislation would mean deliberately protecting a lucrative business model that requires treating key workers differently than the law would treat them in any other setting.

To support this request, the NCAA reprises the argument it has used before. The NCAA operates "amateur" sports competitions that cater to fans who prefer them to professional sports. Paying athletes would alienate these fans, threatening the viability of college sports while increasing its costs. Accordingly, college sports can survive only if the NCAA is allowed to ignore laws that other sports organizers must follow.[17]

In this Essay, we argue that Congress should not (or at least not yet) respond to the NCAA's entreaties by enacting legislation to preserve or restore the NCAA's ability to limit the compensation and earnings of Division I athletes. Instead, we believe that Congress, the courts, and the National Labor Relations Board (NLRB) should ensure that laws of general applicability, including antitrust and labor law, apply to the NCAA and its

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11. *See infra* Part III.B.

12. 141 S. Ct. 2141 (2021).

13. *Id.* at 2169 (Kavanaugh, J., concurring).

14. *See infra* note 40 and accompanying text.

15. *See* Jesse Dougherty, *Why Capitol Hill Remains a Key Battleground in College Sports*, WASH. POST (June 7, 2024), https://www.washingtonpost.com/sports/2024/06/07/ncaa-congress-antitrust-exemption/ [https://perma.cc/FPK7-TXQ5].

16. Major League Baseball (MLB) stands alone in having successfully convinced courts to exempt it from antitrust scrutiny. *See* Fed. Baseball Club of Balt., Inc. v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922) (holding Major League Baseball exempt from Sherman Act).

17. *See* Katherine Knott, *Draft NIL Legislation Aims to 'Save College Sports as We Know It,'* INSIDE HIGHER ED (Jan. 19, 2024), https://www.insidehighered.com/news/government/2024/01/19/draft-nil-bill-aims-save-college-sports-we-know-it [https://perma.cc/GAA7-VVL9] (recounting statement by NCAA president Charlie Baker that most college sports programs would disappear if athletes became employees); Edelman et al., *supra* note 9, at 15 (addressing "the NCAA's claims that paid college athletes would ruin university budgets and lead to the demise of college sports").

members.[18] Although this could be accomplished through the courts and NLRB, it is also possible that this will require legislation making the relationship between athletes and universities that conduct Division I sports programs subject to the National Labor Relations Act[19] (NLRA).[20]

We take this position because we doubt that college sports face the kind of existential crisis that justifies exempting the NCAA and its members from laws that govern all commercial enterprises, including sports. These laws exist to ensure that all enterprises treat fairly those whose work makes enormous revenue possible, and there is no compelling reason why NCAA athletes should be treated as an exception. Although NCAA sports presently face uncertainty and change, we think that federal antitrust and labor law already provide an effective legal framework to encourage negotiations that ensure the fair treatment of athletes while preserving the commercial viability and continued growth of college sports. Indeed, the collective bargaining process contemplated by antitrust and labor law already has an excellent track record of facilitating acceptably fair compromises between employers and workers in professional sports. If athletes and universities wind up negotiating mutually acceptable terms to govern their relationships (and we believe that they will if given the chance), there is little reason for Congress to do more.

The following pages elaborate on the reasons behind our position. Part I reviews the state of college sports, while Part II describes concerns voiced by the NCAA and its preferred legislative solution. In Part III, we express skepticism that the concerns are as serious as the NCAA suggests, in large part because the NCAA has made many other doomsday predictions that proved false. Part III also describes how antitrust and labor law work together to support constructive collective bargaining in professional sports over issues similar to those that concern the NCAA. In Part IV, we assess whether existing antitrust and labor law are likely to produce the desired collective bargaining. We conclude that this could happen but that legislation to ensure this result would be desirable, particularly in the form of ensuring the applicability of the National Labor Relations Act to NCAA Division I sports. In Part V, we consider some of the challenges and objections to the legislation we support, particularly arguments that employee treatment

18. In this respect, we join Professor Jodi S. Balsam's argument against "special interest . . . lawmaking" with respect to athlete NIL. *See* Jodi Balsam, *False Start on NIL: Public and Private Law Should Treat College Athletes Like Any Other Student*, 11 TEX. A&M L. REV. 785, 822 (2024).

19. 29 U.S.C. §§ 151–169.

20. *See infra* notes 107–08 and accompanying text (describing how collective bargaining might arise through voluntary, judicial, and NLRB actions). An example of such legislation would be the proposed College Athlete Right To Organize Act, S. 3415, 118th Cong. (2023), introduced by Senators Chris Murphy, Bernie Sanders, and Elizabeth Warren, establishing that the National Labor Relations Act term "employer" includes "a public institution of higher education with respect to the employment of college athlete employees of the institution." Such a provision would prevent state institutions from avoiding collective bargaining because they are run by individual states. *See infra* note 105 and accompanying text.

would actually harm college athletes. Finally, we conclude with some thoughts about the future of college sports and the NCAA.

I. THE STATE OF COLLEGE ATHLETICS TODAY

The NCAA and Division I college sports face challenges today because significant portions of the public question the fairness and sincerity of the entire enterprise. For years, the NCAA and its members have pursued an arms race of spending in pursuit of athletic glory and revenue. This pursuit has included not only free and open spending to attract coaching and administrative talent, but also a willingness to stretch (if not violate) the NCAA's governing rules and ideals.

Major Division I universities line up to pay coaches and administrators lucrative salaries, with top earners getting millions of dollars per year.[21] However, this largesse does not extend to athletes[22] because universities agreed, through NCAA rules, that college athletes could not earn anything besides a scholarship.[23] According to the NCAA, the prospect of compensation would distract athletes from their studies, undermine competitive balance, and compromise the commercial appeal of college sports.[24]

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21. *See, e.g.*, Charlie Potter, *Full Contract Details Released for Alabama Football Coach Kalen DeBoer*, ON3 (Mar. 18, 2024), https://www.on3.com/teams/alabama-crimson-tide/news/alabama-football-full-contract-details-for-head-coach-kalen-deboer/ [https://perma.cc/R7Z7-KZ7Q] (reporting salary for new Alabama head football coach at $10 million per year); *Georgia's Kirby Smart Becomes the Nation's Highest-Paid College Football Coach at $13m Annually*, ASSOCIATED PRESS (May 2, 2024, 6:37 PM), https://apnews.com/article/georgia-kirby-smart-contract-274a1d0b27ff658784664eee328aec5a [https://perma.cc/JQR9-7Q6L]; Jeff Borzello, *Kansas' Bill Self Now Highest Paid Coach After Amended Deal*, ESPN (Nov. 7, 2023, 4:01 PM), https://www.espn.com/mens-college-basketball/story/_/id/38843036/kansas-bill-self-now-highest-paid-coach-amended-deal [https://perma.cc/MS5T-VDAH] (reporting Kansas basketball coach earns $13 million per year). The rush to pay coaches is not limited to football and basketball. A number of college soccer coaches earn over $300,000 per year, with a very top salary over $500,000 per year. *See Highest Paid College Soccer Coaches: Who Tops the List?*, COLLEGE SOCCER (May 14, 2024), https://collegesoccer.co/blog/highest-paid-college-soccer-coaches [https://perma.cc/Z9TL-JX4N]; *see also* Matt Johnson, *Highest Paid Athletic Directors 2024: Texas, Ohio State, Tennessee ADs Among Top Salaries*, SPORTSNAUT, https://sportsnaut.com/list/highest-paid-athletic-directors/ [https://perma.cc/E57E-FDSP] (May 17, 2024) (reporting highest college athletic director salaries in excess of $1 million per year).

22. *See* SEN. CHRIS MURPHY, MADNESS, INC.: HOW EVERYONE IS GETTING RICH OFF COLLEGE SPORTS—EXCEPT THE PLAYERS (2019), https://www.murphy.senate.gov/newsroom/press-releases/murphy-releases-madness-inc-report-calls-on-ncaa-to-compensate-student-athletes- [https://perma.cc/Z9VB-PU8N].

23. *See* NCAA, *supra* note 2 at 36–37, 173 (article 12.1.2 and article 15.01) (providing athlete becomes ineligible if loss of amateur status and permitting receipt of scholarships by student athletes); *see also* Edelman et al., *supra* note 9, at 4 ("No other industry generates so much revenue without the businesses that make up the industry directly paying the workers who generate it."); *id.* at 13 (describing the NCAA as a "cartel" characterized by an agreement "to maintain wealth in the hands of a select few administrators, athletic directors, and coaches").

24. *See infra* note 67 and accompanying text.

At the same time, despite the NCAA's supposedly idealistic prohibition against paying players, NCAA members have long been willing to stretch and break the relevant rules to attract players. Universities commonly engage in recruiting practices that violate the spirit (if not the letter) of NCAA rules,[25] and stories about payments to athletes abound.[26] Additionally, NCAA member institutions frequently give athletes priorities that are inconsistent with a supposed commitment to prioritizing education ahead of sports. As Northwestern University football players revealed in their effort to unionize, Division I athletes do not live typical student lives.[27] Instead, they live and train like professionals, typically spending thirty to forty hours or more per week on their sport. Their schedules often require absence from campus when classes are in session,[28] and now they often travel across the country to compete.[29] They are steered into majors that make it easy to accommodate their difficult schedules and remain academically eligible.[30] All of this suggests that the NCAA and its members actually conduct

25. *See* Alfred C. Yen, *Finding Another Way: The NCAA's Regulation of NIL and Recruiting*, 76 OKLA. L. REV. 175, 190–91 (2023) (characterizing as naïve the NCAA's apparent hope that institutions would avoid using NIL deals to entice recruits simply because NCAA rules prohibited them from doing so); Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585, 598–601 (2011) (describing how universities exploit loopholes in NCAA rules about early recruiting to evade the intent of those rules).

26. *See* Adam Silverstein, *Chris Simms Clarifies Texas '$100 Handshakes' Comments: 'It was Cool,'* CBS SPORTS (June 19, 2015, 5:51 AM), https://www.cbssports.com/college-football/news/chris-simms-clarifies-texas-100-handshakes-comments-it-was-cool/ [https://perma.cc/NP3A-VNTG] (recounting athlete admitting to receipt of money from college program boosters); Mark Schlabach, *NCAA Denies UGA's Gurley Appeal*, ESPN (Oct. 30, 2014, 10:06 PM), https://www.espn.com/college-football/story/_/id/11793406/georgia-bulldogs-rb-todd-gurley-suspension-upheld-ncaa [https://perma.cc/MA7S-QBHQ] (describing NCAA sanctions concerning receipt of money by football player); 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/GA29-Q4PG]; Robert Read, *Reggie Bush-NCAA Timeline: Why Did Former USC Star Lose His Heisman?*, NEWSWEEK (Aug. 23, 2024, 5:56 PM), https://www.newsweek.com/reggie-bush-ncaa-timeline-why-did-former-usc-star-lose-his-heisman-1821992 [https://perma.cc/D6UU-6HS2].

27. Transcript, Northwestern Univ., 362 N.L.R.B. No. 167 (Feb. 12, 2014).

28. *See, e.g.*, *Men's March Madness 2025 Schedule, Sites, Locations*, ESPN (Sept. 30, 2024, 10:30 AM), https://www.espn.com/mens-college-basketball/story/_/id/41458843/mens-college-basketball-march-madness-2025-schedule-sites-locations [https://perma.cc/9RBW-6D2F]; *Women's March Madness 2025 Schedule, Locations and More*, ESPN (Sept. 30, 2024, 10:30 AM), https://www.espn.com/womens-college-basketball/story/_/id/41460085/women-ncaa-tournament-march-madness-2025-schedule-locations-bracket-announcement-date [https://perma.cc/6FZ2-Y25E]; *Future Dates & Sites*, NCAA, https://www.ncaa.com/championships/baseball/d1/future-info [https://perma.cc/62TY-Z2GQ] (last visited Mar. 7, 2025) (2025 Baseball College World Series); *Future Dates & Sites*, NCAA, https://www.ncaa.com/championships/softball/d1/future-info [https://perma.cc/2LXZ-6LP4] (last visited Mar. 7, 2025) (2025 Women's College World Series).

29. *See* Jeff Eisenberg, *Conference Realignment Has Redefined "Travel Ball"*, YAHOO! SPORTS (Sept. 11, 2024), https://sports.yahoo.com/conference-realignment-has-redefined-travel-ball-135309973.html [https://perma.cc/P85F-WNYB].

30. *See* SEN. CHRIS MURPHY, MADNESS, INC.: HOW COLLEGES KEEP ATHLETES ON THE FIELD AND OUT OF THE CLASSROOM (2019), https://www.murphy.senate.gov/newsroom/press-releases/murphy-releases-second-madness-inc-report [https://perma.cc/QC3G-LTKP].

professional sports while espousing "amateurism" to keep financial competition for players lower than it would be in a free and open market.

Over the years, lawyers, academics, media outlets, and an important athletes' rights campaign[31] have drawn attention to the contradictions of the NCAA's position. As intercollegiate sports generated ever-increasing amounts of revenue, disturbing scandals involving academic fraud,[32] athletes receiving subpar educations,[33] the consequences of athletic traumatic brain injuries,[34] and enormous salaries for coaches and administrators,[35] among other things, made it increasingly unseemly, if not untenable, for the NCAA and its members to earn so much while insisting that the athletes earn nothing. This has led to a public perception captured by Justice Kavanaugh in *National Collegiate Athletic Ass'n v. Alston*: it is absurd and generally illegal for a commercial venture to make millions and claim that its product is "better," and indeed can only exist, when its workers are unpaid.[36]

Not surprisingly, reformers resorted to legislation, litigation, and administrative regulation to force change upon the NCAA and its members. First, many states enacted statutes that forbid the NCAA and its members from sanctioning athletes who exploit their name, image, and likeness (NIL) rights for money.[37] Second, athletes filed lawsuits claiming that the NCAA and its members violated antitrust law by limiting benefits or payments players can receive.[38] Third, athletes and the National Labor Relations Board

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31. *See* About the NCPA, NAT'L COLLEGE PLAYERS ASSOC., https://www.ncpanow.org/about-us [https://perma.cc/6NBH-XNML] (last visited Mar. 7, 2025).

32. *See* Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 AM), https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/6XK6-K7NX].

33. *See* MURPHY, *supra* note 30.

34. *See* Complaint, Riedy v. Nat'l Collegiate Athletic Ass'n, No. 24-cv-498 (S.D. Ind. filed Mar. 18, 2024) (lawsuit from family member of former college football player claiming the NCAA knowingly ignored the risk of head injuries); Jessica Glenza, *A Tragic Death and College Football's New Reckoning over Brain Injuries amid a New Class-Action Lawsuit*, THE GUARDIAN (Nov. 25, 2017, 7:00 PM), https://www.theguardian.com/sport/2017/nov/25/college-football-cte-ncaa-lawsuit-zack-langston [https://perma.cc/M6AM-B5GT].

35. *See supra* note 21.

36. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

37. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-1892 (2024); ARK. CODE ANN. § 4-75-1303 (2024); CAL. EDUC. CODE § 67456 (Deering 2024); COLO. REV. STAT. § 23-16-301 (2024); CONN. GEN. STAT. § 10a-56 (2024); FLA. STAT. § 1006.74 (2024); GA. CODE ANN. § 20-3-681 (2024); 110 ILL. COMP. STAT. 190/10 (2024); KY. REV. STAT. ANN. § 164.6945 (West 2024); LA. STAT. ANN. § 17:3703 (2024); MD. CODE ANN., EDUC. § 15-131 (West 2023); MICH. COMP. LAWS § 390.1733 (2024); MISS. CODE ANN. § 37-97-107 (2024); MO. REV. STAT. § 173.280 (2024); MONT. CODE ANN. § 20-1-232 (2024); NEB. REV. STAT. § 48-3605 (2024); NEV. REV. STAT. ANN. § 398.300 (West 2022); N.J. STAT. ANN. § 18A:3B-87 (West 2020); N.M. STAT. ANN. § 21-31-3 (2024); OHIO REV. CODE ANN. § 3376.06 (West 2025); OKLA. STAT. tit. 70, § 820.23 (2024); OR. REV. STAT. § 702.200 (2024); 24 PA. CONS. STAT. § 20-2003-M (2024); S.C. CODE ANN. § 59-158-20 (2024); TENN. CODE ANN. § 49-7-2802 (2024); TEX. EDUC. CODE ANN. § 51-9246 (West 2023); *see also* Balsam, *supra* note 18, at 809–13.

38. *See generally*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (2015); *Alston*, 141 S. Ct. 2141 (2021) (majority opinion); Complaint, House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804 (N.D. Cal. 2021) (No. 20-cv-03919) (limitations on NIL payments); Complaint, Hubbard v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-01593 (N.D.

moved to get athletes legally declared employees[39] so that athletes may enjoy the benefits and protections of, for instance, unionization and collective bargaining.

Together, these actions have disrupted the NCAA's ability to unilaterally control athlete earnings. Initially, the NCAA chose not to contest the constitutional validity of state laws empowering athletes to earn NIL money. Instead, it merely suspended the enforcement of its rules forbidding college athletes from striking such deals.[40] This kept in force other rules that prohibited the use of NIL money as pay-for-play or inducements to enroll at a particular institution.[41] Thus, the NCAA acquiesced to athletes earning income from side deals with sponsors like car dealerships or sandwich shops, but it continued to prohibit financial incentives in the recruitment of athletes or direct payment to athletes for playing sports.[42]

Interestingly, the NCAA's efforts quickly failed because member schools and their boosters immediately flouted the relevant rules. Today, almost every Division I program has a nominally independent NIL collective that raises revenue to strike NIL deals with athletes, and it is clear that these collectives often use these payments to facilitate the recruitment of top athletes, particularly in football and men's basketball.[43] The NCAA could

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Cal. filed Apr. 4, 2023) (limitations on academic-related compensation); Complaint, Carter v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-6325 (N.D. Cal. filed Dec. 7, 2023) (amateurism writ large); Class Action Complaint, Fontenot v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-03076 (D. Colo. filed Nov. 20, 2023) (antitrust/price-fixing); Amended Complaint, Ohio v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-00100 (N.D. W.Va. filed Jan. 18, 2024) (limitations on student-athletes transferring for a second time). The U.S. Department of Justice joined the lawsuit in January 2024. *See Justice Department Joins Lawsuit Challenging National Collegiate Athletics Association's (NCAA) Transfer Eligibility Rule*, U.S. DEP'T OF JUST. (Jan. 18, 2024), https://www.justice.gov/opa/pr/justice-department-joins-lawsuit-challenging-national-collegiate-athletics-associations-ncaa [https://perma.cc/GC3N-LGYV].

39. *See* Decision and Direction of Election, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024) (N.L.R.B. regional director held members of the Dartmouth College men's basketball team were employees); Univ. of S. Cal.; Pac-12 Conf.; Nat'l Collegiate Athletics Ass'n, No. 31-CA-290326 (N.L.R.B. 2023) (complaint and notice of hearing asserting the NLRA applies to college athletes).

40. *See Interim Name, Image and Likeness Policy: Guidance Regarding Third Party Involvement*, NCAA (July 1, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf [https://perma.cc/JA27-A7KL] (suspending enforcement of certain NCAA rules while continuing enforcement of rules against pay-for-play and recruiting inducements).

41. *Id.*

42. *Id.*

43. *See NIL Collectives*, ON3, https://www.on3.com/nil/collectives/ [https://perma.cc/AG7N-SPNJ] (last visited Mar. 7, 2025) (listing NIL collectives and the universities they are associated with); *see also* Antonio Morales, David Ubben & Brian Hamilton, *After 3-0 Start, UNLV QB Matthew Sluka to Sit Rest of Season over NIL Payment Dispute*, THE ATHLETIC (Sept. 25, 2024), https://www.nytimes.com/athletic/5793011/2024/09/25/matthew-sluka-unlv-redshirting/?source=user_shared_article [https://perma.cc/5BT8-HD9F] (describing alleged promise by University of Nevada, Las Vegas (UNLV) assistant coach that quarterback Matthew Sluka would receive $100,000 before Sluka committed to UNLV and Sluka's decision to leave team over alleged nonpayment); John Talty, *Inside the College Football NIL Market: How Much Players at Each Position Are Actually Getting Paid*, CBS SPORTS (May 20, 2024, 3:42 PM), https://www.cbssports.com/college-football/news/inside-the-college-fo

have disciplined any number of well-known rule violators, but it has chosen not to because several states, including Colorado, Illinois, New York, North Carolina, Ohio, Tennessee, Virginia, and West Virginia sued the NCAA to prevent enforcement.[44] When courts in those cases granted the states preliminary injunctive relief, the NCAA stopped enforcing rules supposedly still in effect nationwide.[45] Accordingly, active bidding markets now exist for the initial enrollment and transfer of college athletes.[46] In short, state law, litigation, and the rule flouting of NCAA members have forced the NCAA to accept the very thing that it has claimed would destroy college sports.

II. THE NCAA'S PREFERRED LEGISLATIVE SOLUTION

The NCAA and its members have taken the position that payments to athletes, whether through endorsement deals or formal employee status, threaten the viability of college sports.[47] According to them, fair competition will disappear if programs with well-heeled supporters consistently outbid their rivals for top talent, and escalating NIL packages funded by boosters will divert financial resources from athletic programs. Moreover, as resources flow to revenue sports like football and basketball, other sports will suffer and possibly disappear.

It is difficult to overstate how dire the NCAA insists the situation is. In the words of NCAA president Charlie Baker, if nothing is done, countless participation opportunities will disappear "because the money is just not

otball-nil-market-how-much-players-at-each-position-are-actually-getting-paid/ [https://perma.cc/2ZGS-5Z8L] (describing range of payments to starting players in Division I college football); John Drape & Allison McCann, *In College Sports' Big Money Era, Here's Where the Dollars Go*, N.Y. TIMES (Aug. 31, 2024), https://www.nytimes.com/interactive/2024/08/31/business/nil-money-ncaa.html [https://perma.cc/DPG6-94X6] (describing range of NIL payments made to college athletes).

44. *See* Tennessee v. Nat'l Collegiate Athletic Ass'n, 718 F. Supp. 3d 756 (E.D. Tenn. 2024) (granting preliminary injunction against enforcement of NCAA rules against the use of deals with NIL collectives for recruiting); Ohio v. Nat'l Collegiate Athletic Ass'n, 706 F. Supp. 3d 583 (N.D. W.Va. 2023) (granting preliminary injunction against enforcement of NCAA rules requiring transfers to sit out for a year).

45. *See* Associated Press, *NCAA Settles Lawsuit with States over NIL Rules for Recruits*, ESPN (Jan. 31, 2025), https://www.espn.com/college-sports/story/_/id/43643716/ncaa-settles-lawsuit-tennessee-virginia-compensation-rules-recruits [https://perma.cc/3A6L-CMTL]; NCAA, NCAA DIVISION I BYLAW 14.5.5.1 PRELIMINARY INJUNCTION – APPLICATION FAQ (2024), https://on3static.com/uploads/dev/assets/cms/2024/03/13213158/D1_Transfer-TRO QA.pdf [https://perma.cc/P6TG-N3NM] (NCAA announcement suspending enforcement of rules requiring transfers to sit out for one year).

46. *See supra* note 43; *see also* Jared Diamond & Laine Higgins, *The Numbers That Show the Growing Divide in College Football*, WALL ST. J. (Aug. 18, 2024, 7:00 AM), https://www.wsj.com/sports/football/college-transfers-power-five-conferences-aee82375?st=rui62i1i47n92 [https://perma.cc/T3CA-LTZB] (describing how top conferences bid for top players from lower conferences through the transfer portal).

47. Edelman et al., *supra* note 9, at 36–37 (explaining the "dire prediction" advanced by NCAA members that if colleges and universities are required to pay athletes, many schools will cut teams, especially those in nonrevenue sports).

there."[48] Similarly, one university athletic director stated that if Congress did not take action to limit NIL rights, "I don't know how Division II, Division III, and most of Division I exist anymore."[49] And in the U.S. Court of Appeals for the Third Circuit briefs and oral arguments in *Johnson v. National Collegiate Athletic Ass'n*,[50] attorneys for the NCAA and supporting amici argued that a decision declaring athletes employees under the Fair Labor Standards Act[51] (FLSA) would threaten college sports, or at least women's college sports.[52]

Some members of Congress have taken the NCAA's message to heart. Representative Gus Bilirakis has stated that Congress needs "to save college sports as we know it."[53] Similarly, other members of Congress have repeated the NCAA's position that unionization posed "an existential threat" to intercollegiate sports.[54] This congressional support has led to proposed legislation designed to ameliorate the NCAA's concerns. The two bills with considerable support from the NCAA and its members reveal the legislative strategy desired by the NCAA.[55]

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48. *Proposal to Protect Student Athletes' Dealmaking Rights Before the H. Subcomm. on Innovation, Data, & Com., Comm. on Energy & Com.*, 118th Cong. (2024) (statement of Charlie Baker, president of the NCAA), https://docs.house.gov/meetings/IF/IF17/20240118/116756/HHRG-118-IF17-Transcript-20240118.pdf [https://perma.cc/HX79-LN3Y]; Knott, *supra* note 17.

49. David Steele, *Only Congress Can Fix NIL, College Leaders Claim in Hearing*, LAW360 (March 29, 2023, 9:16 PM), https://www.law360.com/articles/1590579/only-congress-can-fix-nil-college-leaders-claim-in-hearing [https://perma.cc/GX9G-4KXP].

50. 108 F.4th 163 (3d Cir. 2024).

51. Ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219).

52. Billy Witz, *Federal Judges Express Skepticism College Athletes Are Not Employees of Institutions*, N.Y. TIMES (Feb. 17, 2023), https://www.nytimes.com/2023/02/17/sports/ncaa-federal-court-athletes.html [https://perma.cc/A23K-NU7K]; Brief for Amici Curiae American Council On Education And Twelve Other Educational Organizations In Support of Appellants at 7, Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163 (3d Cir. 2024) (No. 22-1223) ("Most dramatically, if colleges and universities are forced to pay their student-athletes, it is inevitable that many schools will simply eliminate athletics teams, with non-revenue sports teams the most likely to be on the chopping block.").

53. Knott, *supra* note 17.

54. Katherine Knott, *House Republicans Warn Against College Athlete Unions*, INSIDE HIGHER ED (Mar. 13, 2024), https://www.insidehighered.com/news/government/2024/03/13/athlete-unions-threaten-college-sports-panel-argues [https://perma.cc/KMP8-D795].

55. One bill is the "Cruz Bill," S. LEGIS. COUNS., DRAFT COPY OF MCC23890 R5T (2023), https://www.commerce.senate.gov/index.cfm?a=files.serve&File_id=00530A65-EE3B-4EF9-862A-A4C942ACB156 [https://perma.cc/4TP3-F6C4]. This bill is supported by a number of institutions and individuals associated with major college sports. *See Sen. Cruz Releases Discussion Draft of Bill to Codify NIL Rights for Athletes, Provide Legal Certainty for College Athletics*, TED CRUZ: U.S. SENATOR FOR TEX. (Aug. 2, 2023), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-releases-discussion-draft-of-bill-to-codify-nil-rights-for-athletes-provide-legal-certainty-for-college-athletics [https://perma.cc/VFV3-2PFF]. The other is the "FAIR College Sports Bill." *See* 118TH CONG., DISCUSSION DRAFT: FAIRNESS, ACCOUNTABILITY, AND INTEGRITY IN REPRESENTATION OF COLLEGE SPORTS ACT, OR FAIR COLLEGE SPORTS ACT (2024), https://bilirakis.house.gov/sites/evo-subsites/bilirakis.house.gov/files/evo-media-document/fair-college-sports-act_1.pdf [https://perma.cc/8HZX-KDYH]. Support for this bill is found from another list of individuals and institutions. *See Advocates Agree: Congress Needs to Act to Protect Student Athletes' NIL Rights*, ENERGY & COM. (Jan.

First, both bills preempt all state NIL legislation.[56] This would keep states from enacting laws that pressure the NCAA to change its rules. To the extent that the NCAA still feels pressure from existing NIL laws, those laws would be neutralized.

Second, they authorize the NCAA, conferences, and institutions to make and enforce rules limiting athlete compensation, and they exempt the NCAA from legal liability for doing so.[57] The bills protect the ability of athletes to make NIL deals, but only if those deals otherwise comply with rules passed by the NCAA.[58] Provisions like these restore the NCAA's ability to restrict the kinds of NIL deals athletes make, prevent universities from directly compensating athletes, and limit the recruiting of high school and transfer candidates. Importantly, the NCAA can act with impunity because no one, including athletes, can bring lawsuits of the kind that have presently caused the NCAA not to enforce its existing rules.

Third, both bills prohibit treating college athletes as employees.[59] This assures the NCAA and its members that they cannot be forced to pay athletes wages or benefits that employment laws require. Additionally, this prevents athletes from claiming the right to collectively bargain under the National Labor Relations Act. This removes the possibility of open bidding for athletic talent on the basis of wages and benefits, and it takes away leverage that athletes could use to gain fair treatment through collective bargaining.

If passed, the legislation desired by the NCAA would diminish earning opportunities for athletes to something less than they presently enjoy. Today, athletes get two kinds of NIL deals: salary substitutes offered for purposes of recruitment and bona fide endorsement deals unrelated to recruitment. Renewed enforcement of existing NCAA rules would wipe out the former type of deal. Moreover, if athletes consider any NCAA action unfair, the proposed legislation would deprive them of legal recourse. The NCAA and its members would once again enjoy something close to unfettered control of college sports.

III. EVALUATING THE NCAA'S ASSESSMENT AND SOLUTION

At first inspection, the NCAA's preferred legislation may appear sensible. If one accepts that college sports face existential threats, uniform federal regulation might be needed so that the NCAA can "save" it. And, if the NCAA is going to enforce rules to accomplish that "salvation," it should not

25, 2024), https://energycommerce.house.gov/posts/advocates-agree-congress-needs-to-act-to-protect-student-athletes-nil-rights [https://perma.cc/C4PE-HUQR].

56. S. LEGIS. COUNS., *supra* note 55 (Cruz Bill); 118TH CONG., *supra* note 55 (Fair College Sports Bill).

57. S. LEGIS. COUNS., *supra* note 55 (Cruz Bill); 118TH CONG., *supra* note 55 (Fair College Sports Bill).

58. S. LEGIS. COUNS., *supra* note 55 (Cruz Bill); 118TH CONG., *supra* note 55 (Fair College Sports Bill).

59. S. LEGIS. COUNS., *supra* note 55 (Cruz Bill); 118TH CONG., *supra* note 55 (Fair College Sports Bill).

face legal liability for doing so. However, ample reasons exist to doubt the account and solution offered by the NCAA.

For one thing, the NCAA has a record of making unfounded doomsday claims. This undercuts the credibility of the NCAA's arguments. And for another, the bargaining process fostered by existing antitrust and labor laws has an excellent record of creating reasonably fair bargains between workers and leagues in professional sports. It therefore makes sense to let this process run its course before imposing a legislative solution.

A. Doomsday Predictions That Never Come True

The NCAA supports its position with an assertion that it has made before, namely that disrupting its regulatory hegemony over college sports will ruin the enterprise, especially if the regulation increases athlete rights. These arguments channel claims made by other sports entities against changes favoring athletes.[60] These doomsday predictions have a record of being demonstrably false.

Consider the NCAA's resistance to Title IX,[61] which Congress enacted in 1972 to prohibit discrimination against women in federally funded education programs, including college sports. The NCAA and its allies tried to defeat or weaken the legislation by arguing that requiring gender equity would destroy college athletics, or at least college football. Darrell Royal, the University of Texas football coach, worked with Senator John G. Tower on an amendment to Title IX that would exempt men's football and basketball. Royal stated that requiring gender equity "would 'eliminate, kill, or seriously weaken the programs we have in existence.'"[62] The NCAA's Walter Byers emphasized the point, stating that "impending doom is around the corner."[63] Similarly, John Fuzak, then-president of the NCAA, urged Congress to reject regulations implementing Title IX. Fuzak stated that "[w]ithout a doubt, as surely as we sit here today, [Health, Education and Welfare]'s Title IX program is calculated—and I think by some even intentionally so—to destroy" men's revenue-generating college sports.[64] At the same hearing, Representative James G. O'Hara referred to the NCAA and men's coaches

60. *See* STEPHEN LOWE, THE KID ON THE SANDLOT: CONGRESS AND PROFESSIONAL SPORTS 31 (1995) (quoting then-MLB Commissioner Ford C. Frick incorrectly claiming that outlawing baseball's reserve clause would "result in the abolition of the professional game as we now know it"); JULES BOYKOFF, POWER GAMES: A POLITICAL HISTORY OF THE OLYMPICS 86 (2016) (quoting then–International Olympic Committee Vice President Avery Brundage incorrectly predicting that allowing professionals to compete in the Olympic Games would "sound the death knell of the Games").

61. Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified at 20 U.S.C. §§ 1681–1688).

62. Ellen Staurowsky, *Title IX, Gender Equity and College Sports*, *in* CONGRESS AND THE POLITICS OF SPORTS 136 (Colton C. Campbell & David A. Dulio ed., 2024).

63. *Id.*

64. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. On Educ & Lab.*, 94th Cong. 103 (1975), https://files.eric.ed.gov/fulltext/ED118012.pdf [https://perma.cc/DK7V-7Y47].

who "feel the Title IX regulation will be administered in such a way as to destroy their program."[65]

The NCAA has made similar, if less dramatic, claims about impending doom when confronted with antitrust litigation and state legislation designed to increase the benefits and earnings enjoyed by college athletes. In *National Collegiate Athletic Ass'n v. Alston* and *O'Bannon v. National Collegiate Athletic Ass'n*,[66] the NCAA argued (albeit unsuccessfully) that antitrust laws should excuse anticompetitive NCAA restrictions on athlete compensation because these restrictions "are necessary to preserve the amateur tradition and identity of college sports" and "contribute to the popularity of college sports and help distinguish them from professional sports and other forms of entertainment in the marketplace."[67] This argument implied that college sports would lose viewers and become commercially less valuable if the NCAA lost its ability to restrict athlete earnings.

The NCAA and its members employed a slightly different set of doomsday arguments when confronted with the impending enactment of California's Senate Bill 206 (S.B. 206), the first law giving college athletes the right to market their name, image, and likeness. The NCAA argued that the law would, "make unattainable the goal of providing a fair and level playing field."[68] It complained that S.B. 206 would "erase the critical distinction between college and professional athletics" and suggested that California schools would have to be barred from NCAA competition.[69] The Pac-12 Conference (the "Pac-12"), which at the time included four California schools, was even more histrionic, stating that the bill "will likely reduce resources and opportunities for student-athletes in Olympic sports and have a negative disparate impact on female student-athletes."[70]

Of course, the dire consequences predicted by the NCAA and its members never materialized. Despite the enactment of Title IX, the imposition of antitrust liability in *O'Bannon* and *Alston*, and the widespread enactment of legislation similar to S.B. 206, NCAA sports have flourished. As noted earlier, college sports media deals have become incredibly lucrative.[71] And, contrary to the Pac-12's stated concerns, allowing athletes to license their

65. *Id.*

66. 802 F.3d 1049 (9th Cir. 2015).

67. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 999 (C.D. Cal. 2014); *see* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2152–53 (2021) (referring to NCAA position that rules restricting athlete compensation serve the procompetitive purpose of preserving consumer demand for college sports).

68. *NCAA Statement on Gov. Newsom Signing SB 206*, NCAA MEDIA CTR. (Sept. 30, 2019, 10:44 AM), https://www.ncaa.org/news/2019/9/30/ncaa-statement-on-gov-newsom-signing-sb-206.aspx [https://perma.cc/6YUQ-UZ88].

69. *NCAA Responds to California Senate Bill 206*, NCAA MEDIA CTR. (Sept. 11, 2019, 10:08 AM), https://www.ncaa.org/news/2019/9/11/ncaa-responds-to-california-senate-bill-206.aspx [https://perma.cc/XW7T-9DB2].

70. *See* Jeremy Cluff, *California SB 206: Pac-12 Conference, NCAA React to Signing of Bill by Gov. Gavin Newsom*, AZCENTRAL. (Sept. 30, 2019, 11:03 AM), https://www.azcentral.com/story/sports/college/pac-12/2019/09/30/california-sb-206-pac-12-conference-ncaa-react-signing-bill/3821642002/ [https://perma.cc/5Y87-PGLQ].

71. *See supra* note 7 and accompanying text.

NIL rights has harmed neither Olympic sports nor female athletes. During the 2024 Olympic Games, athletes from the four California-based universities then in the Pac-12 (Stanford University, University of Southern California, University of California, Los Angeles, and University of California, Berkeley) won ninety-one Olympic medals.[72] And, with respect to women, the total number of Division I participants increased from 86,904 in the 2018 to 2019 academic year (the year before S.B. 206 was signed) to 89,537 in the 2022 to 2023 academic year.[73]

In short, history has emphatically shown that using law to ensure the fair treatment of athletes does not ruin college sports. To the contrary, expanded rights for athletes have existed side by side with college sports' unprecedented popularity, goodwill, and overall commercial success.

B. Antitrust, Labor Law, and NCAA Concerns

Although one can understand why the NCAA considers recent developments threatening, there is little reason to think that it is entitled to special legislative relief. Antitrust and labor laws exist to promote free markets[74] and the fair treatment of workers.[75] Our entire economy operates on the premise that bargaining (as opposed to centrally-planned directive) promotes productivity and fairness.[76] Antitrust law plays a vital role in ensuring that free markets exist to support bargaining, and labor law facilitates collective bargaining between workers and employers.[77] These laws govern the overwhelming majority of commercial sports ventures,[78] but

72. *See Record-Setting 2024 Paris Games*, STANFORD ATHLETICS (Aug. 11, 2024), https://gostanford.com/news/2024/08/11/record-setting-2024-paris-games [https://perma.cc/K2B3-BX5S] (announcing thirty-nine medals won by Stanford-affiliated athletes); David Medzerian, *Heavy Medals: USC's Decorated Olympians*, USC TODAY (Aug. 26, 2024), https://today.usc.edu/heavy-medals-uscs-decorated-olympians/# [https://perma.cc/BWA3-ZR2S] (announcing fifteen medals earned by athletes affiliated with the University of Southern California); *Bruins Win 14 Meals at 2024 Olympic Games*, UCLA ATHLETICS (Aug.12, 2024), https://uclabruins.com/news/2024/8/12/bruin-athletics-bruins-win-14-medals-at-2024-olympic-games [https://perma.cc/WLX6-LUR2] (announcing fourteen medals won by UCLA-affiliated athletes); *Golden Bears Tie School Record with 23 Medals*, CAL ATHLETICS (Aug. 13, 2024, 3:57 PM), https://calbears.com/news/2024/8/13/golden-bears-tie-school-record-with-23-medals.aspx [https://perma.cc/2XMK-ZZZT] (announcing twenty-three medals won by athletes affiliated with the University of California, Berkeley).

73. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 82, 90 (2023), https://ncaaorg.s3.amazonaws.com/research/sportpart/2023RES_SportsSponsorshipParticipationRatesReport.pdf [https://perma.cc/V4ZN-PCK4] (providing statistics about participation in NCAA women's sports).

74. *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring).

75. *See* 29 U.S.C. § 151.

76. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 147–50 (5th ed. 2008) (presenting the basic economic insight that because, under perfect market conditions, bargains reached in free markets maximize social welfare, economists generally prefer free markets to centrally planned economic activity).

77. *See generally* 29 U.S.C. §§ 151–169.

78. As noted earlier, Major League Baseball does enjoy an exemption from antitrust law. *See supra* note 16. However, that exemption has been limited by the Curt Flood Act of 1998,

the NCAA claims it should not have to live by them. It is therefore perfectly understandable that the NCAA struggles and chafes when it is forced to comply with laws that others follow. That does not mean, however, that Congress should excuse the NCAA from compliance.

The NCAA makes two related, but distinguishable, arguments to support its case for exemptions from antitrust and labor law. The first is a basic argument that unrestricted bidding for athletes will lead to overspending which bankrupts college sports.[79] The second is a claim that unrestricted bidding will destroy competitive equity, making college sports unappealing to consumers.[80] Neither argument is sufficient to support the NCAA's desired exemptions.

With respect to concerns about overspending and bankruptcy, every industry has similar worries. Bidding for workers creates upward pressure on wages, and higher wages imply lower profits. Surely, most industries would like to discourage competitive bidding for workers, but antitrust law does not permit this, as courts regularly declare agreements among competitors to suppress labor illegal.[81] Accordingly, employers learn to live with competitive bidding for workers.

Of course, bidding for workers does not generally bankrupt businesses. For example, law firms compete vigorously to hire associates,[82] and NCAA member institutions do likewise to employ top coaches.[83] Basic economics explains why vigorous competition does not spiral out of control the way the NCAA claims it would.

Businesses presumably pay more for better workers because better workers produce more. This does not mean, however, that businesses will spend an unlimited amount for better workers. It is rational to pay more for a worker only if the extra amount paid is less than the value of the worker's productivity.[84] Accordingly, there is a limit to the amount any business will pay a worker. An extremely valuable worker may command a handsome premium over other workers, but unlimited, ruinous bidding is highly

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Pub. L. No. 105-297, 112 Stat. 2824, which applied antitrust laws to the market for major league baseball players. *See* Curt Flood Act of 1998, Pub. L. No. 105-297, § 3, 112 Stat. 2824, 2825–26 (applying antitrust law to the employment of Major League Baseball players).

79. *See supra* notes 47–52 and accompanying text.

80. *See supra* notes 66–67 and accompanying text.

81. *See* Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc., 540 F.2d 824 (5th Cir. 1976) (plaintiff states viable antitrust claim by alleging agreement not to hire among competitors in securities business); Roman v. Cessna Aircraft Co., 55 F.3d 542 (10th Cir. 1995) (plaintiff alleges viable antitrust claim on the basis of no-poaching agreement between Boeing and Cessna); Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998) (affirming lower court decision declaring that NCAA cap on compensation for entry-level coaches violated antitrust law).

82. *See, e.g.*, Tobi Raji, *Clerks for Hire: The Supreme Court Recruiting Race*, WASH. POST (Jan. 25, 2024), https://www.washingtonpost.com/politics/2024/01/25/supreme-court-clerks-bonuses-law-firms/ [https://perma.cc/8DJM-Y85A].

83. *See supra* note 21 (offering examples of high compensation packages for coaches).

84. *See* MANKIW, *supra* note 76, at 395–96 (describing how profit maximizing firm "hires workers up to the point where the value of the marginal product equals the wage").

unlikely. This observation alone suggests that the NCAA does not need an antitrust exemption for college sports to remain economically viable.

With respect to concerns about the commercial appeal of college sports, other sports leagues have solved similar worries without antitrust and labor law exemptions because the law actually encourages bargaining between workers and leagues to ensure long-term economic viability while treating players fairly. For example, the National Football League (NFL) has expressed concerns about the effect of free bidding for players,[85] and for many years it enforced rules designed to discourage such bidding.[86] When NFL players sued to have one of these rules (the so-called "Rozelle Rule") declared a violation of antitrust laws, the NFL argued that the rule was reasonable to avoid destroying competitive equity and the commercial appeal of the league.[87] However, the U.S. Court of Appeals for the Eighth Circuit did not find this argument compelling, ruling instead that the Rozelle Rule violated antitrust laws.[88]

Tellingly, this ruling did not lead to the dire consequences predicted by the NFL. Instead, many rounds of litigation and collective bargaining followed, with players eventually agreeing in 1993 to a salary cap set at a defined percentage of overall football revenues and limited free agency for veterans.[89] In effect, the players gave up the possibility of unrestrained bidding in exchange for knowing that they would collectively share a set percentage of the league's revenues. Over time, the collective bargaining agreement between the NFL and its players has grown to encompass compensation, the conduct of practices, codes of conduct, player discipline, and even group licensing of player publicity rights.[90] This bargaining process has coincided with rapid growth in league profits and the value of

85. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (recounting NFL assertion that the so-called "Rozelle Rule" is reasonable to prevent cities with "natural advantages" including "larger economic bases" from hiring too many star players, thereby destroying competitive balance and the commercial appeal of the league).

86. *See id.* at 610–11 (recounting history of NFL restrictions on player movement including Rozelle Rule).

87. *See id.* at 621 (noting NFL argument that invalidation of Rozelle Rule might lead to "the demise of the NFL").

88. *Id.* at 622 (holding Rozelle Rule violates Sherman Act).

89. *See* NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT 94–95 (1993), https://ecommons.cornell.edu/items/453b725a-d4dd-4270-ab0c-7c6236d08084 [https://perma.cc/9KXE-KCUD] (providing for salary cap and guaranteed minimum salaries based on "Defined Gross Revenues"); *id.* at 57–68 (providing for veteran free agency).

90. *See* NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT, at arts. 12–15 (2020), https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/PH9J-44FA] (salary cap); *id.* at arts. 21–24 (offseason workouts, minicamps, preseason training camps, and regular/postseason practices); *id.* at arts. 42, 46 (player discipline including reference to "Personal Conduct Policy"); *id.* at art. 4, § 7 (group licensing); NAT'L FOOTBALL LEAGUE, PERSONAL CONDUCT POLICY: LEAGUE POLICY FOR PLAYERS (2018), https://sports-entertainment.brooklaw.edu/wp-content/uploads/2021/01/NFL-Personal-Conduct-Policy-2018.pdf [https://perma.cc/V4KG-4YHS].

NFL franchises that continues to this day. And collective bargaining comes with an important legal upside: the Supreme Court has implied a nonstatutory labor exemption to antitrust law and interpreted it broadly[91] to facilitate the parties' ability to craft solutions to their unique workplace issues without the threat of antitrust litigation.

The story of the bargaining relationship between the NFL and its players has repeated itself in the most prominent American professional sports leagues. The National Basketball Association (NBA) and Women's National Basketball Association (WNBA), National Hockey League (NHL), Major League Soccer (MLS) and the National Women's Soccer League (NWSL), and Major League Baseball (MLB) all have collective bargaining agreements with their players.[92] All of these leagues worry about their finances, and collective bargaining has, in all of these cases, resulted in players agreeing to discourage open bidding to differing degrees.[93] One might wonder why players would ever give up unlimited bidding given its lucrative potential, but further consideration reveals that players have good reason to cooperate with owners and bargain in good faith, even if those negotiations are sometimes tense. If unrestrained bidding really would result in the demise of the league, players have a strong interest in preventing that demise. This explains why it is reasonable to expect players to accept limits on bidding if the NCAA, conferences, or universities can make a convincing case that such bidding would injure the overall financial condition of college sports. Of course, players would expect something in return for that concession, and it is equally reasonable to expect that the NCAA and its members would provide it. Professional leagues have generally guaranteed players payments equal to a defined percentage of revenue, effectively making players partners

91. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236–42, 249 (1996) (explaining nonstatutory labor exemption from antitrust, its applicability to multiemployer bargaining, and applying it to shield actions taken by the NFL during collective bargaining impasse).

92. *See* NBA 2023 COLLECTIVE BARGAINING AGREEMENT (2023), https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2023/06/2023-NBA-Collective-Bargaining-Agreement.pdf [https://perma.cc/H9U3-6VDP]; WNBA COLLECTIVE BARGAINING AGREEMENT (2020), https://wnbpa.com/wp-content/uploads/2020/01/WNBA-WNBPA-CBA-2020-2027.pdf [https://perma.cc/BXJ7-GP3Z]; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NHL AND THE NHLPA (2012), https://www.nhlpa.com/the-pa/cba [https://perma.cc/6RVV-SWV9]; COLLECTIVE BARGAINING AGREEMENT BETWEEN MLS AND MLSPA (2020), https://s3.amazonaws.com/mlspa/2020-2028-CBA-Long-Form_FINAL.pdf?mtime=20230221184117 [https://perma.cc/X7Y6-XTMX]; COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NWSLPA AND NWSL (2022), https://www.nwslplayers.com/_files/ugd/84dade_c1592001e8774f81b8346c2b13e6a5f4.pdf [https://perma.cc/B3J9-Z5LY]; MLB 2022-26 COLLECTIVE BARGAINING AGREEMENT (2022), https://www.mlbplayers.com/_files/ugd/4d23dc_d6dfc2344d2042de973e37de62484da5.pdf [https://perma.cc/QMP6-WPC7].

93. *See, e.g.*, NBA 2023 COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. VII, § 2(a)–(d) ("Salary Cap," "Minimum Team Salary," "Tax Level"); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NHL AND THE NHLPA, *supra* note 92, at art. 50 ("Team Payroll Range System"); COLLECTIVE BARGAINING AGREEMENT BETWEEN MLS AND MLSPA, *supra* note 92, art. 23 ("Roster & Budget Guidelines"); MLB 2022-26 COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. XXIII ("Competitive Balance Tax").

in the financial success of the league.[94] And, certainly, the bargaining is not always about revenue. One could easily imagine how demands and concessions about transfers and recruiting, NIL deals, guarantees of salary/scholarships, scheduling, academic assistance, health care, housing, and other benefits could play a key role in the final agreement being reached.

IV. THE POSSIBILITY OF COLLECTIVE BARGAINING IN COLLEGE SPORTS

The foregoing forms the basis for our position that Congress need not exempt the NCAA and its members from antitrust and labor laws to ensure the commercial viability of college sports. The general experience of businesses and the specific experience of professional sports shows that the proper solution for the NCAA's woes is the kind of collective bargaining that has solved similar problems for major sports leagues—collective bargaining explicitly made possible by existing antitrust and labor laws. Despite the protests of the NCAA and sports leagues who have resisted collective bargaining, the application of antitrust and labor law does not ruin the commercial appeal and economic viability of sports. To the contrary, sports have flourished negotiating with athletes in good faith about how they will share in the revenue their talents generate. And because these solutions require bargaining and agreement, it is likely that major concerns about fairness to athletes have been reasonably addressed.

In fact, empowering athletes through collective bargaining in college sports promises an additional, and powerful, benefit. The current ethical objections to and widespread perception of the NCAA model as unfair to athletes would be mitigated significantly by making athletes partners in their athletic experiences. In contrast, were Congress to enact the NCAA's desired legislative solution, it would only exacerbate existing concerns. Since 2019, the NCAA has spent more than $15 million lobbying for its preferred solution.[95] Far from resolving the matter, giving the NCAA special treatment under these circumstances would surely deepen the crisis of confidence over its stewardship of college sports by making it appear that it bought a legislative solution that unpaid athletes would never agree to.

Of course, the desirability of the solution we favor does not mean that it will happen. Although it seems clear that the NCAA and its members face

94. *See* NBA 2023 COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. VII, § 12 ("Designated Share Arrangement"); WNBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. XII ("Revenue Sharing"); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NHL AND THE NHLPA, *supra* note 92, at art. 50.4 ("League-wide Player Compensation," "Players' Share," "Escrow Account"); COLLECTIVE BARGAINING AGREEMENT BETWEEN MLS AND MLSPA, *supra* note 92, at art. 10, § 10.11 ("Incremental Media Revenues"); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NWSLPA AND NWSL, *supra* note 92, at art. 8, § 8.13 ("Media/Broadcast Profit Sharing"); MLB 2022-26 COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. XXIV ("The Revenue Sharing Plan").

95. *See* Amanda Christovich, *'A Breathtaking Lobbying Campaign': The NCAA's Sophisticated Effort to Save Amateurism*, FRONT OFF. SPORTS (May 18, 2024, 12:59 AM), https://frontofficesports.com/a-breathtaking-lobbying-campaign-the-ncaas-sophisticated-effort-to-save-amateurism/ [https://perma.cc/M88R-46XS].

antitrust problems that could be solved by collective bargaining,[96] it is unclear if athletes can use the National Labor Relations Act to support collective bargaining for two reasons. First, athletes may or may not be employees for NLRA purposes. Second, state universities appear not to be employers for NLRA purposes.

Congress enacted the NLRA for the purpose of "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[97] Accordingly, the NLRA states that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[98] The NLRA also defines a number of unfair labor practices by employers that include interfering with union-forming activities and refusing to bargain with a duly formed union.[99] Accordingly, the application of the NLRA to college sports would force the NCAA and its members to collectively bargain with athletes over all aspects of their relationship if the athletes chose to form an appropriate union.

By its terms, the NLRA applies only to the activity of employees and employers as defined in § 2.[100] However, it is not presently clear if NCAA Division I athletes are employees under the NLRA or if the NCAA, conferences, or member institutions are employers.

The question of athletes' status as employees under the NLRA is under active consideration.[101] The strongest indication of employee status comes from the 2024 regional director's decision that basketball players at Dartmouth College are employees within the NLRA and entitled to form a union.[102] Pursuant to this decision, the Dartmouth players voted 13-2 to form

96. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (majority opinion); House v. Nat'l Collegiate Athletic Ass'n, 545 F. Supp. 3d 804 (N.D. Cal. 2021); Hubbard v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-01593 (N.D. Cal. filed Apr. 4, 2023); Tennessee v. Nat'l Collegiate Athletic Ass'n, 24-CV-00033, 2024 U.S. Dist. LEXIS 32050 (E.D. Tenn. Feb. 23, 2024); Ohio v. Nat'l Collegiate Athletic Ass'n, No. 23-cv-00100 (N.D. W. Va. filed Jan. 18, 2024).

97. 29 U.S.C. § 151.

98. *Id.* § 157.

99. *Id.* § 158(a)(1)–(5).

100. *See id.* § 152 (defining terms "employer" and "employee").

101. Litigation over the employee status of college athletes under the Fair Labor Standards Act already exists. *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163 (3d Cir. 2024) (finding that college athletes could be employees under the Fair Labor Standards Act and remanding case to district court). As a technical matter, the employee status of college athletes under the FLSA is separate from that status under the NLRA. However, as a practical matter, decisions about one highly influence the other. *Id.* at 178–79 (stating that shared history of the FLSA and NLRA often leads courts to "draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace").

102. Decision & Direction of Election, Trs. of Dartmouth Coll., 373 N.L.R.B. No. 34 (Feb. 5, 2024).

a union. Dartmouth College would normally be expected to appeal, but it is unclear how courts would ultimately rule, especially in light of a 2015 NLRB ruling against the attempt of Northwestern University football players to unionize.[103] Moreover, at the time of this writing, the Dartmouth players have abandoned their attempts to unionize, perhaps to preserve the favorable regional director's decision against adverse action from an NLRB influenced by the administration of Donald J. Trump that might be hostile to college athlete unionization.[104]

Even if the Dartmouth decision were to become controlling, it does not necessarily follow that athletes can require the NCAA's members to engage in comprehensive collective bargaining. This is because the NLRA's definition of "employer" excludes "any State or political subdivision thereof."[105] Thus, it is unlikely that courts would force state universities to engage in collective bargaining.[106] The primary course around this obstacle under existing law would be an arrangement proposed by Professor William W. Berry III, in which a nonstate entity, mostly likely a conference or the NCAA itself, becomes the employer for purposes of collective bargaining. This could happen voluntarily if universities deliberately so organize to take advantage of collective bargaining to gain a nonstatutory antitrust exemption.[107] Alternatively, this could happen if the NLRB declared the NCAA or a conference a joint employer for a relevant collection of athletes.[108]

The foregoing shows that the successful application of collective bargaining to college sports would be bolstered by judicial declarations that NCAA Division I athletes are employees within the NLRA and an NLRB or judicial finding that the NCAA or conferences are joint employers with public universities that operate Division I sports. Of course, the NCAA and its supporters will oppose this because collective bargaining is precisely what

103. Northwestern Univ., 362 N.L.R.B. 1350 (2015).

104. *See*, Billy Witz, *Dartmouth College Basketball Players Halt Effort to Unionize*, N.Y. TIMES (Dec. 31, 2024), https://www.nytimes.com/2024/12/31/us/dartmouth-basketball-unionize.html [https://perma.cc/2S89-KPYY].

105. 29 U.S.C. § 152(2).

106. Cf. *Northwestern Univ.*, 362 N.L.R.B. at 1353–54 (asserting that the NLRB cannot assert jurisdiction over state universities involved in NCAA sports).

107. *See generally* William W. Berry III, *Conference-Employees and Student-Athletes*, 104 TEX. L. REV. (forthcoming 2025) (unpublished manuscript on file with authors) (proposing that conferences employ college athletes and analyzing benefits—including nonstatutory labor exemption from antitrust—that such organization would bring).

108. A nonstate entity like a conference or the NCAA has a clear obligation to bargain with a properly elected union under § 8(a)5 of the NLRA. See 29 U.S.C. § 158(a)(5) (declaring refusal to bargain collectively with employees' representatives an unfair labor practice). A nonstate entity might argue that its joint employer status with a state-exempt entity relieves it from the duty to bargain collectively. However, courts generally reject this type of argument. *See* Teledyne Econ. Dev. v. NLRB, 108 F.3d 56, 60 (4th Cir. 1997) (refusing to extend exemption for state entities under the NLRA to nonexempt joint employers); Bannum Place of Saginaw, LLC v. NLRB, 41 F.4th 518, 529 (6th Cir. 2022) (noting consensus among circuits against extending exemptions for state entities to nonexempt contractor/joint employers, especially in light of Supreme Court admonition to interpret exemptions from the NLRA narrowly).

they fear. As long as the NCAA has the authority to impose rules on athletes without accountability through antitrust and labor law, it does not truly have to ensure the fair treatment of athletes because athletes have no genuine leverage to create change. Individual athletes would have to accept NCAA rules as they are or forego playing college sports. The formation of a union and mandatory collective bargaining would change everything by forcing the NCAA and its members to negotiate over athlete concerns and face the possibility of a strike if the athletes' concerns are not adequately addressed. It is therefore perfectly understandable that the NCAA wants to avoid this outcome.

V. POSSIBLE OBJECTIONS

Because collective bargaining creates leverage that athletes can use to protect their interests, most of the arguments against it focus on supposed negative consequences of treating athletes as employees. For example, some have claimed that employee status will harm college athletes because athletic scholarships will become taxable. Others have argued that, as employees, athletes could be terminated at will and lose their scholarships because their athletic performance did not satisfy a coach. Opponents to employee treatment have also contended that athletes will be harmed if universities must follow occupational health and safety laws when conducting practices. We believe that these arguments are largely red herrings that should not affect the desirability of collective bargaining as a solution to the challenges facing college sports.[109]

A. Taxes

It is true that athletes, like all individuals, must pay taxes on income. This obligation exists regardless of whether a college athlete is an employee of her university. This is why NCAA athletes owe taxes for income derived from exploiting NIL rights. It is not necessarily the case, however, that declaring athletes as employees will inevitably expose them to large tax bills on their scholarships.

Because of the general obligation to pay taxes, the tax argument against treating athletes as employees under the NLRA seems a bit odd. If college athletes receive "compensation" for services, they must pay taxes on income whether or not they are university employees. The question is therefore whether athletic scholarships are income.

Internal Revenue Code (IRC) § 117(a) excludes from income "any amount received as a qualified scholarship by an individual who is a candidate for a

109. See Sally Jenkins, Opinion, *College Athletes Should Think Twice Before Asking to Be Employees*, WASH. POST (June 16, 2024), https://www.washingtonpost.com/sports/2024/06/16/college-sports-unionization-employees/ [https://perma.cc/BZN3-JUUG]; Jane Coaston, Opinion, *Ted Cruz Has Some Strong Opinions About College Sports*, N.Y. TIMES (May 28, 2024), https://www.nytimes.com/2024/05/28/opinion/ted-cruz-ncaa-transfer.html [https://perma.cc/G5SX-V8ZB] (quoting Senator Ted Cruz as noted in text), for arguments along these lines.

degree at an educational organization."[110] On its face, this provision benefits employees and nonemployees alike. Accordingly, there is no obvious basis for concluding that athletic scholarships become taxable simply because athletes get treated as employees.

Some have argued, however, that athletic scholarships (as opposed to ordinary scholarships) would become fully taxable if college athletes become employees.[111] This assertion arises from a peculiar reading of IRC § 117(c)(1), which disallows the § 117(a) exclusion for "amount[s] received which represents payment for . . . other services by the student required as a condition for receiving the qualified scholarship."[112] Thus, because athletic scholarships are given in return for an athlete's participation in college sports, these scholarships would become taxable because they are conditioned on "other services." Though superficially plausible, the suggested outcome is actually rather unlikely.[113]

Since 1977, the Internal Revenue Service (IRS) has explicitly excluded athletic scholarships from taxable income.[114] In Revenue Ruling 77-263, the IRS directly considered whether the expectation of sports participation rendered athletic scholarships taxable, and it concluded that universities did not sufficiently condition these scholarships on sports participation to make them "other services" within the meaning of § 117(c)(1). The ruling states:

> [T]he university requires no particular activity of any of its scholarship recipients. Although students who receive athletic scholarships do so because of their special abilities in a particular sport and are expected to participate in the sport, the scholarship is not cancelled in the event the student cannot participate and the student is not required to engage in any other activities in lieu of participating in the sport.[115]

This meant that "athletic scholarships are awarded by the university primarily to aid the recipients in pursuing their studies, and therefore, the value of the scholarships is excludable from the recipients' gross incomes under section 117 of the Code."[116]

For purposes of the analysis at hand, it is important to note that the revenue ruling does not condition the favorable tax treatment of athletic scholarships

110. 26 U.S.C. § 117(a) (emphasis added) (excluding scholarships used for tuition and related expenses from income).

111. *See* Justin Morehouse, *When Play Becomes Work: Are College Athletes Employees?*, 144 TAX NOTES 1427 (2014) (reporting contention by the NCAA and Northwestern University that treating players as employees would automatically make athletic scholarships taxable as income); Transcript of Oral Argument at 69, Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163 (3d Cir. 2024) (counsel for NCAA making same argument); Jenkins, *supra* note 109 (making same claim).

112. 26 U.S.C. § 117(c)(1).

113. In addition to the points made here, it is unlikely because of what tax scholars characterize as the "traditional sweetheart arrangement between the IRS and the NCAA" that amounts to "unreasonably generous tax treatment." Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087, 1088–89 (2019).

114. Rev. Rul. 77-263, 1977-2 C.B. 47.

115. *Id.*

116. *Id.*

on the athlete's nonemployee status. What matters is the conditioning of aid upon the provision of services.[117] Moreover, even if the IRS decided to pursue taxes on athletic scholarships for athlete employees, two workarounds exist.

First, remember that under IRC § 117(c)(1), scholarships become taxable if they are conditioned on provision of a service. This implies that universities could render athletic scholarships nontaxable by honoring them even if an athlete decided not to play her sport.[118]

Second, universities could restructure athletic scholarships as tuition reductions. IRC § 117(d) excludes from income tuition reductions provided to employees for education "below the graduate level" as long as the reduction is made available in a way that does not discriminate in favor of highly compensated employees.[119] Because universities already provide athletic scholarships to those in sports that would not draw large salaries (e.g. swimmers), continuing this practice would seemingly shield tuition reductions from taxation even if the recipients were employees.[120]

B. At-Will Employment and Loss of Scholarships

One can easily unmask arguments that employee status means exposing athletes to the consequences of at-will employment as somewhat overheated. It is true that the default employment agreement is "at will," meaning that either side can terminate the agreement at any time. At-will employment makes it possible for employers to fire employees on short notice for almost any reason. This does not mean, however, that college athletes who become employees will necessarily be treated worse than they are now.

As an initial matter, it must be noted that nonemployee college athletes do enjoy modest security. NCAA Bylaw 15.3.4 generally prohibits institutions from canceling or ending athletic financial aid based upon the recipient's

117. *See id.*; *see also* Letter from John A. Koskinin to Sen. Richard Burr (April 9, 2014), https://www.irs.gov/pub/irs-wd/14-0016.pdf [https://perma.cc/SJW3-ZME8]. In this letter, Mr. Koskinin (who was at the time commissioner of the Internal Revenue Service) responded to an inquiry from Senator Burr about the tax implications of a National Labor Relations Board decision treating Northwestern University football players as employees under the National Labor Relations Act. Mr. Koskinin stated that "the NLRB decision does not control the tax treatment of athletic scholarships." *See also* Morehouse, *supra* note 111, at 1428–29. It is instructive to note that, to the extent that universities do condition athletic scholarships on sports participation, their athletic scholarships would appear to be fully taxable even if the athletes are not employees. *See id.*

118. *See* Marc Edelman, *From Student-Athletes to Employee-Athletes: Why a "Pay for Play" Model of College Sports Would Not Necessarily Make Educational Scholarships Taxable*, 58 B.C. L. REV. 1138, 1161–63 (2017) (analyzing Internal Revenue Code and concluding that educational scholarships would not be taxable to employee athletes as long as scholarships are not conditioned on playing a sport).

119. 26. U.S.C. § 117(d).

120. *See* Morehouse, *supra* note 111, at 1434–35 (analyzing possible restructuring of athletic scholarships as employee tuition reductions); Edelman, *supra* note 118, at 1163–67 (analyzing various strategies for avoiding income tax on athletic scholarships given to employee athletes).

athletic performance.[121] However, scholarships may be reduced or not renewed if an athlete chooses to withdraw from playing their sport.[122] This allows coaches to run athletes off their teams because they are not satisfied with their athletic ability. For example, when Deion Sanders joined the University of Colorado Boulder as its head football coach, he successfully convinced sixty-seven of eighty-three scholarship athletes to leave the team "voluntarily," thereby saving scholarships to be spent on incoming transfers.[123] Notably, "the majority" apparently did not find new football scholarship opportunities.[124] It would therefore be a mistake to think that NCAA athletes presently enjoy meaningful "job security."

Moreover, even if at-will employment is "worse" than what college athletes have today, nothing requires universities to treat athletes that way. If security is important to athletes, universities willing to provide secure employment will gain advantages in recruitment. And if collective bargaining should occur, athletes can negotiate for guaranteed contracts.

C. Employment Laws

It is strange to argue that nonemployee college athletes are better off than employee college athletes because laws that protect employees somehow harm athletes. The argument appears to be that athletes must practice incredibly long hours and take unusual risks in order to excel—hours and risks that would otherwise be prohibited by laws protecting employees. Thus, laws that might require universities to pay overtime[125] or operate safe workplaces[126] actually harm athletes by somehow restricting their training. As Senator Ted Cruz has argued:

> If student athletes are treated as employees, that would ultimately hurt the student athletes . . . . Employees have all sorts of restrictions in terms of work, in terms of overtime, in terms of the conditions of employment. I'm

121. *See* NCAA, *supra* note 2, at 183–85 ("Operating Bylaws" article 15.3.4).

122. *See id.* at 183–84 (Operating Bylaws article 15.3.4.1).

123. *See* Max Olson & Andy Staples, *Run-Offs, the Transfer Portal and CFP 'Cuts': How Can Deion (and Others) Flip Rosters so Fast?* THE ATHLETIC (Apr. 26, 2023), https://www.nytimes.com/athletic/4451556/2023/04/26/college-football-runoffs-transfer-portal-rules/ [https://perma.cc/A7FC-UAHM] (reporting about turnover on the Colorado football team caused by Sanders and the "long-standing tactic" of "run-offs" used by coaches); *see also* Tony Breland, *Alabama Football: Oversigning and Roster Cuts Are Part of Nick Saban's Process*, BAMA HAMMER (Feb. 28, 2013), https://bamahammer.com/2013/02/28/alabama-football-oversigning-and-roster-cuts-are-part-of-nick-sabans-process/ [https://perma.cc/9RL3-W5SA] (describing how former Alabama football coach Nick Saban managed his roster "like an NFL team").

124. *See* David Ubben, *Inside Deion Sanders' Unprecedented Roster Flip: 'We Have Plans to Go Another Way'*, THE ATHLETIC (Apr. 26, 2023), https://www.nytimes.com/athletic/4451509/2023/04/26/deion-sanders-colorado-transfer-portal/ [https://perma.cc/VK2Y-W28B] (reporting on the experiences of those "cut" from the Colorado football team by Sanders).

125. *See* 29 U.S.C. § 207.

126. *See id.* §§ 651–678.

> quite certain the two-a-days that I ran in high school would not comply with OSHA.[127]

This argument does not make sense. Presently, nonemployee college athletes must train whenever their coach schedules training sessions, and they are permitted to train voluntarily on their own. To the extent that nonemployee athletes consider this excessive, there is little that they can do about it. Similarly, to the extent that coaches engage in dangerous practices, such as practicing in excessive heat, athletes must go along until something tragic happens.[128]

Collective bargaining would allow athletes to negotiate over all these things, and athletes would not bargain for a deal that makes them worse off. Athletes fully understand that sufficient training is necessary for excellence. They also understand when they are training so much that their performance will deteriorate. Professional sports have collectively bargained with player unions to limit the number and duration of practices.[129] Indeed, to the extent that Senator Cruz believes that it is in an athlete's interest to have their coach violate basic safety laws, one must ask why any society should consider athletic performance so important that athletes must take whatever risks a coach imposes. It is not as if employment laws prevent employee athletes in professional sports from doing the necessary training to perform at the highest levels. Senator Cruz's argument implies that college athletes must be better off than professional athletes because college athletes are not employees, but there is little reason to think that this is true when one considers the money, quality of coaching, and facilities that professional athletes enjoy.[130]

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127. *See* Coaston, *supra* note 109.

128. Dan Novak, *Pushed Too Far: Overexertion Has Claimed Lives of 22 Division I Football Players Since 2000*, CAP. NEWS SERVS., https://cnsmaryland.org/interactives/spring-2021/pushed-too-far/ [https://perma.cc/V5DS-KP54] (last visited Mar. 7, 2025).

129. *See, e.g.*, NBA 2023 COLLECTIVE BARGAINING AGREEMENT, *supra* note 92, at art. XX, § 1(e)(i); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NHL AND THE NHLPA (2012), *supra* note 92, at art. 15.3.

130. It is also a dubious proposition given the reports, investigations, and litigation concerning allegedly abusive college sports workouts that have caused athletes physical harm and even death. *See* Marie Fazio, *Family Reaches $3.5 Million Settlement in Death of Maryland Football Player*, N.Y. TIMES (Jan. 17, 2021), https://www.nytimes.com/2021/01/17/sports/football/Jordan-McNair-death-settlement-Maryland.html [https://perma.cc/2ZRD-N2YM] (reporting on death of Maryland football player Jordan McNair after receiving substandard care for heat stroke and reporting that thirty-four NCAA football players died a "non-traumatic exertion related death during off-season or preseason workouts" from 1998 to 2018); Patrick Whittle, *Navy SEAL Who Led Workout That Hospitalized Tufts Lacrosse Players Lacked Expertise, Report Says*, ASSOCIATED PRESS (Jan. 31, 2025, 3:08 PM), https://apnews.com/article/lacrosse-players-hospitalized-navy-seal-5f72180e7f1c2353336a5f6035f81cc5 [https://perma.cc/M3R5-C3VP] (reporting on hospitalization of nine Tufts University lacrosse players after workout led by Navy SEAL instructor); Brittany Britto, *UH Launches Investigation into Rhabdo Cases as New Details Emerge Related to Life Threatening Condition*, HOUSTON CHRON. (June 13, 2019, 9:34 PM), https://www.houstonchronicle.com/news/houston-texas/education/article/UH-launches-investigation-into-rhabdo-cases-as-13992419.php [https://perma.cc/643H-UHEZ] (reporting hospitalization of University of Houston women soccer players for rhabdomyolysis, a dangerous medical condition brought on by overly strenuous workouts).

CONCLUSION

Addressing the red herring arguments against the possibility of employee status for college athletes strengthens our position that the courts, NLRB, and Congress should react to the purported crisis in NCAA sports by making sure that existing laws, including antitrust and labor law, govern and guide the behavior of the parties. This does not mean that the road ahead will be simple or easy.

Even if courts, the NLRB, or even Congress take the actions we suggest, more litigation is likely as athletes claim the right to collectively bargain and universities resist. Such litigation could be costly and time-consuming, and there are risks of inconsistent decisions—although those would presumably be sorted out on appeal. At the same time, however, such litigation provides our system of justice an opportunity to make nuanced distinctions between different college athletes on a case-by-case basis. This makes good sense because relationships between athletes and universities are heterogeneous.[131] At the very least, litigation will give courts the opportunity to restrict collective bargaining to athletes who fit the legal definition of employee under the NLRA. And to the extent that the definition of employee is unclear in the college sports context, litigation will clarify the issues and give courts the opportunity to create rules and principles to guide future behavior.

Of course, college athletes who are eligible for unionization will have to decide if they want to unionize and what they want to bargain for. It is far from clear whether all athletes will act together or whether unions with different interests will emerge. This may complicate the future of college sports, but we do not think that these challenges are different from those faced in other areas of work, such as medicine or education. Indeed, collective bargaining in an educational setting, just like NIL rights, can be an important part of the "life lessons" learned through sports participation, and educational institutions are uniquely suited to teach them.

Nevertheless, we believe that collective bargaining is the right way to go forward because bargaining is the most reliable way to ensure that the concerns of college athletes are heard and addressed. The alternative favored by the NCAA is a return to unaccountable authority that the NCAA and its members can use to dictate what happens to college athletes. This regime has already failed to treat athletes fairly, denying them a proper share of the revenue they generate while subjecting them to onerous training and travel that subverts their educational experience while enriching universities. Given its track record, it is unlikely that this regime will somehow magically reform into one genuinely committed to fair athlete treatment. Far better then to make the NCAA and its members come to the negotiating table.

131. *See* Paige Sutherland & Meghna Chakrabarti, *The NCAA, Antitrust, and the Future of College Sports*, WBUR (Oct. 31, 2023), https://www.wbur.org/onpoint/2023/10/31/the-ncaa-antitrust-and-the-future-of-college-sports [https://perma.cc/77JK-SFQ5] (reporting statements taking the position that athletes at most Division I sports programs have experiences markedly different from those at the most prominent ones).