TAMING THE WILD WEST: CAN ORDER BE RESTORED TO THE COLLEGIATE PLAYING FIELDS?

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"Money changes everything."[1]

INTRODUCTION

On May 23, 2024, the NCAA and member conferences entered into a historic settlement to resolve the *House* case, a class action lawsuit brought on behalf of some 14,000 college athletes seeking damages for lost opportunities to gain financial benefits from their schools' use of their name, image, and likeness ("NIL") due to the NCAA's past denials of NIL compensation from media broadcasts, video games, and third parties.[2] The trial court had certified damage classes consisting of (1) men's football and basketball players; (2) women's basketball players; and (3) other sports.[3] As part of the settlement, defendants agreed to pay class members save $2.77 billion over the next ten years for some 14,000 claims dating back to 2016.[4] More importantly, the settlement also includes a provision for revenue sharing that would allow schools to commit up to $22 million per year from media revenue to be paid directly to college athletes as soon as the 2025 season,[5] marking the first time that college athletes will be permitted to receive direct payments from their institutions.

The significance of this landmark settlement cannot be overstated. As the Supreme Court has noted, "[f]rom the start,

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[1] Adam Davidson, *Money Changes Everything,* N.Y. Times (Feb 5, 2013), https://www .nytimes.com/2013/02/10/magazine/money-changes-everything.html.

[2] *See Joint Statement on the Agreement of Settlement Terms*, NCAA (May 23, 2024), https://www.ncaa.org/news/2024/5/23/media-center-joint-statement-on-the-agreement-of-settlement-terms.aspx.

[3] *See* Order Granting Motion for Certification of Damages Classes, 2023 WL 8372787, (N.D Cal. Nov. 3, 2023) [hereinafter *House*].

[4] Ross Dellenger, *NCAA, Power 5 Conferences Vote to Approve $2.8 B Settlement in House, Hubbard and Carter Cases,* Yahoo Sports (May 23, 2024),https://sports.yahoo.com/ncaa-power-five-conferences-vote-to-approve-28b-settlernent-in-house-hubbard-and-cmter-cases-001736810.html.

[5] *Id.*

American colleges and universities have had a complicated relationship with sports and money."[6] Colleges and universities have "sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni."[7] For decades, colleges and universities have portrayed their intercollegiate athletic programs as amateur endeavors[8]—student athletes participating in extracurricular activities—while at the same time reaping tens of millions of dollars in revenue from these programs, principally from television contracts and licensing agreements.[9] Tho NCAA's current contract to broadcast its March Madness basketball tournament alone is worth $1.1 billion annually.[10] Ironically, the student athletes whose efforts created value for their institutions have not been given a piece of the pie. That irony has not been lost on college athletes who, in the past two decades, have pushed back with a flurry of lawsuits seeking, among other things, the right to be fully compensated for use of the name, image and likeness[11] and casing of strict transfer rules that required athletes transferring between schools to sit out a year before they are eligible to compete at their new schools.[12] Other athletes have claimed that they are employees of their universities and have demanded the right to compensation and the right to unionize.

The *House* settlement did not come about overnight. Rather, it was the culmination of a series of lawsuits challenging the NCAA's iron-fisted control over college athletics. Even prior to *House,* the NCAA had eased its restrictions on interschool

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[6] NCAA v. Alston, 594 U.S. 69, 74 (2021).
[7] *Id.* at 76.
[8] *Id.*
[9] *See Id.* at 79.
[10] *Id.* at 79-80.
[11] O'Bannon v. NCAA, 802 F. 3d 1049, 1052 (9th9 th Cir. 2015).
[12] *See, e.g.*, Vassar v. NCAA & Nw. Univ., No. 16-cv-10590, 2017 U.S. Dist. LEXIS 239339, 2 (N.D. Ill. Nov. 14, 2016); *see also* Press Release, U.S. Department of Justice, Justice Department and State Coalition Restore Competition for College Athletes at Division I Institutions (May 30, 2024) (insert hyperlink) (announcing proposed consent decree barring the NCAA from enforcing restrictive transfer eligibility rules).

transfers,[13] thereby making the transfer portal more accessible to athletes, and dropped its blanket opposition to NIL payments.[14] Those two developments alone have transformed intercollegiate athletics to the point that the college sports scene bears little resemblance to that which existed even two years ago. Whereas athletes once looked to colleges not only to hone their athletic skills but also to provide an education and preparation for life after sports, money is now top of mind for young recruits; and institutional loyalty is now negotiable. In many ways, the emerging model for college athletics is indistinguishable from the professional model. As LSU football coach, Brian Kelly, observed, there is "a lot of money" in college sports.[15] Kelly then drew parallels between the recruitment of college athletes and the signing of professional athletes. Like the professional rookie, the college recruit seeks a "signing" bonus.[16] Just as a free agent in professional sports asks for a bump in pay when seeking to change teams, the college athlete seeks a "free agent" bonus.[17] Like a professional player who chooses to stay put on a team, college athletes who do not transfer seek a "retention" bonus.[18] This new normal in college athletics was a factor in the decision of legendary University of Alabama football coach, Nick Saban, to retire following the 2023 season.[19] Saban recalled ruefully that today's recruits arc more

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[13] *See NCAA Approves New Rule Allowing Transfers Immediate Eligibility,* Fox Sports, https://fox.sports.com/stories/college-football/ncaa-approves-new-rule-allowing-transfers-imrnediate-eligibility (Apr. 17, 2024).

[14] *See Division I Council Approves NIL Disclosure and Transparency Rules,* NCAA (Jan. 10, 2024) https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx.

[15] Travis May, *Head Coach of LSU Football Brian Kelly says what we're all thinking when it comes to the future of college football* AtoZ Sports, (Apr. 12, 2024), https://www.atozsports.com/college -football head coach-of-isu-football-brian-Kelly-says-what-were-all-thinking-when-it-comes-to-the-future-of-college- football/.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *See* Chris Law, *Nick Saban wants to be a voice for change in college football,* ESPN (Feb. 21, 2024), https://www.espn.com/college-

concerned with guarantees of playing time and the amount of money they could be paid than they are about development as athletes and preparation for life after sports.[20]

Now that the *House* settlement authorizes direct payments to athletes, money has become more important than ever in shaping the intercollegiate sports scene. Far from the staid, buttoned down atmosphere that prevailed for years under the watchful eye of the National Collegiate Athletic Association ("NCAA"), the atmosphere in college sports today has been described as the "Wild West."[21] Alumni-funded booster collectives, flush with cash, are offering recruits money.[22] Are these NIL payments (OK) or pay to play inducements (not OK)? How do you tell the difference? Athletes are transferring in droves. Is there nothing a college can do to stop the talent drain? How should direct compensation payments to athletes be apportioned?

This article will (1) review the evolution to college athletics and the demise of the NCAA amateur model, principally through an antitrust lens, (2) analyze the impact of other statutory schemes, viz. (a) Labor laws, (b) Title IX, and state NIL laws; (3) offer proposals for a compensation model that brings some sanity and common sense to the intercollegiate athletics scene.

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footbalI/story/id/ 39572219/nick-saban-wants-voice-change-college-football.

[20] *See id.*

[21] Kristopher J. Brooks, *It's the "Wild, Wild West" for companies hoping to monetize college athletes,* MONEY WATCH (July 30, 2021), https://www.cbsnews.com/news-nil-college-athletes-collegiate-sports--ncaa/.

[22] *See* David Ubber & Tess Demeyer, *What is NIL How has it Changed College Sports and Why are Schools Under Investigation?* THE ATHLETIC (Feb. 2, 2024), https://www.nytimes.com/athletic5245564/202/02/21/nil-explained-ncaa-name-image-likeness-investigation.

I. THE RISE AND FALL OF THE NCAA

A. Costs of Housing and Development

The NCAA is the regulatory body governing college athletes. It consists of some 1,100 member colleges and universities and makes rules for all aspects of intercollegiate sports, including recruitment, academic eligibility, compliance, and sanctions for violating its standards.[23] The NCAA also sponsors championship tournaments, such as March Madness in basketball.[24] Founded in 1906, the NCAA' s original mission was to provide a regulatory structure for college sports that would protect student athletes, most notably football players, from injury.[25] The NCAA also sought to rid college sports of itinerant athletes who went from school to school, playing sports for pay without even enrolling.[26] Indeed, the NCAA constitution made clear that college sports were to be an amateur endeavor, providing that "[n]o student shall represent a college or university in any intercollegiate game or contest who has at any time received directly or indirectly, money or other consideration, to play on a team…."[27] In addition to direct pay, NCAA rules barred NIL payments, excessive educational payments, performance- based payments, and preferential

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[23] David A. Martin, *Breaking (from) Board: Putting "Student" in "Student-Athlete" NCAA Basketball Transfer Regulations* 2019 Ill. L. Rev. 1117, 1122 (2019), *see* NCAA v. Alston, 594 U.S. 69, 74-80 (2021).

[24] *Alston*, 594 U.S. at 769.

[25] Jennifer A. Schults, *If at First You Don't Succeed Try, Try, Again: Why College Athletes Should Keep Fighting for "Employee" Status,* 56 COL. J. LAW & SOC. PROB. 452, 458-61 (2023).

[26] *Alston,* 549 U.S. at 75 ("The absence of academic residency requirements gave rise to 'tramp athletes' who 'roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better.'") *See also* SCHULTS, *supra* note 25, at 459. (stating that many college stars were suspected of parading "false college colors" that is, taking money under the table while masquerading as an amateur).

[27] *See Alston,* 594 U.S. at 76 (citing Intercollegiate Athletic Ass'n of the U.S. Const. By-Laws, art VII §3 (1906)).

treatment for athletes.[28] The NCAA did, however, allow tuition scholarships for student-athletes, and today college may, consistent with NCAA rules, pay the full cost of attendance for scholarship athletes.[29]

B. NCAA and the Sherman Act

For decades, the NCAA, its member schools, and athletes lived in relative harmony under NCAA governance. In the latter part of the twentieth century, the NCAA began to face lawsuits contending that it rules constituted unreasonable restraints of trade in violation of section one of the Sherman Act.[30] The NCAA has consistently argued that its rules are immune from antitrust scrutiny.[31]

1. NCAA v. Board of Regents of the University of Oklahoma

Harmony gave way to dissonance in 1981. Ironically, it was the schools themselves, and not the (perhaps) more aggrieved athletes, who initiated the first major antitrust action against the NCAA. Member schools with major football programs grew unhappy with NCAA policies on televising football games, particularly its exercise of complete control over the number of college games that could be televised under contracts with ABC and CBS that the NCAA had negotiated.[32] These schools formed the College Football Association ("CFA") a sub-group within NCAA Division I football, to lobby for the interests of schools with big time football programs.[33] In 1981,

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[28] *Bylaws*, art. 12 § 12.1.2.1.5, at pg. 36, NAT'L COLLEGIATE ATHLETIC ASS'N 2024-2025 DIVISION I MANUAL (2024).
[29] *Alston,* 594 U.S. at 77-78.
[30] 15 U.S.C. §l.
[31] *See Alston,* 594 U.S. at 74.
[32] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 88-95, 106 n. 30 (1984).
[33] *Id.* at 89, 94-95.

the NCAA negotiated deals with ARC and CHS to televise college football games for the 1982-85 seasons.[34]

The CFA faction was particularly unhappy with two aspects of these contracts: (1) the appearance requirements, which obligated the networks to schedule appearances for 82 member schools; and (2) appearance limitations, which provided that a school could appear on television no more than six times during the period of the contracts.[35] The appearance requirement meant that the networks would have to televise games of schools with smaller and less competitive programs. The appearance limitation provision meant that major programs would have less television exposure. The CFA then negotiated its own television deal with NBC, but backed out of that deal when the NCAA threatened sanctions if the contract were to go forward.[36]

The CFA members responded with an antitrust action under section one of the Sherman Act, alleging that the NCAA had acted as a cartel that limited the output of televised college football games and artificially raised their prices.[37] The Supreme Comi ultimately agreed that the NCAA television plan artificially limited output and raised the price of televising college football game and hence violated the Sherman Act.[38] Although the Supreme Court recognized that the NCAA's conduct mirrored the action of cartels, it declined to condemn out of hand the NCAA restrictions.[39] Analogizing the NCAA to a professional sport league, the court stated that some restrictions among member schools competitors arc necessary if the product of college football is to exist at all and that NCAA restrictions should be condemned only if they are shown to be anticompetitive as a matter of fact.[40] Accordingly, the NCAA must be given some leeway in restricting member activities.

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[34] *Id.* at 91-92.
[35] *Id.* at 94.
[36] *Id.* at 94-95.
[37] *Id.* at 95-96.
[38] *Bd. of Regents*, 468 U.S. at 98-99.
[39] *Id.* at 100-101.
[40] *Id.* at 101.

> 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.[41]

At the same time, the Court made clear that allowing the NCAA latitude is not tantamount to granting it antitrust immunity and that NCAA acts that run afoul of the Sherman Act would be condemned.[42] Here, the Court recognized that although "maintaining a competitive balance among amateur athletic teams" was a valid interest, the NCAA had failed to prove that the restrictive television plan could achieve competitive balance.[43]

> [c]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record suppo1ts the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than

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[41] *Id.* at 119.

[42] *See Id.* at 120.

[43] *Id.* at 117.

> enhanced the place of intercollegiate athletics in the Nation's life.[44]

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Although the NCAA lost on the merits and in the process perhaps also lost any air of invincibility that it might have otherwise believed that it had, the decision in *Board of Regents* was not without its bright spots for the regulatory body. Restraints by the NCAA would be adjudged under the Rule of Reason and not under a per se jurisprudence that would condemn NCAA restraints out of hand and not allow the NCAA to offer justifications for its restrictions.[46] The Court noted further that college football is associated with an academic tradition that differentiates it from professional sports.[46] The Court also underscored the importance of amateurism in college athletics, stating that "athletes must not be paid, must be required to attend class and the like." in order to "preserve the character and quality of [college football]."[47] The lower courts followed suit in granting the NCAA leeway in its governance of intercollegiate athletics and in making amateurism synonymous with college sports.[48]

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[44] *Bd. of Regents*, 468 U.S. at 120.
[45] *Id.* at 103.
[46] *Id.* at 101-102.
[47] *Id.*
[48] *See, e.g.,* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 (7th Cir. 1992) ("We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations."); O'Bannon, v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015). *See also* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 172 (3d Cir. 2024); Gaines v. Nat'l Collegiate

2. *O' Bannon*

The Supreme Court in *Board of Regents* did not address the question of whether NCAA restrictions on compensation of college athletes violated the Sherman Act. Ed O'Bannon, a star basketball player for UCLA in the mid-90s, brought an antitrust class action against the NCAA alleging that its compensation restrictions violated the Sherman Act because they (1) prevented athletes from earning NIL payments; (2) limited scholarship benefits; (3) barred compensation from outside sources based on their athletic skills or ability; and (4) prohibited endorsement of commercial products or services by athletes while in school.[49] The trial court held that the foregoing restrictions constituted unlawful restraints of trade in violation of the Sherman Act.[50] As the Ninth Circuit later noted, "[a]s far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of1hc NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."[51]

The Ninth Circuit affirmed, in part, the ruling below, holding that schools must be allowed to raise athletic scholarship benefits to the full cost of attendance.[52] The court concluded that while preservation of amateurism is a cognizable procompetitive benefit, limits on athlete scholarships do not promote competition in the "college education" market "whereas colleges compete for the services of athletic recruits."[53] On the other hand, the Ninth Circuit upheld NCAA rules that barred athletes from receiving "NIL cash payments

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Athletic Ass'n, 746 F.Supp. 738, 744 (M.D. Tenn. 1990) ("Even in the increasingly commercial modern world, there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.").

[49] O*'Bannon,* 802 F.3d 1049, 1053.

[50] *O.Bannon,* 7 F. Supp. 3d at 988 ("This price-fixing agreement constitutes a restraint of trade.").

[51] O*'Bannon,* 802 F.3d at 1053.

[52] *Id.* at 1075-76.

[53] *Id.* at 1070.

untethered to their education expenses."[54] In the view of the Ninth Circuit, NIL payments represented a "quantum leap" from payments related to education; and "[o]nce that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point."[55]

Both sides could claim victory in *O'Bannon.* The plaintiffs won the right to be paid the full cost of college attendance. The NCAA convinced the court that NIL payments would undermine amateurism and hence the whole foundation of inter-collegiate athletics. However, the real significance of *O'Bannon* is that the decision focused attention on how college athletes were being systematically exploited by their institutions and the NCAA through the denial of NIL payments. *O'Bannon* spurred additional lawsuits challenging a myriad of NCAA restrictions on athletes.[56] Finally, the *O'Bannon* holding galvanized state legislatures into action by passing laws to protect NIL rights for college athletes within their respective states.[57]

3. Alston

Alston v. NCAA, the third case in the NCAA trilogy, was a class action by college football and basketball players that challenged "a narrow subset of the NCAA compensation rules - namely, restricting the education related benefits that students athletes might receive"[58] including (a) aid post-eligibility internships; (b) cash awards for academic success or graduation; and (c) in-kind education benefits. The Supreme Court affirmed the trial court's holding that the NCAA's restrictions on the education-related benefits at issue were "patently and inexplicably stricter than is necessary" in order to achieve the procompetitive benefits that the NCAA had

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[54] *Id.* at 1076.
[55] *Id.* at 1078.
[56] *See, e.g., Alston,* 594 U.S. 69 (2021) (compensation for education related expenses); Vassar v. NCAA, No. 1:16- cv-10590, 2016 WL 6693054 (N.D. Ill. Nov. 14, 2016) (transfer eligibility).
[57] *See, e.g.,* CAL. EDUC. CODE § 67456 (Deering 2021).
[58] *Alston,* 594 U.S. at 108 (Kavanaugh, J., concurring).

asserted.[59] The Court, however, declined to address compensation issues beyond education- related benefits:

> The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.[60]

The decision did not pass on the legality of NCAA restrictions on NIL payments. Moreover, the ruling did not bar the NCAA from banning cash or in-kind compensation unrelated to education, from defining the type of benefits that are education-related, or from limiting cash awards for athletic or academics achievement. Nor did the opinion address restrictions on benefits to athletes imposed by conferences or individual schools.

At the same time, the Court made clear that the NCAA was a commercial enterprise and subject to antitrust scrutiny. It rejected out-of-hand any contention that the NCAA was entitled to Sherman Act immunity because its restraints "happen to fall at the intersection of higher education, sports, and money,"[61] noting that it "has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond

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[59] *Id.* at 101.
[60] *Id.* at 108 (Kavanaugh, J., concurring).
[61] *Id.* at 94.

enhancing competition."[62] Nor did the Court agree that the NCAA restraints were entitled to "abbreviated deferential review" under the Sherman Act. Here, the "NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition"[63] and that ''student athletes have nowhere else to sell their labor."[64] Although the Court acknowledged that "some degree of coordination between competitors within sports leagues can be procompetitive"[65] in that they make the athletic enterprise possible, nevertheless, it further stated "[t]hat *some* restraints are necessary to create or maintain a league sport does not mean *all* aspects of elaborate interleague cooperation are."[66]

The Court was especially reluctant to defer to the NCAA concept of amateurism. It noted that the "district court found that the NCAA had not adopted any consistent definition" of amateurism.[67] Further, the trial court "observed that the NCAA conception of amateurism has changed steadily over the years."[68] Moreover, the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon.''[69] In any event, the district court found little evidence "to support the NCAA's contention that its compensation restrictions play a role in consumer demand."[70] Indeed, the NCAA adopted its compensation restrictions without any reference to consumer demand.

In addition, the Court rejected the NCAA argument that the decision in *Board of Regents* foreclosed inquiry into

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[62] *Id.* at 94-95.
[63] *Id.* at 90.
[64] *Alston,* 594 U.S. at 90.
[65] *Id.*
[66] *Id.* (citing American Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010)).
[67] *Id.* at 101.
[68] *Id.* at 83.
[69] *Id.* (citing In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F. Supp. 2d 1058, 1070 (N.D. Cal. 2019)).
[70] *Alston,* 594 U.S. at 83. (Citing In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation, 375 F.Supp.2d at 1070-71.

compensation limits imposed by the NCAA.[71] First, NCAA compensation rules were not at issue in *Board of Regents.* Second, although *"Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation," that does not mean that "courts must reflexively reject *all* challenges to NCAA compensation restrictions."[72] However, the specific language from Justice Stevens' opinion in *Board of Regents*-that the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the line"[73]-were "stray comments"[74] or "an aside''[75] and accordingly, nothing more than dicta.

Finally, the Court agreed with the trial court that the NCAA must have "ample latitude" to run intercollegiate sports and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints."[76] It recognized that courts must engage in a careful analysis of market realities to determine whether violation exists; and "[i]f those market realities change, so may the legal analysis."[77] Notably, what has changed in the college sports in forty years since *Board of Regents* is the explosive growth of television and other media revenues that has inured to the financial benefit of the NCAA and its member institutions. For example, in 2020 the Southeastern Conference reached a ten-year deal worth $3 billion with Disney to televise its football games on ABC and ESPN.[78] In 2022, the Big Ten concluded a media deal with NBC, CBS, and Fox worth $8 billion over seven years to televise its

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[71] *Id.* at 91-92.
[72] *Id.* at 92.
[73] *Id.*
[74] *Id.* at 93.
[75] *Alston,* 594 U.S. at 93.
[76] *Id.* at 84.
[77] *Id.* at 93.
[78] *See* Kevin Draper and Alan Blinder, *SEC Reaches $3 Billion Deal with Disney, Drawing CBS Ties Toward an End,* N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/12/10/sports/ncaafootball/sec-disney-deal.html

football games."[79] What has not changed-until now-is the fact that college athletes do not share in those revenues. This fact, coupled with the fact that the NCAA amateurism justification is on shaky ground, if not life support, suggests that the Court may well find in the near future that the NCAA rules on compensating college athletes violate of the Sherman Act.

a. Justice Kavanaugh's Concurrence in *Alston*

In a scathing concurring opinion, Justice Kavanaugh excoriated the NCAA for exploiting college athletes for financial gain stating that "[t]he bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges each year."[80] He forcefully rejected the NCAA defense "that colleges may decline to pay student athletes because the defining feature of college sports ... is that the students are not paid" as "circular and unpersuasive."[81] He further stated that the "NCAA's business model would be flatly illegal in almost any other industry in America;" and, accordingly,[82] "it is not clear how the NCAA can legally defend its remaining compensation rules."[83] Justice Kavanaugh recognized that ''[i]f it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions

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[79] *See* Chloe Peterson, *The power of broadcast TV cannot be under-estimated: Big Ten readies for new media deal with NBC, CBS, FOX,* INDYSTAR, (July, 27, 2023, 2:02 PM), https://www.indystar.com/story/sports/college/2023/07/26/big-ten-football-readies-for-tv-deal-with-nbc-cbs-fox/70471706007/

[80] *Alston,* 594 U.S. at 110 (Kavanaugh, J., concurring).

[81] *Id.* at 109; *See* Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 181 (3d Cir. 2024) (argument that college athletes need not be paid because the defining feature of college sports is that athletes are not paid "is circular, unpersuasive, and increasingly untrue.") (quoting and supporting Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69, 109 (2021) (Kavanaugh, J. concurring)).

[82] *Alston,* 594 U.S. at 109.

[83] *Id.* at 111.

would undoubtedly ensue," including (1) the effect of paying student athlete in revenue-producing sports on non-revenue-generating sports; (2) whether some athletes could be paid and others not paid; (3) assuring that any payment scheme complies with Title IX; (4) whether limitation akin to a "salary cap" on payments to athletes would be desirable and, if so, how could that cap be administered; and (5) whether students athletes could be compensated in a manner that is financially sustainable.[84]

Justice Kavanaugh did not dispute that the NCAA may lawfully promulgate certain kinds of rules governing college sports, such as requiring students to be enrolled in an institution and to be in good standing in order to be eligible to participate in a given sport.[85] He also recognized that "the NCAA and its member colleges maintain important traditions that have become part of the fabric of America."[86] Nevertheless, he concluded that "those traditions "alone" cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated."[87]

As discussed above,[88] *Alston* made clear that its ruling was narrow and involved only NCAA restrictions on education-related payments; restrictions on payments not related to education could remain in place. Still, *Alston* left the NCAA with little to celebrate. The Court war openly skeptical of the NCAA's amateurism justification for its compensation restrictions. Justice Kavanaugh's blistering concurrence painted a grim picture of the NCAA's future in the courts. State legislatures were enacting laws to protect athletes' NIL rights. The handwriting was on the wall, and the NCAA finally got it. In May 2024, the NCAA agreed to a landmark settlement of the *House* case. ln so doing, the NCAA abandoned its bedrock position that college athletes are amateurs and must not be paid.

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[84] *Id.*
[85] *Id.* at 110-11.
[86] *Id.* at 111.
[87] *Id.* at 112.
[88] *See Alston*, 594 U.S. 69 (2021).

4. House v. NCAA

As discussed above,[89] *House* was a class action litigation brought against the NCAA and major conferences on behalf of some 14,000 former college athletes seeking damages for lost NIL opportunities caused by the NCAA's rules denying NIL compensation from television broadcasts, video games, and third parties to college athletes. Under the settlement agreement, defendants would pay class member some $2.8 billion over the next ten years.[90] The settlement would also rescind limitations on athletic scholarships and in place of those limitations would institute roster caps for various sports.[91]

More importantly, the settlement also includes a revenue sharing provision that would allow schools to commit up to $22 million per year from media revenues to be paid directly to college athletes as soon as the 2025 season.[92] Thus, for the first time, school will be permitted to pay their athletes directly. The milestone settlement in *House* appears to be an economic bonanza for college athletes. Not surprisingly, college coaches and administrators have greeted the news of the settlement with trepidation, confusion, and more than a little anxiety.[93] Trepidation stems from concerns about the impact of the settlement negotiated by wealthy institutions with big-time football programs on smaller, less wealthy schools and on non-revenue generating sports.[94] Confusion is likely to be experienced by families of prospective college athletes.[95] Once the question was simple: will there be a scholarship or not? Now, college recruits face a bewildering array of options to

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[89] *See, supra* nn3, and accompanying text
[90] *See* Dellenger, *supra* note 4.
[91] *Id.*
[92] *Id.*
[93] David Chen, Jacey Fortin, and Anna Betts, *NCAA Athlete's Pay Deal Raises Questions About Future of College Sports,* N.Y. Times (May 24, 2024), https://www.nytimes.com/2024/05/24/us/ncaa-payments-athletes-reaction.html.
[94] *Id.*
[95] *Id.*

finance their education and earn income-scholarships, NIL payments, and revenue sharing.[96] Smaller conferences are have objected to shouldering the financial bunders flowing from the settlement shaped by big schools.[97] Yet another concern is how the settlement will impact women's sports at the college, level and whether Title IX issues will be implicated.[98]

II. LEGAL ISSUES IN THE WAKE OF *HOUSE*

The settlement in *House,* while surely a milestone, does not end the ongoing debate about whether, and how, to compensate college athletes. As the Supreme Court in *Alston* noted, the "market realities [for college sports] have changed significantly since 1984," the year that *Board of Regents* came down.[99] Just as *Alston* paved the way for NIL payments, the *House* settlement marks one more step in the evolution of that ever-changing intercollegiate sports landscape. Moreover, the settlement faces major hurdles. First, it must be approved by the trial judge, and that approval is likely. Second, it must pass antitrust scrutiny. Third, the settlement is likely to have spillover effects involving labor issues and Title IX issues that must be addressed.

A. Revenue Sharing and the Antitrust Laws

As matters now stand, the revenue sharing provisions of the *House* settlement are vulnerable to challenge as a price-fixing agreement in violation of section one of the Sherman Act.[100] Arguably, the $22 million cap on funds available for revenue sharing for each school that has been agreed upon by the NCAA and its member institutions as part of the *House* settlement is a contract in restraint of trade in that it artificially limits what athletes can be paid. The fact that the agreement was

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[96] *See Id.*
[97] *See Id.*
[98] *See Id.*
[99] *Alston*, 594 U.S. at 93.
[100] 15 U.S.C. § 1 (1937).

reached as part of a settlement of an antitrust suit does not confer antitrust immunity.[101] Similar limits on compensation, so-called salary caps, implemented by certain professional sports leagues, are free from antitrust scrutiny because they are the products of collective bargaining agreements.[102] Under the non-statutory labor exemption, restrictions on wage, hours, working conditions, and other issues that are the subject of collective bargaining between labor and management are exempt from antitrust review.[103] That antitrust exclusion, however, is not available for the kind of revenue sharing contemplated by the *House* settlement because it is not a product of the collective bargaining process.

B. Labor Issues

At first glance, recognizing athletes or employees who can unionize can bargain collectively might appear to be the most expeditious way to address the problem of potential antitrust liability. This solution, however, is not as simple as it appears and, indeed, may create more problems than it resolves because recognition of college athletes as employees will have ramifications beyond antitrust law. Colleges and athletes have very different views on whether athletes should be recognized as employees with the rights to unionize and engage in collective bargaining. Colleges have successfully resisted[104]—

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[101] *See* FTC v. Actavis, Inc., 570 U.S. 136, 141 (2013) ("reverse settlement payments such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws.").

[102] *See* Brown v. Pro Football Inc., 518 U.S. 231 (1996) (upholding a salary cap of $1,000.00 per week for substitute players on a development squad).

[103] *See* Local Union No. 189 v. Jewel Tea Co., 381 U.S. 676, 688-89 (1965).

[104] Berger v. NCAA, 843 F.3d 285, 293 (7th Cir. 2016) ("Because NCAA-regulated sports are 'extracurricular,' 'interscholastic athletic' activities, we do not believe that the Department of Labor intended the FLSA to apply to student-athletes."); Dawson v. NCAA, 250 F. Supp. 3d 401, 408 (N.D. Cal: 2017) ("there is . . . no legal basis for finding [Division I athletes] to be 'employees' under the FLSA."); *see generally* Adam Epstein & Paul Anderson, *The Relationship Between a Collegiate Student-*

and continue to resist[105]—efforts by athletes to unionize. Colleges view athletes, not as employees, but as students engaged in extracurricular activities, that is, athletes are amateurs not professionals.[106] Athletes are not paid on the basis of services they render to their schools. Indeed, athletes are not paid wages at all; nor do they render the kind of work product traditionally as associated with employment.[107] Moreover, treating athletes as students engaging in extracurricular activities rather than employees who are paid aligns with the school's narrative that intercollegiate athletics is an amateur enterprise.[108] Undoubtedly, colleges have a very practical concerns about increased costs that would be incurred through wages, benefits, worker's compensation, as well as potential catastrophic liability for injuries suffered by athletes in practices or in games. They may also view the issue as a slippery slope which threatens colleges with significant loss of control over their students. Yet, the NCAA in lobbying Congress still

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Athlete and the University: An Historical and Legal Perspective, 26 MARQ. SPORTS L. REV. 287, 297 (20l6) ("[T]he courts have been consistent finding that student-athletes are not recognized as employees under any legal standard, whether bringing claims under workers' compensation laws, the NLRA or FLSA.").

[105] *See* William Gilchrist, *Are College Athletes Employees? Unpacking the NLRB's Decision in Trustees of Dartmouth College*, WAKE FOREST L. REV. (2024), https://www.wakeforestlawreview.com/2024/03/are-college-athletes-employees-unpacking-the-nlrbs-decision-in-trustees-of-dartmouth-college/.

[106] *See* Santul Nerkar, *The NCAA Agreed to Pay Players but Won't Call Them Employees,* N.Y. TIMES, May 27, 2024, at D6. (statement from Rev. John I Jenkins, President of the University of Notre Dame) ("Congress must 'establish that our athletes are not employees, but students seeking college degrees.'").

[107] [107] *See* Jonathan Israel, *Repeat After Me: College Athletes Are Not School Employees Under the FLSA,* FOLEY BLOG (November 8, 2017), https://www.jdsupra.com/legalnews/repeat-after-me-college-athletes-are-60007/ ("[S]tudent athlete play is not work and extracurricular endeavor of student athletes do not render them employees under the FLSA.").

[108] *See* NERKAR, *supra* note 106.

relies heavily on the amateurism argument in resisting the claim that athletes are employees.[109]

Athletes paint a very different picture; they are much more than students engaged in an extracurricular, amateur enterprise.[110] As employees, athletes would gain two important benefits:(1) the right to unionize and engage in collective bargaining; and (2) the right to a minimum wage under the Fair Labor Standards Act.[111] Athletes may argue that they are more like employees than students because of the significant control that schools exercise over their activities, control that is far greater than that exercised over ordinary students.[112] Colleges dictate athletes' schedules by determining practice times, travel schedules, and game participation. This entails 30-40 hours per

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[109] *See* Amanda Christovich, *The NCAA's Existential Question: Can You Pay Players and Still Call Them Amateurs*, FRONT OFFICE SPORTS (April 16, 2024), https://frontofficesports.com/the-ncaas-existential-question-can-you-pay-players-and-still-call-them-amateurs/#:~:text=While%20it%20tries%20to%20placate,amateurs%20once%20and%20for%20all ("[NCAA President Charlie Baker] has said on multiple occasions that in order for [his reform] proposal to work, congress must pass legislation declaring collegiate athletes to be amateur once and for all.").

[110] *See* Schults, *supra* note 25, at 453:

> College athletes perform real labor, make real sacrifices. bear real risks, and create real value. They devote significant time and energy to their sport, adhere to lengthy lists of rules, put their health and safety on the line, and collectively generate billions of dollars in revenue-all for the colleges they compete for. Nevertheless, these athletes are not recognized as "employees" under the law.

[111] *Id.* at 489-92.

[112] *See* Jason Belzer, *Leveling the Playing Field: Student Athlete on Employee Athletes,* FORBES (Sept. 11, 2013), https://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/ (highlighting the schedule of a typical college athlete).

week devoted to athletics and even more time for some sports, such as football and basketball, both in season and out of season. Athletes have to schedule classes around practices and game times and, as a result, may be denied the opportunity to take certain courses because of the commitment to a sport. Certain sports necessitate significant travel, which results in time away from the classroom. Game schedules may mean that athletes must sacrifice vacation time and time with family. In short, playing a college sport comes with a stiff price tag.[113] Accordingly, athletes view themselves as akin to work-study students, who are paid for the time in service to their institutions; but, athletes, as the faces of their schools, contribute far more to the bottom line than work-study students.[114]

Outside the courts, the NCAA has lobbied Congress for legislation that would fully protect revenue sharing from legal challenges.[115] Congress typically does not intervene to provide antitrust immunity for special interests but has done so in the past as when, for example, it granted antitrust immunity to the merger between the National Football League and the America Football League.[116] Senator Chris Murphy (D-Conn.) has introduced legislation that would make college athletes employees and have the right to unionize and bargain collectively.[117] No doubt, the NCAA would prefer less sweeping

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[113] *See Sacrifices,* STUDENT ATHLETES, ukstudentathletes.wordpress.com/about/ (last visited Feb. 2, 2025).

[114] *See,* Roberto L. Corrada, *College Athletes in Revenue-Generating Sports as Employees: A Look into the Alt-Labor Future,* 95 CHI. KENT L. REV. 187, 203-09 (2020).

[115] Jesse Dougherty, *Why Capitol Hill Remains a Key Battleground in College Sports,* WASH. POST (Jun. 7, 2024), https://www.washingtonpost.com/sports/2024/06/07/ncaa-congress-antitrust-exemption/ ("The NCAA and its conferences are continuing to lobby-and lobby hard for a federal bill that would offer antitrust protections, a preemption of state laws that contradict NCAA rules and a 'special status' for college athletes that says they cannot become employees.").

[116] 15 U.S.C.S. § 1291 (LEXIS through Pub. L. No. 118-107).

[117] *See* College Right to Organize Act, S. 1929, 117th Cong. (2021).

legislation and would offer the *House* settlement as an example of how an acceptable outcome can be reached without recognizing athletes as employees with the right to unionize.[118] A major concern is that some schools, including Division I schools, will simply eliminate their sports programs if athletes are treated as employees.[119] A legislative solution is likely to chart a clear and predictable course for revenue sharing in the future, but whether Congress will act is another question.

C. Title IX Issues

The *House* settlement does not address potential Title IX[120] issues that may result, now that athletes can be paid directly. Title IX, enacted in 1972, bars gender-based discrimination in federally funded educational programs; including college sports.[121] Title IX regulations mandate that colleges provide equal opportunity to male and female athletes in their sports programs.[122] Title IX also requires that in addition to equal

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[118] *See* Michael McCann, *Congress to Consider Bill Declaring College Athletes Are Not Employees,* SPORTICO (Jun. 12, 2024, 2:38 PM), https://www.sportico.com/law/analysis/2024/ncaa-antitrust-settlement-congress-athletes-employee-debate-1234783946/ (stating that NCAA hopes that *House* settlement "will earn the NCAA good will in Congress" and reject the concept of athletes as employees).

[119] *See* Jim Trotter, *If NCAA House settlement is approved, smaller schools could take the brunt of the impact,* N.Y. TIMES (Jun. 17, 2024), https://www.nytimes.com/athletic/5546613/2024/06/07/ncaa-college-sports-antitrust-house-settlement/ ("Seemingly little attention has been paid to the mid-major or lower-level Division I Schools, which some administrator and executors believe could be left with three choices when addressing the loss of revenue stemming from the $2.8 billion settlement: find a way to replace the money, make cuts to programs to offset lost money or drop down a division.").

[120] 20 U.S.C. § 1681(a) (2024).

[121] *Id.* ("No person in the United States shall, on the basis of sex, be excluded from participation be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

[122] *See* Shults, *supra* note 25 at 498 (Title IX "revolutionized college sports by banning sex discrimination against any

opportunities in college sports, women are also entitled to "equal treatment and benefits."[123] Title IX regulations, drafted in an era when compensating college athletes was not allowed or ever contemplated, do not specifically address the treatment of non-education related benefits paid to athletes.

Nevertheless, schools must be conscious of any disparate impact that athlete compensation policies have on the opportunities and benefits provided to female athletes. Many women's sports programs, like many men's programs, are not revenue generating. As long as women and men participating in non-revenue programs receive like compensation, schools will not run afoul of Title IX. If direct payments to athletes make them employees of the institution, then it is unclear whether Title IX requires equal payment for male and female athletes' services. The scope of Title IX in this context is disputed but some scholars maintain that Title IX applies regardless of whether athletes are deemed to be employees.[124] The Title IX requirement of equity should clearly kick in and schools "would be bound to provide athletes on women's teams with comparable treatment and benefits."[125] In that case, college athletic departments may face a serious cash crunch.[126] With the proposed revenue sharing in the *House* settlement, schools will be able to pay up $22 million annually directly to their athletes from funds earned through media contracts and ticket sales.[127] At the same time, with the abnegation of scholarship limits schools are likely to spend an additional $5 million to $10 million on scholarships.[128] That amounts to about $30 million

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person in an "educational program or activity receiving federal assistance.").

[123] *Id.* at 499.

[124] *Id.* at 499 & n.298.

[125] *Id.* at 499.

[126] *Id.*

[127] *See* Brandon Marcello, *Gut Wrenching Choices, Title IX Complications Face College Athletics in Wake of House v. NCAA Settlement,* CBS SPORTS (May 30, 2024), https://www.cbssports.com/college-football/news/gut-wrenching-choices-title-ix-complications-face-college-athletics-in-wake-of-house-v-ncaa-settlement/.

[128] *Id.*

added expenditures. Yet, in 2023, only two major programs—Georgia and Indiana—netted $30 million or more from their athletic programs.[129] That leaves many programs strapped for cash and looking for ways to cut costs; no program—men's or women's—is safe from extraction.[130]

A second question is how the $22 million from the same revenue sharing provision in the *House* settlement will be distributed. Athletes in revenue-generating sports-football and basketball-may argue for a bigger share of pie. Title IX, on the other hand, would suggest equity among players. That, in turn, could generate yet another round of antitrust suits in which athletes in major sports would urge that they should be paid on the basis of their market value. Litigation could conceivably be avoided, however, if the Department of Education would update Title IX regulation to address specifically how revenue sharing funds should be distributed across sports. One solution might be for colleges to treat direct payments to athletes as athletic scholarships and thereby implement proportionally equal payments between male and female athletes.

III. IMPLEMENTATION OF THE COMPENSATION MODEL FOR COLLEGE ATHLETES: A BLUEPRINT FOR THE FUTURE

The *House* settlement provides the broad outline for a compensation model for college athletes but no guidance on how that model is to be implemented. Part II, *supra,* examined the legal and practical issues that remain in the wake of *House.* Set forth below is a proposed framework for implementing *House* that successfully navigates potential legal and practical pitfalls and restores order to the chaotic intercollegiate playing fields.

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[129] *Id.*

[130] *Id.*

A. Revenue Splits

A key element of the *House* settlement agreement is the provision that allows athletes to share up to a $22 million from media revenue earned by the colleges. That figure was waived as part of a negotiated agreement between the parties in *House.* Presumably, the $22 million share is not set in stone and will be subject to future negotiations. As the law now stands, the agreement to set the athletes' share of revenue at a specified rate reached outside the collective bargaining process is vulnerable to attack under the Sherman Act as a contract in restraint of trade.[131] However, that is precisely what the NCAA is trying to avoid.

A principal goal of the *House* settlement was to provide schools with some certainty in implementing revenue sharing plans with their athlete.[132] That certainty had proven elusive as the NCAA has defended a battery of antitrust cases in recent years. The settlement can also serve as a blueprint for future Congressional legislation that would guarantee antitrust immunity for revenue sharing in intercollegiate sports.[133] Without the congressional action, the NCAA and its members are likely to continue to be target of antitrust suits.[134] These suits, in turn, would serve to prolong, and perhaps add to, the uncertainty surrounding the compensation of college athletes that currently exists. Accordingly, legislation authorizing antitrust immunity for the NCAA and member schools appears essential to implementation of any direct payment plan.

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[131] 15 U.S.C. § 1 (1937); *See* Corrada, *supra* note 114, at 210-17 ("[W]ithout unionization of and collective bargaining with these athletes, the NCAA will not be able to sustainability weather what will be crippling antitrust liability.").

[132] Trotter, *supra* note 119.

[133] *Id.*

[134] *See* Corrado, *supra* note 114 at 210-11.

B. Allocating Shared Revenues Within a School

The next question is how a school should allocate the $22 million in shared revenue among the various teams within its athletic program. Two approaches (1) a market-based allocation; or (2) an equitable distribution might be considered. Under a market-based allocation, a program would share in the revenues to the extent it generated those revenues. For a major college football program, which generates roughly 85% of athlete department revenue through football television contracts, this means that some $17 million would return to football players.[135] Other programs would he left with the crumbs. Presumably, non-revenue sports, including many women's sports programs, would receive nominal payments or no funds at all.

The market-based allocation creates several potential problems. First, it may run afoul of the proportionality requirements of Title IX and relegate most women's sports to permanent second class citizenship.[136] Second, certain non-revenue sports may be defunded or climinated.[137] Historically, revenue generating sports have subsidized non-revenue producing sports. Now, with $22 million that once went to athletic departments now going to compensate athletes instead, certain sports may no longer receive funding generated by the football program and will either have to become self-funding or face elimination by the school.[138] In short, the new system creates a form of "financial Darwinism" in which there are haves and have-nots.[139]

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[135] Alex Weber, *Pete Thamel addresses how schools will handle dividing money from House settlement,* ON3 (May 25, 2024), https://www.on3.com/news/pete-thamel-addresses-how-schools-will-handle-dividing-money-from-house-settlement/ (statement of Pete Thamel of ESPN) ("[F]ootball-and I think it's a safe estimate-is about 85% of the revenue at most schools, proportional to TV contracts.").

[136] *See* Marcello, *supra* note 127.

[137] *Id.*

[138] *See* Trotter, *supra* note 119.

[139] *Id.*

Alternatively, a school could adopt an equity-based distribution model in the spirit of Title IX that, for example, would split the $22 million equally between men's and women's sports. An even split would be a positive step toward remedying the inequality that has persisted between men's and women's intercollegiate sports. On the other hand, an even split may prove both impractical and unworkable. Now that athletes will receive direct payments out of revenue that would otherwise flow to their schools, athletic departments will face budget shortfalls and be forced to fundraise to make up these shortfalls. The larger programs may well be able to procure additional funds by tapping their fanbase or alumni-backed collectives.[140] But, even the most robust athletic programs have difficulty balancing their budgets now and face possible donor fatigue if they go back and ask for money to make up the amounts paid directly to athletes. Still "it is much easier for the Ohio States and the Alabamas of the world to make up for lost revenue, even if it is a projected $2 million a year, then it is for [smaller programs] and others, where the pathway to solvency is longer and harder."[141] Charles Baker, the NCAA president, has acknowledged that smaller schools could be hit harder by *House* even though they were not the focal point of the *House* litigation, adding: "I understand this change will not be easy to manage, but given the challenges facing college sports over the last few decades, change is inevitable."[142]

Simply put, small-time programs may be the victims of the financial Darwinism that is part and parcel of the new world of intercollegiate athletics.[143] Accordingly, it is likely that economic factors will trump equality when it comes to distribution of shared revenues.

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*

C. Allocating Revenues Within a Given Sport

As a threshold matter, how direct payments are allocated among squad members ought to be prerogative of each school individually. To leave that determination to the NCAA or individual conferences would only serve to invite antitrust suits. The basic choice is between a lockstep model in which each team member receives equal compensation and a performance-based model, under which a player is compensated based on productivity. To some, it may seem apparent that the starting quarterback should be paid more than the third-string quarterback who secs no game action. That approach, however, may be too simplistic. The third-string quarterback may well see no playing time in games, but he still makes valuable contribution to the team by, among other things, (1) practicing twelve months per year; (2) attending all quarterback meetings·, (3) travelling to all games with the team·, (4) running the plays of the upcoming opponent in practice each week so that the defense, will be optimally prepared; (5) signaling the offensive plays to the quarterback each game; and (6) engaging in strategy conferences during each game. A lockstep model recognizes that each member of a team contributes to the team even if he sees no playing time and that each team member contributes the same amount of time to the team. A lockstep model is not only fair but easy to administer.

A performance-based model, on the other hand, is much more complicated to administer and raises many difficult questions. Should performance be judged by playing time alone on the quality of one's performance during playing time? Should performance for compensation purposes be adjudged on a week-to-week basis? What happens to compensation when a starting player is injured or performs poorly and is demoted to reserve status? Should injured players still be compensated? Not only is a performance model complicated to administer, it may create resentment between the haves and the have nots on a team. Those resentments can, in turn contribute to a toxic locker room atmosphere, which is unhealthy and may be self-defeating. A lockstep motel would avoid any conflict between

haves and have nots; it would also obviate any claims of favoritism by the coaching staff "star" players and other who feel short-changed by an equal-pay approach can gain additional payments through NIL agreements. At the end of the day, a lockstep approach to player compensation has more benefits and fewer drawbacks than a performance-based model.

D. How Win Schools React to the New World of Compensated Student Athletes

The *House* settlement breaks new ground by allowing athletes to be paid directly by their schools. In settling that case, the NCAA traded for the certainty of a $2.77 billion price tag rather than risk a much larger and potentially catastrophic treble damages judgment. The NCAA, however, was not just concerned with the claims in *House;* but rather, had its eye on the bigger picture.[144] The winds of change have been blowing in intercollegiate athletics, and momentum has been building in favor of the athletes. Public sentiment now favors compensation of athletes, suggesting that "amateurism" is no longer important to fans of college sports.[145]

Together with public opinion, the Supreme Court's decision in *Alston* dealt a severe blow to the NCAA. Although the NCAA could claim victory in *Alston* in that the Court let stand the NCAA restrictions on payments to athletes unrelated to education,[146]

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[144] *See* Nerkar, *supra* note l 06 ("Over the past decade Public opinion and a server of court rulings-not to mention the reality that college athletic have generated billions of dollars in annual revenue and that athletic received none of it- have forced the N.C.A.A. to unravel restriction on player compensation.").

[145] Michael Ricciardelli and Marty Appel, *More than Half of Americans Say 'Yes' to Student-Athlete Payments for Revenue- Generating Sports; Number Rises to 62 Percent for Sports Fans,* SETON HALL UNIVERSITY BUSINESS NEWS (Mar. 22, 2023), https://www.shu.edu/business/news/sports-poll-public-favors-student-athlete-pay.html.

[146] *Alston,* 594 U.S. at 108 (Kavanaugh, J. concurring) (stating that compensation rules outside of education-related benefits "remain on the books").

a best that was a Pyrrhic victory. Other parts of the opinion slammed the NCAA 's position. First, the Court reiterated the NCAA's claims that its rules were beyond antitrust scrutiny.[147] Second, the court was openly skeptical of the NCAA's amateurism defense.[148] Third, the Court stressed that any restrictions imposed by NCAA rules had to be adjudged against "market realities," and that market realities had changed significantly since 1984.[149] Having dropped its ban on NIL payments in the wake of *Alston,* the NCAA effectively acknowledged that market realities had indeed changed and that its restriction on athletic compensation could no longer be justified.

Justice Kavanaugh's devastating concurring opinion, lambasting the NCAA and member schools for reaping billions of dollars in revenues on the backs of unpaid college athletes, made the NCAA and member schools appear greedy and exploitative.[150]

In settling *House,* the NCAA was looking to bring stability back to intercollegiate sports,[151] which had grown chaotic since the influx of NIL money from alumni backed booster collectives and the wide open transfer portal. The settlement might also be viewed as a plea to Congress to intervene in intercollegiate sports to restore stability.[152] Nevertheless, whether or not

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[147] *Alston,* 594 U.S. at 91 ("On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation-and this approval foreclosed any meaningful review of those limits today. We see things differently.")

[148] *Id.* at 83 (citing the trial court's discussion of amateurism).

[149] *Id.* at 93.

[150] *Id.* at 107-112 (Kavanaugh, J. concurring).

[151] David Hale, *Charlie Baker hopes NCAA settlement creates stability for schools,* ESPN (May 13, 2024) https://www.espn.com/college-sports/story/-/id/40140633/charlie-baker-hopes-ncaa-settlement-creates-stability-schools (explaining that the settlement will "create predictability and stability for schools").

[152] Charles Baker, et. al, *Joint Statement on Agreement of Settlement Terms*, NCAA (May 23, 2024) https://www.ncaa.org/news/2024/5/23/media-center- joint-statement-on -the-agreement-of-settlement-terms.aspx ("This settlement is also a road map for college sports leaders and Congress to ensure this

Congress intervenes, schools must now adapt to the new normal of compensated college athletes.

1. Tighter Athletic Budgets

One feature of the new normal is likely to be tighter athletic department budgets, now that a portion of the media revenues that once flowed to institutions will be shared directly with athletes. Colleges and universities will have some tough calls to make regarding (1) whether and how to make up for revenues that now go directly to athletes rather than to athletic department; (2) whether to drop certain athletic programs; and (3) whether to make some programs self-funded.[153] Further, now that the *House* settlement eliminates scholarship limits, schools will have to determine whether to increase scholarships in certain sports and how to reallocate scholarships among the sports being offered.[154] In addition tighter budgets are likely to impact coaches significantly. Salaries may decrease, and the job descriptions of head coaches may well expand to include fundraising. As Jeff Hafley, former Boston College head football coach and now defensive coordinator for the Green Bay Packers, observed upon leaving the college coaching ranks" "College coaching has become fundraising, NIL and recruiting your own

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uniquely American institution can continue to provide unmatched opportunity for million of students.").

[153] *See* Chen, supra n. 93.

[154] Pete Iacobelli, *Big changes for the NCAA likely to upend scholarship limits and roster sizes across college sports,* AP NEWS (May 28, 2024), https://apnews.com/article/ncaa-settlement-scholarships-8a35Sal 274f2cef644449833b4099d21 ("Scholarship limits for individual teams are expected to be lifted. That could mean even more scholarships available from certain schools for money-makers like football or basketball. It could mean that programs like baseball and softball - which have to slice and dice scholarships each season - could be fully funded. Bet even the wealthiest schools may have to make tough choices when it comes to investing in which sports.").

team and transfers. There's no time to coach football anymore."[155]

2. Policing NIL Payments

The *House* settlement does not affect NIL payments going forward, and an athlete may still earn NIL money in addition to receiving direct payments from revenue sharing. NIL was intended to compensate athletes for use of their so name, image and likeness *after* they enroll at a school. It was not intended to be an *inducement* to enroll is a particular school. Nevertheless, as one commentator has observed, "NIL has largely become pay to-play at the highest levels of college football and basketball,"[156] and the *House* settlement "aims to rectify that."[157] How this will be accomplished is not clear. Since the introduction of NIL payments, the NCAA has done little to police payments by booster collectives. After *House,* the "[r]ole of collectives remains up in the air."[158] A case in point involves Texas Tech's recruitment of superstar softball pitcher Nijaree Canady who had previously pitched for Stanford.[159] Canady

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[155] Pete Thamel, *Packers Hire Boston College's Jeff Hafley as Defensive Coordinator,* ESPN (Jan. 31, 2024), https://www.espn.com/nfl/story/-/id/39429573/sources-packers-hire-boston-college-jeff-hafley-dc.

[156] Ben Portnoy, *House Settlement Leaves Numerous Questions for NCAA, College Sports Moving Forward,* SMALL BUSINESS JOURNAL (May 24, 2024), https://sportsbusinessjournal.com/Articles/2024/05/24/ncaa-settlement-follow-up-questions.

[157] *Id.*

[158] Shehan Jeyarajah, *How Historic House v. NCAA settlement will impact college athletics on and off the field for years to come,* CBS SPORTS (May 24, 2024), https://www.cbssports.com/college-football/news/how-historic-house-v-ncaa-settlement-will-impact-college-athletics-on-and-off-the-field-for-years-to-come/ ("With revenue-sharing entering the picture, the pressure on collectives to provide a primary income for revenue sport athletes on campus will decrease, a huge win for fans.").

[159] Justin Williams & Stewart Mandel, *The unprecedented million-dollar recruitment of the nation's best softball player*, NY TIMES (July 29, 2024), https://www.nytimes.com/athletic/5664181/2024/07/29/nijaree-canady-texas-tech-nil-million-dollar-contract/.

received a NIL offer reportedly in excess of $1 million from the Texas Tech affiliated NIL collective.[160] She enrolled in Texas Tech. Was that payment a pay-for-play inducement or a true NIL deal reached after her enrollment at Texas Tech? Unquestionably NCAA enforcement could be beefed up, NCAA guardrails on NIL "have been gutted after court losses."[161] Schools themselves could also play a role in policing collectives. To that end, some have suggested that NIL programs be administered in-house by the schools themselves rather than by third parties. Others have opposed bringing NIL programs in-house, questioning whether schools have the resources and expertise to manage endorsements of their athletes. However accomplished, policing of collectives is essential to assuring fairness play and a level playing field.

3. Managing the Transfer Portal

Historically, the NCAA rules restricted the ability of athletes to transfer to another program by forcing transfers to sit out a year before they would be eligible to pa11icipate in the athletic program at their new school. Athletes have successfully challenged these restrictions in court[162] and the NCAA backed off its restrictions on one-time transfers.[163] The amended complaint in *Ohio v. NCAA* characterizes the NCAA's Transfer Eligibility Rule as "a no poach agreement between horizontal competitor schools that serves to allocate the market for labor of NCAA Division I athletes."[164] With the relaxation of the rules on transferring college athletes now enjoy unprecedented

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[160] *Id.*

[161] *Id.*

[162] *See, e.g.,* Williams v. Nat'l Collegiate Athletic Ass'n, No. 24-614, 2024 WL 397760 at 1 (D.N.J. Feb. 2, 2024).

[163] *See* Stewart Mandel, *NCAA Agrees to End Transfer Rules Permanently; Athletes Who Lost Eligibility Will Have Year Restored*, N.Y. TIMES: THE ATHLETIC (May 30, 2024), https://www.nytimes.com/athletic/5530608/2024/05/30/ncaa-transfer-rules-banned-permanently/.

[164] Amended Complaint at 3, Ohio v. Nat'l Collegiate Athletic Ass'n, No. 1:23-cv-100 (N.D.W.Va. 2024).

mobility. College coaches have quickly adapted, and the wide open transfer portal (together with NIL) has fundamentally reshaped basketball recruiting.[165] The stock of transfers has risen, while the value of high school recruits has declined.[166] Some coaches now view high school players as risky "rentals" and are prioritizing experienced transfers over the development of freshman recruits.[167] Indeed, coaches who still try to build their programs off of high school recruits, arc "pushing against a current that has taken over the sport."[168]

At the same time, the wide open transfer portal, has in some ways negatively impacted college programs. It has led to constant turnover of rosters, making it difficult to develop continuity in programs and to kindle a loyal fan base. Individual schools, nevertheless, are not powerless to deal with the transfer issue. Schools may, for example, limit athletes via contract. If athletes want to transfer, they would have to buy out that contract. On the other hand, athletes might avoid schools that make that kind of contractual demand. The alternative for schools is to accept the wide-open transfer portal, do their best to retain their athletes, and take steps to attract transfers who can help their programs.

A more effective approach might be to have Congress intervene and enact legislation authorizing athletes to engage in collective bargaining with their institutions. Although there is no guarantee that Congress would act on this issue, the NCAA has lobbied aggressively for protection from potential antitrust liability as it attempts to govern college athletics.[169] Legislation

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[165] *See* Matt Norlander, *How Transfer Portal, NIL Reshaping College Basketball Recruiting Has Dropped Value of High School Prospects*, CBS SPORTS (July 8, 2023), https://www.cbssports.com/college-basketball/news/how-transfer-portal-nil-reshaping-college-basketball-recruiting-has-dropped-value-of-high-school-prospects/.

[166] *See id.*

[167] *See id.*

[168] *Id.*

[169] Jesse Dougherty, *Why Capitol Hill Remains a Key Battleground in College Sports,* WASH. POST (June 27, 2024), https://www.washingtonpost.com/sports/2024/06/07/ncaa-congress-antitrust-exemption/ ("The NCAA and its conferences are continuing to

that would protect the NCAA and its members, conferences, and athletes from legal exposure as they attempt to navigate the new landscape in college sports has been introduced, but "no bill has made it past the introductory phase."[170] Congressional intervention would bring some measure of certainty and predictability to the college sports scene, which now borders on the chaotic. Without Congressional action, the *House* settlement will almost certainly face antitrust challenges; and the NCAA will be forced to defend more costly lawsuits, which, in turn, will make it difficult for the NCAA to do any form of governance, thereby leaving intercollegiate athletics in a state of flux. Senator Ted Cruz has made an even more dire prediction:

> There is a misconception that the [House v. NCAA] settlement reduces the urgency for Congress to act to protect college sports. Nothing could be further from the truth. Without congressional action, there is a very high risk that college sports as we know them will be destroyed and the student-athletes will experience irreparable harm, including loss of benefits and scholarship guarantees.[171]

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lobby - and lobby hard – for a federal bill that would offer antitrust protections, a preemption of state laws that contradict NCAA rules and a "special status" for college athletes that says they cannot become employees.").

[170] *See id.*

[171] *Id.*

E. Labor Issues

Historically, student athletes have not been recognized as employees of their institutions.[172] Recently, however, student athletes have made a renewed push to be treated as employees and not simply students attending a college. Employee status would confer two important benefits on athletes: (1) the right to unionize and engage in collective bargaining; and (2) the right to be paid at least a minimum wage.[173] As discussed above, the right to unionize and engage in collective bargaining would shield players and colleges alike from any antitrust liability related to revenue sharing, pursuant to the non-statutory labor exemption. [174]

In addition, as employees, athletes would be entitled to a minimum wage under the Fair Labor Standards Act.[175] Athletes argue that they are more like employees than students because of the significant control that institutions exert over athletes. Colleges dictate athletes' schedules by determining practice times, travel schedules, and game participation. Accordingly, athletes view themselves as akin to work-study students, who are paid for their time in service to their institutions, But at the same time, athletes contribute far more to a college's bottom line than work-study students.

Colleges, on the other hand, have resisted classifying student athletes as employees, citing the same playbook used in arguing against compensation for athletes—college athletes are amateur.[176] Unfortunately for the NCAA and its members, *Alston* dealt *a* stiff blow to the NCAA 's amateurism argument. In analyzing the NCAA's compensation restrictions, *Alston* recognized that although the NCAA may well "play a critical role in the maintenance of ... amateurism" in intercollegiate athletics, antitrust strictures nevertheless apply to college sports.[177]

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[172] *See* Israel, *supra* note 107.
[173] *See* Schults *supra* note 25, at 489-492.
[174] *See id.* at 496-497.
[175] *See id.* at 489-492.
[176] *See* Nerkar, *supra* note 106.
[177] Nat'l Collegiate Athletic Ass'n v. Alston*,* 594 U.S.69, 92 (2021).

Using this same reasoning in the labor context, one could conclude that the NCAA cannot withhold employee status from college athletes because they are amateurs. Whether made in the compensation context or the labor context, the amateurism argument is "circular and unpersuasive."[178] *Alston* also "disrupted the status quo by holding that *Board of Regents* did not create a binding precedent 'reflexivity' supporting the organizations compensation rules."[179]; rather judges should apply legal standards that have developed in the courts.[180]

Finally, *Alston* has, at least indirectly, undermined the NCAA position that athletes are not employees because they are amateurs in two ways. First, *Alston* triggered the NCAA's decision to revoke its blanket ban on NIL payments.[181] Second, the Com1 stressed the need for judges to look to economic realities in assessing the legality of NCAA regulations.[182] *Alston* has also signaled a changed in the lower courts. The Third Circuit in *Johnson v. NCAA* held in July 2024 that "college athletes cannot he barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism'."[183] Rejecting the NCAA's argument that the history and tradition of amateurism is sufficient to deny athletes employee status under the FLSA, the court specifically declined to "use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of athletes' relationships to their schools."[184] Rather, the court held that college athletes maybe employees under the FLSA when they:

> (a) perform services for another part, (b) "necessarily and primarily for the [other party's] benefit," *Tenn. Coal,* 321 U.S. at 598, 64 S. Ct. 698, (c) under that party's

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[178] *See id.* at 109 (Kavanaugh, J. concurring).
[179] Johnson v. Nat'l Collegiate Athletic Ass'n, 108 F.4th 163, 173 (3d Cir. 2024).
[180] *Alston,* 594 U.S. at 109 (Kavanaugh, J. concurring).
[181] *Johnson*, 108 F.4th at 173 (footnote omitted).
[182] *See Alston,* 594 U.S. at 93, 106.
[183] *Johnson,* 108 F.4th at 182 (citation omitted).
[184] *See id.* (citation omitted).

> control or right of control, *id.,* and (d) in return for "express" or "implied" compensation or "in-kind benefits." If so, the athlete in question may plainly fall within the meaning of "employee" as defined in 29 U.S.C. § 203(e)(1). Ultimately, the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal and economic reality that is that of an employee-employer.[185]

The Court also threw salt into the NCAA's wound by eschewing the term "student-athlete," describing it as "an NCAA marketing invention designed to 'conjure the nobility of amateurism,' assert "the precedence of scholarship over athletic[s]', and 'obfuscate the nature of the legal relationship at the heart of a growing commercial enterprise."[186]

Finally, the National Labor Relations Board, likely in response to *Alston,*[187] has for the first time taken the position that athletes are employees for purposes of the National Labor Relations Act.[188] NIL payments have become widespread in the past two years, the line demarcating professional from college sports has grown fuzzy, and the economic reality is that college athletes, flush with NIL money, look a lot more like professionals than amateurs.

If athletes do gain recognition as employees, they may find that their new status has downsides. With added income, athletes may face new costs. Scholarships and related educational benefits, tax-free under current law, may now be

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[185] *Id.* at 180.
[186] *Id.* at 170 (footnote omitted).
[187] *Id.* at 176 (footnote omitted).
[188] *Id.*

taxable.[189] That may not be a big deal for a football or basketball player earning direct compensation and NIL money in addition to a scholarship; but for a swimmer or a gymnast, with minimal or no direct payments, it may be a hardship to come up with funds to pay taxed on the scholarship.[190] Schools, as employers, may seek contribution from athlete employees for the costs of health care, dental care, and retirement benefits. Schools may impose limits on use of social media and enforce policies that limit entities that athletes can partner with to earn endorsement money.[191]

Second, employee status for athletes may lead to a contraction of sports programs and have an especially devastating effect on non-revenue sports programs.[192] The increased costs of salaries and benefits for athlete-employee salaries and benefits may leave schools strapped for cash to support all athletic programs.[193] Administrators will likely not cut revenue-generating programs, but may well eliminate non-revenue sports,[194] such as swimming, track, fencing, and gymnastics. Simply put, athletes may want to think twice about gaining employee status.[195]

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[189] Travis Knobbe, *NCAA Athletes Shouldn't Want to be Employees,* LWOS (Feb. 6, 2024), https://www.lastwordonsports.com/collegefootball/2024/02/06/ncca-athletes-shouldn't-want-to-be- employees-2/.

[190] *Id.*

[191] David Cobb, *House v. NCAA Settlement Winners and Losers: Athletes Take Monumental Step, Non-Revenue Sports at Risk,* CBS SPORTS (May 24, 2024), https://www.cbssports.com/college-football/news/house-v-ncaa-settlement-winners-and-losers-athletes-take-monumental-step-non-revenue-sports-at-risk/ ("In addition to potential measure, such as staff cuts and delayed facilities upgrades, non-revenue sports could be on dropping block.").

[192] *See id.*

[193] *Id.*

[194] Knobbe, *supra* note 190.

[195] Ben Nuckols, *NCAA Head Warns That 95% of Student Athletes Face Extinction if Colleges Actually Have to Pay Them as Employees,* FORTUNE (Feb. 24, 2024), https://fortune.com/2024/02/24/ncaa-college-sports-employees-student-athletes-charlie-baker-interview/.

Third, as employees, athletes may face loss of individual freedoms. Once athletes are designated as employees, schools may seek to impose contractual limits on an athlete's activities. Athletes may be subjected to strict work place rules, such as fines for lateness or missing meetings. Athletes may have to negotiate a buyout before their schools release them from their contracts so that they can transfer elsewhere. Simply put, employee status may kill non-revenue sports.[196]

F. Title IX Issues

As noted above,[197] the *House* settlement does not address potential Title IX issues that may result. The question is whether women participating in non-revenue sports should be paid the same amount as male football players being paid out of fonds generated by revenue sharing authorized by the *House* settlement. If direct payments to athletes make them employees of the institutional, then Title IX arguably does not require equal payments for employment related services. For example, Title IX does not require that the female women's basketball coach be paid the same as the male men's basketball coach. However, if athletes are not deemed employees, Title IX requirement of equality should clearly kick in. In that case, college athletic departments may face a serious cash crunch. With the proposed revenue sharing in the *House* settlement, schools will be able to pay up $22 million annually directly to their athletes from funds earned through media contracts and ticket sales. At the same time, with the abnegation of scholarship limits schools are likely to spend an additional $5 million to $10 million on scholarships. That amounts to about $30 million added expenditures. Yet, in 2023, only two major programs—Georgia and Indiana—netted $30 millions or more from their athletic programs.[198] That leaves many programs strapped for cash and looking for ways to cut costs. Women sports will be a prime target for elimination.

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[196] *See* Shults, supra note 25 and accompanying text.
[197] *See* Marcello, *supra* note 127.

A second question is how the $22 million from the same revenue sharing provision in the *House* settlement will be distributed. Athletes in revenue-generating sports—football and basketball—may argue for a bigger share of pie. Title IX, on the other hand, would suggest equality among players. That, in turn, could generate yet another round of antitrust suits in which athletes in major sports would urge that they should be paid on the basis of their market value. Litigation, could be avoided, however, if the Department of Education updates Title IX regulation to address specifically how revenue sharing funds should be distributed across sports. One solution might be for colleges to treat direct payments to athletes as athletic scholarships and thereby implement proportionally equal payments between male and female athletes.

CONCLUSION

The *House* settlement has forever altered the landscape of intercollegiate athletics. The line separating amateur from professional sports has been crossed, and there is no turning back. Many athletes, at least those participating in revenue-generating sports, will be compensated directly, thus ending decades of exploitation by colleges and universities. Yet, many uncertainties remain. The spill-over effects of the settlement, including (1) whether students should be considered employees; (2) potential Title IX discrepancies; and (3) fair distribution of shared revenue among athletic programs and athletes at individual schools are likely to be the subjects of litigation for years to come. What is certain, however, is that intercollegiate sports will never be the same. Money does, in fact, change everything.