

LAW AND ORDER IN THE WILD WEST: A PROFESSIONAL SOLUTION TO THE NCAA'S FADING  
AMATEURISM MODEL

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SCHOLARLY TOPICS IN SPORTS LAW

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## I. INTRODUCTION

In 2021, Justice Brett Kavanaugh stated “The NCAA’s business model would be flatly illegal in almost any other industry in America.”<sup>1</sup> The Supreme Court ultimately ruled in *NCAA v. Alston* that the National Collegiate Athletic Association’s (“NCAA”) former model of limiting college athletes to education-related compensation was a violation of the Sherman Act, which prohibits agreements that unreasonably restrain trade.<sup>2</sup> However, it was Justice Kavanaugh’s daunting statement in his concurring opinion that helped set the landscape for what has turned college athletics into a modern day Wild West through a litany of antitrust lawsuits.<sup>3</sup>

After the *Alston* decision, the NCAA started to allow athletes to seek compensation off their own name, image, and likeness (“NIL”).<sup>4</sup> Since NIL compensation has been allowed in college sports, the NCAA has been unable to put a strong governance system for it in place.<sup>5</sup> This had led to college athletes, primarily in key revenue generating sports such as football and basketball, essentially being bought by programs with lucrative NIL deals via the transfer portal and high school recruiting.<sup>6</sup> The NCAA forbids the use of NIL in recruiting and compensation that is essentially “pay for play”, but because of the lack of permanent rules in place they have struggled to enforce that rule.<sup>7</sup> To add to these struggles, schools and athletes are taking Justice Kavanaugh’s opinion on the illegality of the current compensation system to heart and are bringing antitrust lawsuits against the NCAA.<sup>8</sup>

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<sup>1</sup> *Nat’l Collegiate Athletic Ass’n v. Alston*, 549 U.S. 69, 109 (2021) (Kavanaugh, J., concurring).

<sup>2</sup> *Id.* at 107; Section 1 of the Sherman Act: Overview, <https://us.practicallaw.thomsonreuters.com/w-016-3376>.

<sup>3</sup> *See Alston*, 549 U.S. at 109 (Kavanaugh, J., concurring).

<sup>4</sup> Michael Roseburg, *The NCAA Has Let Name, Image, and Likeness Become the Wild West*, *Sports Illustrated* (Dec. 4, 2023), <https://www.si.com/college/2023/12/04/ncaa-let-name-image-likeness-deals-become-wild-west>.

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See generally* Ralph D. Russo and Teresa M. Walker, *Tennessee, Virginia AGs suing NCAA over NIL-related recruiting rules with Vols under investigation*, *The Associated Press* (Jan. 31, 2024), <https://apnews.com/article/tennessee-lawsuit-ncaa->

In January of 2024, the Attorney Generals from both Tennessee and Virginia brought forth lawsuits against the NCAA, again for alleged violations of the Sherman Act.<sup>9</sup> The one lawsuit came after the University of Tennessee was placed under investigation for potential recruiting violations involving their use of NIL.<sup>10</sup> The Attorney Generals claim that pay for play restrictions that limit athletes from discussing NIL deals with boosters in the recruiting process are anticompetitive and thus a violation of the Sherman Act.<sup>11</sup> The NCAA raised several concerns in response as to why they hope to prevent athletes from discussing NIL deals in recruiting, including competitive imbalance and the exploitation of student athletes.<sup>12</sup> The NCAA fears that the legal use of NIL deals as coercion in recruiting and the transfer portal, despite the widespread belief that it is already occurring, will only further this notion that college athletics has become the Wild West.<sup>13</sup> Unfortunately for the NCAA, the Tennessee Federal District Court granted a preliminary injunction against them to prevent enforcement of its pay for play rules following the Attorney Generals' lawsuits.<sup>14</sup> As a result, NIL can now be used for recruitment of both high school athletes and in the transfer portal without repercussions from the NCAA, with little hope of the preliminary injunction being overturned.<sup>15</sup> Additionally, without the ability to enforce pay for play rules, the university collectives that broker these deals will not have to tie compensation to an accompanying NIL deal.<sup>16</sup>

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[recruiting-violations-nil; NCAA could face billions in damages with judge's ruling in case](https://www.espn.com/college-sports/story/_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case), (Nov. 3, 2023), [https://www.espn.com/college-sports/story/\\_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case](https://www.espn.com/college-sports/story/_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case).

<sup>9</sup> See [id.](#)

<sup>10</sup> See [id.](#)

<sup>11</sup> See [id.](#)

<sup>12</sup> See [id.](#)

<sup>13</sup> See [id.](#)

<sup>14</sup> See Leonard Armato, [Nil Court Loss: Ncaa Must Embrace Pay For Play To Survive](https://www.forbes.com/sites/leonardarmato/2024/02/26/big-nil-court-loss-means-ncaa-must-embrace-pay-for-play--to-survive/?sh=12b4b6d76284). See [How.](https://www.forbes.com/sites/leonardarmato/2024/02/26/big-nil-court-loss-means-ncaa-must-embrace-pay-for-play--to-survive/?sh=12b4b6d76284), Forbes (Feb. 26, 2024), <https://www.forbes.com/sites/leonardarmato/2024/02/26/big-nil-court-loss-means-ncaa-must-embrace-pay-for-play--to-survive/?sh=12b4b6d76284>.

<sup>15</sup> See [id.](#)

<sup>16</sup> See [id.](#)

Elsewhere, the NCAA is facing another antitrust suit in *House v. NCAA* regarding the restrictions of NIL-based compensation for college athletes who competed before *Alston*.<sup>17</sup> The plaintiffs in the *House* case were granted class action status in November of 2023.<sup>18</sup> Aside from the damages the athletes are seeking from not being able to cash in on NIL opportunities, the plaintiffs are also seeking to obtain a portion of the revenue from lucrative media deals that NCAA conferences possess.<sup>19</sup>

Meanwhile, NCAA coaches are getting frustrated about the lack of governance around compensation rules and the leverage players have over their schools. Recently, legendary Alabama Football Coach Nick Saban cited unrestricted free agency via the NCAA's transfer portal and schools' ability to lure away talent in the portal with lucrative NIL deals as reasons for his retirement.<sup>20</sup> Coach Saban says that despite the NCAA's wishes, the use of NIL has become almost entirely pay for play and creates a competitive imbalance in college sports.<sup>21</sup> Following Alabama's loss to Michigan in the Rose Bowl this past season, players were almost immediately asking Saban about playing time and payment guarantees for next season while threatening to transfer if they were not satisfied.<sup>22</sup> Coach Saban spoke at a Congressional hearing in March of 2024 shortly after his retirement in which he called for making NIL equal across the board for

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<sup>17</sup> [NCAA could face billions in damages with judge's ruling in case](https://www.espn.com/college-sports/story/_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case), ESPN (Nov. 3, 2023), [https://www.espn.com/college-sports/story/\\_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case](https://www.espn.com/college-sports/story/_/id/38811591/ncaa-face-billions-damages-judge-ruling-house-vs-ncaa-case).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See* Margaret Fleming, [Nick Saban: Nil Money, Transfer Portal Influenced Retirement](https://frontofficesports.com/nick-saban-nil-money-transfer-portal-retirement/), Front Office Sports (Mar. 10, 2024), <https://frontofficesports.com/nick-saban-nil-money-transfer-portal-retirement/>.

<sup>21</sup> *See* James Parks, [Nick Saban Tells Congress How To Fix NIL In College Football](https://www.si.com/fannation/college/cfb-hq/ncaa-football/nick-saban-nil-college-football-revenue-sharing-congress), Sports Illustrated Fan Nation (Mar. 12, 2024), <https://www.si.com/fannation/college/cfb-hq/ncaa-football/nick-saban-nil-college-football-revenue-sharing-congress>.

<sup>22</sup> *See* Fleming, *supra* note 20.

conferences as well as a revenue sharing system that is equally distributed to each school.<sup>23</sup> He believes that this model will allow the NCAA to maintain competitive balance across schools while still giving athletes the compensation they deserve for their performance.<sup>24</sup>

The most effective solution for both the NCAA and student athletes regarding athlete compensation is to enter into collective bargaining agreements (“CBAs”) between the student athletes and their respective conferences that establish salary caps that share media revenue with athletes and regulate the use of NIL compensation. For multiple decades, professional sports leagues have avoided antitrust lawsuits by allowing athletes to unionize and collectively bargain for terms they find most desirable. CBAs will allow student athletes to negotiate favorable compensation terms while the NCAA can internalize athlete compensation and ensure competitive balance amongst schools. The ability for NCAA athletes to unionize is on the horizon, and professional sports have laid a foundation that athletes can build upon to negotiate a deal that fairly reflects the value they provide to their respective schools.

This research paper will analyze the main components of a proposed salary cap that fairly compensates NCAA athletes while addressing concerns expressed by both coaches and the NCAA. Part II of this paper will dive into the history of collective bargaining in professional sports and how federal courts have engaged with the terms of CBAs. Part II also discusses the current state of unionization amongst college athletes and recent pushes by both athletes and political entities to allow for their unionization or recognition as employees of their universities to allow for direct compensation. Part II concludes with a background on the need for salary caps

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<sup>23</sup> See Jon Conahan, Nick Saban Says NIL Should Be 'Equal Across The Board', Sports Illustrated Fan Nation (Mar. 15, 2024), <https://www.si.com/fannation/name-image-likeness/news/nick-saban-says-nil-should-be-equal-across-the-board->.

<sup>24</sup> See id.

to ensure competitive balance. In Part III, this paper evaluates the two major revenue sources that the NFL and NBA CBAs use as a benchmark for calculating their salary caps: media revenue and postseason ventures. Part III also offers creative solutions on how to address concerns around the use of NIL in recruiting and the transfer portal. Lastly, Part III will clarify how the NCAA can implement a governance system for the rules of a salary cap. Part IV will recap the current issues of NIL compensation as well as progress towards unionization and summarize how a salary cap will address the current predicament the NCAA and student athletes face.

## II. BACKGROUND ON COLLECTIVE BARGAINING AND SALARY CAPS

### A. History of Collective Bargaining

As the push for college athletes to be treated like their professional counterparts continues, both the NCAA and student athletes can look at the history of collective bargaining in professional sports as guidance for the seemingly inevitable negotiations that will occur in the coming years. One of the earliest cases regarding collective bargaining was tried before the Eight circuit in 1976, *Mackey v. the National Football League*. The case involved a group of former and then current NFL players attempting to challenge the “Rozelle Rule,” a rule that restricted free agency and player mobility throughout the league, as a violation of the Sherman Antitrust Act.<sup>25</sup> The court held that the NFL and the players could “avail themselves of the non-statutory labor exemption where they are parties to collective bargaining agreements pertaining to mandatory subjects of bargaining” as long as the agreement was the product of bona-fide arm’s

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<sup>25</sup> See *Mackey v. Nat'l Football League*, 543 F.2d 606, 611 (8th Cir. 1976).



length dealing.<sup>26</sup> Simply put, unless the agreement is a product of collective bargaining and arm's length dealing, the terms of the agreement are subject to antitrust laws.<sup>27</sup>

Several years after the decision in *Mackey*, the Sixth Circuit Court of Appeals not only relied on the decision but expanded upon it in *McCourt v. California Sports, Inc.* In *McCourt*, an NHL player tried to challenge the NHL's reserve system that was similar to the Rozelle Rule.<sup>28</sup> However, the Sixth Circuit ruled that the NHL's reserve system was a product of arm's length collective bargaining, therefore the players could not challenge it under antitrust law.<sup>29</sup> Looking at the decisions in both *Mackey* and *McCourt*, the NCAA will be wise to implement collective bargaining agreements to decide the parameters of athlete compensation. As the Sixth Circuit concluded when it decided *McCourt* almost half a century ago, if the provision is stated in the collective bargaining agreement, the opposing party cannot later bring a lawsuit for a violation of antitrust law regarding that provision.<sup>30</sup>

## B. Why College Athletes Have Yet to Collectively Bargain

### I. *Amateur Status, But Going Pro Soon*

What has held the unionization of college athletes back is the fact that they have always been labeled as amateur athletes. However, over the past several decades the NCAA has begun to lose the presumption that their rules are necessary to preserve amateurism.<sup>31</sup> The NCAA has

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<sup>26</sup> *Id.* at 623.

<sup>27</sup> *See id.*

<sup>28</sup> *See McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1195 (6th Cir. 1979).

<sup>29</sup> *See id.* at 1203.

<sup>30</sup> *See id.*

<sup>31</sup> *See* Thomas Baker, *Why NCAA Should Settle Claims in House v. NCAA*, *Forbes* (Nov. 20, 2023), <https://www.forbes.com/sites/thomasbaker/2023/11/20/looking-back-at-white-v-ncaa-for-reason-why-the-ncaa-should-settle-claims-in-house-v-ncaa/>.

long operated under its presumption of amateurism ever since the Supreme Court case of *NCAA v. Board of Regents of University of Oklahoma* was decided in 1984, in which Justice Stevens shielded certain NCAA rules from antitrust laws.<sup>32</sup> In *Board of Regents*, Justice Stevens stated that “It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”<sup>33</sup> Of these protected rules, Justice Stevens cited “the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.”<sup>34</sup> Federal courts continued to shield certain NCAA rules from antitrust laws for several decades following the *Board of Regents* case because they were seen as vital to preserve the amateurism of NCAA athletes.<sup>35</sup>

However, in 2015 the Ninth Circuit in *O’Bannon v. NCAA* went away from the long-held conclusion that NCAA rules were presumptively valid to preserve amateurism.<sup>36</sup> The district court in *O’Bannon* ruled that the NCAA’s regulations needed to be subject to antitrust laws and the Sherman Act.<sup>37</sup> The Supreme Court in *Alston* followed the Ninth Circuit’s lead when it decided that the NCAA’s rules were not necessary to preserve amateurism and therefore preserve interest in college athletics.<sup>38</sup> The NCAA now has little ground to stand on its amateurism argument following *Alston* and the continued commercial success of college sports.<sup>39</sup> While the Supreme Court in *Alston* discussed compensating athletes to a level commensurate with the value they bring to their respective schools, the Court’s ruling was ultimately limited to a holding

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<sup>32</sup> See *id.*

<sup>33</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 117 (1984).

<sup>34</sup> *Id.*

<sup>35</sup> See Baker, *supra* note 31.

<sup>36</sup> See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1064 (9th Cir. 2015).

<sup>37</sup> See *id.* at 1079.

<sup>38</sup> See Baker, *supra* note 31.

<sup>39</sup> See *id.*

that restricting compensation for student athletes is a violation of antitrust law.<sup>40</sup> This led Justice Kavanaugh to analyze in his concurrence the fact that the NCAA is restricting the pay of athletes that generate billions in revenue for them every year, and how the current compensation rules will be difficult to legally defend.<sup>41</sup> As a result, multiple antitrust lawsuits have been filed against the NCAA challenging athlete compensation rules since *Alston* was decided in 2021.

## 2. *Recent Attempts to Shed the Amateur Label*

Since *Alston*, there have been multiple efforts for college athletes to be viewed as employees rather than amateur athletes. Most notably, the Dartmouth's men's basketball team has been recognized as employees of the University by a regional National Labor Relations Board ("NLRB") in an ongoing effort to unionize.<sup>42</sup> NLRB Regional Director Laura Sacks determined that the collegiate basketball team met the standard of employees under the National Labor Relations Act.<sup>43</sup> The men's basketball team had previously petitioned in September to become a part of a local union, an effort that will likely regain traction following the NLRB ruling, although an appeal of the ruling is expected.<sup>44</sup> Although this ruling is monumental for college athletes, it is important to note that as of now the Dartmouth team only has recognition from the regional NLRB board, not nationally.

The Dartmouth decision wasn't the first time a regional NLRB office got involved with collegiate athletics. The University of Southern California, one of the most recognizable brands in college football, found itself in a dispute with the NLRB in spring of 2023 when the Los

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<sup>40</sup> See *Alston*, 549 U.S. at 74.

<sup>41</sup> See *Alston*, 549 U.S. at 110-11.

<sup>42</sup> See Jimmy Golden and Ralph D. Russo, US Labor Official Says Dartmouth Basketball Players Are School Employees, Sets Stage for Union Vote, the Associated Press (Feb. 6, 2024), <https://apnews.com/article/dartmouth-basketball-union-ncaa-employees>

<sup>43</sup> See *id.*

<sup>44</sup> See *id.*

Angeles office filed a complaint that the football and men’s basketball players at the University were employees rather than student athletes.<sup>45</sup> While the complaint has yet to yield results, it demonstrates the NLRB’s willingness to get involved with a major revenue-generating program.

The NLRB has not been the only government entity voicing the opinion that college athletes should be able to unionize. In December of 2023, Senator Chris Murphy and several other members of Congress pushed for legislation called the *College Athlete Right to Organize Act (CARO)*.<sup>46</sup> Senator Murphy stated that “There is no college sports industry and its \$16 billion in annual revenues without the athletes' labor.... Instead of fighting athletes' rights in courts and spending millions on lobbying Congress, the NCAA and its members should start negotiating directly with players on revenue-sharing, health and safety protections, and more.”<sup>47</sup> The stance from several members of Congress, an entity that has struggled with the NCAA since the decision in *Alston* on the regulation of NIL, both reiterates Justice Kavanaugh’s stance and foreshadows the future: collective bargaining is coming to college sports.

While recent pushes for classification as employees and unionization have yet to cross the finish line, both the NCAA and its athletes can see the writing on the wall. There will be a time soon where the NCAA finds themselves at the negotiation table working out a collective bargaining agreement with student athletes. The NCAA has expressed concerns about the use of NIL in recruiting and the transfer portal but has struggled to maintain a competitive balance in

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<sup>45</sup> See [Labor Relations Board Files Complaint Against USC Over Athlete Compensation](https://apnews.com/article/usc-labor-ncaa-81a789801ee168f71d31bb0217d11981), the Associated Press (May 18, 2023), <https://apnews.com/article/usc-labor-ncaa-81a789801ee168f71d31bb0217d11981>.

<sup>46</sup> See [With Support From Major Labor Unions And Players Associations, Murphy, Sanders, Warren Reintroduce Legislation To Strengthen College Athletes' Collective Bargaining Rights](https://www.murphy.senate.gov/newsroom/press-releases/with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights), <https://www.murphy.senate.gov/newsroom/press-releases/with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights>.

<sup>47</sup> [Id.](#)

college sports. Meanwhile, the players just want to be fairly compensated. There is a potential collective bargaining agreement that can give both parties what they desire.

### C. The Need for a Salary Cap Due to Competitive Imbalance

This section will outline why the need for a salary cap in college athletics has grown ever since the Supreme Court's decision in *Alston*. As previously mentioned, Coach Saban outlined the difficulties in maintaining competitive balance with no restrictions on poaching players and recruits with the power of NIL deals. Apart from a school like Alabama that is flush with NIL funds, universities with more financial constraints than top athletic programs likely feel as if they are at a competitive disadvantage because of their inability to offer as lucrative of payment packages. Recently, long time Minnesota baseball head coach John Anderson highlighted the primary issues NIL poses to programs like his that don't receive the most attention.<sup>48</sup> While other conferences such as the SEC have more financial interest in college baseball, the Big Ten currently gives priority to sports such as football and basketball, creating parity in the level schools can recruit at for less financially successful sports such as baseball.<sup>49</sup>

This new era of NIL creates a competitive imbalance, as schools with more funding to provide NIL opportunities to students are able to advertise this capability and lure the top talent away from programs that are financially deficient.<sup>50</sup> For non-revenue generating sports, competitive imbalance only worsens when it's a smaller group of schools with the funding

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<sup>48</sup> See generally Noah Henderson, Unequal NIL Funding in Baseball Highlights College Sports Concerns, Sports Illustrated (Feb. 20, 2024), <https://www.si.com/fannation/name-image-likeness/news/unequal-nil-funding-in-baseball-highlights-college-sports-concerns-noah9>.

<sup>49</sup> See id.

<sup>50</sup> See id.

available to provide its non-revenue generating athletes NIL opportunities.<sup>51</sup> Coach Anderson noted that before the use of NIL, uniform rules on scholarships were the only way to compensate a student athlete and served as a de facto salary cap in college sports.<sup>52</sup> Without that uniformity, athlete compensation in the NCAA has become the Wild West and has caused struggles for smaller budget programs such as Coach Anderson's.<sup>53</sup> This has created a need for a new system in college sports to maintain competitive balance: a salary cap.

### III. CBA AND SALARY CAP ANALYSIS

#### A. Reasons For Conference-Specific Collective Bargaining Agreements

The first question on this topic that needs to be answered is who the negotiations will be between. Individual CBAs between each university and their own athletes will be too isolated and not further the NCAA's goal of maintaining competitive balance if each university is playing by different rules for compensating athletes. Although some uniformity will be required across all CBAs, a general agreement between the student athletes and the NCAA is too broad because the interests of student athletes will vary based on their respective conference.

For example, the Dartmouth's men's basketball team that has just been granted employment status currently plays in the Ivy League.<sup>54</sup> The Ivy League is known for not providing their athletes with athletic scholarships, and almost all Ivy League sports fail to make a

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<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See* Cole Forsman, Labor Board Clears Way for Dartmouth to Form a Union, Sports Illustrated (Feb. 5, 2024), <https://www.si.com/college/gonzaga/basketball/labor-board-clears-way-for-dartmouth-mens-basketball-to-form-union>.

profit each year.<sup>55</sup> It would not make sense for basketball players from Dartmouth to be on the same side of a negotiation table as football players from the Big Ten or SEC, as their interests and ability to obtain favorable terms in any deal will likely diverge. The Ivy League athletes likely will merely request the tuition assistance like their fellow Division One athletes have received for years, while major college football teams will be pushing for a slice of the media revenues they generate for their respective conferences.

Rather, the NCAA should follow the precedent set forth by professional leagues such as the NFL and NBA and have negotiations between the party that creates the product, the athletes, and the party that manages the revenue, the conferences. For example, the NFL sets their salary cap, or the amount each team can spend on player salaries each year, based on a number of components (to be discussed later) including media revenue.<sup>56</sup> Due to a new media deal the NFL struck in 2021, league revenues significantly increased for the 2023 season, and the NFL raised its salary cap 13.6% from the previous season.<sup>57</sup> This wasn't a decision that was left to the discretion of the NFL, but rather agreed upon in the salary cap section of the collective bargaining agreement between the NFL owners and the players' union.<sup>58</sup> In the NCAA each conference has a media deal similar to the NFL's, with each of the "Power Five" conferences having deals that exceed \$1 billion in total value.<sup>59</sup>

NCAA athletes at major conferences will certainly negotiate for a share of the media revenue in any prospective collective bargaining agreement, especially with the stance the class

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<sup>55</sup> See *id.*

<sup>56</sup> See *e.g.*, Eric Jackson, [Nfl Salary Cap Gets \\$30m Boost To Record \\$255m](https://www.sportico.com/leagues/football/2024/nfl-salary-cap-2024-1234768020/), Sportico (Feb. 25, 2024), <https://www.sportico.com/leagues/football/2024/nfl-salary-cap-2024-1234768020/>.

<sup>57</sup> See *id.*

<sup>58</sup> See *generally* [NFL Collective Bargaining Agreement](#) (2020), Article 13 Salary Cap Accounting Rules.

<sup>59</sup> See Michael Smith, [Big Ten Officially Agrees To New Media Deals With CBS, Fox, NBC](https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx), Sports Business Journal (Aug. 18, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx>.

is taking in the *House* case. However, given the financial disparity between the conferences' media deals, it will make the most sense to have separate CBAs for each conference. Take two Power Five conferences, the Atlantic Coastal Conference (“ACC”) and the Southeastern Conference (“SEC”), into consideration. While both conferences are considered major revenue generators in some of college athletics' most popular sports, the current SEC media deal is for about \$710 million annually for all sports, while the current ACC deal is worth a little more than a third of that at \$240 million annually.<sup>60</sup> The revenue disparity becomes even more alarming when compared to smaller Division One conferences. The American Athletic Conference, a conference for Division One athletics that participates in major revenue driving sports such as basketball and football, currently has a 12-year deal in place with ESPN for an estimated \$83.3 million annual average.<sup>61</sup>

While the NFL calculates the share of revenue the players receive based off the league-wide media rights, the same cannot be reasonably done for a model that tries to incorporate all NCAA conference media deals given the gross disparity between the value of these contracts.<sup>62</sup> A salary cap for an entire sport across all of Division One will lead to two results: 1) the cap will be based off of the top revenue generating conferences and therefore will not contribute to the goal of creating competitive balance, or 2) the cap would be too low for top revenue generating schools and create a stalemate in collective bargaining negotiations for major conferences. As a result, it is most logical for the athletes to negotiate directly with their respective conferences.

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<sup>60</sup> See *id.*

<sup>61</sup> See Matt Brown, [The American Athletic Conference Is Reportedly Getting A Healthy Raise Without Sacrificing Flexibility](https://www.sbnation.com/college-football/2019/3/19/18273232/aac-television-deal-espn-conference-realignment), SB Nation (Mar. 19, 2019), <https://www.sbnation.com/college-football/2019/3/19/18273232/aac-television-deal-espn-conference-realignment>.

<sup>62</sup> See generally [NFL Collective Bargaining Agreement](#), (2020), Article 13: Salary Cap Accounting Rules.



## B. Overview of a Salary Cap and its Components

What many like Coach Anderson hope to see soon is a way to reimplement a salary cap into college sports based off the current climate of athlete compensation since *Alston*. Longtime NCAA men's basketball coach and current St. John's Coach Rick Pitino was very vocal about the path he hopes to see in wake of the recent Dartmouth ruling.<sup>63</sup> Pitino believes that the major conferences in college basketball should have a salary cap of between \$1.5-\$2 million for each team, with other mid major and smaller conferences determining their own salary cap.<sup>64</sup> While Pitino did not specify exactly what makes up that estimated salary cap, several professional sports leagues' current CBAs may provide clearer guidance in what that number consists of.

Of the four major North American Sports (baseball, basketball, football, and hockey) only major league baseball does not have a salary cap.<sup>65</sup> Unsurprisingly, major league baseball also faces the largest gap in payroll out of the four sports at almost \$300 million between the highest and lowest payroll in baseball for the 2023 season.<sup>66</sup> However, the other three major sports have fixed salary caps agreed upon in their CBAs. The theory of a salary cap is that it gives teams equal footing in their ability to pay athletes' salaries to maintain competitive balance within the sport.<sup>67</sup> A similar ceiling on player compensation in college may alleviate the struggles of veteran coaches like John Anderson who want to recruit top talents but cannot win a bidding war against schools with deeper pockets.

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<sup>63</sup> See generally Myron Medcalf, Rick Pitino Says College Basketball Needs Salary Cap, ESPN (Feb. 6, 2024), [https://www.espn.com/mens-college-basketball/story/\\_/id/39471080/rick-pitino-says-college-basketball-needs-salary-cap](https://www.espn.com/mens-college-basketball/story/_/id/39471080/rick-pitino-says-college-basketball-needs-salary-cap).

<sup>64</sup> See *Id.*

<sup>65</sup> See Chris Neiger, How Salary Caps Changed Sports, Investopedia (Dec. 4, 2022), <https://www.investopedia.com/financial-edge/0910/how-salary-caps-changed-sports.aspx>.

<sup>66</sup> See Jesse Rogers, MLB Is A Sport Divided By Historic Payroll Disparity -- So What's Next?, ESPN (Jun. 5, 2023), [https://www.espn.com/mlb/story/\\_/id/37775153/mlb-divided-historic-payroll-disparity-next](https://www.espn.com/mlb/story/_/id/37775153/mlb-divided-historic-payroll-disparity-next).

<sup>67</sup> See Neiger, *supra* note 65.

The professional leagues that use a salary cap all use similar variables to determine the cap on player salaries. In the NFL, the salary cap is annually determined by taking the sum of 55% of the league’s media revenue, 45% of revenue from league ventures and the postseason, and 40% of the annual local revenue from teams.<sup>68</sup> That number is then divided by the 32 teams that play in the NFL, and that calculation gives each team its salary cap for how much it can spend on player salaries for the upcoming season.<sup>69</sup> This number is also fixed so that the salary cap is set at no less than 48% and no more than 48.5% of projected revenues in a given year.<sup>70</sup> That number is a record \$255 million per team for the upcoming 2024 season.<sup>71</sup> Similarly, the NBA takes 44.74% of “basketball related income” every year, divided by the 30 teams playing in the NBA, to determine the salary cap.<sup>72</sup> “Basketball related income” is comprised of a multitude of revenue streams, including ticket sales, broadcasting revenue, advertising, arena naming rights, and more.<sup>73</sup>

The issue of what makes a salary cap “fair” becomes a much larger issue when discussing CBAs that will set spending limits for schools with multiple sports that need financing and effective resources to recruit top talent. While professional CBAs don’t create an all-encompassing roadmap for universities and conferences, they provide a starting point for determining where the funds will come from to pay athletes other than just NIL compensation.

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<sup>68</sup> See generally NFL Collective Bargaining Agreement, *supra* note 58.

<sup>69</sup> See id.

<sup>70</sup> See id.

<sup>71</sup> See e.g., Jackson, *supra* note 56.

<sup>72</sup> See NBA Collective Bargaining Agreement (July 2023), Article VII Basketball Related Income, Salary Cap, Minimum Team Salary, Tax Level, Apron Levels, and Designated Share Agreement.

<sup>73</sup> See id.

## C. Media Revenue Deals

### 1. *Recent Progress on Media Deals*

This section will analyze how the NCAA can use the NFL and NBA's model of sharing media revenue with the players to shape the framework of a salary cap that ensures competitive balance in college sports. Media deals between athletic conferences and television networks serve as a main source of revenue for college athletic programs, and the value of these media deals have been the subject of two current events. First, in the pending lawsuit of *House v. NCAA*, which is scheduled to go to trial in early 2025, the class of former college athletes will be going after a share for the media revenue they helped their respective universities generate.<sup>74</sup> Meanwhile, several conferences have signed record-breaking new media deals since their recent realignments.

The Big Ten in 2022 signed a seven-year deal with Fox, NBC, and CBS that will televise its programs for a total of about \$8 billion of the course of the contract, or about \$1.15 billion per season through 2030.<sup>75</sup> This deal does not currently include ESPN, however there is a possibility that the Big Ten adds ESPN to the deal at some point, creating even more revenue potential for the powerful conference.<sup>76</sup> The deal comes after the announcement that the conference would be adding in 2024 the University of Oregon, University of Washington, University of Southern California, and UCLA, four of the most successful programs from the now extinct Pacific 12 Conference.<sup>77</sup>

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<sup>74</sup> See NCAA could face billions in damages with judge's ruling in case, *supra* note 17.

<sup>75</sup> See Smith, *supra* note 59.

<sup>76</sup> See *id.*

<sup>77</sup> See Big Ten Conference Announces Future Football Schedule Formats For 2024-28, Big Ten (Oct. 4, 2023), <https://bigten.org/news/2023/10/4/big-ten-conference-announces-future-football-schedule-formats-for-2024-28.aspx>.

Meanwhile, the SEC has also expanded, adding powerhouse programs Oklahoma and University of Texas at Austin to their roster for the 2024 season.<sup>78</sup> On top of the additions of these two former Big 12 schools, the SEC will also commence a 10-year, \$7.1 billion deal with ESPN this year.<sup>79</sup> Additionally, the Big 12's media deal with Fox and ESPN is set to expire in 2025, and the newly expanded conference will certainly be looking for a contract that at least compares to its counterparts in terms of total revenue.<sup>80</sup> In short, the media is investing a lot of money into college sports, and under the current model the athletes are not seeing a dime of that money.

## 2. *Media Revenue Distribution*

The uncharted territory of revenue sharing in college sports is more complex than revenue sharing in the NFL or NBA given that the schools rely on the distributions they receive from their respective conferences to finance entire athletic programs. Take for example the University of Michigan, who last year won the college football national championship. Prior to the 2023 college football seasons starting, the University projected operating expenses for the 2024 fiscal year of just under \$215 million, which would result in an operating surplus of just about \$200k despite having top programs in multiple athletics.<sup>81</sup> However, for the 2023 season the program was expecting only a \$5.2 million increase in its annual distribution from the Big

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<sup>78</sup> See James Parks, [SEC Reveals 2024 Football Schedule As Texas, Oklahoma Join Next Season](https://www.si.com/fannation/college/cfb-hq/ncaa-football-schedule/sec-football-schedule-2024-season-texas-oklahoma-realignment), Sports Illustrated (Dec. 13, 2023), <https://www.si.com/fannation/college/cfb-hq/ncaa-football-schedule/sec-football-schedule-2024-season-texas-oklahoma-realignment>.

<sup>79</sup> See Smith, *supra* note 59.

<sup>80</sup> See *id.*

<sup>81</sup> See Kurt Svoboda, [Athletic Department Projects Balanced Budget in FY '24](https://mgoblue.com/news/2023/6/15/general-athletic-department-projects-balanced-budget-in-fy-24), University of Michigan (Jun. 15, 2023), <https://mgoblue.com/news/2023/6/15/general-athletic-department-projects-balanced-budget-in-fy-24>.

Ten, with the increase in large part due to the increase in television revenue for the Big Ten that season.<sup>82</sup>

An increase in revenue distributions of \$5.2 million may seem on the surface like a lot of money. However, under the previous media deal the Big Ten had in place, the conference was paying roughly \$50 million a year to each school, with the expectation that this figure wasn't going to change dramatically during the last year of the old media deal.<sup>83</sup> Now with the new deal in place, the Big Ten is expected to increase its distributions for each school to anywhere between \$80 to \$100 million each year.<sup>84</sup> While schools like Michigan may not currently see large profits in its athletic department, the influx of media revenue coming to Big Ten and SEC schools leaves money on the table that can be reasonably split with student athletes. This is especially true when schools are looking at the potential of earning almost double what they currently receive in distributions on an annual basis due to the strength of these new media deals.<sup>85</sup>

While sharing 55% of those revenue distributions like the NFL salary cap may not be attainable based on the differing financial constraints on college athletic departments and NFL franchises, there will at least be new money that the players can argue for in collective bargaining negotiations. Athlete representatives and the conferences can work out in collective bargaining negotiations a financially feasible fixed percentage of the media revenue distribution that can be shared with student athletes each year.

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<sup>82</sup> See *id.*

<sup>83</sup> See Smith, *supra* note 59.

<sup>84</sup> See Vincent Pensabene, How Much Does Big Ten TV Deal Pay Per School? Exploring Tony Petitti's Exclusive Agreements With CBS, NBC And FOX, Sportskeeda (Aug. 3, 2023), <https://www.sportskeeda.com/college-football/how-much-big-ten-tv-deal-pay-per-school-exploring-tony-petitti-s-exclusive-agreements-cbs-nbc-fox>.

<sup>85</sup> See *id.*

Some programs may argue that this creates further competitive imbalance if the Big Ten and SEC are able to pay student athletes more because of the funds available through richer media deals. However, these programs have been at an advantage for years, especially in football, because of the intrinsic value Big Ten and SEC programs have due to the professional success of their athletes. Take for example the 2020 NFL draft, a year before the Supreme Court decided the *Alston* case and player compensation was introduced into college sports. In this draft, the SEC had the most players selected by far at 63 total player selections, the 14<sup>th</sup> consecutive season in which the conference lead the way in player selections.<sup>86</sup> The Big Ten was the runner up with 48 player selections, and the now extinct Pac 12 came in a distant third with 32 player selections.<sup>87</sup> Top recruits will certainly be enticed at the opportunity to earn more money if the salary caps are higher in the Big Ten and SEC, but it cannot be said that the top talent was not already drawn to these schools before the idea of compensating college athletes was a possibility.

### 3. *Equitable Apportionment of Media Revenue*

The next question becomes how to split these revenues in a fair manner amongst all sports when calculating a salary cap. The answer may be equitable apportionment using viewership as the measuring stick for how to split the revenues amongst sports. Viewership is what is driving these mega-deals between television networks and conferences, specifically viewership of college football.<sup>88</sup>

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<sup>86</sup> See Ben Kercheval, 2020 NFL Draft Picks By College Team, Conference, CBS Sports (Apr. 25, 2020), <https://www.cbssports.com/college-football/news/2020-nfl-draft-picks-by-college-team-conference-lsu-ties-all-time-record-sec-on-top-for-14th-straight-year/>.

<sup>87</sup> See *id.*

<sup>88</sup> See generally The Big Ten Effect: With 4 New Football Teams Next Year, The NCAA Conference Will Extend Its TV Reach In Key Markets, Nielsen (Sept. 2023), <https://www.nielsen.com/insights/2023/the-big-ten-effect-with-4-new-football-teams-next-year-the-ncaa-conference-will-extend-its-tv-reach-in-key-markets/>.

While popular sports such as basketball are drawing strong viewership numbers, it's not even close to the numbers major college football games have turned out in recent years.<sup>89</sup> For example, last year college basketball games aired on Fox had the second highest viewership in the sport, just behind CBS.<sup>90</sup> Averaging about 963,000 viewers per game, Fox's total viewership in 34 nationally televised college basketball games was about 32.7 million viewers during the regular season.<sup>91</sup> Compare that figure to the Michigan football team in 2023, who was fifth amongst all college football teams at 5.6 million viewers per game.<sup>92</sup> In 12 nationally televised college football games for Michigan in 2023, the team had approximately 67.2 million viewers.<sup>93</sup> That's more than double the amount of viewers than marquee college basketball games had in about one third the amount of televised games.<sup>94</sup> Therefore, it is logical to conclude that based on the discrepancy in viewership, even amongst the two most popular sports in college athletics, that equitable apportionment of media revenue is fair. Splitting the media revenue based off viewership allows schools to compensate athletes based off a reasonable estimate of the actual value that they bring their respective school.

#### 4. *Compliance with Title IX*

There may be an argument that giving men's teams a greater share of the revenue than women's teams, despite more viewership, fails to comply with Title IX. However, as employees

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<sup>89</sup> See Austin Karp, [NCAA Men's Basketball Viewership Rebounds In 2022-23](https://www.sportsbusinessjournal.com/Daily/Issues/2023/03/10/Media/ncaa-mens-college-basketball-season-viewership.aspx), Sports Business Journal (Mar. 10, 2023), <https://www.sportsbusinessjournal.com/Daily/Issues/2023/03/10/Media/ncaa-mens-college-basketball-season-viewership.aspx>; See David Rumsey, [At Least There's No Debating College Football's Most-watched Team](https://frontofficesports.com/at-least-theres-no-debating-college-footballs-most-watched-team/), Front Office Sports (Dec. 21, 2023), <https://frontofficesports.com/at-least-theres-no-debating-college-footballs-most-watched-team/>.

<sup>90</sup> See Austin Karp, [NCAA Men's Basketball Viewership Rebounds In 2022-23](https://www.sportsbusinessjournal.com/Daily/Issues/2023/03/10/Media/ncaa-mens-college-basketball-season-viewership.aspx), Sports Business Journal (Mar. 10, 2023), <https://www.sportsbusinessjournal.com/Daily/Issues/2023/03/10/Media/ncaa-mens-college-basketball-season-viewership.aspx>.

<sup>91</sup> See [id.](#)

<sup>92</sup> See David Rumsey, [At Least There's No Debating College Football's Most-watched Team](https://frontofficesports.com/at-least-theres-no-debating-college-footballs-most-watched-team/), Front Office Sports (Dec. 21, 2023), <https://frontofficesports.com/at-least-theres-no-debating-college-footballs-most-watched-team/>.

<sup>93</sup> See generally [Id.](#)

<sup>94</sup> See [id.](#)

of the university, members of different athletic teams may not be entitled to equal pay under Title IX. In order for a female employee of a university to win a claim under Title IX, the employee must prove that she was paid at a lower rate than her counterpart of the opposite sex for substantially equal work that is completed in similar working conditions.<sup>95</sup> Although female athletes will have strong claims that they train and compete to a commensurate degree as male athletes in similar conditions, there are several frequent rebuttals that universities have successfully used to defend Title IX claims. These rebuttals include seniority compensation systems, merit compensation systems, and pay based on quantitative and qualitative output.<sup>96</sup> For purposes of this topic, pay based on quantitative and qualitative output is the strongest argument universities will have against female athletes bringing Title IX claims for unequal pay.

A strong case example of unequal pay between female and male employees complying with Title IX due to pay based on quantitative output is *Stanley v. University of Southern California*. In the 1990's, former USC women's basketball coach Marianne Stanley sued the school when she was not offered a contract comparable to the men's coach, alleging violations of equal pay, Title IX, and the Fair Employment Act.<sup>97</sup> The 9<sup>th</sup> Circuit ruled that, in addition to other factors, the men's team had helped the school generate almost 90 times more revenue than the women's team had and therefore justified the higher salary.<sup>98</sup> Therefore, the schools may be justified in awarding higher salaries to the athletes, labeled as employees, that bring in the most revenue.

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<sup>95</sup> 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.13(a) ("The equal work standard does not require that compared jobs be identical, only that they be substantially equal").

<sup>96</sup> 29 U.S.C. § 206(d)(1).

<sup>97</sup> See *Stanley v. Univ. of S. California*, 13 F.3d 1313, 1318 (9th Cir. 1994).

<sup>98</sup> See *id.*



While *Stanley* is not a case that tells a lot about the intersection between Title IX and CBAs, it provides universities with a strong legal foundation to justify an equitable split of media revenue amongst its athletes based on viewership. As mentioned below, even when the NCAA Women's March Madness had its highest viewership of all time and the Men's tournament had one of its most disappointing years, the Men's Final Four still drew over 20 million more viewers than the Women's Final Four did.<sup>99</sup> This is why networks pay more to broadcast the Men's tournament than they do the Women's tournament. While we have yet to see how a Title IX lawsuit for student athletes' salaries would play out in federal court, these basic facts on viewership and revenue deals for men's versus women's sports as well as the *Stanley* case provide universities with a foundation to rebut Title IX violation claims.

#### 5. *Media Revenue Conclusion*

Professional CBAs show that a major driver of salary cap calculations is the amount of media revenue that is shared with the players. With this new influx of large media deals in college sports, and more looming in the coming years, the money will be on the table to allow athletic departments to share media revenue with college athletes by the time the parties get to collective bargaining. Given the position the class is taking in the *House* case, it is likely that at least a share of the revenue is going to be a necessity for student athletes in collective bargaining negotiations.<sup>100</sup>

To calculate the first prong of a salary cap within each conference, the representatives for the players and the conferences will have to negotiate which percentage of the media revenue

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<sup>99</sup> See Brad Adgate, March Madness Finals Ratings Set A Record High For Women, Record Low For Men, Forbes (Apr. 5, 2023), <https://www.forbes.com/sites/bradadgate/2023/04/05/ratings-for-the-march-madness-finals-games-sets-a-record-high-women-and-a-record-low-men/?sh=3d593ab86837>.

<sup>100</sup> See NCAA could face billions in damages with judge's ruling in case, *supra* note 17.

distributions to each school will be shared with the players. Once that percentage has been determined, the portion of the media revenue shared with the players will be allocated based off viewership by sport and will be uniform for each school within the conference. For example, say each Big Ten school receives \$100 million in media revenue distribution one year, and the collective bargaining agreement says that 50% of the media revenue will be shared with athletes, so the total player compensation pool per school is \$50 million just off media revenue. If football makes up 50% of the Big Ten's non-postseason viewership that year, then each team Big Ten team can spend up to \$25 million on football player salaries for that upcoming season, along with any additional funds coming from postseason revenues as discussed next.

#### D. Postseason Profits: More Games Equals More Money

##### 1. *Record Postseason Viewership*

This section will identify how conferences can share the revenues each receives for postseason success with student athletes as a second segment of the salary cap calculation. While viewership of college sports has remained strong in the regular season, the postseason viewership numbers for college athletics has been quite remarkable in recent years. Last year, a total of 50 million people watched the Rose Bowl and Sugar Bowl combined, college football's two playoff games for the 2023-2024 season.<sup>101</sup> A week later, another 25 million watched the college football

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<sup>101</sup> See Amanda Brooks, ESPN Delivers Record Viewership Across College Football Playoff and New Year's Six, ESPN Press Room (Jan. 10, 2024), <https://espnpressroom.com/us/press-releases/2024/01/espn-delivers-record-viewership-across-college-football-playoff-and-new-years-six/>.

national championship between Michigan and Washington.<sup>102</sup> This doesn't include the slew of additional bowl games aired throughout the holiday season.<sup>103</sup>

Elsewhere in college sports, viewership was high for both the men's and women's college basketball national championships.<sup>104</sup> The men's game averaged 14.7 million viewers, with an additional 12.4 million viewers during each of the two Final Four games.<sup>105</sup> Meanwhile the women had a record 9.9 million average viewers during the championship game, and an average of 4.5 million viewers in each of its Final Four contests.<sup>106</sup>

## *2. New Postseason Media Deals and Conference Payout Systems*

These record viewership numbers have not gone unrewarded, as the NCAA is looking at major new media deals for postseason play alone. ESPN and the college football playoff are in agreement on a new deal with the now expanded 12-team playoff that has been reported to be for six years and \$7.8 billion, just over \$1.3 billion a year through the 2032 season.<sup>107</sup> While the deal is still pending until the format of the newly expanded playoffs is finalized, the reported number is a massive increase over the old deal which was valued at about \$608 million annually.<sup>108</sup>

The conference payouts under the previous playoff deal were already quite strong. Under the previous model, conferences that had teams participate in the college football playoff received \$6 million per team, and an additional \$4 million for each team that made a "New Years

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<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See Adgate, *supra* note 99.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *College Football Playoff, ESPN agree to 6-year extension worth \$1.3 billion per year: Sources*, The Athletic (Feb. 13, 2024), <https://theathletic.com/5272749/2024/02/13/college-football-playoff-espn-media-rights-deal/>.

<sup>108</sup> See *id.*

Six” bowl that was not a playoff game that season.<sup>109</sup> This did not include the additional funds the schools receive to cover the costs of playing in each game.<sup>110</sup> Additionally, conferences received payouts for all other bowl games that vary based on prestige.<sup>111</sup> Coupled with an academic performance pool, the average payout for each of the five Power Five conferences after the 2023-2024 bowl season was just under \$80 million.<sup>112</sup>

While the new media deal is still being finalized for the recently expanded college football playoff, the reported payouts for the major conferences are expected to be massive.<sup>113</sup> Both the Big Ten and SEC are expected to receive over \$21 million annually from the playoff revenue, with other major conferences the ACC and the Big 12 receiving \$13 million and \$12 million, respectively.<sup>114</sup> Notre Dame is also slated to receive \$12 million for each year it makes the playoff, as they remain an independent college football team and do not participate in a conference.<sup>115</sup> While the deal is still being finalized, this is a major development for the new era of college sports.<sup>116</sup> Under the new playoff layout, each of the four conferences previously mentioned will have at least one representative every year.<sup>117</sup> Meanwhile, the two most successful conferences in college football, the Big Ten and the SEC, will see their respective playoff payouts more than triple as early as next year.<sup>118</sup> There was already a lot of money invested into college football, and there is about to be a whole lot more.

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<sup>109</sup> College Football Playoff Payouts 2023-2024, Business of College Sports (Feb. 25, 2024), <https://businessofcollegesports.com/college-football-playoff-payouts/>.

<sup>110</sup> See id.

<sup>111</sup> See id.

<sup>112</sup> See id.

<sup>113</sup> See Heather Dinich and Pete Thamel, Conferences, Notre Dame Agree To New Playoff Deal, ESPN (Mar. 15, 2024), [https://www.espn.com/college-football/story/\\_/id/39738322/conferences-notre-dame-agree-new-playoff-deal](https://www.espn.com/college-football/story/_/id/39738322/conferences-notre-dame-agree-new-playoff-deal).

<sup>114</sup> See College Football Playoff Payouts 2023-2024, *supra* note 109.

<sup>115</sup> See id.

<sup>116</sup> See id.

<sup>117</sup> See id.

<sup>118</sup> See id.

College basketball has also cashed in on the success of its postseason tournament which is often referred to as “March Madness.” The NCAA has a deal with CBS and Turner Sports for the exclusive media rights to the Men’s NCAA Division 1 Tournament that pays an estimated \$770 million per year and is expected to bump to \$1.1 billion per year in 2025 until after the 2032 season.<sup>119</sup> Meanwhile, women’s college basketball, collectively with 20 other college sports, had a deal in place with ESPN for about \$34 million annually that expired after this year.<sup>120</sup> The NCAA took advantage of the strength of women’s basketball viewership when it agreed to an eight-year, \$920 million new deal with ESPN in January of 2024 for the media rights to the women’s basketball tournament.<sup>121</sup> The deal also included the rights to air the postseasons for 39 other collegiate sports.<sup>122</sup>

The March Madness payouts for each conference are similar to the postseason payouts for college football in that the money is given to each conference and distributed evenly to each school within that conference.<sup>123</sup> Each game played by a conference representative is considered a “unit”, and for the men’s 2023 tournament each unit was valued at about \$2 million each.<sup>124</sup> Ultimately, the more teams a conference has participating in each tournament and the more times those teams advance, the more units they will earn and in turn the payout will be greater.<sup>125</sup> Last

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<sup>119</sup> See Jon Lewis, [CBS, Turner, Extend NCAA Deal Through '32; No Changes to Final Four](https://www.sportsmediawatch.com/2016/04/cbs-turner-ncaa-march-madness-eight-year-extension-final-four-cable-2032/), Sports Media Watch (2014), <https://www.sportsmediawatch.com/2016/04/cbs-turner-ncaa-march-madness-eight-year-extension-final-four-cable-2032/>.

<sup>120</sup> See Adgate, *supra* note 99.

<sup>121</sup> See Ralph D. Russo, [NCAA Agrees To \\$920 Million, 8-Year Deal With ESPN For Women’s March Madness, 39 Other Championships](https://why.org/articles/ncaa-new-920-million-8-year-deal-with-espn-womens-march-madness/), PBS Why (Jan. 4, 2024), <https://why.org/articles/ncaa-new-920-million-8-year-deal-with-espn-womens-march-madness/>.

<sup>122</sup> See *id.*

<sup>123</sup> See Eben Novy-Williams and Lev Akabas, [March Madness 2023: Eliminated Early, Sec Nabs Tournament-High \\$34 Million](https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-unit-payouts-1234717368/), Sportico (Mar. 27, 2023), <https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-unit-payouts-1234717368/>.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

season, three conferences, the SEC, the Big 12, and the Big East, all received payouts of greater than \$30 million.<sup>126</sup>

### 3. *How to Share the Postseason Revenue with Athletes*

While the NCAA has cashed in on the success of its postseason popularity with lucrative new deals, its athletes have not. The NCAA is looking at the potential of more than \$2 billion annually in postseason media revenue starting in 2025, nearly double what it had previously made off of its expiring postseason contracts.<sup>127</sup> Meanwhile, Power Five conferences are making more than \$100 million off postseason distributions for football and men's basketball alone.<sup>128</sup> The NFL uses a similar model to what the NCAA currently uses in conference distributions, as the postseason revenues in the NFL are distributed evenly amongst all 32 teams.<sup>129</sup> However, the NFL distributes this money so that 45% of the postseason revenues are used in the calculation of the player salary caps, while the conferences and universities are keeping the revenue they receive from the athletes.<sup>130</sup>

A model using several factors to compute a salary cap for each conference should include a share of the postseason revenue the conference makes, distributed evenly amongst all teams within the respective conference. However, unlike the general media deals in which it is suggested that distributions are based off viewership, these distributions should be made based

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<sup>126</sup> See *id.*

<sup>127</sup> See generally College Football Playoff, ESPN agree to 6-year extension worth \$1.3 billion per year: Sources, The Athletic (Feb. 13, 2024), <https://theathletic.com/5272749/2024/02/13/college-football-playoff-espn-media-rights-deal/>; Jon Lewis, CBS, Turner, Extend NCAA Deal Through '32; No Changes to Final Four, Sports Media Watch (2014), <https://www.sportsmediawatch.com/2016/04/cbs-turner-ncaa-march-madness-eight-year-extension-final-four-cable-2032/>; Ralph D. Russo, NCAA Agrees To \$920 Million, 8-Year Deal With ESPN For Women's March Madness, 39 Other Championships, PBS Whyy (Jan. 4, 2024), <https://why.org/articles/ncaa-new-920-million-8-year-deal-with-espn-womens-march-madness/>.

<sup>128</sup> See Novy-Williams and Akabas, *supra* note 123.

<sup>129</sup> See generally NFL Collective Bargaining Agreement, *supra* note 58.

<sup>130</sup> See *id.*

off which sport brought in the revenue. This is because the general media deals are with the entire conference, while the postseason deals for football and basketball are made with the NCAA specifically for these individual sports. For the sports that fall under the new deal made with ESPN in January of 2024 that includes 40 total sports, an equitable apportionment based off viewership like the suggested model for the regular season media revenue distribution is appropriate.

The NFL is a completely different entity from the NCAA, and it may not be realistic for the players to ask for 45% of the postseason revenue distributions given to their schools. Yet with new deals beginning to kick in and the size of those distributions on the rise due in large part to the product the student athletes create in competition, they will argue to be compensated for the value they provide their conference and receive a portion of that revenue. That percentage will need to be hammered out in a collective bargaining agreement and provide the schools with the financial flexibility to allow the athletic programs to cover their respective budgets, but there will be at least a share for the student athletes that is evenly distributed through a salary cap.

#### E. Keep the Local Revenue, Give Them NIL

##### 1. *The Danger in Sharing Local Revenue*

This section will suggest how universities can substitute NIL payments for a share of local revenues generated by college sports in the computation of a salary cap, and how this will allow the NCAA to manage NIL deals more effectively.

One of the “big three” revenue streams that make up the NFL and NBA salary cap that has not been discussed is local revenue.<sup>131</sup> However, taking local revenue from colleges will have a severe impact because unlike the value of the media deals, there is no evidence that local revenues are seeing a major spike soon. Additionally, colleges have depended on local revenues for many years to fund a large portion of their athletic departments. Going back to the example of Michigan, the football team saw a reduction from eight home games in 2022 to seven home football games in 2023.<sup>132</sup> Based off just a one game reduction, the program anticipated an \$8.7 million reduction in admissions revenue for the 2023 season.<sup>133</sup> This data means that ticket sales for Michigan’s football team made up over a quarter of the projected revenue for the 2023 season, in which the athletic department was anticipating only slim profits.<sup>134</sup> If football players at Big Ten and SEC schools start going after some of the local revenues their sport generates, then these athletic conferences may not have enough money in their budget to fund non-revenue generating sports and will be in danger of failing to comply with Title IX.

## 2. *NIL, But With Actual Rules*

Rather than go after a share of the local revenues, college athletes would be wiser to keep their current payment plan with stronger governance: a cap on NIL money as Coach Saban suggested. The NCAA has already taken steps to increase standardization amongst schools with NIL deals.<sup>135</sup> The Division One Council has adopted a new plan that will require standardized

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<sup>131</sup> See generally NFL Collective Bargaining Agreement (2020), Article 13 Salary Cap Accounting Rules; NBA Collective Bargaining Agreement (July 2023), Article VII Basketball Related Income, Salary Cap, Minimum Team Salary, Tax Level, Apron Levels, and Designated Share Agreement.

<sup>132</sup> See Kurt Svoboda, Athletic Department Projects Balanced Budget in FY '24, University of Michigan (Jun. 15, 2023), <https://mgoblue.com/news/2023/6/15/general-athletic-department-projects-balanced-budget-in-fy-24>.

<sup>133</sup> Id.

<sup>134</sup> See e.g. id.

<sup>135</sup> See Meghan Durham Wright, 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>.



contracts and disclosure requirements for NIL deals that will take effect on August 1, 2024.<sup>136</sup>

This is a short term fix to resolve the issue of transparency in NIL deals, but when the day comes where college athletes can become employees this effort can be taken further.

The NCAA should implement in a salary cap a limit on NIL expenditures for each athletic department. By making the salary cap on NIL an athletic department wide cap, it tackles a major issue Coach Anderson had discussed. Recall that Coach Anderson was concerned that his school and the Big Ten in general were at a disadvantage because the conference focuses their NIL funds on football and basketball.<sup>137</sup> A cap that reasonably limits the amount of funds an entire athletic department can use will ensure that the schools who spend the most for a marquee sports like football or basketball will not also be able to outspend other universities in non-revenue generating sports. This forces the athletic department to be strategic about how to allocate NIL funds.

### 3. *NIL Cap and Title IX*

Another issue that a department-wide NIL cap addresses is compliance with Title IX. Even if college athletes are deemed to be employees and enter into CBAs with their universities, they are not exempt from protection under Title IX.<sup>138</sup> Therefore, schools must provide the same athletic opportunities, quality of programs, and the availability of scholarship dollars to women as they do to men.<sup>139</sup> Simply put, there needs to be the same opportunities for women as there are for men in college sports.<sup>140</sup> An equitable apportionment based off revenue is different than

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<sup>136</sup> See *id.*

<sup>137</sup> See generally Henderson, *supra* note 48.

<sup>138</sup> See Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J.C. & U.L. 297, 329 (2015).

<sup>139</sup> See *id.* at 322-23.

<sup>140</sup> See *id.* at 324.

limiting an athlete's marketability because of the sport she plays. The schools can argue for giving female athletes a smaller share of media revenue because women's sports generate less revenue for the universities, as detailed above. The same cannot be said for the quantity and quality of NIL deals for female athletes versus male athletes.

Take for example Olivia Dunne, the famous LSU gymnast. She currently is valued to have \$3.5 million in NIL deals, which is third amongst all projections for college athletes behind only Shedeur Sanders and Lebron James Jr.<sup>141</sup> Telling Ms. Dunne that she is not allowed to earn her \$3.5 million because she participates in women's gymnastics, which is not as marketable as football, could be a violation of Title IX by LSU. On the other hand, creating an NIL cap of \$3.5 million for women's gymnastics would likely leave only a few schools like LSU that have the financial ability to pay the price for a top talent in a non-revenue generating sport as the likely landing spot for Ms. Dunne. Thus, a collective bargaining agreement that caps the NIL money an entire athletic department can spend would keep a school like LSU from going out and simply buying the best rosters while still complying with Title IX.

#### 4. *NIL Cap Conclusion*

The cap on NIL spending would have to be reasonable so that there are not great spending disparities between universities in the same conference. It also cannot be so small a number that the typical Division One athlete, maybe not an outlier like Dunne or Sanders, would see the agreement as egregiously limiting his or her ability to earn. The details will need to be discussed amongst representatives from schools in each conference at collective bargaining negotiations to ensure all schools' and the athletes' interests are being served, but the most

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<sup>141</sup> See Barry Werner, Top NIL Earners in NCAA, Yahoo Sports (Feb. 20, 2024), <https://sports.yahoo.com/top-nil-earners-ncaa-153252893.html>.

efficient path to ensure competitive balance and compliance with Title IX is a hard NIL cap for the entire athletic department as Coach Saban suggested.

## F. Multi-Year Contracts for Unionized Athletes

### 1. *Athletes May Reject an NIL Cap*

A point that should not be forgotten when discussing these suggestions for collective bargaining to maintain competitive balance in college sports is that all these terms need to be agreed upon in the actual CBAs. The athletes, speaking through their representatives in collective bargaining negotiations, maintain the right to reject any of these terms discussed. A cap on NIL compensation may be difficult to get athletes to agree to for two reasons.

First, the Supreme Court's decision in the *Alston* case directly stated that restricting athlete compensation is a violation of antitrust law, which opened the gate to NIL compensation.<sup>142</sup> Even though the NCAA would be exempt from an antitrust lawsuit if there was a provision in the CBA limiting each school's use of NIL, getting such a provision into the CBA may be difficult in negotiations. Second, there is no language in the CBA for the NFL that restricts athlete endorsement.<sup>143</sup> Therefore, unlike the language of the other salary cap provisions suggested, there would be no precedent for the NCAA to draw from. This would make this suggested third prong of the salary cap novel and susceptible to unforeseen issues.

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<sup>142</sup> See *Alston*, 549 U.S. at 107.

<sup>143</sup> See *NFL Collective Bargaining Agreement* (2020), Article 51 Miscellaneous, Section 1 Endorsements.

## 2. *Multi-Year Contracts and the Issues They Address*

A solution that can address this issue and be implemented into the CBAs, regardless of whether athletes agree to an NIL cap or not, is multi-year contracts for high school recruits that limit each athlete's ability to enter the transfer portal after each season. These contracts will be structured like the NBA and NFL rookie contracts. In the NBA, rookies sign four-year contracts with the teams that draft them that include team options for both the third and fourth season.<sup>144</sup> At the end of the four-year contract, a team retains the right to offer a player a qualifying offer which makes that player a restricted free agent.<sup>145</sup> The value of the qualifying offer will be based off a player's performance throughout the duration of his rookie deal.<sup>146</sup> In restricted free agency, the team that extended the player the qualifying offer maintains the right to match any offer from another team for a multi-year extension.<sup>147</sup> Teams also retain the right to work out their own multi-year extension with the player after the qualifying offer has been extended.<sup>148</sup> If the player is unable to obtain a multi-year extension, the player plays his fifth year under the qualifying offer and becomes an unrestricted free agent following his fifth season in the league.<sup>149</sup>

In the NFL, drafted players must also remain with the team that drafted them for four years on their rookie contract unless they are cut or traded (the scope of this research paper will not discuss the possibility of college athletes being cut or traded).<sup>150</sup> Following the expiration of

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<sup>144</sup> See NBA Collective Bargaining Agreement (July 2023), Article VIII Rookie Scale: Section 1 Rookie Scale Contracts For First Round Picks.

<sup>145</sup> See Zach ZoBell, NBA Qualifying Offers - What Are They And How Do They Work?, LinkedIn (Aug. 2, 2023), <https://www.linkedin.com/pulse/nba-qualifying-offers-what-how-do-work-zach-zobell/>.

<sup>146</sup> See id.

<sup>147</sup> See id.

<sup>148</sup> See id.

<sup>149</sup> See id.

<sup>150</sup> See NFL Collective Bargaining Agreement (2020), Article 7 Rookie Compensation and Rookie Compensation Pool, Section 3(a) Contract Length.

their rookie deal, players can enter unrestricted free agency and sign with new teams.<sup>151</sup> A common exception to this is if a team were to place a “franchise tag” on a player.<sup>152</sup> Teams possess the ability to franchise tag one player a year so that the tagged player must remain with the team, and they must pay that player a premium contract if they choose to do so.<sup>153</sup>

For CBAs in the NCAA, college athletes should sign two to three season contracts with their teams when they make their commitment out of high school. Four-year initial contracts like professional sports leagues would be too long given that college athletes only have four years of eligibility, and players often transfer due to lack of playing time or other considerations beyond NIL money. The NCAA and its conferences can also explore the possibility of a franchise tag like the NFL does. However, a more fitting solution may be a restricted free agency model like the model the NBA uses after expiration of a player’s initial contract with matching rights for a player’s school.

These contracts will prevent players from entering negotiations with other schools and limit the unrestricted free agency that Coach Saban and others have expressed concern about. If players do not agree to a cap on NIL in collective bargaining negotiations, these multi-year contracts will at least serve as a mechanism to prevent a bidding war in the transfer portal through lucrative NIL offers each year. Having multi-year contracts will bring stability to the transfer portal system that coaches have been calling for without restricting student athletes to a point where they feel stuck at a school for the entire duration of their eligibility.

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<sup>151</sup> See *id.* at Article 9 Veteran Free Agency, Section 1 Unrestricted Free Agents.

<sup>152</sup> See *generally id.* at Article 10 Franchise and Transition Players.

<sup>153</sup> See *id.*

### G. Enforcement of the Salary Cap

Professional leagues have multiple punishments in place for varying violations of their salary cap rules. For example, the NFL states in its collective bargaining agreement that the league may impose a fine of up to \$6.5 million and take away up to two draft picks a year for clubs found to have violated the rules of the salary cap for player compensation.<sup>154</sup> While the NCAA does not possess the ability to take away draft picks, they have in the past punished schools for recruiting violations and illegal compensation of athletes through fines, postseason bans, and reductions in scholarships permitted.

The NCAA for most of its history has been no stranger to harsh punishments for NCAA rule violations. For almost 75 years now, the NCAA has imposed postseason bans for college football teams found in violations of these rules.<sup>155</sup> These bans include the inability to compete in bowl games and compete for a national championship.<sup>156</sup> Not only that, but teams missing out on the postseason have been placed at a huge financial detriment.<sup>157</sup> In 2017, Ole Miss reported that they missed out on about a \$7.8 million share of postseason revenue from the SEC due to a self-imposed bowl ban.<sup>158</sup> The NCAA does not limit this severe of a punishment to just football, as multiple other sports have imposed postseason bans as a punishment for failing to adhere to NCAA rules and standards.<sup>159</sup>

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<sup>154</sup> See generally NFL Collective Bargaining Agreement (2020), Article 14 Enforcement Of The Salary Cap And Rookie Compensation Pool, Section 6(b) Sanctions: Clubs.

<sup>155</sup> See Alex Kirshner, A Brief History Of College Football Bowl Bans, Like The One The NCAA Just Gave Mizzou, SB Nation (Jan. 31, 2019), <https://www.sbnation.com/college-football/2017/2/23/14713598/bowl-ban-postseason-missouri/comment/502359939>.

<sup>156</sup> See id.

<sup>157</sup> See id.

<sup>158</sup> See id.

<sup>159</sup> See Michelle Brutlag Hosick, Division I Teams Face Penalties, Loss Of Postseason Due To Low Aprs, NCAA (May 19, 2020), <https://www.ncaa.org/news/2020/5/19/division-i-teams-face-penalties-loss-of-postseason-due-to-low-aprs.aspx>.

The NCAA has a host of other methods for punishing schools that violate NCAA rules. For example, in 2020 the University of Tennessee's football coach was caught breaking NCAA rules by conducting paid unofficial visits and compensating athletes and their families directly.<sup>160</sup> In addition to several other punishments, the sanctions included a fine of 3% the entire football budget for the 2020 season, a reduction in overall scholarships permitted, and a five-year probation period for the team.<sup>161</sup>

The NCAA can continue with their previous model of enforcing its own rules when the time comes to allow for direct athlete compensation. A way to enforce the salary cap is to continue imposing financial penalties by fining schools that go over the salary cap via several different methods. First, the NCAA may impose a standard fine based on minor violations as they currently do in cases like the Tennessee punishment from 2020. Second, the school's respective conference may withhold money from media right deals by lowering the school's distribution by a certain percentage based on the severity of the action. Athletic department budgets will be constrained when student athletes are added to the payroll. When those budgets take a financial hit, it will hinder the ability of the violating schools to spend up to the salary cap amount. As a result, schools that are found in violation and receive a fine will be less enabled to lure in top recruiting classes due to the financial constraints the NCAA imposes.

Expanding upon the second option, the NCAA can continue to impose postseason bans and withhold the team's share of postseason revenue for teams found to have committed egregious violations of the salary cap rules. As outlined earlier in this research paper, postseason

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<sup>160</sup> See Hundreds Of Violations Occurred In Tennessee Football Program Over 3 Seasons, NCAA (Jul. 14, 2023), <https://www.ncaa.org/news/2023/7/14/media-center-hundreds-of-violations-occurred-in-tennessee-football-program-over-3-seasons.aspx>.

<sup>161</sup> See id.

revenues will likely make up a large portion of each conference's salary cap. The NCAA can impose a rule that with a postseason ban not only does the team not receive those funds, but their salary cap is reduced by the amount of the withheld allocation so that they may not derive those funds from another source. This strong punishment is not unprecedented given the extensive history the NCAA has in keeping schools from participating in postseason play and not being able to reap the financial rewards from it. With financial rewards being used to attract and pay top talent, this level of punishment will prove to be a strong enforcement mechanism and hopefully a deterrent for violating any salary cap rules.

Overall, the NCAA does not have to stray too far from its current model to impose fines on schools that are breaking the rules of the salary cap. This enforcement mechanism will provide a framework to ensure an equal playing field for athlete compensation.

#### IV. CONCLUSION

The NCAA landscape has been accurately referred to as the Wild West in the past few years since the Supreme Court's decision in *Alston*. Eventually, law and order found its way to the Wild West. It will find its way to the NCAA once again. While compensation for NCAA athletes is still in its premature phase, more clarity on how to proceed will arrive soon.

The NLRB decision that Dartmouth's men's basketball players are employees of the university is the first step towards unionization for college athletes. If college athletes nationwide are labeled as employees or able to unionize, the athletes will be able to make a push for better compensation and a share of the revenue that each generates for their respective schools. At that



point, the NCAA will be wise to have conferences enter into CBAs with athletes to avoid being subject to further antitrust lawsuits.

When the time comes for collective bargaining, the NCAA can follow the precedent set forth by professional sports leagues and implement a salary cap across each sport. Drawing from the CBAs of the two most successful professional leagues with a salary cap, the NBA and the NFL, the NCAA can utilize its rapidly expanding media revenue for both its regular season and postseason ventures to carve out its own salary cap. However, with local college athletic revenues being so critical to each college for funding a plethora of activities, the NCAA should allow schools to keep all local revenues for themselves and continue to use NIL money to compensate college athletes. Even if players do not agree to an NIL cap, the NCAA can restrict athlete mobility by making the standard contracts for recruits two to three years in length before players can reach “free agency.” Lastly, the NCAA will not have to reinvent the wheel for punishments when schools violate the salary cap rules, as the current system of punishing schools through fines and postseason bans will apply to rules around athlete compensation as well.

Change is the only constant, and major changes in college athletics have been occurring almost every week with many more on the horizon. The NCAA can use the legal history of collective bargaining and current examples at its disposal to create an appropriate salary cap between conferences and student athletes that ensures competitive balance.