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Preserving a Tradition or Creating a New One? The Legal Benefits of an Enhanced Educational Model for College Sports

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Abstract

This Article examines the seismic shift underway in intercollegiate athletics, focusing on the growing disconnect between college sports and education. The Article explains how this disconnect has diminished the longstanding judicial deference afforded to college athletics, and increased vulnerability to labor and antitrust scrutiny. The Article proposes a new Enhanced Educational Model for college athletics to recenter the inherent value and experience of a rigorous education and mitigate legal risk to college athletics programs.

Introduction

We are in the midst of a seismic shift in intercollegiate athletics. The relationship between the National Collegiate Athletic Association ("NCAA"), colleges, and college athletes is likely to undergo a more significant transformation in this decade than at any other point in the NCAA's history. Although critics have long contended that the very existence of college athletics is under threat from commercial interests, frustration over unchecked

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spending and diminished emphasis on education has reached a new zenith.[1] "Complaints about big-time college sports interfering with the academic integrity of universities" are louder than ever.[2]

Many of the recent changes have provided significant—and long overdue—benefits for college athletes, including stipends to cover their "full cost of attendance," access to multi-year scholarships, and the ability to receive compensation for the use of their name, image, and likeness ("NIL"). Meanwhile, the influx of money into big-time college sports shines an ever-brighter spotlight on skepticism about commercial interests in college sports and the disregard for the universities' educational missions.[3]

The disconnect between college *athletics* and college *education* not only presents an existential question about the future of college sports, but also is one of the primary issues raised in the antitrust and labor attacks against the NCAA. Over the last century, the operative test under antitrust law is whether NCAA rules are reasonably necessary to maintain college sports as distinct from professional sports. Recently, federal courts (including the Supreme Court) have noted that college sports have become less distinct from professional sports and are, therefore, entitled to less deference under the law than they have received in the past.[4]

Complaints about the disconnect between college athletics and education will likely only accelerate. Consider the Football Bowl Subdivision ("FBS"), one of two football classifications within Division I college athletics and the one containing the highest-profile and highest-revenue-earning

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[1] *See* Gabe Feldman, Reimagining The Role Of Intercollegiate Sports In Higher Education 3 (Arnold Ventures), http://craftmediabucket.s3.amazonaws.com/uploads/AVCollegeSportWhitePaper_HigherEd-v4b-1.pdf [https://perma.cc/V9FZ-JYNT] (last visited Dec. 8, 2025).

[2] *Id.*; *see, e.g.*, Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, Aspen Institute (Apr. 23, 2018), https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/ [https://perma.cc/46MH-4DQW].

[3] Feldman, *supra* note 1, at 3; *see, e.g.*, Knight Comm'n on Intercollegiate Athletics, Connecting Athletics Revenue with the Educational Model of College Sports 2 (5th ed. 2025) (orig. pub. 2021), https://www.knightcommission.org/wp-content/uploads/2021/09/CAREModel.pdf [https://perma.cc/Y3FV-V3VH] ("College sports in Division I, most notably in Football Bowl Subdivision (FBS) football, are in the midst of a runaway financial race that threatens to upend and undermine the educational model of college athletics.").

[4] *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 82–83 (2021) (finding that the NCAA failed to set forth "any coherent definition" of amateurism); Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024).

programs.[5] The total annual athletics revenue generated by FBS public institutions is projected to increase to $20.9 billion by 2032[6] Additionally, the proposed *House* class action settlement opens the door for colleges and universities to directly pay their athletes up to $20.5 million each year.[7] As the gap continues to widen between college athletics and education, the NCAA and its institutions will remain vulnerable to antitrust and labor lawsuits and invite broader attacks on the collegiate model, creating a vicious cycle that deepens the athletics-vs-education divide, which in turn might continue to decrease the legal deference afforded to college athletics. This might continue until college athletics is completely severed from the academy.

Although several high-profile athletic departments are embracing this brave new world, many schools are struggling to reconcile "[t]he seemingly paradoxical coexistence of academics and sports-as-entertainment" and are seeking a different path.[8] This Article proposes a new college sports model—the Enhanced Educational Model ("EEM")—which can help harmonize collegiate sports and a university's academic mission and, in turn, minimize some of the legal risk that the existing runaway-spending model has created.

The EEM does not preclude 'big-time college sports' under a revenue-centric model in which athletes are paid. Nor does this Article presume that big-time college sports will or even should abandon a revenue-centric model. Rather, both models can operate in parallel— perhaps even within the same institution, with major sports like football and basketball operating under a revenue-centric model, and other sports following the EEM.

However, the EEM also does not offer a solution to the legal issues facing the revenue-centric model. Big-time college sports are a valuable part of the college athletics fabric, but treating them differently from non-revenue

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[5] *See Football Bowl Subdivision*, Knight-Newhouse Coll. Athletics Database, https://knightnewhousedata.org/fbs [https://perma.cc/4GWY-JKYX] (last visited Dec. 8, 2025) (containing revenue breakdowns).

[6] *See* Knight Comm'n on Intercollegiate Athletics, Financial Projections Through 2032 for Division I FBS Program 22 (2023), https://www.knightcommission.org/wp-content/uploads/2023/09/cla_financial_projections_report_2023.pdf [https://perma.cc/RF33-HXFU].

[7] Dan Murphy, *Judge OK's $2.8B Settlement, Paving Way for Colleges to Pay Athletes*, ESPN (June 6, 2025, 21:28 ET), https://www.espn.com/college-sports/story/_/id/45467505/judge-grants-final-approval-house-v-ncaa-settlement [https://perma.cc/XF62-SP2L] ("The annual cap is expected to start at roughly $20.5 million per school in 2025-26 and increase every year during the decade-long deal. These new payments are in addition to scholarships and other benefits the athletes already receive.").

[8] Feldman, *supra* note 1, at 3.

sports can prevent the non-revenue sports from being engulfed by the legal issues facing revenue-centric sports, primarily football and basketball.[9]

Thus, the EEM offers a potential path to alleviate withering legal attacks on the majority of college athletics programs (those outside the realm of big-time college sports). The EEM accomplishes this by removing the economic engine—which is the chief source of antitrust and labor law scrutiny—from a school's athletics program and replacing it with a rigorous academic experience that captures the inherent educational value of sports.

Part I of this Article provides an overview of the history and early criticisms of the connection between college athletics and education. Part II examines the history of judicial deference afforded to college athletics. Part III explores the growing divide between college athletics and education and the consequent diminished judicial deference. Finally, Part IV discusses the proposed EEM and how it could lead to renewed legal protection for college athletics.

I. Early History and Criticisms of the Relationship Between College Athletics and Education

The NCAA was formed in 1905 in response to a series of fatalities that occurred during college football games and initially positioned itself as "an advisory body that promoted amateurism and discouraged commercialism."[10] This new governing body articulated standards for intercollegiate athletics,

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[9] The idea of separating the top football programs into a new league has been raised widely. *See, e.g.*, Paolo Uggetti, *UCLA's Chip Kelly Advocates for Single Power 5 Conference*, ESPN, (Dec. 17, 2023, 01:57 ET), https://www.espn.com/college-football/story/_/id/39130831/ucla-chip-kelly-advocates-single-power-five-conference [https://perma.cc/F992-FS78]; Brandon Marcello, *After the House v. NCAA Settlement: Is a 'Super League' College Football Realignment's Inevitable Final Form?*, CBS Sports (Aug. 6, 2025, 11:50 ET), https://www.cbssports.com/college-football/news/after-the-house-v-ncaa-settlement-is-a-super-league-college-football-realignments-inevitable-final-form/ [https://perma.cc/NT85-QT69]. One proposal, dubbed "Project Rudy," could create an approximately seventy-team league with a new scheduling system, television broadcast deal, and expanded postseason. *See* Ross Dellenger, *While SEC and Big Ten Leaders Mull Major Changes, a New Super League Concept Could Radically Alter College Sports*, Yahoo! Sports (Oct. 8, 2024), https://sports.yahoo.com/while-sec-and-big-ten-leaders-mull-major-changes-a-new-super-league-concept-could-radically-alter-college-sports-130031473.html [https://perma.cc/VD33-SYVU].

[10] Brian M. Ingrassia, The Rise of Gridiron University: Higher Education's Uneasy Alliance with Big-Time Football 58–59 (Univ. Press of Kan. ed.,

including a prohibition on "promised pay in any form" in return for athletic performance.[11] Over time, however, the NCAA loosened its restrictions and expanded the scope of permissible benefits to include athletic scholarships and, eventually, room, board, books, fees, and the athlete's "full cost of attendance,"[12] as well as certain payments incidental to athletic performance and education-related benefits.[13]

Today, the NCAA's membership includes approximately 1,100 colleges and universities, organized into three competitive divisions.[14] Division I, the highest level of intercollegiate competition, encompasses approximately 350 schools.[15] Division I football programs are further subdivided into the FBS and the Football Championship Subdivision ("FCS").[16] FBS football and men's basketball generate the vast majority of collegiate athletic revenue and media attention.[17]

Throughout its history, the NCAA has long stated that its mission is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body" thereby preserving "a clear line of demarcation between intercollegiate athletics and professional sports."[18] Until 2022, the NCAA Constitution also stated that "[s]tudent-athletes shall be amateurs," that "their participation should be

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2012) (discussing creation of the Intercollegiate Athletic Association of the United States, later renamed the National Collegiate Athletic Association).

[11] NCAA v. Alston, 594 U.S. 69, 77 (2021).

[12] *See* O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) (affirming that NCAA rule prohibiting athletes from receiving their "full cost of attendance" was illegal under antitrust law).

[13] *Alston*, 594 U.S. at 77–78.

[14] *See Overview*, NCAA, https://www.ncaa.org/sports/2021/2/16/overview.aspx [https://perma.cc/HUT6-WL7R] (last visited Dec. 8, 2025).

[15] *See Our Division I Members*, NCAA, https://www.ncaa.org/sports/2021/5/11/our-division-i-members.aspx [https://perma.cc/2UUW-N6FW] (last visited Dec. 8, 2025) (displaying data from the 2025-26 academic year).

[16] *Football Bowl Subdivision*, *supra* note 5.

[17] *See* Andrew Zimbalist, *Analysis: Who Is Winning in the High-Revenue World of College Sports?*, PBS News (Mar. 18, 2023, 19:14 ET), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports [https://perma.cc/QGF8-LSS4].

[18] *See* NCAA, 2024-2025 NCAA Division I Manual 1 (2024) ("The National Collegiate Athletic Association is . . . committed to the well-being and development of student-athletes, to sound academic standards and the academic success of student-athletes . . . . Member institutions and conferences believe that intercollegiate athletics programs provide student-athletes with the opportunity to participate in sports and compete as a vital, co-curricular part of their educational experience.").

motivated primarily by education," and that they "should be protected from exploitation by professional and commercial enterprises."[19]

Despite these lofty goals, the tension between college athletics and education emerged well before the NCAA's formation and has persisted ever since.[20] An 1852 boating contest between Harvard and Yale is widely considered the first collegiate athletic competition, and the first intercollegiate football game was held in 1869 between Princeton and Rutgers.[21] Football in particular grew quickly in popularity. By the 1890s, Thanksgiving Day championship games in New York City routinely drew crowds exceeding 40,000 fans.[22] By the early 1900s, college sports had become a commercial enterprise "attract[ing] hundreds of thousands of paying spectators and millions of dollars to arenas throughout the nation."[23]

Even this earliest commercialization of college sports was accompanied by violations of amateur ideals. Although institutional bylaws adopted in 1906 declared that "no student shall represent a college or university in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial assistance,"[24] schools had begun using "paid ringers" by the 1880s.[25] The "absence of academic residency requirements gave rise to 'tramp athletes,'" who traveled between institutions in pursuit of better financial opportunities, often with little connection to the educational mission of the schools they represented.[26]

Some schools made efforts to keep athletics within the university's academic units.[27] In 1907, a future University of Michigan regent predicted he'd "live to see the day when the athletic department w[ould] be conducted the same as the department of Greek, the department of Physics, or any other

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[19] NCAA Const. art. 2, § 9 (1997). As part of a comprehensive rewrite, the NCAA removed this article in 2022. *See New NCAA Constitution*, *Division I Proposal - BOG-2022-1*, NCAA, https://web3.ncaa.org/lsdbi/search/proposalView?id=106135 [https://perma.cc/ST2F-UKCT] (last visited Dec. 8, 2025).

[20] *See* Feldman, *supra* note 1, at 2.

[21] Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 Am. Q. 222, 224–29 (1970).

[22] James L. Shulman & William G. Bowen, The Game of Life: College Sports and Educational Values 6 (2001).

[23] Ingrassia, *supra* note 10, at 115.

[24] Robert J. Romano, *The Concept of Amateurism*: *How the Term Became Part of the College Sport Vernacular*, 1 UNH Sports L. Rev. 29, 36 (2022) (quoting Intercollegiate Athletic Ass'n U.S. Const. By-Laws art. VII, § 3 (1906)).

[25] NCAA v. Alston, 594 U.S. 69, 75 (2021).

[26] *Id.*

[27] Ingrassia, *supra* note 10, at 137–38.

department on campus."[28] From the 1910s into the 1930s, Ohio State placed its athletic department under faculty control; Iowa made its coaches tenured faculty members within the physical education department; and Illinois housed athletics within its "School of Physical Education."[29] These experiments, however, proved short-lived as commercial pressures and institutional incentives increasingly separated athletics from academic governance.

Criticism of this divergence was both immediate and sustained.[30] In 1893, Harvard University's president observed:

> With athletics considered as an end in themselves, pursued either for pecuniary profit or popular applause, a college or university has nothing to do. Neither is it an appropriate function for a college or university to provide periodical entertainment during term-time for multitudes of people who are not students.[31]

A decade later, in 1903, Stanford University's president stated that "he would prefer that college football be banished for a decade and 'athletic fields closed . . . for fumigation than to see our colleges helpless in the hands of athletic professionalism.'"[32] By the 1920s, commentators framed the issue in even starker terms. Upton Sinclair famously proclaimed that "[c]ollege athletics, under the spur of commercialism, has become a monstrous cancer, which is rapidly eating out the moral and intellectual life of our educational institutions."[33] The 1929 Carnegie Foundation echoed these concerns, concluding that "[t]he admission to the university of students who are financed because of their athletic prowess and because of their ability to round out winning athletics teams, cannot do otherwise than result in disaster to our educational program and to its standards of scholarship."[34]

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[28] *Id.* at 137.

[29] *Id.* at 136.

[30] *See* Feldman, *supra* note 1, at 2.

[31] *See id.* at 2 (quoting Charles T. Clotfelter, Big-Time Sports in American Universities 10 (2011)).

[32] *See id.* at 3 (alteration in original) (quoting Ingrassia, *supra* note 10 at 53).

[33] *See* Feldman, *supra* note 1, at 3 (quoting Steven Mintz, *The Uncertain Future of College Sports*, Inside Higher Ed (Apr. 16, 2021), https://www.insidehighered.com/blogs/higher-ed-gamma/uncertain-future-college-sports [https://perma.cc/G955-77RM]).

[34] *See* Howard J. Savage et al., *American College Athletics*, Carnegie Found. for the Advancement of Teaching, 1929, at 32, http://www.thecoia.org/wp-content/uploads/2014/09/Carnegie-Commission-1929-excerpts-1.pdf [https://perma.cc/F78C-VH6Q]); Knight Comm'n on Intercollegiate Athletics, *supra* note 3, at 2 ("College sports in Division I, most notably FBS football, are in the midst of

Indeed, most of the problems raised nearly a century ago "are still with us, and in barely altered forms," including whether athletic scholarships are appropriate, the purported character education of college sports, how to fund college sports, and the role of third-party boosters.[35]

II. Antitrust and Labor Judicial Deference to the Educational Model of College Sports

A. Antitrust Background and Judicial Deference

Federal antitrust law, principally the Sherman Act,[36] prevents business competitors with market power from entering agreements, creating rules, or otherwise acting to restrain economic competition.[37] In the context of sports, courts most commonly apply the Rule of Reason, an analysis that balances the procompetitive benefits of the challenged conduct with its anticompetitive effects and whether those justifications could be achieved through less restrictive means.[38] Despite the early criticisms and repeated antitrust legal attacks, the NCAA's athletic/academic model received broad and virtually unwavering support from the courts for nearly a century.

Judicial deference to this model reached a peak in *NCAA v. Board of Regents of the University of Oklahoma*, where the Supreme Court declared that the "academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable."[39] The Court added that "the NCAA plays a vital role" in

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a runaway financial race that threatens to upend and undermine the educational model of college athletics."); *see also* Charles T. Clotfelter, Big-Time Sports in American Universities 26 (2011) ("Big-time college athletics has little to do with the nature or objectives of the contemporary university. Instead, it is a commercial venture, aimed primarily at providing a entertainment for those beyond the campus and at generating rewards for those who stage it."). Further along these lines, in some cases, athletes are higher paid in college than professional sport. *See, e.g.*, NCAA v. Alston, 594 U.S. 69, 77 (2021) (noting that Hugh McElhenny, a halfback at the University of Washington in the 1940s, "became known as the first college player ever to take a cut in salary to play pro football" and that he reportedly said: "A wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.").

[35] Shulman & Bowen, *supra* note 22, at 8.

[36] 15 U.S.C. § 1, *et seq*.

[37] *Alston*, 594 U.S. at 96.

[38] *Id.* at 96–97.

[39] 468 U.S. 85, 101–02 (1984).

preserving this tradition, that its rules "widen consumer choice—not only the choices available to sports fans but also those available to athletes."[40] In perhaps its most enduring—and consequential—dictum, the Court also stated:

> 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]

The Court further framed the NCAA's role as safeguarding "a tradition that might otherwise die."[42]

For nearly four subsequent decades, lower courts consistently invoked this language to justify great deference to NCAA regulations, particularly those limiting athlete compensation, because of the educational value of college athletics to college athletes.[43] Courts reasoned that such restrictions were procompetitive because they preserved the "unique atmosphere" of intercollegiate sports and promoted the educational welfare of student-athletes.[44] As one court observed in 1990, there remained "validity to the Athenian concept of a complete education derived from fostering full growth of both mind and

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[40] *Id.* at 102.

[41] *Id.* at 120.

[42] *Id.*

[43] *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) ("The goal of the NCAA is to integrate athletics with academics."); *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019) ("[T]he evidence shows that student-athletes benefit from receiving a college education."); *cf.* Albach v. Odle, 531 F.2d 983, 985 (10th Cir. 1976) ("The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity."); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) ("The evidence further shows that these justifications are in keeping with the NCAA principles of amateurism and recruiting that aim to promote education and keep student athletics separate from professional sports."); Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 898 (D. Colo. 1976) ("The objectives of the NCAA have been previously stated. They include maintaining intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."); Ass'n for Intercollegiate Athletics for Women v. NCAA, 558 F. Supp. 487, 494 (D.D.C. 1983) ("[The NCAA] exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity.").

[44] Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

body," and the NCAA rules were therefore justified by their role in maintaining "competition between 'student-athletes,'" rather than professional laborers.[45]

B. Labor & Employment Law Deference

Labor and employment law poses two related inquiries for collegiate athletics: (1) whether college athletes qualify as "employees" entitled to minimum wage and other benefits under the Fair Labor Standards Act ("FLSA");[46] and (2) whether college athletes are entitled to organize unions and collectively bargain under the National Labor Relations Act ("NLRA").[47] The benefits offered by each law apply only to workers who meet the legal definition of an "employee."

The NCAA's judicial deference also extended to labor and employment cases, where courts consistently held that college athletes were not employees, citing in part the academic foundation of college athletics. In FLSA cases, courts often emphasized the amateur and extracurricular nature of collegiate sports. In *Berger v. NCAA*, for example, the United States Court of Appeals for the Seventh Circuit applied an "economic reality" test and leaned on what it described as the NCAA's "revered tradition of amateurism."[48] The court concluded that, as a matter of law, college athletes were not FLSA employees because they did not perform "work" for their schools.[49]

The *Berger* Court relied heavily on the Department of Labor's Field Operations Handbook, which excludes extracurricular activities like college sports from FLSA coverage when they are "conducted primarily for the benefit of the participants as a part of the educational opportunities provided to the students by the school or institution."[50] The court reasoned that "the long tradition of amateurism in college sports, by definition, shows that student athletes—like all amateur athletes—participate in their sports for reasons

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[45] *Id.*

[46] 29 U.S.C. §§ 201–19.

[47] 29 U.S.C. §§ 151–69.

[48] 843 F.3d 285, 290 (7th Cir. 2016).

[49] *Id.* ("[T]o qualify as an employee for purposes of the FLSA, one must perform 'work' for an 'employer.'" (quoting NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984))).

[50] *Id.* at 292–93 (citing Wage & Hour Div., U.S. Dep't of Lab., Field Operations Handbook § 10b03(e) (2016) [hereinafter "Field Operations Handbook"]).

wholly unrelated to immediate compensation. . . . Simply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA."[51]

Treatment of college athletes under the NLRA is procedurally distinct from the FLSA. The NLRA protects and governs employees' right to organize and collectively bargain with their employers, i.e., to unionize; it also establishes the National Labor Relations Board (NLRB), the body charged with overseeing collective bargaining procedures and hearing grievances.[52] Challenges under the NLRA must proceed first through the NLRB, beginning with a regional director's decision and potentially culminating in review by the full Board.[53] Only after the Board issues a final ruling may the dispute reach the federal courts.

To date, the full Board has never squarely resolved the issue of whether college athletes qualify as "employees" under the Act—although it has gotten close, as discussed below.

The first serious attempt to gain NLRA "employee" status for college athletes came from Northwestern University football players in 2014. Applying the common-law agency test, the NLRB regional director concluded that the players were employees because they (1) performed services for the university's benefit (including generating significant football revenue and reputational benefits); (2) received compensation for that work in the form of athletic scholarships and other benefits; and (3) were subject to extensive control over their daily schedules.[54] On appeal, however, the full Board declined to assert jurisdiction and expressly did not decide whether college athletes qualify as employees; it did notably observe that the Northwestern players "receive no academic credit for their football endeavors."[55]

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[51] *Id.*

[52] *See* 29 U.S.C. §§ 153, 157; *National Labor Relations Act*, Nat'l Lab. Rels. Bd., https://www.nlrb.gov/guidance/key-reference-materials/national-labor-relations-act [https://perma.cc/7H8B-3XVC] (last visited Dec. 12, 2025).

[53] *See* 29 U.S.C. §§ 153, 157; *National Labor Relations Act*, *supra* note 52.

[54] *See* Nw. Univ., No. 13-RC-121359, 2014 WL 1246914, at *12–14 (N.L.R.B., Region 13 Mar. 26, 2014).

[55] Nw. Univ., 362 N.L.R.B. 1350, 1351 (2015). In 2021, then-NLRB General Counsel Jennifer Abruzzo issued a formal memorandum taking the position that "scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA." Off. of Pub. Affs., *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status of Players at Academic Institutions*, Nat'l Lab. Rels. Bd. (Sep. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/53AZ-6GPQ]. On February 14, 2025, the new Acting NLRB General Counsel,

Taken together, antitrust and labor jurisprudence long reflected a broad judicial willingness to accept the NCAA's assertion that college athletics are meaningfully distinct from professional sports because of their educational foundation. That deference persisted despite decades of criticism regarding commercialization, athlete exploitation, and the growing economic stakes of Division I athletics.

In recent years, however, courts have increasingly questioned the factual and legal premises underlying that deference, discussed further in section III(B).

The next Part of this Article highlights the forces driving the increasingly blurred distinctions between college and professional sports and analyzes how those developments are reshaping judicial treatment of the NCAA's regulatory authority.

III. Diminished Judicial Deference to the NCAA

A. The Explosion of Athletic Spending and Further Professionalization of College Sports

Although intercollegiate athletics has been heavily influenced by commercial interests since its inception, the Supreme Court's 1984 decision in *NCAA v. Board of Regents of the University of Oklahoma*, which opened the door to market-based revenue from television broadcasting rights, can be seen as a fountainhead for the revenue that has dramatically altered college athletics in the decades since. Especially in recent years, growth in media revenue—particularly at the top tier of Division I football—has accelerated to a level that increasingly resembles professional sports.

The most striking example is the College Football Playoff ("CFP"). Its initial television agreement generated approximately $5.64 billion over twelve years; in March 2024, that agreement was replaced with a new six-year deal valued at roughly $7.8 billion.[56] Conference-level media contracts also reached new heights, with the Big Ten and Southeastern Conference ("SEC")

William Cowen, formally rescinded Abruzzo's 2021 memorandum. *See* Off. of Pub. Affs., *GC 25-05 Rescission of Certain General Counsel Memoranda*, Nat'l Lab. Rels. Bd. (Feb. 14, 2021), https://www.nlrb.gov/news-outreach/news-story/gc-25-05-rescission-of-certain-general-counsel-memoranda [https://perma.cc/7X3R-WJTB].

[56] *See* Kristi Dosh, *Current College Sports Television Contracts*, Bus. of Col. Sports, (Mar. 19, 2024), https://businessofcollegesports.com/current-college-sports-television-contracts/ [https://perma.cc/ELR2-MHAE].

deals far eclipsing those of other conferences. For example, each school in the Big 12 Conference will receive approximately $31.7 million per year through the 2030–31 season, while schools in the Big Ten and SEC are expected to receive annual distributions approaching—or exceeding—$70 million per school over comparable periods.[57]

Division I men's college basketball has also seen explosive growth. From 1982 to 1984, CBS paid approximately $16 million per year to televise the NCAA men's basketball tournament.[58] Twenty years later, the rights fees were over $1 billion per year.[59] In 2024, the NCAA signed an eight-year television deal totaling $115 million per year for forty NCAA championships (twenty-one women's events and nineteen men's events), which tripled the value of the prior contract.[60]

The revenue disparity in the conference television deals has spurred massive conference realignment, especially in recent years, with several schools leaving their traditional, regional-based rivals to chase more lucrative football media contracts. As one example, in 2023, most of the schools in the Pac-12 Conference—a group of elite athletic universities founded in 1915 and located on the West Coast—exited to join the ACC, Big 12, or Big Ten, conferences of elite athletic universities primarily located in the East Coast and Midwest.[61] The moves were inarguably driven by a desire to increase their revenue from the more lucrative conference football television deals, not a desire to improve the educational experience of their athletes.

Of the many deleterious impacts these conference realignments had on college athletes, perhaps none is more striking and illustrative than the University of Oregon men's basketball team. For the 2024–25 season, the

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[57] *Id.*

[58] Gordon S. White, *N.C.A.A. Title Basketball Sold to CBS for $48 Million* (Mar. 5, 1981), https://www.nytimes.com/1981/03/05/sports/ncaa-title-basketball-sold-to-cbs-for-48-million.html [https://perma.cc/9JN4-Y4PQ].

[59] *See* NCAA v. Alston, 594 U.S. 69, 93 (2021).

[60] Dosh, *supra* note 56.

[61] *See* Jacob Lev & Homero De la Fuente, *5 Universities Announce Departure from Pac-12 Conference on Friday, Leaving its Future in Question*, CNN (Aug. 4, 2023, 23:32 PM ET), https://www.cnn.com/2023/08/04/sport/oregon-washington-big-ten [https://perma.cc/X6JY-7D7Y]; Pete Thamel, *ACC adding Stanford, Cal, SMU as New Members in 2024*, ESPN (Sept. 1, 2023, 8:04 AM ET), https://www.espn.com/college-sports/story/_/id/38304694/sources-acc-votes-invite-stanford-cal-smu [https://perma.cc/9TTY-LEBA]; *see also* Peter A. French, Ethics and College Sports 105–06 (2004) (discussing restructuring of the Big East and dissolution of the Southwest Conference, driven primarily by member institutions pursuing more lucrative television contracts).

team traveled nearly 27,000 miles to compete in eighteen out-of-state games, including five trips exceeding 1,500 miles.[62] As a result of extensive travel demands, every player on the team was required to enroll exclusively in online-only courses, raising questions about whether the structure of major college sports remains meaningfully tethered to the academic mission of universities or more closely resembles professional sports.[63]

During this same period, state legislators took notice of the enormous and growing economic realities of college sports and opened the door for college athletes to receive compensation for their NIL. California enacted the first such law in September 2019.[64] More than thirty states have followed suit, and in 2021 the NCAA abandoned its long-standing prohibition on college athletes receiving NIL compensation from third parties.[65] Since then, college athletes have reportedly received hundreds of millions of dollars from third parties under this new compensation regime.[66]

Recently, NCAA rule changes have gone even further, permitting "levels and types of student-athlete compensation that have never been permitted in the history of college sports, while also very generously compensating

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[62] The prior year, the team traveled 7,327 miles. *See* Laine Higgins, *They're Going to March Madness—but Only After Circumnavigating the Planet*, Wall St. J. (Mar. 14, 2025, 07:00 ET), https://www.wsj.com/sports/basketball/oregon-ducks-big-ten-travel-march-madness-8ead1b8d [https://perma.cc/ZKL3-GH3Z].

[63] *Id.*

[64] Dan Murphy, *California Defies NCAA as Gov. Gavin Newsom Signs into Law Fair Pay to Play Act*, ESPN (Sep. 30, 2019, 10:31 ET), https://www.espn.com/college-sports/story/_/id/27735933/california-defies-ncaa-gov-gavin-newsom-signs-law-fair-pay-play-act [https://perma.cc/HD86-T55A].

[65] Elizabeth Frost Hemann & Mark R. Butscha, Jr., *Trouble in the Huddle – Uncertainty and Opportunity with the NCAA'S NIL Rules*, Thompson Hine (Mar. 28, 2024), https://www.thompsonhine.com/insights/trouble-in-the-huddle-uncertainty-and-opportunity-with-the-ncaas-nil-rules/ [https://perma.cc/G6J9-QPKF].

[66] For example, Duke University men's basketball star Cooper Flagg garnered NIL deals worth a reported $2.6 million in his first year. Ryan Haley, *Cooper Flagg becomes first men's college basketball player with Gatorade endorsement deal*, USA TODAY Sports (Oct. 29, 2024 13:49 ET), https://dukewire.usatoday.com/story/sports/college/duke/mens-basketball/2024/10/29/cooper-flagg-gatorade-nil-endorsement-deal/75918107007/ [https://perma.cc/C5J6-GQQB]. Also, Louisiana State University women's basketball Star Flau'jae Johnson has a reported $1.5 million NIL valuation. Lindsey Darvin, *Women Athletes Are Reshaping College Sports' Financial Landscape Through NIL Success*, Forbes, (Oct. 29, 2024 11:42 ET), https://www.forbes.com/sites/lindseyedarvin/2024/10/28/women-athletes-are-reshaping-college-sports-financial-landscape-through-nil-success/ [https://perma.cc/55RP-CCTN].

Division I student-athletes who suffered past harms."[67] There is no indication that the nation's desire for big-time college sports is waning, and it would be no surprise if other, new developments continue to increase the revenue in the college sports ecosystem in the ensuing years and decades.

B. Commercialization and Diminished Antitrust Deference

Given the changes summarized above, it is perhaps unsurprising that courts have begun to view the collegiate athletic experience, particularly in football and basketball, as increasingly indistinct from professional sports. The diminished distinction has led to the rapid erosion of judicial deference to the NCAA over the last two decades in both antitrust and labor disputes.

The modern turning point came in 2014 in *O'Bannon v. NCAA*.[68] In an opinion written by Judge Wilken (the same judge who presided over the *House* settlement and the *Alston* trial), the district court struck down NCAA rules that barred schools from compensating FBS and Division I men's basketball players for their "full cost of attendance," or from paying them up to $5,000 per year in deferred compensation for the use of their NIL.[69] Judge Wilken's decision was "the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."[70]

On appeal, the Ninth Circuit affirmed the portion of the injunction that permitted full cost-of-attendance scholarships but reversed the portion permitting additional NIL compensation.[71] Despite the narrow ruling, the Ninth Circuit made clear that the NCAA athlete restrictions at issue could not be deemed legal as a matter of law under *Board of Regents* and "reaffirm[ed] that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason."[72]

The Supreme Court's 2021 decision in *NCAA v. Alston* marked an even more significant turning point. There, the Court described modern college sports as a "sprawling enterprise" and a "massive business," explicitly rejecting the NCAA's argument that its rules warranted abbreviated or special antitrust

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[67] *In re* Coll. Athlete NIL Litig., No. 20-CV-03919 CW, 2025 WL 1675820, at *2 (N.D. Cal. June 6, 2025).
[68] 802 F.3d 1049 (9th Cir. 2015)
[69] *Id.* at 1053.
[70] *Id.*
[71] *Id.* at 1075–76.
[72] *Id.* at 1079.

scrutiny by virtue of "amateurism."[73] In doing so, the Court disavowed prior dicta suggesting that NCAA compensation restraints were presumptively lawful and made clear that the NCAA's rules are instead subject to ordinary Rule of Reason analysis.[74]

Specifically, the Court characterized prior references to amateurism in *Board of Regents* as "stray comments" that "do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions."[75] Although the *Alston* Court affirmed the district court's narrow injunction of certain NCAA restraints "on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like," it underscored that industry-specific exemptions from antitrust law are matters for Congress, not the judiciary.[76]

Despite the narrow ruling, Justice Kavanaugh added a scathing concurrence to "underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[77] Further, Justice Kavanaugh noted that "[t]he NCAA's business model . . . of using unpaid student athletes to generate billions of dollars in revenue for the colleges . . . would be flatly illegal in almost any other industry in America" and succinctly asserted that "[t]he NCAA is not above the law."[78]

Following *Alston*, a wave of antitrust litigation has attacked virtually every type of NCAA restriction, including athlete eligibility rules,[79] limits on

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[73] NCAA v Alston, 594 U.S. 69, 79, 108 (2021).

[74] *Id.* at 92–93.

[75] *Id.* at 92–93. As Justice Kavanaugh explained, "[t]he Court makes clear that the decades-old 'stray comments' about college sports and amateurism made in [*Board of Regents*] were dicta and have no bearing on whether the NCAA's current compensation rules are lawful." *Id.* at 108 (Kavanaugh, J., concurring). The Court added that the NCAA's unique nature does not "categorically exempt its restraints from ordinary rule of reason review." *Id.* at 90 (majority opinion).

[76] *Id.* at 96, 103 (internal quotation marks omitted).

[77] *Id.* at 108 (Kavanaugh, J., concurring).

[78] *Id.* at 109–10, 112. Although this quote received much attention, others had previously reached the same conclusion. *See, e.g.*, NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984); O'Bannon v. NCAA, 802 F.3d 1079, 1063–64 (9th Cir. 2015) ("The amateurism rules' validity must be proved, not presumed. . . . The NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules."); Hennessey v. NCAA, 564 F.2d 1136, 1149 (5th Cir. 1977) ("The court holds that the NCAA is not entitled to a total exclusion from anti-trust regulations on this ground.").

[79] *See, e.g.*, Fourqurean v. NCAA, 143 F.4th 859, 868–71 (7th Cir. 2025) (reversing lower court's grant of plaintiff motion for temporary restraining order); Pavia v. NCAA, 760 F. Supp. 3d 527, 535–45 (M.D. Tenn. Dec. 18, 2024) (enjoining NCAA

scholarships,[80] amateurism rules,[81] restrictions on NIL compensation,[82] athlete transfer rules,[83] and prohibitions on athletes accepting prize money in non-NCAA competitions.[84]

In some of these cases, the courts enjoined the NCAA from enforcing long-standing "amateurism" rules in light of the increasing professionalization of college sports.[85] For example, in *Ohio v. NCAA*, multiple state attorneys general challenged the NCAA's transfer eligibility rule, which required athletes transferring schools to sit out a season before competing at their new school.[86] The district court began by outlining the substantial revenues generated by the NCAA and Division I conferences and held that the rule unlawfully limited athletes' ability to choose a school "that provides the best environment for their academic, mental, *and economic* well-being."[87] The court's analysis reflected a broader judicial shift away from categorical deference and toward a more skeptical examination of NCAA rules that constrain athlete mobility and economic opportunity.

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from restricting duration of athlete's eligibility based on time spent at junior college), *dismissed as moot by* Pavia v. NCAA, 154 F.4th 407 (6th Cir. 2025).

[80] Cornelio v. NCAA, No. 24-cv-02178 (D. Colo. filed Aug. 6, 2024).

[81] *See* Tennessee v. NCAA, 718 F. Supp. 3d 756, 761–66 (E.D. Tenn. 2024) (granting preliminary injunction preventing NCAA from enforcing rules restricting booster involvement in NIL negotiations; enjoining NCAA from enforcing its "NIL recruiting ban"); *Tennessee Attorney General Announces Settlement in Principle with NCAA to Protect Student-Athletes' Rights*, Att'y Gen. & Rep. (Jan. 31, 2025 15:19 CT), https://www.tn.gov/attorneygeneral/news/2025/1/31/pr25-6.html [https://perma.cc/RV2S-TH6P] (announcing settlement that maintains injunction in *Tennessee v. NCAA*).

[82] *See In re* Coll. Athlete NIL Litig., No. 20-cv-03919 CW, 2023 WL 8372787 (N.D. Cal. Nov. 3, 2023); *see also* Fontenot v. NCAA, No. 23-cv-03076 (D. Col. filed Nov. 20, 2023) (not part of the *House* settlement).

[83] Ohio v. NCAA, 706 F. Supp. 3d 583, 594 (N.D. W.Va. 2023) (enjoining NCAA "one-year-in-residence" requirement for transfer students). The NCAA reached a settlement with the U.S. Department of Justice that eliminated the rule at issue. *See* Mike Scarcella, *NCAA Settles US, States' Antitrust Lawsuit over Athlete Transfer Rules* (May 30, 2024, 16:57 CDT), https://www.reuters.com/legal/government/ncaa-settles-us-states-antitrust-lawsuit-over-athlete-transfer-rules-2024-05-30/ [https://perma.cc/2M4L-N2J5].

[84] *See* Brantmeier v. NCAA, No. 24-cv-00238, 2024 WL 4433307, at *2–6 (M.D. N.C. Oct. 7, 2024) (denying plaintiff's motion for preliminary injunction).

[85] *See* Pavia, 760 F. Supp. 3d at 535–45; Tennessee v. NCAA, 718 F. Supp. 3d at 759; Ohio v. NCAA, 706 F. Supp. 3d at 594.

[86] 706 F. Supp. 3d 583, 588–90 (N.D.W. Va. 2023).

[87] *Id.* at 588–89, 592 (emphasis added).

The most consequential among these challenges was the consolidated NIL antitrust litigation, commonly known as the "*House* case."[88] In 2020, a class of college athletes challenged NCAA rules that had restricted them from earning money for their NIL.[89] In June 2025, the Northern District of California approved a settlement to resolve *House*,[90] which provided over $2.5 billion in retroactive NIL compensation for former athlete class members and created a future compensation model governing schools' sharing of revenue directly with their athletes over the succeeding ten years.[91] Over 100,000 athletes submitted claims for past damages payments, with approximately ninety-five percent of retroactive compensation allocated to football and men's and women's basketball players from Power Five schools.[92] The combined value of existing benefits (e.g., athletic scholarships) to Division I athletes and future athlete payments over the ten-year period are estimated to total $19 billion, which represents approximately half of Division I athletic revenues, "similar to the share of professional sports revenue that is shared with professional athletes."[93]

The *House* settlement represents only the beginning of a major shift in the legal and economic structure of college sports, and a significant amount of further litigation is certain to follow. As the court noted in approving the settlement, "Because this action is being settled instead of being litigated through trial, the question[] of whether the . . . conduct permitted under the terms of the [settlement agreement] violate[s] the Sherman Act will remain unresolved and unadjudicated."[94] It is clear that the *House* settlement, while an enormous undertaking and an impressive step in many regards, is only the beginning of a long road of legal uncertainty in collegiate athletics.

C. Diminished Labor & Employment Deference to the Collegiate Athletics Model

The erosion of judicial deference to the NCAA is also evident in the labor and employment law context. Recent challenges to athlete employment

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[88] *See In re* Coll. Athlete NIL Litig., No. 20-cv-03919 CW, 2025 WL 1675820, at *1 (N.D. Cal. June 6, 2025).

[89] *See id.*

[90] *Id.*

[91] *Id.* at *5–6 (detailing specific types and amounts of past damages claims).

[92] *Id.* at *22 (detailing how total payment to each athlete ranges from $80–$91,000 depending on sport played and other factors).

[93] *Id.* at *18.

[94] *Id.* at *37.

status under the FLSA and efforts to unionize college athletes under the NLRA reflect growing skepticism toward the assumption that Division I college athletics are primarily educational rather than economic by nature.

In *Johnson v. NCAA*, college athletes—including FCS football players and athletes participating in Division I baseball, soccer, swimming, diving, and tennis—filed suit seeking FLSA benefits such as minimum wage.[95] The NCAA moved to dismiss, arguing that it is settled law that college athletics are "conducted primarily for the benefit of the educational opportunities provided to the students by the school or institution and are not work of the kind contemplated by the FLSA."[96]

The district court denied the motion to dismiss, holding that the complaint plausibly alleges that Division I athletics are "not conducted primarily for the benefit of the student athletes who participate in them, but for the monetary benefit of the NCAA and the colleges and universities that those student athletes attend."[97] The court further emphasized allegations that the demands of college sports "interfere with the student athletes' abilities to participate in and get the maximum benefit from the academic opportunities offered by their colleges and universities."[98]

In July 2024, the Third Circuit affirmed this ruling in part, issuing an opinion that significantly narrowed the NCAA's long-standing reliance on amateurism in employment litigation. The court held "that college athletes cannot be barred as a matter of law from asserting FLSA claims simply by virtue of a 'revered tradition of amateurism' in [Division I] athletics."[99] The Third Circuit rejected the *Berger* analysis, refusing to "use a 'frayed tradition' of amateurism with such dubious history to define the economic reality of

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[95] Johnson v. NCAA, 108 F.4th 163, 185 (3d Cir. 2024).

[96] Johnson v. NCAA, 556 F. Supp. 3d 491, 502 (E.D. Pa. 2021) (quoting Field Operations Handbook, *supra* note 50, § 10b03(e)).

[97] *Id.* at 506.

[98] *Id.* The court also noted that *Alston* undercuts NCAA's reliance on "amateurism" and rejected NCAA's "argument that Plaintiffs are not employees entitled to minimum wages pursuant to the FLSA because there is a long-standing tradition of amateurism in NCAA interscholastic athletics that defines the economic reality of the relationship between Plaintiffs and [NCAA/schools]." *Id.* at 501.

[99] *Johnson*, 108 F.4th at 182 (rejecting employment test applied by district court, announcing new test to determine employment status of college athletes, and remanding case back to district court to apply new test; under new *Johnson* test, college athletes may be employees under FLSA when they "perform services for another party;" "necessarily and primarily for the [other party's] benefit;" "under that party's control or right of control;" "in return for 'express' or 'implied' compensation or 'in-kind benefits'").

athletes' relationships to their schools."[100] While the court agreed with *Berger* to the extent that it considered "'the economic realities of the relationship' between college athletes and their schools or the NCAA,"[101] it clarified that the relevant inquiry is whether an athlete's participation crosses the legal line from recreational play into compensable work.[102] In other words, the *Johnson* test is designed "to identify athletes whose play is *also* work."[103]

The Third Circuit remanded and called into question the academic value of the existing college sports model.[104] The court observed that "interscholastic athletics are not part of any academic curriculum"[105] and credited allegations that "the sports played are actually *detrimental* to [the athletes'] academic performance because athletic performance provides no academic benefits, they are frequently precluded from enrolling in hundreds of courses that conflict with their athletic obligations, and they are unable to declare their preferred majors."[106]

On the NLRA front, NLRB regional directors have twice ruled that college athletes qualify as "employees" entitled to form a union, although the full Board has never addressed that question.[107] The first arose in the 2014 *Northwestern* case discussed above. A decade later, in 2024, an NLRB regional director concluded that Dartmouth men's basketball players qualified as employees under the NLRA despite the absence of athletic scholarships because the school received benefits from the players' work and the players were compensated in other ways.[108] Although the Dartmouth players withdrew their unionization petition before an appeal reached the full Board, the decision further signaled diminishing institutional confidence in the categorical non-employee status of college athletes.[109]

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[100] *Id.*

[101] *Id.* at 177 (quoting Martin v. Selker Bros., 949 F.2d 1286, 1293 (3d. Cir. 1991)).

[102] *Id.*

[103] *Id.* at 178.

[104] *Johnson*, 108 F.4th at 182.

[105] *Id.* (contrasting college athletics with "properly designed unpaid internships," where work "can greatly benefit interns, as the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment.").

[106] *Id.*

[107] *See* Nw. Univ., No. 13-RC-121359, 2014 WL 1246914, at *12–14 (N.L.R.B., Region 13 Mar. 26, 2014); Trs. of Dartmouth Coll., No. 01-RC-325633, slip op. 18–21 (N.L.R.B. Feb. 5, 2024).

[108] *See Dartmouth Coll.*, No. 01-RC-325633, at 18–20.

[109] Associated Press, *Dartmouth Men's Basketball Players End Attempt to Unionize*, ESPN (Dec. 31, 2024, 13:10 ET), https://www.espn.com/mens-college-basketball/

The recent message from the courts and the NLRB is clear: college sports have become less distinct from professional sports and are thus entitled to less deference under the law than they have received in the past. Rather than preserving an education-centered "tradition that might otherwise die,"[110] the perception is that significant commercialization has hollowed out the very rationale on which judicial deference once rested. The courtroom defeats may continue to grow as more money pours into collegiate athletics and the demarcation between professional and college sports continues to blur.[111]

In response, many schools are seeking an alternative path to athletics that is sustainable, legally defensible, and more consistent with their educational mission. "College sports can provide a vehicle for individualized, innovative, experiential and traditional classroom learning. Recognizing, extracting, and enhancing the educational value of sports can be an important step toward transforming college sports into a key pillar—rather than an obstacle—of higher education."[112] This transformational approach can strengthen college athletics, solidify its role on college campuses, and restore some of the judicial deference previously afforded to college sports. The next Part provides a brief description of this approach—the proposed EEM—and highlights some of its key legal benefits.

IV. A New Enhanced Educational Model for College Sports

A. Overview of the Enhanced Educational Model

The concept of integrating athletics and education is not new. The ancient Greeks recognized that athletic participation was a key component of education.[113] In the American context, similar ideas emerged as early as the

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story/_/id/43237303/dartmouth-men-basketball-players-end-attempt-unionize [https://perma.cc/C3SD-HQ6S].

[110] *See* NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984).

[111] One notable example: the University of North Carolina leadership recently proclaimed their football program the "33rd Team" of the NFL, which has thirty-two teams. *See* Blake Silverman, *UNC Football GM Drops Bold NFL's '33rd Team' Moniker for Bill Belichick-Led Program*, Sports Illustrated (Feb. 12, 2025), https://www.si.com/college-football/unc-football-gm-bold-33rd-nfl-team-moniker-bill-belichick-program [https://perma.cc/F26U-WXB6].

[112] Feldman, *supra* note 1, at 7.

[113] *See id.* at 2. Isocrates argued that physical training and rhetoric (training of the mind) are one and convergent, rejecting a separate education of mind and body. Debra Hawhee, Bodily Arts: Rhetorics and Athletics in Ancient Greece 5

nineteenth century. In 1869, a representative of Amherst College observed that the school "intended physical culture to become part of the curriculum, just like Latin, Greek, or mathematics," recognizing the belief that physical activity was akin to other traditional academic subjects.[114] Early football coaches "often employed the rhetoric of science and pedagogy"[115] and published manuals and articles emphasizing the pedagogical value of football.[116] Coaches used these writings "to claim a quasi-disciplinary university space by arguing that they were athletic experts and educators, not agents of popular culture or mere entertainers."[117]

More recently, former NCAA President Myles Brand published a highly influential article, *The Role and Value of Intercollegiate Athletics in Universities*, in which he articulated "an 'Integrated View' of college athletics," proposing that athletic participation could merit academic credit, "just [like] students who participate in music, dance, or dramatic arts."[118] Brand's approach "spurred a wave of . . . research exploring the legitimacy of his conceptual framework and its practical implementation. . . ."[119] Professors Weight and Harry—two of the pioneers in this growing field—cite numerous studies demonstrating that college athletics "align closely with the broader missions of higher education to foster intellectual growth, instill personal and social

(quoting *Antidosis* 180–83). Later, Socrates likewise rejected the idea that the arts develop the mind while athletics developed the body. *See* Drew Hyland, *The Sweatiest of the Liberal Arts*, Point Mag. (Apr. 30, 2011), https://thepointmag.com/examined-life/sweatiest-liberal-arts/ [https://perma.cc/435X-GMF4]. In fact, to the Greeks, "the real point of education in athletics is less to develop the body than to develop the soul," and virtues like courage and self-discipline are best, or perhaps only, learned in athletics. *Id.* at 4.

[114] *See* Feldman, *supra* note 1, at 2 (quoting Ingrassia, *supra* note 10, at 21).

[115] *See id.* (quoting Ingrassia, *supra* note 10, at 118).

[116] *See id.* (citing Ingrassia, *supra* note 10, at 115). For example, Amos Alonzo Stagg, then-football coach at the University of Chicago, published the "Scientific and Practical Treatise on American Football for Schools and Colleges." *Id.* (quoting Ingrassia, *supra* note 10, at 124).

[117] *See id.* (quoting Ingrassia, *supra* note 10, at 115).

[118] *See id.* at 2, n.24 (citing Myles Brand, *The Role and Value of Intercollegiate Athletics in Universities*, 33 J. Phil. Sport 9 (2006)).

[119] Erianne A. Weight & Molly Harry, Reimagining College Sport in an Era of Transformation: A Narrative Review of Scholarship & Examples of Sport-Centric Curricula Within Higher Education 2 (rev. 2025), https://www.knightcommission.org/wp-content/uploads/KCIA_Narrative-Literature_Review_of_Integrating_Athletics_into_Higher_Education.pdf [https://perma.cc/NBK7-P5QV].

responsibility, and prepare students for lifelong learning."[120] As they explain, Brand's Integrated View "positioned athletics as essential to the mission of universities, emphasizing its role in holistically developing students and aligning with broader educational goals."[121]

Building on these concepts, Weight, Harry, and other scholars have proposed various paths to further integrate athletics within the academy, including awarding academic credit for athletic participation;[122] athletics-centric course design;[123] recognizing sports as both an art and a science;[124] and the establishment of a sports major.[125] For example, a school may pair its athletics program with "courses in sport psychology, coaching principles, exercise physiology, community service, sport analytics, group dynamics, and biomechanics, among others."[126] Or a school may create a liberal arts-oriented athletics major, like the performing arts, requiring three years of varsity athletics participation paired with courses in "natural sciences, social sciences, and humanities."[127] These examples are merely illustrative, and other permutations are also possible. Such programs would be faculty-led, subject

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[120] *Id*. Two such modern areas of research include embodied cognition and Experiential Learning Theory ("ELT"), which reveal a striking similarity to the Greek mind-body concepts in describing the relationship between physical activity and learning. *See, e.g.*, Feldman, *supra* note 1, at 5–6; Andrea Schiavio et al., *Optimizing Performative Skills in Social Interaction: Insights from Embodied Cognition, Music Education, and Sport Psychology*, 10 Front. Psychol. 6 (2019); Michael Rifenburg, Chapter 1: Introduction, *in* The Embodied Playbook: Writing Practices of Student-Athletes (2018).

[121] Weight & Harry, *supra* note 119, at 1.

[122] *See id*. at 7; Erianne A. Weight & Matt R. Huml, *Education Through Athletics: An Examination of Academic Courses Designed for NCAA Athletes*, J. Intercollegiate Sport 372–73 (2016); *see generally* Lou Matz, *Turning Intercollegiate Athletics into a Performance Major Like Music*, 42 J. Phil. Sport 283 (2020).

[123] Weight & Harry, *supra* note 119, at 3; Weight & Huml, *supra* note 122, at 372.

[124] Weight & Harry, *supra* note 119, at 5; Erianne Weight, *Time to Embrace the Art and Science of College Sports*, Chron. Higher Educ. (Mar. 23, 2015), https://www.chronicle.com/article/time-to-embrace-the-art-and-science-of-college-sports/?sra=trueat [https://perma.cc/RF9Z-BEZ4].

[125] Weight & Harry, *supra* note 119, at 4; Matz, *supra* note 122, at 9–13; Lou Matz, *How to Better Justify Intercollegiate Athletics*, Inside Higher Ed (Aug. 1, 2024), https://www.insidehighered.com/opinion/views/2024/08/01/how-better-justify-intercollegiate-athletics-opinion [https://perma.cc/73L5-NLJ4]; Weight & Huml, *supra* note 122, at 373.

[126] Weight & Harry, *supra* note 119, at 4.

[127] Matz, *supra* note 122, at 11; *see* Weight & Harry, *supra* note 119, at 5–6.

to standard curricular approval processes, and periodically reviewed under ordinary academic governance structures.[128]

The specific contours of any such program are beyond the scope of this article and may vary between schools, but the core of the EEM is its treatment of college athletics as a rigorous academic discipline, enhancing the legitimacy of athletics as an educational endeavor. This approach would require a fundamental shift in how universities view the educational value of athletic performance, but such shifts are not unprecedented, "as the breadth of serious academic disciplines has expanded exponentially from traditional subjects to performative, professional, and technical fields."[129]

The integration of athletics into the academy is not without its critics. Some believe that athletics is simply incompatible with a university's mission to "transmit and add to the sum of human knowledge."[130] However, much of this criticism is directed not at athletics per se, but at the economic machinery driving big-time college athletics.[131] There is far less criticism of the non-revenue-generating athletics programs in, for example, Division III. The EEM responds directly to these concerns by decoupling athletics from professional-style revenue streams and re-centering them within a rigorous pedagogical experience. In practice, the EEM will likely create a division between commercially-driven college athletics programs and those that adopt an education-centered model. Accordingly, the most lucrative television contracts, athlete NIL deals, and the like would remain concentrated in major Division I sports and outside the EEM. Implementing the EEM, therefore, removes much of the professional-type revenue streams and alleviates most of these concerns over commercial influences.

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[128] Matz, *supra* note 122, at 10; *see* Feldman, *supra* note 1, at 7.

[129] Feldman, *supra* note 1, at 4.

[130] French, *supra* note 61, at 5 (quoting Robert L. Simon, *Intercollegiate Athletics: Do They Belong on Campus*, *in* Rethinking College Athletics 46 (1991)); *see id.* at 5–7; Randolph Feezell, *Branding the Role and Value of Intercollegiate Athletics*, 42 J. Phil. Sport 185, 192–94 (2014); Robert L. Simon, Cesar R. Torres & Peter F. Hager, *Sports on Campus: Intercollegiate Sports and Their Critics*, *in* Fair Play: The Ethics of Sport 75 (4th ed. 2014) (Simon is not himself a proponent of what he terms the Incompatibility Thesis, but he summarizes and addresses it aptly).

[131] *See* French, *supra* note 61, at 80–81, 105 ("Clearly, and without apology, the elite sports . . . are in partnerships with major commercial companies because those sports provide an audience, an exposure, to sell their products. . . . Television . . . contracts drive intercollegiate athletics at the Division I level."); Feezell, *supra* note 130, at 185–87, 204–05.

Others remain skeptical of integrating athletics into academics on a practical level given the lengthy history of academic scandals in college athletics.[132] These concerns are well-founded, as "[b]ig-time college sports are uniquely vulnerable to academic integrity issues because of the pressure to keep athletes academically eligible . . . ."[133] However, these issues may be addressed through prophylactic measures such as "specialized accreditation for sports-performance based courses, faculty, curricula, and programs"; placement of such programs under traditional administrative and faculty oversight separate from athletic departments; and "[instruction] by trained academicians."[134] Properly designed, these measures would align athletics with existing academic standards rather than exempting them from scrutiny.

As Professors Weight and Harry explain, "[b]y adopting innovative approaches such as creating athlete-focused courses and developing minors and majors in sport, colleges and universities can reposition competitive athletics to be part of the academic curriculum and narrow the growing academic-athletic divide by formally integrating athletics within the academy."[135] While academics and athletics have long had a strained relationship, integrating them further will help solve these issues, rather than exacerbate them, by replacing the existing economic-related incentives with a genuine academic structure, like music or performing arts academic programs.[136]

B. Legal Benefits of an Enhanced Academic Model of College Sports

In addition to reorienting college athletics squarely within the academic mission of universities, the EEM could offer meaningful legal advantages. It strengthens the doctrinal distinction between college and professional

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[132] *See* Feldman, *supra* note 1, at 6–7. For example, one high-profile case is the "paper classes" academic fraud scandal at the University of North Carolina in the 2010s. *See* Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 23, 2014, 10:28 ET), https://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/index.html [https://perma.cc/V5FT-4633]. And in 2015, NPR reported that the NCAA disclosed that it was investigating twenty schools for academic misconduct. *See* NPR staff, *Academic Foul: Some Colleges Accused of Helping Athletes Cheat*, NPR (June 13, 2015, 17:07 ET), https://www.npr.org/2015/06/13/414188857/academic-foul-some-colleges-accused-of-helping-athletes-cheat [https://perma.cc/CP7V-4B7Z].

[133] Feldman, *supra* note 1, at 6.

[134] *Id.* at 6–7.

[135] Weight & Harry, *supra* note 119, at 1.

[136] *See* Feldman, *supra* note 1, at 6–7.

sports—a distinction courts have repeatedly emphasized as foundational to judicial deference in both antitrust and labor contexts. By embedding athletics within a bona fide academic curriculum, the EEM not only "preserve[s] a tradition that might otherwise die,"[137] but also offers a principled framework for restoring the dwindling judicial deference to the NCAA's legacy model.

1. Legal Benefits under Antitrust Law

Even during the NCAA's recent judicial losing streak, courts have continued to recognize the value of an educational model of college sports and charted a course for renewed deference. The EEM reinvigorates this value into athletic programs that adopt it by reshaping those programs into an educational department, like a performing arts department. The specific contours of such an academic-athletic program are up to the discretion of individual schools, as discussed above. Nevertheless, any formulation that implements genuine, rigorous academic study of athletics in conjunction with academic credit for on-field play should shift the legal analysis in favor of the schools. By making athletic participation part of a credit-bearing curriculum overseen by faculty, the EEM strengthens the argument that athletics advance educational objectives rather than merely serving commercial ends. In doing so, it aligns with courts' prior analysis of the procompetitive benefits of college athletics that justify judicial deference—much like requirements for students in performing arts departments.

The historic antitrust analysis has long permitted the NCAA to regulate college sports to the extent necessary "to preserve the unique atmosphere of competition between 'student-athletes.'"[138] Even recent judicial decisions that have been hypercritical of the NCAA have not rejected this core principle. Instead, they have rejected the particular methods by which the NCAA has sought to achieve its purported educational goals, finding that NCAA restrictions are either overly restrictive or pretextual.[139] The problem, in other words, lies less with the educational justification itself than with its increasingly tenuous connection to the NCAA's commercial reality.

Maintaining a model of college sports distinct from professional sports still constitutes a legitimate defense to antitrust challenges.[140] For example,

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[137] NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 120 (1984).

[138] Gaines v. NCAA, 746 F. Supp. 738, 744 (M.D. Tenn. 1990).

[139] *See* NCAA v. Alston, 594 U.S. 69, 82–84 (2021).

[140] *See id.* ("The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur

in *Alston*, the Supreme Court noted that the "status of the NCAA's members as schools and the status of student-athletes as students may be relevant in" determining the legality of restraints on athletes.[141] Even Justice Kavanaugh, in his sharply critical concurrence, acknowledged that "[e]veryone agrees that the NCAA can require student athletes to be enrolled students in good standing."[142] And, in *O'Bannon*, the Ninth Circuit held that, "to borrow the Supreme Court's analogy, the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports lest it become 'minor league [football].'"[143]

The EEM not only deepens the distinction between college and professional sports but is further distinct from the NCAA's legacy conception of "amateurism." In the EEM, athletes enter a robust academic curriculum that incorporates on-field play with traditional classroom experience—an innovation never adopted in the legacy NCAA model. The emphasis on the professionalization of the athletics program is replaced by the focus on faculty instruction of the athletes (who still play for traditional coaches on the field) within a credit-bearing curriculum. The obligations applied to athletes under the EEM are similar to those imposed on performing arts students in terms of academic, practice, and performance requirements.[144] As a result, the EEM

college sports as distinct from professional sports."); *Id.* at 87–88 ("The NCAA . . . argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this.").

[141] *Id.* at 94. The Court also noted that judges "should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities." *Id.* at 92; *see, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015) ("[W]e agree with the Supreme Court and our sister circuits that many of the NCAA's amateurism rules are likely to be procompetitive."); *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1102–03 (N.D. Cal. 2019) ("Most of the benefits that student-athletes can gain from attending college are caused . . . by the education itself and by other rules and policies, such as those relating to academic eligibility requirements, tutoring, academic support, living conditions, and the scheduling of athletic practice and events.").

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

[143] 802 F.3d at 1049 (quoting NCAA v. Bd. of Regents Univ. Okla., 468 U.S. 85, 102 (1984)).

[144] *See generally* Erianne A. Weight, Molly Harry, Kristina Navarro & Megan Lewis, *Integrating Athletics Within the Academy: Educational Experiences of Athletes, Musicians, and Traditional Students*, 13 J. Issues Intercollegiate Athletics 143 (2020). In fact, studies show that music students on average spend *more* time on music than their athlete classmates spend on athletics. *Id.* at 160.

offers an even stronger case for judicial deference than the NCAA's legacy model.

The EEM also addresses a structural weakness in the NCAA's legacy antitrust defense: its reliance on procompetitive benefits only in one market (the "seller-side consumer market") to justify anticompetitive harms in another (the "buyer-side labor market").[145] In other words, under the legacy NCAA model, consumers benefit from a differentiated college sports product at the expense of the athletes, whose compensation is restricted. Amici in *Alston* and the Court highlighted this concern, noting "that a court should not 'trade off' sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one." Although the Court declined to resolve that issue,[146] it underscores a growing discomfort with a system in which athletes disproportionately shoulder the burdens of preserving college sports' distinctiveness. At the heart of ongoing debates over whether athletes should be paid are questions of fairness, particularly when the system generates billions of dollars in revenue and athletes, until recently, received no share of it.

The EEM also alleviates this significant issue because the procompetitive benefits of college athletics in the EEM are enjoyed not only by consumers (who get an additional product), but also by the athletes, who gain an additional choice in pursuing their college athletic career. College athletes may choose between pursuing their sport within the EEM or competing in the big-time, revenue-sharing, commercialized model of college sports. Within the EEM, athletes receive academic credit tied to their athletic participation and, because EEM programs are unlikely to generate significant revenue, questions about revenue sharing and athlete compensation become less significant. This more balanced allocation of benefits further strengthens the EEM's position under antitrust scrutiny.

2. Legal Benefits under Labor & Employment Law

The EEM also alters the labor and employment analysis of college athletes, potentially giving schools further support for the position that athletes in the EEM do not qualify as "employees" under either the FLSA or the NLRA. Although these statutes employ different doctrinal tests, both ultimately seek to determine whether an athlete's "play" constitutes "work" that benefits the school or whether it benefits athletes "as part of the [school's]

[145] *Alston*, 594 U.S. at 82.
[146] *Id.* at 87.

educational opportunities" and is primarily pursued for noncommercial reasons.[147] The former facts lend themselves to employment status; the latter disfavor it. In other words, employment status turns on the "economic reality" of the relationship.[148]

The EEM completely alters the nature of college athletes' practices, games, and other on-field pursuits by integrating them into a rigorous, credit-bearing academic program. In the EEM, the "economic reality" is drastically different than the current college athletics model—under which athletes receive no academic credit for their athletic performance and, instead, participate in a multi-billion-dollar market. Although the EEM does not prevent athletes from monetizing their NIL, the most significant financial opportunities will likely be at the major programs under the revenue-sharing model. As a result, the overall flow of money through the EEM ecosystem will be drastically lower, creating a vastly different "economic reality" than for athletic programs in a revenue-centric, big-time college sports model.

Admittedly, the NLRB regional director's recent *Dartmouth* decision complicates this analysis. As discussed above, the regional director concluded that Dartmouth's men's basketball players were employees despite the absence of athletic scholarships and the fact that Dartmouth made little or no profit from the team.[149] *Dartmouth* relied in part on a prior NLRB opinion regarding graduate teaching assistants at Columbia University, which ruled that the key inquiry is whether an employment relationship exists, "rather [than] on whether some other relationship [*i.e.*, as a student] between the employee and employer is the primary one."[150] "In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer."[151] Applying this reasoning could possibly render college athletes statutory employees, even in the EEM.

However, the *Dartmouth and Northwestern* NLRB regional director decisions that found college athletes to be employees relied, at least in part,

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[147] Johnson v. NCAA, 108 F.4th 163, 177 n.58 (3d Cir. 2024) ("[T]he NLRA and FLSA have distinct policy goals, but their shared history often inspires courts to draw interchangeably from each statute's caselaw to answer fundamental questions related to the equitable regulation of the American workplace.").

[148] *See id.* at 180 ("Ultimately, the touchstone remains whether the cumulative circumstances of the relationship between the athlete and college or NCAA reveal an economic reality that is that of an employee-employer.").

[149] Trs. of Dartmouth Coll., No. 01-RC-325633, slip op. 18–21 (N.L.R.B. Feb. 5, 2024).

[150] Trs. of Columbia Univ., 364 N.L.R.B. 1080, 1084 (2016).

[151] *Id.* at 1086.

on the fact that college athletes' participation in sports simply was not academic in nature. This is an important distinction from the EEM, where time spent on the field or court *is* "indistinguishable from academic work"[152] because the athletes receive course credit for it, especially when paired with traditional classroom instruction. Thus, athletes in the EEM receive "academic direction" in a program overseen by legitimate faculty and are pursuing athletics to "further their own academic purposes."[153] This makes athletes in the EEM distinguishable from, and less likely to be employees than, the athletes in *Dartmouth*, *Northwestern*, or *Johnson*.

In the EEM, a primary purpose of the athletes' work on the field is to receive an education and earn an academic degree, like theater and music students. Contrast the EEM with the facts of *Northwestern*, *Dartmouth* and *Johnson*, where the athletes "receive[d] no academic credit for their football endeavors;"[154] the athletics programs were not designed to "further their own academic purposes;"[155] and were "not part of any academic curriculum."[156] Although still an open question, this distinction at least improves the argument that college athletes in the EEM are not "employees" of their school. In a *Johnson* concurrence, Judge Porter of the Third Circuit indicated that some athletes in certain sports (e.g., football) may qualify as employees while others may not.[157] The EEM leverages that doctrinal flexibility by offering a model in which athletic participation is primarily educational rather than commercial.

Importantly, adoption of the EEM need not be uniform across all sports or institutions. Some schools may adopt the EEM entirely, while others forgo it for a revenue-centric model, while still others may operate a hybrid model with some sports in the EEM and other sports (such as football and basketball) in a revenue-sharing model. Properly implemented, the EEM offers a means of protecting "the rest" of college sports and preventing the whole

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[152] *Dartmouth Coll.*, No. 01-RC-325633, at 21.

[153] Mass. Inst. of Tech., Case 01-RC-304042, slip op. 2, 10 (N.L.R.B. March 13, 2023) (finding that MIT graduate fellows were not employees of the university where "the work performed is indistinguishable from academic work and the direction is indistinguishable from academic direction").

[154] Nw. Univ., 362 N.L.R.B. 1350, 1351 (2015).

[155] *Mass. Inst. of Tech.*, Case 01-RC-304042, at 2.

[156] Johnson v. NCAA, 108 F.4th 163, 180 (3d Cir. 2024).

[157] *See id.* at 192 ("I tend to agree with Judge Hamilton's intuition that the economic-reality question probably shakes out differently for FBS football players and March Madness-level men's basketball players than it does for other student-athletes); Berger v. NCAA, 843 F.3d 285, 294 (7th Cir. 2016) (Hamilton, J., concurring).

college sports enterprise from being swallowed up by the legal issues plaguing the heavily commercialized, big-time college sports.

Conclusion

Intercollegiate athletics are in the midst of the most dramatic transformation in their history. As college sports have grown increasingly commercialized, courts have become correspondingly skeptical of the NCAA's claims that its regulatory regime meaningfully advances educational objectives. That skepticism has driven court rulings adverse to the NCAA in both antitrust and labor contexts and has placed the traditional model of college athletics under enormous legal pressure.

Colleges and universities have an opportunity to reaffirm the distinction between college and professional sports by refocusing on education and, in the process, mitigating substantial legal risks.[158] An EEM for college athletics can accomplish those goals. By embedding athletics within a rigorous academic curriculum, the EEM deepens the distinction between college and professional sports, strengthens procompetitive justifications under antitrust law, and improves the argument that athletes are students first, pursuing their sport within a rigorous academic curriculum and apart from the heavily commercial elements that courts have questioned under labor and employment law. Accordingly, the EEM could help revive the lingering vestiges of judicial deference and provide renewed justification for protecting college athletics programs from the most destabilizing legal challenges facing college athletics today.

[158] *See* Feldman, *supra* note 1, at 1.