

The Fix Ain't In: Athletics and the University in the Post-*Alston* Era

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Antitrust law, particularly the Supreme Court's decisions in National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984), and National Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021), has fundamentally changed college sports. Intercollegiate athletics, at least at the major conference level and particularly (but not exclusively) with respect to football and men's basketball, has become a multibillion-dollar business and completely shed any pretense of amateurism on the part of the players. This raises a serious question whether major-conference athletics of the kind the antitrust laws have engendered is consistent with the other, primary output of great research universities: their academic programs. I suggest there are significant tensions, ranging from revenue drains through distortion of admissions and educational programs to hidden and potentially exploitative cross-subsidies among students.

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Introduction

Over the course of my academic career, I took dozens of final exams. But I remember only one.

In the spring of 1982, I was a student in George Priest's advanced antitrust seminar. You may wonder why, as an aspiring civil rights lawyer, I chose the course. It was largely because of George: his Law and Economics course had been one of the highlights of my first year. And antitrust law had turned out to be surprisingly relevant to my life's work: my assignment in 1981 as a summer intern at the NAACP Legal Defense Fund involved the question whether a finding of racially discriminatory purpose was subject to the "clearly erroneous" standard of Federal Rule of Civil Procedure 52—a rule the Supreme Court had addressed largely in the context of antitrust decisions.¹

Still, the advanced antitrust class was a bit foreign to me: I was the only woman in the room and one of the few students without graduate training in economics. The class readings consisted primarily of scholarly articles marbled with equations that I painstakingly "translated" into English in my notebook. So it was with some trepidation that I picked up the packet for the 24-hour take-home final.

But I was in luck. George had combined two of his special passions: antitrust doctrine and sports. The exam consisted of a set of NCAA bylaws and the prompt "Discuss the antitrust implications." I may not have completely plumbed the complexities of the Herfindahl–Hirschman Index, but I was a longtime subscriber to *Sports Illustrated* and religious reader of the New York Times sports section. So I understood, for example, that college football was the only path to the NFL save for some foreign-born soccer-style kickers, a couple of NAIA players, and Otis Sistrunk "from the University of Mars."² After two semesters of antitrust, I could phrase it this way: The NCAA was a monopsonist in the market for aspiring quarterbacks and weak-side linebackers. And I knew how it used that market power to its advantage. I worked Sistrunk into my answer, which may be the best examination answer I ever wrote.

George posed that exam question shortly before the U.S. Supreme Court began to wrestle with the antitrust implications of college sports, first in *National Collegiate Athletic Association v. Board of Regents*,³ and most

1. See Resp. Br. 10, 63, 136, 138, 139, 140, 146, 150, *Pullman-Standard, Inc. v. Swint*, 456 U.S. 273 (1981) (Nos. 80-1190 and 80-1193) (citing, inter alia, *United States v. General Motors Corp.*, 384 U.S. 127 (1977); *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Oregon State Medical Society*, 343 U.S. 326 (1952); *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949); *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948)).

2. Otis Sistrunk, WIKIPEDIA, https://en.wikipedia.org/wiki/Otis_Sistrunk [<https://perma.cc/H8H4-QE28>] (last visited July 17, 2024).

3. 468 U.S. 85 (1984).

recently in *National Collegiate Athletic Association v. Alston*.⁴ As far as I know, he never returned to the issue in his own scholarship.⁵ Nor did I. But in thinking about how to celebrate George's work, I found inspiration in a famous passage from T.S. Eliot's *Little Gidding*:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.⁶

So this essay returns to the question George asked on that long-ago exam. After *Alston*, the nature of the product the NCAA and its members produce—intercollegiate athletic competition—has changed profoundly. But this is not just, or perhaps even primarily, an issue of antitrust law. These changes pose questions of institutional adjustment—another issue to which George was also paying attention in the mid-1980s, with his provocative essay on how “the structure of the law school [would] be forcibly changed” by the growing focus in legal scholarship on the social sciences.⁷

Part I of this article discusses how *Board of Regents* and *Alston* transformed intercollegiate athletics. Universities can no longer agree among themselves that players who wear their uniforms cannot profit from their athletic participation. Nor can they bind athletes to their schools. The emergence of deals through which players monetize their performance, revenue sharing by schools, and a transfer portal through which players enter an open market for their services means that college sports, at least at the major conference level and particularly with respect to football and men's basketball, has become a multibillion-dollar business in which the “revered tradition of amateurism in college sports”⁸ has largely disappeared.

Part II then turns to the question whether major-conference intercollegiate athletics of the kind the antitrust laws have engendered is consistent with the other, primary outputs of great research universities:

4. 594 U.S. 69 (2021).

5. He did once cite *Board of Regents*, but only in passing. George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S1 n.2 (2014).

6. T.S. Eliot, *Little Gidding*, in *FOUR QUARTETS* 31, 59 (1943).

7. See George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437, 440 (1985). George did return to *this* question several times. See GEORGE L. PRIEST, *THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY* 4-5 (2020) (pointing to the huge increase in the number of law and economics scholars at leading law schools); George L. Priest, *The Increasing Division Between Legal Practice and Legal Education*, 37 BUFF. L. REV. 681 (1989); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993).

8. *Board of Regents*, 468 U.S. at 120.

their academic programs. I suggest there are significant tensions. Athletics programs may well be a revenue drain on a university's overall operations. They may also distort other aspects of the university—in particular, the quality of undergraduate students and the quality of the education undergraduate athletes receive. And football programs in particular may involve hidden and exploitative cross-subsidies among students.

I. Amateur Hour at the Supreme Court: From *Board of Regents* to *Alston*

A critical first step in Sherman Act antitrust cases is to determine the product at issue because “[w]ithout a definition of [the] market there is no way to measure [the defendants’] ability to lessen or destroy competition.”⁹ One aspect of that inquiry considers the presence of sufficiently similar substitutes that market participants “may readily use for their purposes”; where there are such alternatives, “illegal monopoly does not exist merely because the product said to be monopolized differs from others.”¹⁰ And even when an actor does have some market power, its practices can survive antitrust scrutiny under the “rule of reason” when the challenged restraint “stimulat[es] competition that [is] in the consumer’s best interest.”¹¹

When it comes to intercollegiate athletics, the NCAA and its members are both sellers and buyers. They are sellers with the respect to the audience that watches college sports, either directly (through, for example, stadium tickets) or indirectly (through selling the right to broadcast a team’s games). They are buyers with respect to the personnel (the coaches they hire and the athletes who sign letters of commitment) who participate in those games.¹² The NCAA and its members have appeared before the Supreme Court in both roles. Both times, the Court has confronted the question whether intercollegiate athletics is a unique product and, if it is, the nature of that product.

A. Antitrust Comes to College Sports

In *National Collegiate Athletic Ass’n v. Board of Regents*,¹³ two major football powers—the University of Georgia and the University of Oklahoma—challenged the NCAA’s plan for televising college football games.

9. *Ohio v. Am. Express Co.*, 585 U.S. 529, 543 (2018) (quoting *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965)).

10. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956).

11. *Am. Express Co.*, 585 U.S. at 541 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

12. I suppose one could also characterize the NCAA and its members as “sellers” with respect to the athletes themselves: the schools are “selling” their athletes an education (or access to coaching and training facilities) for which the athletes “pay” by playing. But this recharacterization turns out not to matter for antitrust purposes.

13. 468 U.S. 85 (1984).

The plan forbade member schools from making their own television deals, limited the number of games that would be televised as part of the NCAA-negotiated package, and on top of that limited the number of times any particular team could appear in a televised game.¹⁴

The Supreme Court recognized that the plan involved a “horizontal restraint—an agreement among competitors” that imposed an “artificial limit on the quantity of televised football that [was] available to broadcasters and consumers.”¹⁵ Because the plan prevented “any price negotiation between broadcasters and institutions,” it constituted “horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.”¹⁶

Normally this kind of “price fixing and output limitation” would be unlawful *per se* under the Sherman Act.¹⁷ But the Court declined to apply the *per se* rule because the case “involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all.”¹⁸ By definition, football games involve competition between two teams. But that competition requires “a myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed.”¹⁹ Those sorts of restraint on competition are not only permissible; they’re mandatory.

The NCAA and its members are not the only sellers of football games to broadcast. After all, there’s the National Football League with its competitive product. So the Court’s discussion went beyond the rules of football itself to elaborate on the distinctive nature of the football the NCAA and its member institutions were selling:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.²⁰

The Court acknowledged this “revered tradition of amateurism in college sports” and declared that “the preservation of the student-athlete in

14. *See id.* at 92-94 (laying out the details of the plan).

15. *Id.* at 99.

16. *Id.* at 100.

17. *Id.*

18. *Id.* at 101.

19. *Id.*

20. *Id.* at 101-02.

higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.”²¹

Nevertheless, the Court ruled against the NCAA. It held that even if “maintaining a competitive balance among amateur athletic teams is legitimate and important,” that interest could not justify “[t]he specific restraints on football telecasts” that the plaintiffs challenged.²² Restricting individual schools’ ability to sell their football games to broadcasters was unnecessary to preserve the attractive nature of college football because the NCAA’s “other restrictions designed to preserve amateurism”—most obviously, not permitting schools to pay players—were both “much better tailored to the goal of competitive balance than is the television plan,” and “‘clearly sufficient’ to preserve competitive balance to the extent it is within the NCAA’s power to do so.”²³

Board of Regents coincided with, and in some ways caused, an era of profound change for intercollegiate athletics.²⁴ Money absolutely flooded the system. For example, at the time *Board of Regents* was decided, the NCAA’s broadcast contract for the Division I men’s basketball tournament produced \$16 million per year. “In 2016, those annual television rights brought in closer to \$1.1 billion.”²⁵

The United States has more than 2600 four-year colleges and universities.²⁶ The overwhelming majority of these schools, if they field extramural sports teams at all, still operate athletics programs largely funded by the university “and/or the student body” through the mechanism of student activity fees.²⁷ But a group of schools corresponding “exactly to the members of the so-called ‘Power Five’ athletic conferences” operate under a very different model: They are largely self-funded through “overall athletic department revenues” that are “meaningfully larger” than those available to institutions in the first category and decoupled from their university’s general budget.²⁸ (Today, those Power Five conferences have consolidated to four: the Atlantic Coast Conference (ACC), Big Ten, Big 12 (don’t ask

21. *Id.* at 120. For a critical account of the history of the term “student-athlete,” see Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1012-17 (2012).

22. *Board of Regents*, 468 U.S. at 118.

23. *Id.* at 119.

24. For discussions of the post-*Board of Regents* changes, see, for example, Josephine R. Potuto, *A Fine Mess: The NCAA, the Collegiate Model, and the Post-Alston World*, 76 OKLA. L. REV. 35 (2023); Kamron Cox, *Exploring Key Antitrust Implications of Conference Consolidation in College Football*, 89 MO. L. REV. 567 (2024).

25. Nat’l Collegiate Athletic Ass’n v. Alston, 594 U.S. 69, 93 (2021).

26. U.S. Dep’t of Educ., Nat’l Ctr. For Educ. Stat., Digest of Educ. Stat., tbl. 317.10, <https://perma.cc/A4BF-4RZZ> (showing 2,628 four-year, degree-granting postsecondary institutions in 2022-23).

27. Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits From Amateurism? Rent-Sharing in Modern College Sports* 7 (NBER Working Paper 27734, 2020), https://www.nber.org/system/files/working_papers/w27734/w27734.pdf [<https://perma.cc/99E4-HCJL>].

28. *Id.*

me why one spells it out and the other uses numbers), and Southeastern Conference (SEC)).²⁹ The power conferences each have broadcast contracts worth hundreds of millions of dollars annually. (Indeed, the latest television deal for the Big Ten involves three different networks and \$8 billion over a seven-year period.³⁰) The differential in conference revenue deals has prompted schools to switch conferences in pursuit of greater payouts,³¹ resulting, among other things, in the essential destruction of the fifth power conference and the abandonment of century-old rivalries along the way.³²

Where did all this money go? While some of it went to athletic scholarships (which became a bit more generous as the NCAA relaxed some of its limits), “the largest and most visible part of revenues went to coach and administrator salaries and athletic facilities.”³³ By 2019, the highest-paid public employee in 40 of the 50 states was some head coach or another.³⁴

In 2014, a group of current and former student-athletes in men’s Division I Football Bowl Series football and men’s and women’s Division I

29. Originally, when the NCAA granted a greater level of autonomy to the members of the five wealthiest conferences, *see* Steve Eder, *How New N.C.A.A. Rules Will Work*, N.Y. TIMES (Aug. 7, 2014), <https://www.nytimes.com/2014/08/08/sports/ncaaf/football/how-new-ncaa-rules-will-work-or-not.html> [https://perma.cc/C9KC-JVMF], there was a fifth power conference—the Pac 12. But between 2022 and 2024, it essentially imploded. *See 2023 In Review: How the Pac-12 Conference Crumbled*, FRONT OFFICE SPORTS (Dec. 27, 2023), <https://frontofficesports.com/2023-in-review-how-the-pac-12-conference-crumbled> [https://perma.cc/ZHD8-ZKY5] (describing how “the richest [four] conferences ripped the Pac-12 apart, fueled by an unrelenting pursuit of TV revenue disguised as an interest in stability and athlete welfare”).

30. *See* Business of College Sports, *Current College Sports Television Contracts* (last updated Mar. 19, 2024), <https://perma.cc/KDS3-ZTPD>.

31. *See, e.g.*, Cox, *supra* note 24, at 570-71; Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O’Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 341-42 (2016).

32. *See, e.g.*, Brett Gibbons, *College Football Rivalries Going Extinct with Conference Realignment*, SPORTS ILLUSTRATED (Sept. 21, 2023), <https://www.si.com/college/tcu/football/college-football-rivalries-going-extinct-oklahoma-state-bedlam-tcu-smu-iron-skilllet-usc-stanford-oregon-state> [https://perma.cc/3555-4XTJ] (going forward, Oklahoma, now in the SEC, and Oklahoma State, which remained in the Big 12, will no longer play a game first played in 1904; Oregon, now in the Big 10, and Oregon State, which made a scheduling dealing with the Mountain West Conference after the Pac-12 imploded, will no longer play the “Civil War,” first contested in 1894; and Stanford, now in the Atlantic Coast Conference, and the University of Southern California, now in the Big 10, will abandon a rivalry first contested in 1905).

33. Potuto, *supra* note 24, at 37; *see also* Garthwaite, *supra* note 27, at 13 (discussing the disproportionate share of the increased revenue that went to coaching salaries rather than support for athletes in revenue sports).

34. John Duffley, *In 40 States, Sports Coaches Are the Highest-Paid Public Employees*, FANBUZZ (Dec. 31, 2019), https://fanbuzz.com/national/highest-paid-state-employees/?utm_medium=recirc-module&utm_campaign=recirc&itm_source=parsey-api&utm_source=recommended-poster [https://perma.cc/Z7UE-8MPM]. The same was true for private universities in the Power 5 conferences. For example, in 2022, Baylor paid Scott Drew \$5 million, Duke paid Mike Krzyzewski close to \$9 million, Southern Methodist University paid Rob Lanier \$2.8 million, Stanford paid David Shaw over \$7 million, and the University of Southern California paid Lincoln Riley over \$19 million. I derived these figures from using ProPublica’s Nonprofit Explorer, which provides copies of universities’ IRS Form 990s; the forms list the highest-compensated employees of nonprofit organizations. *See* ProPublica, Nonprofit Explorer, <https://projects.propublica.org/nonprofits/>.

basketball filed a class action against the NCAA and eleven Division I conferences to challenge the “interconnected set of NCAA rules that limit[ed] the compensation they [could] receive in exchange for their athletic services.”³⁵ They alleged that those rules violated section 1 of the Sherman Act.

The district court found that the NCAA possessed “near complete dominance of, and exercise[d] monopsony power in” the market for players because “NCAA’s Division I essentially *is* the relevant market for elite college football and basketball.”³⁶ Not surprisingly, it then found that without the challenged restrictions, schools would increase the “compensation they would offer to recruits, and student-athlete compensation would be higher as a result.”³⁷

Ultimately, the district court enjoined the rules that limited or prohibited education-related benefits such as “tutoring, graduate school tuition, and paid internships” because the defendants failed to show that these limits had any “effect on enhancing consumer demand for college sports as a distinct product.”³⁸ However, it left in place the existing restrictions on outright compensation, finding that those sorts of limits were “procompetitive . . . to the extent that they help maintain consumer demand for college sports as a distinct product.”³⁹ It saw a possibility that “unlimited, professional-level cash payments” having nothing to do with the “scholarly” side of scholar athletes “could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand for Division I basketball and FBS football.”⁴⁰

By the time the case arrived at the Supreme Court, the parties agreed that the NCAA enjoyed monopsony control over the labor market for collegiate athletes and that there was “admitted horizontal price fixing” in that market by the defendants.⁴¹ The NCAA’s defense was that each of its rules limiting the benefits that could be provided to student athletes “preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.”⁴²

The Supreme Court saw the NCAA’s position as little more than an attempt to immunize itself from antitrust liability by “relabel[ing] a restraint as a product feature.”⁴³ As to the characteristics of that product, the

35. *Alston*, 594 U.S. at 80.

36. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1097, 1070 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *aff’d sub nom. Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69 (2021).

37. *Id.* at 1068.

38. *Id.* at 1102.

39. *Id.*

40. *Id.* at 1104.

41. *Alston*, 594 U.S. at 86.

42. *Id.* at 82.

43. *Id.* at 101.

Court pointed to the NCAA's failure to adopt "any consistent definition of amateurism."⁴⁴ Moreover, the restrictions on compensation for athletes had been adopted "without any reference to 'considerations of consumer demand'" — that is, without regard to whether those restrictions benefited the consumers of the NCAA's product, namely, the audience for college football and basketball.⁴⁵ So the Supreme Court affirmed the district court's injunction.

The majority's unanimous opinion did not address the panoply of restrictions on non-education-related compensation for collegiate athletes. But Justice Kavanaugh wrote a pointed concurrence "to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."⁴⁶

Justice Kavanaugh was skeptical that the NCAA could justify restricting compensation to athletes "on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes."⁴⁷ After all, no other industry in the United States would be permitted to restrict compensation to the people who produce its product on the grounds that the product would be "purer" if pay were kept artificially low. For example, "[l]aw firms [could not] conspire to cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.'"⁴⁸

B. The New Regime: The Emergence of NILs, the Transfer Portal, and Revenue Sharing

Even before the Supreme Court handed down *Alston*, California had enacted a Fair Pay to Play Act (originally scheduled to go into effect in 2023) that forbid universities, athletic conferences, or the NCAA from limiting a California student-athlete's ability to "earn[] compensation as a result of the use of the student's name, image, or likeness" from third party sources.⁴⁹ (At the same time, the act forbid universities, athletic conferences, or the NCAA from providing such compensation themselves.⁵⁰) With more than two dozen other states poised to follow suit and with the shadow *Alston* cast over its restrictions on player compensation, the NCAA suspended the key provisions of its bylaws forbidding college athletes from signing these "NIL" contracts.⁵¹

44. *Id.*

45. *Id.* at 101-02 (quoting *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1101 (N.D. Cal. 2019)).

46. *Id.* at 108 (Kavanaugh, J., concurring).

47. *Id.* at 110-11.

48. *Id.*

49. Cal. Educ. Code § 67456(a).

50. *Id.* § 67456(b).

51. Austin Taylor, Note, *NCAA v. Alston: The Future of College Sports in the Name, Image, and Likeness Era*, 75 RUTGERS U.L. REV. 363, 364-65 (2022). For a compendium of state

The availability of NIL payments ushered in a change for intercollegiate athletics perhaps even more profound than the one that followed *Board of Regents*. In the first year after relaxation of the rule, “more than \$915 million was spent on NIL deals.”⁵²

While some of these deals are struck directly between individual athletes and particular outside businesses, many involve a new player: the ostensibly institution-independent, but in fact institution-linked, “collective.” These entities “pool funds from a wide swath of donors to help create NIL opportunities for student-athletes through an array of activities” ranging from personal appearances to charity-related work to social media posts.⁵³ Even though collectives are not formally controlled or directed by schools themselves (at least not overtly), they are school-specific. They assemble a pool of donors to provide money to a pool of players. For example, “[a] collective led by Barry Switzer, the former head football coach at the University of Oklahoma, guaranteed \$50,000 to each Oklahoma football player.”⁵⁴ And while football and men’s basketball were a primary focus of NIL deals, a number of other college sports also saw significant activity.⁵⁵ The collectives put paid to the claim that the players are not compensated for their athletic participation.

Collectives might pose at least two separate risks to university athletic departments. First, they could undercut the stability of a university’s team rosters, particularly given the NCAA’s relaxation of transfer rules, which now make athletes immediately eligible regardless of how many times they transfer.⁵⁶ Second, they could threaten the athletic department’s revenues

NIL laws, see *NIL Legislation Tracker*, SAUL EWING, <https://www.saul.com/nil-legislation-tracker> [<https://perma.cc/UGG8-9XQ9>].

52. Potuto, *supra* note 24, at 49. On3 maintains a compendium of NIL deals: On3NIL, <https://www.on3.com/nil> [<https://perma.cc/8DBB-8RJW>]. The site provides information and news both about individual deals and about NIL collectives.

53. Pete Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3NIL (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate> [<https://perma.cc/Y38E-T79G>]; see generally John T. Holden, Thomas A. Baker III & Joanna Wall Tweedie, *The Collective Conundrum*, 76 OKLA. L. REV. 113 (2023) (discussing collectives).

54. Potuto, *supra* note 24, at 48-49.

55. See, e.g., Kristi Dosh, *Female Gymnasts Are Proving to be Particularly Successful in NIL*, BUS. OF COLLEGE SPORTS (April 17, 2023), <https://businessofcollegesports.com/name-image-likeness/some-of-nils-top-performers-are-competing-in-the-ncaa-womens-gymnastics-championship> [<https://perma.cc/BYM2-VDLF>] (pointing to six- and seven-figure deals by female gymnasts); Dan Tracy, *Caitlin Clark’s NIL Deals, Explained: How Much Money Iowa Star Makes from Nike, Other Sponsors in 2024*, SPORTING NEWS (Mar. 30, 2024), <https://www.sporting-news.com/us/ncaa-basketball/news/caitlin-clark-nil-deals-money-iowa-nike-sponsors-2024/e58534cad3b2960663a36cb> [<https://perma.cc/V3WP-7MQG>] (noting that Caitlin Clark had NIL deals valued at over \$3 million).

56. In a survey of the athletic directors at FBS schools, “90% are concerned (73% being extremely concerned) that NIL payments from collectives are being used as improper recruiting inducements, both for high school athletes or college transfers.” *LEAD1 Survey Reveals 90% of FBS Athletic Directors Polled Are Concerned NIL Used as Improper Recruiting Tool*, LEAD1 (May 4, 2022), <https://lead1association.com/lead1-survey-reveals-90-of-fbs-athletic-directors-polled-are-concerned-nil-used-as-improper-recruiting-tool> [<https://perma.cc/M59B-V9GK>]. This concern may have been exacerbated by the NCAA’s easing of the restrictions on changing schools. See *NCAA Division I Transfer FAQs*, NCAA ELIGIBILITY CTR.,

because the boosters who previously contributed to the athletic department might instead direct their resources towards collectives.⁵⁷

In 2024, the dam broke completely when the NCAA and the power conferences agreed, as part of a proposed settlement for three pending antitrust cases, to permit schools in those conferences to engage in “revenue sharing” with their student athletes. Under the settlement, which was approved by the district court in 2025, each school can share up to twenty-two percent “of the average Power 5 school’s revenues, which is currently projected to be significantly more than \$20 million per school, per year.”⁵⁸ Schools have discretion to decide whether and how to allocate this revenue among athletes on any Division I sports team.

Put simply, efforts by the NCAA and its members to defeat “direct pay-to-play payments from universities to players” are now at an end.⁵⁹ The “revered tradition of amateurism in college sports”⁶⁰ has been abandoned, at least for the power conferences. Players on power conference teams need no longer be amateurs in any meaningful sense. Thus, the definition of the “product” that the NCAA and its power conference members produce, whether it is football or some other varsity in which the players receive revenue sharing from their school, cannot depend on the proposition that “athletes must not be paid.”⁶¹

Whatever the claims the NCAA made in *Board of Regents* and *Alston* about the unique uncompensated nature of its football product being the reason consumers choose it, the advent of pay for college players seems unlikely to dim enthusiasm for that product.⁶² At least today, the consumers of intercollegiate athletics do not seem to care very much whether the

https://s3.amazonaws.com/fs.ncaa.org/Docs/eligibility_center/Transfer/TransferFAQ.pdf [<https://perma.cc/A47X-RE8T>] (students who have “transferred previously out of a four-year school [can] compete immediately at a third or fourth Division I school if they are still an undergraduate student” as long as they meet academic eligibility requirements). Thus, collectives can be used to recruit a productive player with college experience to transfer to another institution. See also Julie Owen & Ronald J. Rychlak, *Unanticipated Problems with the Transfer Portal*, 53 U. MEM. L. REV. 929, 934 (2023) (stating that “[c]urrent college athletes are being induced to change schools with the promise of large amounts of money”).

57. See *Lead I Survey*, *supra* note 56 (78% of athletic directors expressed this concern).

58. Hagens Berman and Winston & Strawn Secure Historic Multibillion-Dollar Settlement for College Athletes and Bring Revolutionary Change to College Sports, May 23, 2024, <https://perma.cc/H2YQ-94JJ>. See In re Coll. Athlete NIL Litig., No. 20-CV-03919 CW, 2025 WL 1675820, at *7, *25-28 (N.D. Cal. June 6, 2025) (describing and approving this part of the settlement). Prior to the settlement, the NCAA’s president proposed creating a new tier in Division I where universities “would be required to pay at least half their athletes \$30,000 per year.” NCAA Signs Off on Deal that Would Change Landscape of College Sports — Paying Student-Athletes, NBCNEWS.COM (May 23, 2024), <https://tinyurl.com/4t3uyvps> [<https://perma.cc/L8S8-Z99V>].

59. Shehan Jeyarajah, *How Historic House v. NCAA Settlement Will Impact College Athletics on and off the Field for Years to Come*, CBSSPORTS.COM (May 24, 2024), <https://tinyurl.com/3zabef6z> [<https://perma.cc/S84Z-MSWF>].

60. *Board of Regents*, 468 U.S. at 120.

61. *Id.* at 102.

62. Cox, *supra* note 24, at 570-71.

players get paid. (They don't seem to be switching over to watching Division III teams or high school games, for example.)

As for the “identification of this ‘product’ with an academic tradition,”⁶³ while the *audience* for college sports may identify with, and remain deeply connected to, a particular academic institution, that need no longer be true of the athletes.

In 2018, the NCAA created a national transfer database (commonly called the “transfer portal”) allowing players already on a team at one institution to put themselves “on the market” for other schools to recruit.⁶⁴ That market has become quite lively, especially after the NCAA, perhaps fearing additional antitrust liability, got rid of restrictions that prevented players from transferring to another institution without sitting out of athletics for a year and lifted any limits on the number of times a player can transfer. For example, in 2023, more than 1200 men's basketball players (enough players to fill 80 full Division I team rosters) transferred to a school where they received an athletic scholarship.⁶⁵ A majority of the players in the starting lineups at the 2024 men's basketball Final Four were transfers.⁶⁶ And a majority of the ACC teams recruited new quarterbacks through the transfer portal before the 2024 season.⁶⁷ This free agency further weakens the connection between athletes and the academic enterprise of the institution for which they (perhaps only evanescently) play.⁶⁸

63. *Board of Regents*, 468 U.S. at 102.

64. Owen & Rychlak, *supra* note 56, at 940; *see generally id.* at 940-42 (describing how the transfer portal works); NCAA, Division I 2023-24 Manual 75, 166 (2023), <https://perma.cc/7R88-HBS4> (setting out NCAA Bylaws 13.1.1.3.1, and 14.5.5.2, governing the transfer portal and transfer eligibility), <https://perma.cc/7R88-HBS4>.

65. NCAA, Transfer Portal Data: Division I Student-Athlete Transfer Trends, <https://perma.cc/75DD-SN8S>. Across all sports, more than 10,000 students transferred schools and received an athletic scholarship at the receiving institution. *Id.*

66. Cater Bahns, *March Madness 2024: Transfer Portal Shapes Final Four, Defines NCAA Tournament Rosters*, 24-7SPORTS.COM (Apr. 3, 2024), <https://247sports.com/longformarticle/march-madness-2024-transfer-portal-shapes-final-four-defines-ncaa-tournament-rosters-229842558> [<https://tinyurl.com/58s9h5ey>]. Among those starters, four had played for more than two schools. *See id.*

67. Kevin Borba, *ACC Loaded With New Transfer Portal Quarterbacks Ahead Of 2024*, SI.COM (Jan. 24, 2024), <https://www.si.com/college/stanford/football/acc-loaded-with-new-transfer-portal-quarterbacks-ahead-of-2024> [<https://perma.cc/L7N7-K5MV>].

68. To be sure, transferring institutions is quite common among all students. *See* Doug Shapiro et al., *Transfer & Mobility: A National View of Student Movement in Postsecondary Institutions, Fall 2011 Cohort*, NAT'L STUDENT CLEARINGHOUSE RSCH. CTR. 4 (July 2018) (reporting that roughly 38 percent of students who entered a two- or four-year college in 2011 had transferred institutions within six years), <https://perma.cc/64ZL-E7SD>. That being said, NCAA survey data suggests that “close to 90% of all men's basketball transfers say they leave for athletic reasons.” *Tracking Transfer in Division I Men's Basketball*, NCAA RSCH. (Feb. 2021), https://ncaaorg.s3.amazonaws.com/research/rep/NCAARES_REP-TrackingTransfersDIMBB.pdf [<https://perma.cc/NM5Y-3T6V>]. They face academic challenges as a result: Many of these student-athletes “lose credits upon transfer and register lower Academic Progress Rates (APRs) and graduation rates at their new schools than seen among non-transfers.” *Id.*; *see also* Owen & Rychlak, *supra* note 56, at 933-34 (discussing the various difficulties transfer students face).

The huge conference broadcast deals that *Board of Regents* made possible may have reached their apotheosis with the emergence of continental conferences. The Big Ten, once centered in the Midwest, now stretches from California to New Jersey. The Atlantic [*sic*] Coast Conference now extends from Boston to the Bay Area. And the Big 12 reaches from Utah to Orlando. The upshot is that many student-athletes will need to spend large amounts of time away from campus, missing classes and detracting from their academic experience and bonds with the school, as opposed to their team.⁶⁹

Nor are NIL deals and revenue sharing necessarily the end of the road. Now that athletes *can* be paid to play college sports, the question becomes *must* they. The general counsel of the National Labor Relations Board has taken the position that “scholarship football players and other similarly situated players at academic institutions” qualify as “employees” of their institution under section 2(3) of the National Labor Relations Act⁷⁰ and the “common-law test” for determining employee status.⁷¹ After all, athletes in revenue-producing sports “perform a service” that “generat[es] tens of millions of dollars in profit” for their universities, and the scholarships that recruited athletes receive represents “significant compensation” for that service.⁷² Coaches and team administrators oversee large swaths of players’ daily lives. If players are employees, then schools must comply with wage and hour laws, including the Fair Labor Standards Act. The Third Circuit recently held that in the wake of *Alston*, “the ‘frayed tradition’ of amateurism is no shield to FLSA claims”⁷³; there needs to be a fact-intensive inquiry into whether particular athletes are covered. The argument advanced by the NCAA and the defendant schools—“that, although athletes do not earn wages, the benefits of participation include payment in other forms, such as increased discipline, a stronger work ethic, improved strategic thinking, time management, leadership, and goal setting skills, and a greater ability to work collaboratively”⁷⁴—hardly

69. See *Johnson v. Nat’l Collegiate Athletic Ass’n*, 108 F.4th 163, 174 (3d Cir. 2024) (describing allegations by plaintiffs in a Fair Labor Standards Act suit “that they were forced to schedule classes around their athletic commitments, limiting their range of learning options” and “studies showing that NCAA requirements frequently prevent athletes from pursuing their preferred majors”); Brian L. Porto, *Neither Employees Nor Indentured Servants: A New Amateurism for A New Millennium in College Sports*, 26 MARQ. SPORTS L. REV. 301, 309 (2016) (discussing the extensive time commitments athletes had even before conference realignment); Potuto, *supra* note 24, at 61 (describing the additional burdens imposed by conference realignment).

70. 29 U.S.C. § 152(3).

71. Off. Gen’l Counsel, NLRB, *Statutory Rights of Players at Academic Institutions 3 (Student-Athletes) Under the National Labor Relations Act*, Mem. GC 21-08 (Sept. 29, 2021), <https://perma.cc/3W6B-ZJPG>.

72. *Id.* at 3.

73. *Johnson*, 108 F.4th at 181.

74. *Id.* at 174.

distinguish athletes from workers in a range of other industries. Amateur hour seems to be over for athletes in the power conferences.⁷⁵

II. Athletics and the Mission of a Serious University

The preceding discussion shows how de facto minor league professional sports has become one of the products that many major universities now produce. This raises the question whether that product is one that universities *should* be in the business of supplying. This section suggests that this product may actually detract from, rather than contribute to, the primary missions of a serious university.

The Association of American Universities “is composed of America’s leading research universities.”⁷⁶ These institutions are “on the leading edge of innovation, scholarship, and solutions that contribute to scientific progress, economic development, security, and well-being.”⁷⁷ “[T]he majority of competitively awarded federal funding for research” goes to the 69 member schools. In addition to their research mission, members “collectively” aspire to “promote best practices” in undergraduate education.⁷⁸ Public institution members range, alphabetically, from Arizona State to the University of Wisconsin-Madison; private members, from Boston University to Yale.

Coincidentally, the four power conferences collectively have almost an identical number of member schools (68). Their overlap with the AAU (how delicious that it uses the same abbreviation as the Amateur Athletic Union) is quite striking. Every Big Ten school but Nebraska belongs, as do half the ACC schools; overall, 32 of the power conferences’ 68 members are among the AAU’s 69.⁷⁹

75. And it may be over for other athletes as well: Consider the efforts of the Dartmouth men’s basketball team to unionize. See Andrea Hsu, *Dartmouth Men’s Basketball Team Votes to Unionize, Shaking Up College Sports*, ALL THINGS CONSIDERED (Mar. 5, 2024), <https://www.npr.org/2024/03/05/1235877656/ncaa-dartmouth-mens-basketball-union-election-nlrb> [<https://perma.cc/NZ94-TQ89>] (describing the Dartmouth athletes’ decision to unionize because “[b]eing paid for the time they spend on the sport ‘would alleviate the need for second jobs’”—Dartmouth does not provide athletic scholarships—and “would also allow them to negotiate better health care benefits, to cover out-of-pocket costs incurred as a result of injuries sustained while playing for the school”).

76. *Who We Are: America’s Leading Research Universities*, ASS’N OF AM. UNIV., <https://www.aau.edu/who-we-are-americas-leading-research-universities> [<https://tinyurl.com/3dbujhuj>].

77. *Our Members*, ASS’N OF AM. UNIV., <https://www.aau.edu/who-we-are/our-members> [<https://perma.cc/2JSJ-E8SB>].

78. *Who We Are*, *supra* note 76.

79. And if we broaden the lens slightly, it turns out that all the power conference institutions but Wake Forest, Texas Christian University, and Brigham Young University are classified as R-1 institutions by the American Council on Education and the Carnegie Foundation for the Advancement of Teaching. The R-1 classification refers to a select tier of doctoral degree-granting institutions with very high spending on research: In 2025, “the threshold will be set at \$50 million in total R&D spending and 70 doctoral research degrees.” American Council on Education, *Carnegie Classification of Institutions of Higher Education, 2025 Research Designations FAQs*, <https://perma.cc/M58K-BXP7>.

So these institutions clearly produce products—academic research and new generations of scholars—quite distinct from college sports, amateur or otherwise. What is the relationship between their different product lines? The connection between high-level research and scholarship, on the one hand, and high-revenue sports seems an historical accident. Great universities elsewhere in the world do not operate anything even remotely resembling a power conference athletics operation.

But does a high-level athletics program nevertheless contribute to a university's research and educational missions? To begin, athletics revenues largely stay in athletic departments: in fiscal year 2023, FBS teams had total revenues of roughly \$10.6 billion; they transferred back to the universities whose names appear on their jerseys \$39.2 million dollars—or roughly 0.37 percent.⁸⁰ According to one sports fan who plowed through the school-level data, only nine public universities in fiscal year 2022 “reported transferring athletic profits back to their central campus coffers.”⁸¹ (And even in the power conferences, some schools spend more on athletics than they receive in athletic-related revenue meaning that other units of the university are subsidizing sports.⁸²) There is a rich literature on whether athletic *success* has an effect on such factors as donations, applications, and test scores of admitted students.⁸³ But for every team that wins a game, there is a team that loses. And there is relatively little evidence that simply

80. See *Football Bowl Subdivision—Where the Money Goes/Where the Money Comes From*, KNIGHT-NEWHOUSE COLLEGE ATHLETICS DATABASE (2024), <https://knight-newhousedata.org/fbs> [https://perma.cc/5ZPG-CRGA].

81. @TJAltmore, X (June 3, 2023), <https://x.com/TJAltmore/status/1665011526758019075> [https://perma.cc/VU9V-52UW]. The Knight-Newhouse institution-level data do not include revenue and expenditures for private institutions, so one cannot determine whether those universities' athletic programs are subsidizing their universities' educational or research components.

82. For example, according to the Knight-Newhouse database, in FY2023, the University of California had total athletic revenues of \$126 million, which included \$33 million of “institutional/government support,” but spent \$134 million. See Knight-Newhouse database, *supra* note 80, at <https://perma.cc/WG8G-HFX8>. And outside the power conferences, the mismatch is higher. For example, in 2015-16, Ohio State “was the only Division I sports program among Ohio's public universities to pay all its bills with athletic money. All others depend on student fees, tax dollars or other non-athletic sources to make up the difference.” Rich Exner, *Ohio State Buckeyes Sports Money by the Numbers*, CLEVELAND.COM (Mar. 23, 2017), https://www.cleveland.com/datacentral/2017/03/ohio_state_buckeyes_sports_mon.html [https://perma.cc/DZQ2-F7VQ].

If university athletics departments are subsidizing anything, they are subsidizing U.S. professional sports teams, by providing them with more experienced, better coached entry-level employees. In comparison to U.S. football, where colleges and universities provide players to the National Football League, English football (a/k/a soccer) uses an Elite Player Performance Plan whereby clubs in the Premier League develop young players through their own “academies.” See *Long-Term Strategy Designed to Advance Premier League Youth Development*, PREMIER LEAGUE, <https://www.premierleague.com/en/footballandcommunity/youth-development/eppp> [https://perma.cc/C7VQ-L92W].

83. For descriptions of the literature, see *Johnson v. NCAA*, 108 F.4th 163, 168-69 (3d Cir. 2024); Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design*, 99 REV. OF ECON. & STAT. 119 (2017); Adam G. Walker, *Division I Intercollegiate Athletics Success and the Financial Impact on Universities*, SAGE OPEN, 5(4), <https://doi.org/10.1177/2158244015611186>.

fielding sports teams, let alone sports teams in non-revenue sports with small audiences, produces substantial donations directed to the research and teaching functions of the university or significantly affects the quality of students an institution attracts.⁸⁴

Then there is the question whether operating a large-scale athletics program distorts other aspects of the university—in particular, the quality of undergraduate students. The share of the student body devoted to recruited athletes may not make much of a difference at the largest power conference schools. At huge schools like Michigan or North Carolina or UCLA, the percentage of students who are varsity athletes is vanishingly small.⁸⁵ But at schools with smaller enrollments, like Stanford or Duke, the percentage of varsity athletes exceeds ten percent of the undergraduate student body.⁸⁶ There has been a steady drumbeat in recent years suggesting that recruited athletes differ along a variety of dimensions from their nonrecruited classmates: their entering academic credentials are lower; they major in less rigorous subjects; they underperform their academic predictors; they “place[] less emphasis on the goals of making original contributions to science or the arts”; and they do little to increase the socioeconomic diversity of their institution.⁸⁷ “Indeed, the data suggests that athletes awarded scholarships in big-time college sports are more likely to come from advantaged backgrounds than the wider student body.”⁸⁸ And there’s been a recent decline in the presence of players who are the first in their family to go to college even “among athletes who pla[y] sports that are often thought to be pathways toward social mobility.”⁸⁹ For example,

84. See Barbara H. Fried, *Punting Our Future: College Athletics and Admissions*, 39 *CHANGE* 8, 9, 12 (2007) (discussing the “zero-sum arms race” of sports competition). And when it comes to major donors, one study of donors at 30 highly selective universities—including 8 power conference members—found that “big givers as a group are somewhat more inclined to want to reduce emphasis on athletics than to increase it.” JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 217 (2002).

85. See X Factor Admissions, *Total NCAA Athletes at the Top Colleges* (May 10, 2025), <https://xfactoradmissions.com/basic-guide-to-college-admissions/total-ncaa-athletes-at-the-top-colleges> [<https://perma.cc/55M9-B3GG>] (3% of the Michigan undergraduate student body, 4% of the North Carolina undergraduate student body, and 2% of the UCLA undergraduate student body are varsity athletes).

86. See *id.* (11% of Duke and Stanford undergraduates and 6% of Northwestern undergraduates are varsity athletes). Ironically, the percentage is even higher at highly selective small liberal arts colleges. See SHULMAN & BOWEN, *supra* note 84, at 32 (reporting that the percentage of male students who entered college in 1989 who became athletic lettermen ranged from 5 percent at schools like Michigan and North Carolina to 9 percent at schools like Stanford and Princeton to 32 percent at Division III liberal arts colleges like Williams and Wesleyan).

87. See SHULMAN & BOWEN, *supra* note 84, at 260-62; Fried, *supra* note 84, at 10-13.

88. Tom Farrey, *The Gentrification of College Hoops*, *ANDSCAPE* (2017), <https://andscape.com/features/gentrification-of-ncaa-division-1-college-basketball> [<https://perma.cc/DV3D-SG2G>].

89. James Tompsett & Chris Knoester, *The Making of a College Athlete: High School Experiences, Socioeconomic Advantages, and the Likelihood of Playing College Sports*, 39 *SOCIOLOGY OF SPORTS J.* 129, 132 (2022), available at <https://doi.org/10.1123/ssj.2020-0142>. And it’s even truer with respect to sports that require costly equipment and coaching or where club teams, rather than school teams, are the primary way young athletes hone and display their skills. See *id.* at 131, 137.

in men's basketball, the number of "first-gen" players "plummeted by a third [between 2010 and 2015]. Women's basketball experienced a similar drop. Football fell by more than 10 percent."⁹⁰ So the opportunity cost of admitting individuals for the purpose of having them play varsity sports is the possible loss of other students, with talents or backgrounds more aligned with the university's overall mission.

Finally, there is what George's longtime colleague Guido Calabresi calls "the gift of the evil deity." As Guido tells the story, about a month into his first-year torts class, he would ask his students to imagine themselves as "president of this country or as controller of our legal system"⁹¹ (Remember, as the AAU declares, "educating and training tomorrow's visionary leaders and innovators" is one of a great university's ambitions.⁹²) Suppose a deity were to "offer a gift, a boon, which would make life more pleasant, more enjoyable than it is today."⁹³ In return, the deity demands one thing: "the lives of one thousand young men and women picked by him at random who will die each year horrible deaths."⁹⁴ When Guido asks his students whether they would accept the gift, they all answer "no." The kicker? The gift is the automobile. And of course they (and the rest of us) have accepted it.

What, then, about sports and the university? The National Institutes of Health tell us that football players (and soccer players as well) are at risk of chronic traumatic encephalopathy (CTE) because of repeated blows to the head. "Every additional year playing football was associated with 15% increased odds of a CTE diagnosis and, for those with CTE, 14% increased odds of severe CTE."⁹⁵ The symptoms of this untreatable condition include memory loss, depression, impaired judgment, anxiety, dizziness and trouble balancing, and suicidal tendencies.

A central ambition of any university is to harness the best brains it can find and educate them to serve as leaders and explorers during lifelong careers. But power conference schools give 85 athletic scholarships a year to football players, knowing the heightened risk these students face of losing the very minds universities exist to sharpen.⁹⁶ It seems highly unlikely that

90. Farrey, *supra* note 88.

91. Guido Calabresi, *The Gift of the Evil Deity*, in IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 1, 1 (1985).

92. *Who We Are*, *supra* note 76.

93. Calabresi, *supra* note 91, at 1.

94. *Id.*

95. *How Football Raises the Risk of Chronic Traumatic Encephalopathy*, NAT'L INST. OF HEALTH (July 11, 2023), <https://www.nih.gov/news-events/nih-research-matters/how-football-raises-risk-chronic-traumatic-encephalopathy> [<https://perma.cc/5RWT-3PCX>].

96. Nor is recruiting athletes to play football limited just to power conference members of the AAU. Yale and Harvard do it too. See *Reno Announces Class of 2027*, YALEBULLDOGS.COM, (June 1, 2023) <https://yalebulldogs.com/news/2023/6/1/football-reno-announces-class-of-2027.aspx> [<https://perma.cc/HHH7-JRTK>] (announcing the names of twenty-seven football players recruited to play for Yale); *Football Announces 30-Member Class of 2028*, GOCRIMSON.COM (May 17, 2024), <https://gocrimson.com/news/2024/5/17/football-announces-30->

football, in contrast to other, less dangerous sports, possesses any feature that makes it intrinsically superior as an *educational* matter. Can providing an audience with pleasant and enjoyable entertainment on brisk fall afternoons justify the risks football creates? More broadly, does football's production of revenue that subsidizes the operation of other varsity teams—in sports with rounder balls like tennis or volleyball or golf—justify a world in which football players face risks and other athletes reap only rewards?⁹⁷ To justify the continuation of college football by pointing out that its revenues float the nonrevenue women's sports that Title IX requires a school to field⁹⁸ seems hypocritical at best. The antitrust injuries football players have suffered may turn out to be the least serious ones they incur.

In any case, the status quo is unstable. When a team of basketball players at a flagship state university has to enroll entirely in online courses for a semester in order to travel the more than 26,000 miles conference realignment has required,⁹⁹ that activity cannot be squared with the overall goals of that university, where undergraduate instruction is primarily in

member-class-of-2028.aspx [https://perma.cc/BH4A-6D6S] (announcing Harvard's football recruits).

97. Schools cannot pretend with a straight face that football players are receiving vocational preparation analogous to what students whose studies lead to other sorts of first postgraduate jobs receive. To be sure, the power conference members provide, in antitrust terms, an "essential facility" for producing N.F.L. players. See Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989) (explaining the concept of an essential facility). But the likelihood of any particular college player making it to the pros is quite low. According to NCAA data, "[w]hen we survey NCAA student-athletes about their expectations of moving on to professional athletics careers, the results indicate surprising confidence in that possibility. The reality is that very few go pro." *Football: Probability of Competing Beyond High School*, NCAA RESEARCH (2024), <https://www.ncaa.org/sports/2015/2/27/football-probability-of-competing-beyond-high-school.aspx> [https://perma.cc/ZC7A-Y4UJ]. The NCAA estimates that 3.8% of draft-eligible Division I athletes get drafted by the NFL; if the pool is limited to the power conferences, the NCAA "estimate[s] that 11% were drafted" in 2023. *Id.* But only about 30% of drafted players "will ever make it onto an NFL roster," where the average career lasts three years. Jeffrey May, *What Percentage of Drafted Players Make an NFL Roster?* (Apr. 25, 2024), <https://en.as.com/nfl/what-percentage-of-drafted-players-make-an-nfl-roster-n-2> [https://perma.cc/C68B-DDBM]. So no more than four percent of even the most elite group of college football players will play a minute in the NFL.

98. Title IX of the Education Amendments of 1972 provides that no person "shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The "term 'program or activity'" encompasses "all of the operations of . . . a college, university, or other postsecondary institution . . ." *Id.* § 1687(2)(A). To determine an institution's compliance with Title IX with respect to its athletic programs, one of the primary determinants is "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." See *Ng v. Bd. of Regents of Univ. of Minnesota*, 64 F.4th 992, 994-95 (8th Cir. 2023) (quoting U.S. Dep't of Educ. A Policy Interpretation: Title IX and Intercollegiate Athletics, available at <https://perma.cc/PBF9-RDMQ>)).

99. See Laine Higgins, *They're Going to March Madness—but Only After Circumnavigating the Planet*, WALL ST. J. (Mar. 14, 2025), <https://www.wsj.com/sports/basketball/oregon-ducks-big-ten-travel-march-madness> [https://perma.cc/G899-NH23] (reporting that the University of Oregon Ducks "have crisscrossed the country so frequently that the total distance they've traveled" is "the equivalent of traveling the entire circumference of planet Earth—and then adding on a few thousand miles for good measure" and that because the Big Ten conference "plays every night of the week," "everyone at Oregon enrolled in online classes this term—the first time that's happened in [the coach's] 15-year tenure").

person for pedagogical reasons.¹⁰⁰ It truly is March madness to celebrate a player's taking three separate programs to an NCAA regional final over the course of five years.¹⁰¹ Something has to give. Perhaps it will be the pretense that players are *student*-athletes, and players, at least in revenue sports, will become university employees who represent their school for some fixed period of time in return for an explicit salary. Perhaps it will be the operation of a semi-professional athletics operation, in favor of a less-intensive sports program, or an intramural program, that does not demand of players that they sacrifice their status as full-time students. But universities cannot pretend that there are no tradeoffs to be made.

Conclusion

"Procompetitive," like "jurisdiction," can be "a word of many, too many, meanings."¹⁰² Not all competition is desirable, or just. And there is more than just consumer welfare at stake in the way universities operate and the choices they make with respect to what sorts of sports they will sponsor, under what sorts of circumstances. Universities' distinctive responsibilities to the young people they admit center on the educational products they provide, and the Supreme Court's antitrust decisions have created an environment in which those educational commitments and priorities risk getting sidelined. One of the things I've carried with me from George's Law and Economics and Antitrust II classes is that answering the economic questions is an important beginning, but not invariably the end, of resolving questions of policy. The Supreme Court's antitrust decisions in *Board of Regents* and *Alston* have transformed the world of college sports in ways that raise profound questions well beyond where the money goes.

100. See Office of the Provost, *Spring Term Guidance*, Univ. of Oregon, <https://provost.uoregon.edu/spring-term-guidance> [<https://perma.cc/6JFB-T3JX>].

101. See Alanis Thompson, *Washington Native Hailey Van Lith Grateful for Long, Well-Traveled College Career After It Ends in Elite Eight*, THE COLUMBIAN (Apr. 1, 2025), <https://www.newsnationnow.com/us-news/sports/sports-headlines/ap-hailey-van-lith-is-grateful-for-her-long-well-traveled-college-career-after-it-ends-in-elite-eight> [<https://perma.cc/P7U8-KPBY>] (discussing a player who ended her career at TCU, after also playing for Louisville and LSU).

102. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663, n. 2 (D.C. Cir. 1996)).