

Preparing for the Inevitable— Compensating College Athletes for Playing—by Comparing Two Pay- for-Play Methods: The Duke Model Versus the Free Market Model

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*Change does not roll in on the wheels of inevitability, but comes through continuous struggle. And so we must straighten our backs and work for our freedom. A man can't ride you unless your back is bent.*¹

—Dr. Martin Luther King, Jr.

INTRODUCTION

Many scholars and authors, including a justice of the United States Supreme Court, have referred to the business of college athletics as being built on the backs of college athletes who suffered from exploitation because they were not allowed to profit while others flourished in the business of college sports, which is currently an \$18 billion industry.² Many struggled, and continue to struggle, to gain rights for college athletes to earn money based on their prowess and accomplishments in college athletics.³ Those struggles resulted in major

1. *Martin Luther King, Jr.*, BRAINY QUOTE, https://www.brainyquote.com/quotes/martin_luther_king_jr_121065#:~:text=Martin%20Luther%20King%2C%20Jr.%20-%20Change%20does%20not,strengthen%20our%20backs%20and%20work%20for%20our%20freedom [https://perma.cc/Q4KL-T8SK] (last visited Jan. 4, 2023).

2. *See, e.g.*, David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 225 (2017); Darren Heitner, *Money and Sports, Economic Realities of Being an Athlete*, 8 DEPAUL J. OF SPORTS L. & CONTEMPORARY PROBLEMS 161, 161 (2012) (stating that college athletics is a billion-dollar business “built on the backs of amateur athletes”); Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369, 378-79 (2016); Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 34 (2015); National Collegiate Athletic Assn. v. Alston, 141 S. Ct. 2141, 2169 (2021) (Kavanaugh, J., concurring); Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (July 2, 2021), <https://www-statista.com/chart/25236/ncaa-athletic-department-revenue/#:~:text=Universities%20collectively%20generate%20billions%20of%20dollars%20from%20TV,while%20athletes%20are%20forced%20to%20maintain%20%E2%80%9Ccamateur%20status%E2%80%9D> (noting that college athletics is an \$18.9 billion business).

3. Laine Higgins, *Should College Athletes Be Paid? A Once-Radical Idea Gains Momentum*, WALL ST. J. (Jul. 24, 2022), <https://www.wsj.com/articles/college-athlete-pay-ncaa-employees-11658502884> [https://perma.cc/B949-65GH]; Ralph D. Russo, *Athlete Advocacy Group Files Complaint with DOJ Against NCAA*, ASSOCIATED PRESS (Oct. 21, 2022), <https://apnews.com/article/college-football-sports-business-fff804a5099209796e29a97d5f7a95f3> [https://perma.cc/RSY4-

advancements for college athletes. The most recent win came with allowing college athletes to earn compensation based on the use of their Name, Image, and Likeness (NIL).⁴ The question for so long remained whether college athletes would be compensated based on their athletic achievements either through NIL or pay-for-play, the latter of which refers to paying college athletes for playing on the team.⁵ Although there will certainly be more struggles before it happens, both the arrival of NIL deals for college athletes and the Supreme Court of the United States' decision in *Alston* that gave notice to all, particularly the NCAA, that college athletes should not be exploited any further, indicate pay-for-play is inevitable.

The question surrounding pay-for-play then changes from whether it will happen to when it will start and what it will look like. A date certain cannot be placed on when college athletes will receive compensation for playing, but the time is coming near. As for how they will be paid, this Article focuses on examining two potential methods

GR6C]; Ross Dellenger, *Legal Complaint Around Student Athlete Compensation Takes 'Aggressive' Next Step*, SPORTS ILLUSTRATED (Sept. 15, 2022) <https://www.si.com/college/2022/09/15/ncaa-compensation-complaint-next-step-student-athlete-employees> [https://perma.cc/39KD-CURD].

4. *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA, <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [https://perma.cc/TG84-M9FP] (last visited Jan. 4, 2023).

5. *See, e.g.*, Amy C. McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 497–98 (2008) (arguing for the compensation of college athletes); Brennan Thomas, *Pay for Play: Should College Athletes Be Compensated?*, BLEACHER REPORT (Apr. 4, 2011), <https://bleacherreport.com/articles/654808-pay-for-play-should-college-athletes-be-compensated> [https://perma.cc/L79D-KNZQ]; Andrew Smalley, *Pay for Play for College Athletes?*, NAT'L CONF. OF STATE LEGISLATURES BLOG, <https://www.ncsl.org/blog/2019/09/30/pay-for-play-for-college-athletes.aspx> [https://perma.cc/C6LT-55X8]; Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/9GS3-HC5U] (same); Michael Wilbon, *College Athletes Deserve to Be Paid*, ESPN (July 18, 2011), http://www.espn.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid [https://perma.cc/2F3K-BJLX]; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?mcubz=3> [https://perma.cc/7Y3X-KXFT].

to pay college athletes—a performance-based model and a free market model.

The Duke Model relies solely on the performance of college athletes to determine the amount of payment each college athlete will receive. It allows universities and colleges to compensate athletes based on their academic and athletic achievements. The amounts and various categories of payment (as described below in detail) can be adjusted quite easily depending on the varying levels of financial success of each conference. The free market system is another attractive payment model as it serves as the primary means of recompense in the United States economy. College athletes would be free to negotiate and obtain compensation for playing just as everyone else involved in college athletics is currently able to negotiate and obtain compensation for themselves, including NCAA executives and employees, college sports announcers and analysts, coaches, and athletic directors.

Part I of this Article examines the signs of the times that clearly indicate pay-for-play is coming sooner rather than later. Parts II and III describe the Duke Model's and the free market model's ability to compensate college athletes, respectively. Part IV includes a detailed comparison of the two models. Part V addresses any additional issues with pay-for-play, such as tax issues. This Article concludes that pay-for-play is coming soon, and the easiest and most equitable way to compensate players is via the Duke Model, which is based entirely on the performance of the players on the field or court and in the classroom. The injustices and exploitation borne on the backs of players has been recognized by SCOTUS, the public, and legislators—and now change is coming.

I. THE SIGNS OF THE TIMES CLEARLY INDICATE PAY-FOR-PLAY IS INEVITABLE

Two seismic shifts in the college sports landscape, including the allowance of NIL deals and the Supreme Court decision in *Alston*, demonstrate that pay-for-play is inevitable. Two other indicia, the public response to NIL deals signaling the death of amateurism and (yet another) NLRB general counsel calling college athletes employees, also point to the eventual certainty of pay-for-play.

*A. Name, Image, and Likeness and State Legislatures Favor
Compensating College Athletes*

In the summer of 2021, the NCAA announced that it would remove its prohibition that prevented college athletes from earning compensation based on their NIL.⁶ That monumental change came after several states passed laws that allowed college athletes to profit off of their NIL.⁷ California's statute, signed into law on September 17, 2019, and titled the "Fair Pay to Play Act," states that conferences, schools, and the NCAA cannot prevent college athletes from earning money based on their NIL or obtaining professional representation in relation to NIL deals.⁸ The California statute was originally set to become operative on January 1, 2023.⁹

After California passed the Fair Pay to Play Act in September of 2019, approximately 30 states passed similar laws and seventeen enacted them.¹⁰ A handful of states' NIL statutes went into effect on July 1, 2021, including Alabama, Florida, Georgia, Mississippi, and New Mexico.¹¹ After SCOTUS published the *Alston* opinion (which did not rule on NIL but signaled a substantial change in the SCOTUS' approach to college athlete compensation as discussed in the next section), and in light of the other states' NIL laws taking effect in the fall of 2021, California amended its Fair Pay to Play Act to become operative on September 1, 2021.¹²

6. *See supra*, note 4.

7. *See supra*, note 4; S.B. 26, 2021 Leg. (Cal. 2021) [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB26](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB26) [<https://perma.cc/K76G-N9AG>].

8. S.B. 26, *supra*, note 7.

9. *Id.*

10. *Id.*

11. *Id.*; FLA. STAT. § 1006.74 (2022), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=1000-1099/1006/Sections/1006.74.html [<https://perma.cc/FXE9-D9M8>]; H.B. 617, 2021 Leg., Reg. Sess. (Ga. 2021), <https://legiscan.com/GA/bill/HB617/2021> [<https://perma.cc/SX6W-G5E4>]; S.B. 2313, 2021 Leg., Reg. Sess. (Miss. 2021), <https://legiscan.com/MS/text/SB2313/id/2351829> [<https://perma.cc/MDU9-EYWA>]; S.B. 0094, 2021 Leg., Reg. Sess. (N.M. 2021), <https://www.nmlegis.gov/Sessions/21%20Regular/final/SB0094.pdf> [<https://perma.cc/74SY-PWV8>].

12. S.B. 26, Collegiate Athletics: Student Athlete Compensation and Representation, 2021 Leg. (Cal. 2021)

The NCAA initially argued that if some states allowed college athletes to make NIL deals while others did not, those state laws violated the Dormant Commerce Clause, which “prohibits states from interfering with interstate commerce.”¹³ In essence, states that permitted NIL deals for college athletes would see athletes flock to them, while states without NIL deals for college athletes would lose such athletes or watch as athletes made NIL deals in states that allowed them. Thus, states without NIL-permitting laws would be at a disadvantage to states with them, creating a discriminatory effect on the former.

SCOTUS published the *Alston* ruling on June 21, 2021.¹⁴ Around the same time, several state laws permitting college athletes to profit from their NIL were set to go into effect on July 1, 2021. On June 30, 2021, the NCAA announced an interim policy allowing college athletes to profit from their NIL starting July 1, 2021.¹⁵ The press release of the NCAA read more like a benevolent granting of rights by the NCAA when instead it represented a major concession in the NCAA’s previous incessant fight against any type of payment for athletes in the form of NIL deals.¹⁶

Never before could athletes profit significantly and legally based on their athletic prowess and accomplishments until the NCAA allowed NIL deals. The NIL statutes, though, often explicitly prohibit pay-for-play where an institution pays its athletes for playing.¹⁷

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB26 [<https://perma.cc/K76G-N9AG>]; Ryan Teoh, *Fair Pay to Play Act to take effect beginning Sept. 1*, THE DAILY CALIFORNIAN (June 24, 2021), <https://www.dailycal.org/2021/06/24/fair-pay-to-play-act-to-take-effect-beginning-sept-1> [<https://perma.cc/T5YL-W2MJ>].

13. Alex Blutman, *What If the NCAA Litigated State NIL Legislation?*, HARVARD J. SPORTS & ENT. L. (Dec. 28, 2020), <https://harvardjsel.com/2020/12/what-if-the-ncaa-litigated-state-nil-legislation/> [<https://perma.cc/LRH7-PWCF>].

14. NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021).

15. See *supra*, note 4.

16. *Id.* (quoting NCAA President Mark Emmert, “This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities.”); see, e.g., Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004) (arguing by the NCAA against NIL profits for college athletes), O’Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (same), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015) (same).

17. See, e.g., FLA. STAT. § 1006.74 (2022), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=1000-

Nevertheless, after the major domino of allowing NIL deals fell, the last one left to fall is pay-for-play by a conference or institution, which is not far behind. The *Alston* case, described in the next section, stands as a lighthouse for those seeking pay-for-play in college athletics.

B. SCOTUS Aligns with Compensating College Athletes in Alston

The *Alston* case represents a huge departure from the deference given to the NCAA by the courts, particularly SCOTUS.¹⁸ The opinion, highlighted by a scathing concurrence by Justice Brett Kavanaugh, evinces a healthy skepticism of the NCAA's business practices and borders on contempt of the NCAA's exploitative treatment of college athletes.¹⁹ In *Alston*, the plaintiffs, current and former Division I men and women college basketball players and Division I FBS football players, filed a class action lawsuit against the NCAA and eleven Division I conferences.²⁰ The plaintiffs challenged the NCAA's rules that limited compensation available to college athletes under the Sherman Act, an antitrust statute that prohibits unreasonable restraints of trade and promotes competition.²¹

The district court applied the three-step, burden-shifting Rule of Reason test applicable to the Sherman Act and antitrust law.²² First, a plaintiff must prove an act or practice of defendant results in a

1099/1006/Sections/1006.74.html [https://perma.cc/FXE9-D9M8] (prohibiting payments from institutions and only allowing NIL compensation from third parties unaffiliated with the athlete's institution); S.B. 2313, 2021 Leg., Reg. Sess. (Miss. 2021), <https://legiscan.com/MS/text/SB2313/id/2351829> [https://perma.cc/MDU9-EYWA] ("No student-athlete may earn compensation in exchange for the student-athlete's athletic ability or participation in intercollegiate athletics or sports competition.").

18. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 117 (1984); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 802 F.3d 1049, 1063–64 (9th Cir. 2015) (deferring to the NCAA); *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (showing deference to the NCAA's rulemaking activity since "the NCAA's action does not constitute an unreasonable restraint under the Sherman Act").

19. *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

20. *Id.* at 2151.

21. *Id.*

22. *Id.*

significant anticompetitive effect.²³ If plaintiff meets this burden, then the burden shifts to the defendant to show that the anticompetitive act or practice has a procompetitive justification.²⁴ If defendant meets that burden, then the burden shifts back to the plaintiff who must show the procompetitive justifications “could be reasonably achieved through less anticompetitive means.”²⁵

As for the first step, the district court found, after a ten-day trial, that the NCAA exercised market power because it controlled the only market for the most talented athletes in basketball and football to play in the United States.²⁶ The district court also found that the NCAA’s limit on college athlete compensation constituted horizontal price-fixing that artificially lowered the amount college athletes would receive as compensation because, but for the restraint, the NCAA members (i.e., institutions, which are the universities and colleges) would compete with each other and pay some college athletes more than what is currently allowed, namely cost of attendance scholarships, limited athletic awards—up to \$5,980—for individual or team accomplishments, and academic assistance, for some college athletes.²⁷ The district court further found that the NCAA operated a monopsony, where a buyer (or buyers) limits the price it will pay for a product or labor, as the NCAA places a cap on the amount its institutions will compensate college athletes for playing.²⁸ The NCAA did not challenge any of the findings under the first prong of the Rule of Reason test.²⁹

Turning to the second prong of the test, the district court rejected the purported procompetitive justifications that the limit on college athlete compensation increased output and helped to maintain competitive balance amongst the teams, just as the court did in the O’Bannon case

23. *Id.* at 2152; *In re Nat’l Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019); *American Express Company, et al.*, 138 S. Ct. at 2284.

24. *Alston*, 141 S. Ct. at 2152 (2021); *In re Nat’l Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019); *Ohio v. American Express Company, et al.*, 138 S. Ct. 2274, 2284 (2018).

25. *Alston*, 141 S. Ct. at 2153; *American Express Company, et al.*, 138 S. Ct. at 2284.

26. *Alston*, 141 S. Ct. at 2151–52.

27. *Id.* at 2152–53.

28. *Id.* at 2152.

29. *Id.*

years earlier.³⁰ Despite not finding much evidence that paying college athletes affects consumer demand, the district court somehow found “that rules aimed at ensuring ‘student-athletes do not receive *unlimited* payments unrelated to education’ *could* play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics.”³¹

The district court then moved to the final prong of the Rule of Reason test to determine if there existed less restrictive means for the NCAA to accomplish its procompetitive objectives.³² The district court, despite the fact that the NCAA’s rules limiting compensation to full cost of attendance scholarships for college athletes and “re-strict[ing] compensation and benefits unrelated to education” may be price-fixing agreements, rejected the college athletes’ challenge to these restrictive NCAA rules “in light of the *possibility* that ‘professional-level cash payments . . . *could* blur the distinction between college sports and professional sports and thereby negatively affect consumer demand.’”³³ The court determined, on the other hand, that the

30. *Id.*; see *O’Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015) (accepting the district court’s findings that the NCAA’s compensation rules “do not promote competitive balance [and] . . . do not increase output in the college education market”). The plaintiffs in *O’Bannon* included current and former Division I college football and men’s basketball players seeking damages from the NCAA for the use of the athletes’ NIL in video games and broadcasted games. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014), *aff’d* in part and vacated in part, 802 F.3d 1049 (9th Cir. 2015). The district court held the NCAA’s compensation rules, which limited compensation of college athletes to grant-in-aid scholarships, violated antitrust law under the Sherman Act and granted the following two permanent injunctions: the NCAA could not prevent its member institutions (i.e., colleges and universities) from providing college athletes with (1) full cost of attendance scholarships and (2) up to \$5,000 in shared revenue after graduation. *Id.* at 962–63, 989. The Ninth Circuit affirmed the district court’s holding that the NCAA’s compensation rules violated antitrust law. *O’Bannon*, 802 F.3d at 1078. The Ninth Circuit also upheld the first permanent injunction allowing schools to provide full cost of attendance scholarships to athletes, but it vacated the second permanent injunction claiming the \$5,000 compensation was “untethered to educational expenses.” *Id.* at 1078. For a full analysis of the *O’Bannon* case, see David A. Grenardo, *The Blue Devil’s in the Details: How A Free Market Approach to Compensating College Athletes Would Work*, 46 PEPP. L. REV. 203, 217–20 (2019).

31. *Alston*, 141 S. Ct. at 2153 (emphasis added).

32. *Id.*

33. *Id.* (emphasis added).

“caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid post-eligibility internships”—would not affect consumer demand because no one would confuse these “education-related benefits . . . with a professional athlete’s salary.”³⁴ Therefore, “[e]njoining the NCAA’s restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA’s current rules and yet fully capable of preserving consumer demand for college sports.”³⁵

Both the college athletes and NCAA appealed the ruling to the Ninth Circuit.³⁶ The plaintiffs challenged the district court’s ruling as failing to strike down the NCAA’s compensation limits that are “untethered to education, such as the restrictions on athletic scholarship amounts and cash awards,” while the NCAA challenged the injunction relating to education-related awards.³⁷ The Ninth Circuit affirmed in full the district court’s ruling.³⁸

SCOTUS, in its unanimous opinion, affirmed the Ninth Circuit’s ruling.³⁹ In doing so, it rejected the NCAA’s request to apply a “quick look” approach to the Sherman Act that avoids the longer Rule of Reason analysis.⁴⁰ Although the NCAA needs some deference to create and apply rules to the sports that it oversees, the NCAA’s rules are not immune from Rule of Reason analysis.⁴¹ If the NCAA wants immunity or special treatment under antitrust law, then it should ask Congress, not SCOTUS.⁴²

SCOTUS also (finally) addressed the dicta in the Board of Regents case that many courts have relied on to rule in favor of the NCAA on many occasions when the NCAA was pitted against college athletes.⁴³ In the seminal case of *Board of Regents*, SCOTUS applied the Rule of Reason test and held that the NCAA’s rules limiting televised

34. *Id.*

35. *Id.*

36. *Id.* at 2154.

37. *Id.* at 2166.

38. *Id.* at 2154.

39. *Id.* at 2166.

40. *Id.* at 2151.

41. *Id.*

42. *Id.* at 2157–58.

43. *Id.*

college football games and fixing the amounts colleges could receive for television contracts violated antitrust law.⁴⁴ Despite its ruling against the NCAA, SCOTUS unnecessarily added dicta heavily in favor of the NCAA.⁴⁵ Some of that dicta included, “It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive”⁴⁶ In *Alston*, SCOTUS remarked of this highly deferential language favoring the NCAA,

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in Board of Regents as more than that. This Court may be ‘infallible only because we are final,’ but those sorts of stray comments are neither.⁴⁷

Notably, the plaintiffs did not appeal the Ninth Circuit’s ruling on the NCAA’s cap on college athlete compensation unrelated to education, likely because they did not know how the currently comprised SCOTUS (leaning strongly conservative) would treat college athletes on the issue of pay-for-play. Had plaintiffs’ counsel anticipated Justice Kavanaugh’s concurrence or the court’s hostility to the NCAA during oral argument, plaintiffs would have likely appealed that part of the decision, too, and we would probably already be living in the pay-for-play era.

Justice Kavanaugh’s concurrence in *Alston* came straight from the mouths and minds of those arguing desperately for college athletes to receive compensation for playing and NIL. In his concurrence, Justice Kavanaugh noted that the decision only involved a ruling on the NCAA’s education-related compensation rules for college athletes, but not compensation rules regarding pay-for-play or NIL.⁴⁸ He stated that there exist serious antitrust issues with the compensation rules relating

44. NCAA v. Bd. of Regents, 468 U.S. 85, 85–89 (1984).

45. *Id.* at 101–02 (1984). For a full discussion of Board of Regents, see David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 253–57 (2016).

46. *Bd. of Regents*, 468 U.S. at 117.

47. *Alston*, 141 S. Ct. at 2158 (internal citation omitted).

48. *Id.* at 2166 (Kavanaugh, J., concurring).

to pay-for-play and NIL, but the college athletes did not raise those compensation rules on appeal.⁴⁹

Justice Kavanaugh then went on to question whether, under the Rule of Reason analysis applicable to college athlete compensation rules, the NCAA can plausibly assert a procompetitive justification required under antitrust law to defend its compensation rules against pay-for-play and NIL.⁵⁰ He pointed out the NCAA argues that the “defining feature of college sports . . . is that the student athletes are not paid.”⁵¹ In other words, the product of college football is different than professional sports because college athletes are not paid, and, if they were, consumer demand would decrease (meaning consumers would watch the product, which are the games, less).⁵² Kavanaugh called the NCAA practice of limiting college athlete compensation classic price-fixing labor “that would be flatly illegal in almost any other industry in America.”⁵³ The justice specifically attacked the NCAA’s business model, which “us[es] unpaid student athletes to generate billions of dollars in revenue for the colleges.”⁵⁴ Failing to pay college athletes their “fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes” is extremely questionable and potentially unjustifiable.⁵⁵

Justice Kavanaugh summed up his position on college athlete compensation and the NCAA’s dubious practices in light of antitrust law:

Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.⁵⁶

49. *Id.* at 2166–67 (Kavanaugh, J., concurring).

50. *Id.* at 2167 (Kavanaugh, J., concurring).

51. *Id.* (Kavanaugh, J., concurring).

52. *Id.* at 2151.

53. *Id.* at 2167 (Kavanaugh, J., concurring).

54. *Id.* at 2168 (Kavanaugh, J., concurring).

55. *Id.* (Kavanaugh, J., concurring).

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

C. Public Opinion in Response to NIL and Amateurism

The NCAA's major argument in previous cases regarding compensating college athletes beyond their scholarships amounted to this: fewer people will watch college sports if athletes are paid because college football is a brand of football viewers watch because the athletes do not get paid.⁵⁷ Amateurism, which means a player is not paid for playing, makes college sports marketable and creates a different product for viewers according to the NCAA.⁵⁸ Kavanaugh's concurrence eviscerated this notion by calling it unpersuasive and premised on circular reasoning.⁵⁹ He provided the following absurd examples to illustrate his point:

All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cap lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.⁶⁰

Kavanaugh, thus, blew up the NCAA's faulty notion of amateurism, which previous iterations of SCOTUS adhered to and somewhat revered.⁶¹

Nevertheless, no one knew for certain what would happen when college athletes earned compensation based on their NIL. The public's

57. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984); *O'Bannon v. NCAA*, 802 F.3d 1049, (9th Cir. 2015).

58. *Bd. of Regents*, 1468 U.S. at 102; *O'Bannon*, 802 F.3d at 1059.

59. *Alston*, 141 S. Ct. at 2167.

60. *Id.*

61. See, e.g., *Bd. of Regents*, 468 U.S. 85 (1984).

response to the advent of NIL confirmed one thing: consumers do not care if college athletes are paid, including if those payments consist of large sums of money. Although NIL deals on average are relatively small, several college athletes earn substantial amounts. According to Opendorse, which relies on data from its network of 90,000 athletes (making it one of the largest NIL marketplaces in the country),⁶² the average deal for Division I athletes is just \$2,963 per athlete.⁶³ On the other hand, Bryce Young, quarterback of the University of Alabama football team, earned approximately \$800,000 in NIL deals before the start of the 2021 season.⁶⁴ The timing was significant because Young had not played a single down as the starting quarterback for Alabama before he received nearly one million dollars in endorsements.⁶⁵ Did consumers revolt and decide not to attend Alabama football games because of the quarterback's extravagant NIL payments? Of course not. In fact, Alabama boasted the third highest in-person attendance numbers for the 2021 season averaging 98,720 home fans per game.⁶⁶ Did Bryce Young's large earnings create a distraction for the team or jealousy that caused his teammates to inhibit his success or the team's success? Absolutely not. Alabama reached the National Championship

62. Steven McAvoy, *Football Skill Players Lead NIL Earnings, According to New Opendorse Data*, THE NIL DEAL (Sept. 22, 2022), <https://nildealnow.com/football-skill-players-nil-earnings-opendorse-data>.

63. *NIL INSIGHTS: July 1, 2021 – November 30, 2022, Compensation and Activity Trends from the NIL Era of College Sports*, OPENDORSE (last visited January 10, 2023), <https://biz.opendorse.com/nil-insights/>.

64. Alex Scarborough, *Sources: Alabama Crimson Tide QB Bryce Young Has Already Signed More Than \$800K in NIL Deals*, ESPN (July 29, 2021), https://www.espn.com/college-football/story/_/id/31911674/sources-alabama-crimson-tide-qb-bryce-young-already-signed-800k-nil-deals [https://perma.cc/ZWY5-GPVS].

65. J. Brady McCollough, *Alabama Quarterback Bryce Young is Nearly a Millionaire Already in NIL Era*, LA TIMES (July 20, 2021), <https://www.latimes.com/sports/story/2021-07-20/alabama-quarterback-bryce-young-a-near-millionaire-already-in-nil-era> [https://perma.cc/E5VJ-UWGV].

66. Dean Straka, *College Football: Top 10 Teams by Average Home Game Attendance During 2021 Season*, 24/7 SPORTS (Jan. 5, 2022), <https://247sports.com/LongFormArticle/College-football-Top-10-teams-by-average-home-game-attendance-during-2021-season—179922401/> [https://perma.cc/E3NH-HLZD].

game⁶⁷ during that season while Bryce Young went on to win the Heisman trophy as the top college football player in the country.⁶⁸ Bryce Young is now part of major marketing campaigns as he appears on national television in Nissan and Dr. Pepper commercials.⁶⁹

The reaction by some consumers, namely donors, boosters, and alumni of schools, entailed creating collectives *to pay college athletes themselves* in the form of NIL deals.⁷⁰ Collectives are technically third parties not structurally connected to a university, but they are often founded and comprised by alumni, donors, and boosters of a university.⁷¹ These “school-specific collectives pool funds from a wide swath of donors to help create NIL opportunities for student-athletes through an array of activities . . . Most often, they pool funds from boosters and businesses, help facilitate NIL deals for athletes and also create their own ways for athletes to monetize their brands.”⁷² Over 120 collectives exist or are in the process of being created, and over 90% of the Power

67. College Football, 2021 Alabama Crimson Tide Schedule and Results, REFERENCE (2021), <https://www.sports-reference.com/cfb/schools/alabama/2021-schedule.html> [<https://perma.cc/WA2V-RFAV>].

68. Heisman Winner—Bryce Young, HEISMAN (2021), <https://www.heisman.com/heisman-winners/bryce-young/> [<https://perma.cc/5ZWW-WDFR>].

69. Joey Blackwell, *Bryce Young Inks NIL Deal with Dr. Pepper, Will Be Featured in “Fansville,”* FANNATION (Aug. 22, 2022), <https://www.si.com/college/alabama/bamacentral/bryce-young-inks-nil-deal-with-dr-pepper-will-be-featured-on-fansville-blackwell> [<https://perma.cc/B9Q3-WNFA>]; Dale Buss, *Nissan’s Heisman House Campaign Keeps Old Jocks Making New Hijinks*, FORBES (Sep 30, 2022), https://www.forbes.com/sites/dalebuss/2022/09/30/nissans-heisman-house-campaign-keeps-old-jocks-making-new-hijinks/?sh=3fe7fa615380_ [<https://perma.cc/9K8T-AAX6>].

70. Nick Kelly, *Alabama Football Now Has Third-party NIL Collective: Here’s What We Know*, YAHOO! NEWS (Apr. 11, 2022), https://news.yahoo.com/alabama-football-now-third-party-220656100.html?guccounter=1&guce_referrer=aHR0cHM6Ly91c2Mtd29yZC1lZGl0Lm9mZmljZWZwcm9udG12ZS5jb20v&guce_referrer_sig=AQAAANfOiKVUP0WPmncwgXjzxDqyB-BFexjyQoOa4I3WJZlBxeX6leTxJ6mXf-QdJrxFg161_bBfazLuR0hVVrpO8cmZ7X-k-UDQfIX1cMFm79mft0U8hMLIYjPKhp5Tn-Th54k2S1Ci-coFTvcwW_u0sf8Q37Vntmr22IEGiFO_CmO2GN [<https://perma.cc/R669-N9AE>].

71. Peter Nakos, *What Are NIL Collectives and How Do They Operate?*, ON3 (July 6, 2022), <https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/> [<https://perma.cc/94E3-WFNQ>].

72. *Id.*; Kelly, *supra*, note 70.

Five schools “have at least one collective or are in the process of forming one. All 14 schools in the SEC have at least one organization.”⁷³ Nick Saban, head coach of the University of Alabama football team, which plays in the SEC, stated this his players earned over three (3) million dollars in the first year of NIL.⁷⁴

Collectives come in different shapes and sizes and operate in different manners. Some collectives serve as marketing agencies that simply “connect[] athletes with opportunities.”⁷⁵ Other collectives seek “broad-based donor funding to leverage more and higher value opportunities for athletes.”⁷⁶ Still other collectives pay athletes directly.⁷⁷

The University of Texas in Austin boasts “Horns with Heart,” which is a collective that pays every offensive lineman \$50,000.⁷⁸ Each Texas offensive lineman will “make charitable appearances and bring awareness to worthy causes that impact their local communities” in exchange for \$50,000 of NIL money.⁷⁹ Six Texas alumni and supporters created Horns with Heart to benefit communities and college football

73. Nakos, *supra*, note 71. The Power Five Conferences include the Atlantic Coast Conference (ACC), Big 10, Big 12, Pac-12, and SEC. *See, e.g.*, ESPN Staff, *Power 5 Conference Power Rankings*, ESPN (Sept. 4, 2018), http://www.espn.com/college-football/story/_/id/24570980/power-5-conference-power-rankings (discussing all five conferences). They generate a great deal of more money in college sports, particularly football and men’s college basketball, than the other college conferences; *see, e.g.*, William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 21 (2015).

74. Zach Koons, *Nick Saban Claims Alabama Player Made \$3 Million from NIL Last Year*, SPORTS ILLUSTRATED (July 19, 2022), <https://www.si.com/college/2022/07/19/nick-saban-how-much-alabama-players-made-from-nil-last-year-sec-media-days> [<https://perma.cc/9HB6-V7JG>].

75. Bennett H. Speyer & Robert A. Boland, *Collective Wisdom: How to Avoid the Many Potential Pitfalls and Find Sustainably Positive Outcomes in Working with NIL Collectives*, LEAD1 ASSOCIATION’S NAME, IMAGE, AND LIKENESS (“NIL”) INSTITUTIONAL REPORT, August-September 2022, at 9.

76. *Id.*

77. *Id.* at 10.

78. *Horns with Heart Announces \$800,000 Sponsorship for Texas Longhorn Offensive Line beginning in 2022*, HORNS WITH HEART (Dec. 6, 2021), <https://horns-withheart.org/press-release.html> [<https://perma.cc/M3H5-PVYP>].

79. *Id.*

players.⁸⁰ It may be hard to estimate the actual worth each offensive lineman brings to Horns with Heart, but it is unlikely \$50,000. This arrangement verges on pay-for-play as linemen receive a large payment of money, most of it arguably for playing college football at Texas and perhaps a small fraction of it for the charitable work they complete.

Similarly, an Oklahoma non-profit created a NIL deal for college athletes at the University of Oklahoma in which its football, men's basketball, and softball players can earn up to \$40,000 to \$50,000 a year for serving other non-profits throughout Oklahoma.⁸¹

More blatantly, Texas Tech set up a collective that pays every football player \$25,000 a year.⁸² One of the founding members of the collective, Texas Tech booster Cody Campbell, explicitly stated, "This is kind of a *base salary* for the guys. They're not going to be restricted from doing any other NIL stuff with anybody else. In fact, we're going to encourage and help them to do that."⁸³ Shortly after the football team's deal was announced, the Texas Tech women's basketball team also received a NIL deal from a local agency that pays each player \$25,000 a year.⁸⁴

Ninety-five (95) University of Georgia football players, according to its head coach Kirby Smart, had NIL deals at the start of the 2022 season, which is impressive given that only 85 of them are scholarship players, meaning even walk-ons (i.e., players without scholarships who make the team) are receiving NIL deals at Georgia.⁸⁵

80. *Id.*

81. Harrison Lerner, *New Oklahoma Collective Aims for \$40-50K Annually for Football Athletes*, BUSINESS OF COLLEGE SPORTS (Apr. 26, 2022), <https://businessofcollegesports.com/name-image-likeness/new-oklahoma-collective-aims-for-40-50k-annually-for-football-athletes/>. [<https://perma.cc/LWJ9-28CC>].

82. James Parks, *College Football News: Entire Texas Tech Team Getting \$25,000 NIL Contracts*, FANNATION (Jul. 21, 2022), <https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-nil-contracts-texas-tech> [<https://perma.cc/6ZF9-VG4D>].

83. *Id.*

84. Mechelle Voepel, *Texas Tech Women's Basketball Players to Receive \$25K NIL Deals*, ESPN (Jul. 29, 2022), https://www.espn.com/womens-college-basketball/story/_/id/34314841/texas-tech-women-basketball-players-receive-25k-nil-deals [<https://perma.cc/3ZXY-58GT>].

85. Evan Crowell, *National Pundits Attack Smart's NIL Comments Out of Context*, MSN (July 21, 2022), <https://www.msn.com/en-us/sports/ncaafb/national->

Even the NCAA acknowledges the new prominence of collectives in college athletics. In its latest guidelines for NIL, the NCAA provides guidance on how schools and collectives can operate together. For example, the NCAA explicitly allows schools to “request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or student-athlete.”⁸⁶ The NCAA even enables schools to “provide tickets or suites to NIL entities through sponsorship agreements, provided the terms of those agreements are the same as for other sponsors.”⁸⁷

Both men and women are making NIL deals, and some women are making a million or more dollars in NIL deals.⁸⁸ These deals include athletes in more than the revenue-generating sports of football

pundits-attack-smart-s-nil-comments-out-of-context/ar-AAZQ3Rn
[<https://perma.cc/W9US-AN6W>].

86. Meghan Durham, *DI Board Approves Clarifications for Interim NIL Policy*, NCAA (Oct. 26, 2022), <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx> [https://perma.cc/Y2YN-HGTZ]; *NCAA Division I: Institutional Involvement in a Student-Athlete's Name, Image, and Likeness Activities*, NCAA (Oct. 26, 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf [https://perma.cc/8F9X-M6C6].

87. Durham, *supra*, note 86; *NCAA Division I*, *supra*, note 86.

88. George Malone, *Biggest NIL Deals in College Sports*, YAHOO! FINANCE (Mar. 16, 2022), https://finance.yahoo.com/news/biggest-nil-deals-college-sports-120103369.html?guccounter=1&guce_referrer=aHR0cHM6Ly9lc2Mtd29yZC1lZGl0Lm9mZmljZWFWcHMubGl2ZS5jb20v&guce_referrer_sig=AQAAAKNmXb57kFAnGRY_gaTX1JtF3PnqEun-dYmZP8l9xA3eIVDNaqndzUuPlnyImU-jWakkjMT4rYl-j6kr4MfyGW8U8Bv63LRWLDVdoDPC3b4BU2Nm_GjvBT-HfKeTWrJ8vwb9xnW1XFvw55_9LzMX2RS1m3W7VuOOahdahsdGxS [https://perma.cc/WNC3-KJYZ]; Oliver Hodgkinson, *Top 10 NIL Deals in 2022: Ohio State and Alabama Players at the Forefront of CFB's Financial Revolution*, PRO FOOTBALL NETWORK (Aug. 18, 2022), <https://www.profootballnetwork.com/top-10-nil-deals-in-2022/> [https://perma.cc/SVH4-F9NU]; Jay Bilas, *Why NIL Has Been Good for College Sports . . . and the Hurdles that Remain*, ESPN (June 29, 2022), https://www.espn.com/college-sports/story/_/id/34161311/why-nil-good-college-sports-hurdles-remain [https://perma.cc/GUF7-F56L]; Thuc Nhi Nguyen, *Once Empowered by Title IX, Female Athletes Are Now Among Big Winners in New NIL Era*, L.A. TIMES (June 21, 2022), <https://www.latimes.com/sports/story/2022-06-21/once-empowered-by-title-ix-female-athletes-are-now-among-big-winners-in-new-nil-era> [https://perma.cc/3WGJ-B6JD].

and men's college basketball and in conferences outside of the Power Five.⁸⁹ For example, Rayquan Smith, who is a two-sport athlete (football and track) at Norfolk State University, a historically black university and college (HBCU), garnered 70 endorsement deals.⁹⁰ Known as the "King of NIL," he contacted 100 companies before he acquired his first NIL deal, and now he maintains deals with Champs' Sports, Arby's, and Body Armour.⁹¹

What is clear is that people are no longer buying the NCAA's argument that the NCAA is protecting college athletes from making money, sometimes a million dollars, for the athletes' own good. People are still tuning in to college games, and broadcasting companies and networks continue to pay conferences millions of dollars to televise those games because people are watching in droves, including on every day of the week in the regular season for football.⁹²

SCOTUS attacked the NCAA's compensation rules for pay-for-play and NIL and now NIL is allowed by the NCAA. Pay-for-play is not far behind. The issue with fair compensation for athletes under NIL is that NIL does not truly compensate players on performance. Star, recognizable players like quarterback Bryce Young and female athletes typically comprise many of the athletes receiving deals. Some female athletes, as one journalist argues, achieve NIL deals based on the objectification of women as opposed to their athletic achievements.⁹³ Left

89. Bilas, *supra*, note 88.

90. Daniel Miller, *NIL Deals: College Football, Track Star Known as 'King of NIL' Has 70 Endorsements*, FOX9 (July 29, 2022), <https://www.fox9.com/sports/nil-deals-college-football-player-70-endorsements> [<https://perma.cc/K9WA-5H9P>].

91. *Id.*

92. *College Football Schedule - FBS (I-A)*, ESPN, https://www.espn.com/college-football/schedule/_/week/1/year/2022/seasontype/2 (last visited Nov. 11, 2022) (showing televised games on Thursday, Friday, Saturday, Sunday, and Monday); *College Football Schedule - FBS (I-A)*, ESPN, https://www.espn.com/college-football/schedule/_/week/10/year/2022/seasontype/2 (last visited Nov. 11, 2022) (televising games on Tuesday and Wednesday). Though the NCAA claims that athletes are students first, it strains credulity how the NCAA allows games to be played during the middle of the week for college athletes who must travel the day before a game, play in the game, and then travel back, disrupting their entire academic schedule. This issue becomes much worse for basketball and baseball players who travel constantly throughout the academic year.

93. Candace Buckner, *Brands Are Taking Notice of Female College Athletes. Now Let's Move Beyond Their Sex Appeal*, WASH. POST (Aug. 22, 2022),

tackles are one of highest paid positions in NFL because of the difficulty and importance of the position,⁹⁴ but college NIL deals are not typically focused on left tackles. NIL deals are not based exclusively on merit on the field or court, but pay-for-play could compensate entirely on merit under the Duke Model (discussed in Part II below), a performance-based compensation model.

D. College Athletes Considered Employees Under the National Labor Relations Act

The Northwestern University scholarship football players once sought to unionize under the National Labor Relations Act (NLRA) arguing that they were employees.⁹⁵ In 2014, Peter Ohr, the Regional Director of the National Labor Relations Board (NLRB), determined that Northwestern University scholarship football players were employees of the university and therefore entitled to unionize.⁹⁶ In 2015, the full NLRB heard Northwestern University's appeal from Ohr's decision and declined to exercise jurisdiction over the matter because the NLRB only has jurisdiction over private entities.⁹⁷ Northwestern University is the only private school in the Big 10 Conference, meaning the NLRB's decision would only affect and allow Northwestern football players to unionize, seek fair wages, and potentially strike, resulting in possible upheaval and an uneven playing field for the conference.⁹⁸ The full NLRB also left open the question of whether scholarship college athletes are employees of universities under the NLRA.⁹⁹

<https://www.washingtonpost.com/sports/2021/08/22/nfl-deals-female-college-athletes/> [https://perma.cc/8DJC-3V8F]; Simran Agarwal, *Olivia Dunne: LSU Gymnast Who Earns \$2M From Racy Pics and Endorsements on Social Media Slammed by Coach*, MEAWW (Nov. 9, 2022), <https://meaww.com/olivia-dunne-lsu-gymnast-earns-2-m-from-deals-social-media-posts-slammed-by-coach-sexism> [https://perma.cc/GQP6-47HR].

94. *NFL Positional Payrolls*, SPOTRAC (2022), <https://www.spotracc.com/nfl/positional/> [https://perma.cc/BC62-4RYD].

95. Nw. Univ., No. 13-RC-121359, 2014-15 N.L.R.B. Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

96. *Id.*

97. *Id.* at 3.

98. *Id.*

99. *Id.*

In 2017, general counsel for the NLRB Richard Griffith, Jr. wrote a memorandum addressed to officers and regional directors of the NLRB to resolve the question of whether scholarship college athletes are employees under the NLRA.¹⁰⁰ He explicitly determined that they were. Later that same year, Peter Robb, the new general counsel of the NLRB appointed by former President Donald Trump, rescinded Griffith's memorandum.¹⁰¹ Although only advisory, general counsel memoranda help clarify important legal issues and often provide guidance on how the NLRB will treat cases in the future.¹⁰² As the administration change from Democrat to Republican brought a change in the way the general counsel and NLRB would address college athletes as employees, the latest administration change from Republican to Democrat also resulted in a new general counsel that swung the pendulum back in favor of college athletes as employees.¹⁰³

On September 29, 2021, Jennifer A. Abruzzo, General Counsel for the NLRB, addressed Memorandum 21-08 to all regional directors,

100. Richard F. Griffin, Jr., Nat'l Labor & Relations Bd., General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context, 1-2 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> [<https://perma.cc/N99B-RM36>].

101. Joseph Wilkinson, *New NLRB General Counsel Rescinds Memo That Labelled Football Players As Employees*, DAILY NW. (Dec. 15, 2017), <https://dailynorthwestern.com/2017/12/15/lateststories/new-nlr-general-counsel-rescinds-memo-labelled-football-players-employees/> [<https://perma.cc/N4Q4-47JY>] ("New general counsel Peter Robb, who was appointed by President Donald Trump and confirmed by the U.S. Senate on Nov. 8, [2017,] invalidated that [Griffin] memo on Dec 1[, 2017].").

102. Memos & Research, Nat'l Labor Relations Board (last visited Jan. 5, 2022), <https://www.nlr.gov/guidance/memos-research> [<https://perma.cc/MZL9-4PYS>].

103. The NLRB is a highly politicized entity. See generally James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 COMP. LAB. L. & POL'Y J. 221 (2005) (describing the Board's "politicization"). The policy change that followed the administration change was predictable, but it provides another sign that compensation of college athletes is imminent. Grenardo, *supra*, note 30 at 224 (arguing that "[t]he [Griffith] memorandum remains relevant to this discussion because it provides sound analysis and there is always a possibility that, if a new administration takes over, it might re-adopt Griffith's viewpoint...[,]" which is exactly what happened as Jennifer Abruzzo reinstated the Griffith memorandum after the Biden administration took office).

officers-in-charge, and resident officers.¹⁰⁴ In her memorandum, she discusses how Griffith's memorandum determined scholarship college athletes are employees under the NLRA, but Robb's memorandum rescinded that determination.¹⁰⁵ Abruzzo's memorandum reinstates Griffith's memorandum to the extent it finds scholarship college athletes are employees under the NLRA, and it goes even further.¹⁰⁶ Abruzzo provides notice that "misclassifying such employees as mere 'student-athletes', and leading them to believe that they do not have statutory protections" violate the NLRA.¹⁰⁷

Abruzzo's memorandum states that scholarship college athletes at Division I FBS private colleges and universities, and similarly situated athletes at academic institutions ("scholarship college athletes"), which would include scholarship college athletes who generate revenue for their universities, are employees for two reasons.¹⁰⁸ First, the NLRA defines employees broadly and includes enumerated exceptions to categories of groups that are not employees—college athletes are not listed in the exceptions, which provides strong evidence that they fall under the category of employees according to the NLRA.¹⁰⁹

Second, scholarship college athletes satisfy the elements under the common law definition of employee.¹¹⁰ The definition of an employee under common law consists of the following: a person "who perform[s] services for another and [is] subject to the other's control or right of control.' In addition, '[c]onsideration, i.e., payment, is strongly indicative of employee status.'"¹¹¹ Abruzzo concludes that scholarship college athletes "perform services for their colleges and the NCAA, in return for compensation, and subject to their control."¹¹² In particular, scholarship college athletes (at Northwestern University, for example)

104. JENNIFER ABRUZZO, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (Student-Athletes) Under the National Labor Relations Act (Sep. 29, 2021), (Mem. at 1). <https://www.akingump.com/a/web/fj79W4f637mkQup-WaocC8V/3beRb3/memorandum.pdf> [<https://perma.cc/V7M3-EGWC>].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2–3.

109. *Id.* at 2–3.

110. *Id.* at 3–4.

111. *Id.* at 3.

112. *Id.* at 3–4.

perform the service of playing football for their university and the NCAA, which “generat(es) tens of millions of dollars in profit and provid(es) an immeasurable positive impact on the university’s reputation, which in turn boosts student applications and alumni financial donations.”¹¹³ In return, the “football players receive[] significant compensation, including up to \$76,000 per year, covering their tuition, fees, room, board, and books, and a stipend covering additional expenses such as travel and childcare.”¹¹⁴ The university controls the college athlete’s lives in a number of ways, including when they practice, train, and play games, as well as their daily schedules, meals, living arrangements, and classes.¹¹⁵ The university ensures the college athlete’s compliance with NCAA rules to maintain eligibility, and the university can remove a player from a team and withdraw a player’s scholarship for violating NCAA rules.¹¹⁶ The NCAA maintains control over players by dictating “the players’ terms and conditions of employment, including maximum number of practice and competition hours, scholarship eligibility, limits on compensation, minimum grade point average, and restrictions on gifts and benefits players may accept, and ensures compliance with those rules through its ‘Compliance Assistance Program.’”¹¹⁷

The General Counsel for the NLRB concludes that scholarship football players, and other similarly situated athletes, qualify as employees under both the NLRA and the common law definition of employee.¹¹⁸ Thus, athletes “should be protected by Section 7 when they act concertedly to speak out about their terms and conditions of employment, or to self-organize, regardless of whether the Board ultimately certifies a bargaining unit.”¹¹⁹

Abruzzo, recognizing that the NCAA initially began using the phrase “student-athlete” unabashedly in the 1950s to avoid paying college athletes worker’s compensation, and the NCAA still uses the phrase today, asserts that she will prosecute employers, universities, and colleges that apply this misleading misnomer to college athletes

113. *Id.* at 3.

114. *Id.* at 3.

115. *Id.* at 4.

116. *Id.* at 4.

117. *Id.* at 3.

118. *Id.* at 3.

119. *Id.* at 4.

who are employees under the act because it creates a chilling effect on Section 7 activities.¹²⁰

Abruzzo acknowledges that the NLRB maintains jurisdiction only over private entities,¹²¹ which is what the NLRB pointed out in its opinion that declined to exercise jurisdiction over the Northwestern case because Northwestern is the only private institution in the Big 10 Conference.¹²² Abruzzo asserts that she could bring a case against the conferences and/or the NCAA, which are private entities, to reach public institutions in determining that its players are employees under the NLRA.¹²³ The NLRB could use a similar tactic—naming the NCAA as a joint employer—to allow the unionization of players at public and private institutions.¹²⁴

Abruzzo's memorandum points out the significance of the *Alston* case and the NCAA's about-face when it comes to allowing college athletes to profit from their NIL, which is based not only on the *Alston* case, but also on the state legislatures that passed laws to allow NIL deals for college athletes.¹²⁵ All of these events are leading to pay-for-play for college athletes. When that time comes, the Duke Model would be an excellent approach to compensate athletes.

II. EXAMINING AND UPDATING THE DUKE MODEL, A PERFORMANCE-BASED SOLUTION FOR COMPENSATING COLLEGE ATHLETES

The Duke Model is explained and explored in detail in a previous article,¹²⁶ but this Article will update and highlight the major aspects and features of the Duke Model.

120. *Id.* at 1.

121. *Id.* at 9 n.34.

122. Nw. Univ., 362 N.L.R.B. No. 167, at 3 (2015).

123. ABRUZZO, *supra*, note 104 at 9 n.34.

124. See Jay D. Lonick, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L. J. 135, 161–67 (2015); ABRUZZO, *supra*, note 104 at 9 n.34.

125. ABRUZZO, *supra*, note 104 at 6.

126. See Grenardo, *supra*, note 2 at 157.

*A. Base Salary for Games Played (Football) and Minutes Played (Basketball)*¹²⁷

The Duke Model provides a base salary for the revenue generating sports—football and men’s college basketball. In football, the number of games played at the different levels on the depth chart (starter, second string, third string) determines how much of a base salary a player will receive. For example, if a player plays in all twelve regular season games as the starter on the depth chart, then he will receive a certain salary per game. If a player plays in six games listed as a starter and six games listed as a second-team player on the depth chart, then he will earn a starter’s salary for six games and a second-team player’s salary for the other six games. Thus, it matches the incentives of the players (who want to play more) and the teams (who want to encourage their players to compete for playing time). The position players on offense and defense would each make the same amount of money if they played in the same number of games at the same spot on the depth chart. For example, if a quarterback started all twelve games, he would earn \$40,000 in the original iteration of the Duke Model, and a defensive tackle that started all twelve games would also earn \$40,000. The same applies for a second-team offensive guard and a second-team linebacker, each of whom would earn \$20,000.¹²⁸

The unique special teams’ players, as opposed to the special team players who only block or tackle, would also receive a salary for starting as placekicker (\$20,000 under the initial Duke Model), kick-off specialist, punter, snapper, kick returner, and punt returner (\$10,000 each under the initial Duke Model).¹²⁹

In basketball, the base salary is determined by minutes played. The best players typically play the most minutes and the coach wants to play the best players the most to maximize the team’s chances of winning games. Again, the interests of the players and teams align under this payment model.¹³⁰

The numbers proposed in the original article under the Duke Model gave deference to the NCAA’s unfounded and unreliable

127. *See id.* at 157. The following discussion of the Duke Model is based on the detailed description of it in the cited article.

128. *See id.* at 186–87.

129. *See id.* at 188.

130. *See id.* at 190–91.

argument that less people would watch college athletics if the athletes were compensated. The salaries were intentionally suppressed to appease those that might otherwise claim consumers would be offended. The NCAA's speculative argument, though, built on biased surveys regarding consumer demand, has been completely undone by the public's reaction to NIL.¹³¹ Not only are consumers, including alumni, boosters, and donors, continuing to watch college sports, but they are also creating collectives to help pay college athletes through NIL. Just as predicted in previous articles, fans have not avoided college athletics because athletes are getting paid; fans are actually finding ways to pay athletes themselves because they want to support their school's team and help them win.¹³²

Knowing that consumers will not consume less football because their teams' athletes are receiving payment, the Duke Model base salary would be increased. The number it would increase to depends on how much money is available, and there is plenty. In the fall of 2022, former Big 10 Commissioner Kevin Warren and Big 10 players discussed, among other things, the players' desire to obtain a share of media rights revenue in the future.¹³³ Jim Harbaugh, head coach of the University of Michigan football team (a Big 10 team), stated unequivocally that players should receive a share of the revenue from the forthcoming \$7.2 billion television contracts.¹³⁴ The Big 10 television deal for football and basketball (both men's and women's) with Fox, CBS, and NBC, which begins in 2023 and ends in 2030, is worth over \$1 billion a year.¹³⁵ Each Big Ten team could receive up to \$70 million

131. See *id.* at 184–85.

132. Grenardo, *supra*, note 30 at 223.

133. Dan Murphy, *Penn State QB Sean Clifford, Big Ten Commissioner Kevin Warren Discuss Improving Benefits*, ESPN (July 22, 2022), https://www.espn.com/college-football/story/_/id/34262479/penn-state-qb-sean-clifford-big-ten-commissioner-kevin-warren-discuss-improving-benefits [https://perma.cc/3MRU-VNCT].

134. Isaiah Hole, *Everything Jim Harbaugh Said About Michigan Football in His Week 2 Press Conference*, USA TODAY (Sept. 5, 2022), <https://wolverineswire.usatoday.com/lists/michigan-football-jim-harbaugh-hawaii-week-2-press-conference-transcript/> [https://perma.cc/4RP8-YZDA].

135. Owen Poindexter, *Big Ten Media Deals Expected to Top \$1B Annually*, FRONT OFFICE SPORTS (June 8, 2022), <https://frontofficesports.com/big-ten-media-deals-expected-to-top-1b-annually/> [https://perma.cc/8P38-WHKD].

or more annually as a part of this deal.¹³⁶ The SEC paid out \$55 million in 2021 to each of its teams based on its television deal, and has an “extended rights deal” with ESPN that will start after the 2023 football season worth \$300 million.¹³⁷ Conferences also receive money from the NCAA, which generated over \$1.15 billion in revenues in 2021 from, primarily, the NCAA’s deal with CBS and Turner to broadcast the men’s NCAA basketball tournament.¹³⁸ From that \$1.15 billion, the NCAA doled out \$613 million to universities and colleges based mainly on the success of the conferences’ teams in the men’s NCAA basketball tournament.¹³⁹ The conferences also receive paydays from the College Football Playoffs, with the Power Five Conferences enjoying the largest payments, which amounted to between \$70 million and \$80 million per conference for the 2020-2021 season.¹⁴⁰

Salaries and compensation for athletes could also come from reduced salaries for head coaches, athletic directors, NCAA executives, and conference commissioners.¹⁴¹ Annually, the NCAA president receives almost \$4 million, conference commissioners of Power Five conferences make between \$2 to \$5 million, athletic directors average

136. Michael Smith, *Big Ten Officially Agrees to New Media Deals With CBS, Fox, NBC*, SPORTS BUSINESS JOURNAL (Aug. 18, 2022), <https://www.sportsbusinessjournal.com/Daily/Issues/2022/08/18/Media/Big-Ten-Media-Deal.aspx> [https://perma.cc/V49Q-2MSV].

137. *Id.* The Big 12’s latest broadcasting deal with ESPN and Fox, which begins in 2025 and includes football and men’s and women’s basketball, projects that schools will receive \$50 million each. Pete Thamel, *Big 12 Nears Six-year, \$2.28B TV Extension Deal with ESPN, Fox*, ESPN (Oct. 30, 2022), https://www.espn.com/college-football/story/_/id/34910144/big-12-nears-six-year-228b-tv-extension-deal-espn-fox [https://perma.cc/M5BB-2278].

138. ASSOCIATED PRESS, *NCAA Earns \$1.15 Billion in 2021 as Revenue Returns to Normal*, ESPN (Feb. 2, 2022), https://www.espn.com/college-sports/story/_/id/33201991/ncaa-earns-115-billion-2021-revenue-returns-normal [https://perma.cc/S44Y-XAYL].

139. *Id.*

140. Kristi Dosh, *ACC And SEC Big Winners In 2020-21 College Football Playoff Payouts*, FORBES (Dec. 21, 2020), <https://www.forbes.com/sites/kristi-dosh/2020/12/21/acc-and-sec-big-winners-financially-in-2020-21-college-football-playoff/?sh=54c635301ee4> [https://perma.cc/7ATV-RE23].

141. Oliver Hodgkinson, *Highest-Paid College Football Coaches of the 2022 Season*, PRO FOOTBALL NETWORK (Sept. 8, 2022), <https://www.profootballnetwork.com/highest-paid-college-football-coaches-2022/> [https://perma.cc/3THB-RTC2].

over \$1 million, top FBS head coaches make close to \$11 million, and some assistant football coaches take in over \$2.5 million.¹⁴² Consumers are not coming to watch any of these individuals—they come to watch the players do amazing feats on the field or court. Alumni and boosters could also cover the costs of paying the players.¹⁴³

Representatives of the players (like the NFLPA or NBPA) could collectively bargain at the conference level with the conference and universities to determine which categories of compensation would be included and the maximum value for each category.¹⁴⁴ Each school in that conference could then use the maximum number agreed upon (such as \$10,000 for each game started in football) or use a lower amount for that or any other number, and each school could also pick and choose which of the chosen categories they actually would want to include for their athletes.

The bargaining would be done at the conference level since much of the revenue generated is distributed to conferences from broadcasting deals, success in the NCAA tournament, and the College Football Playoff System, as discussed in the preceding paragraphs. Conferences that earn higher revenues could pay their athletes more than conferences that earn lower revenues.¹⁴⁵ Power Five conferences might be able to pay football players, hypothetically, \$10,000 per game as starters and \$120,000 for the season if a player starts every game.¹⁴⁶

142. NCAA v. Alston, 141 S. Ct. 2141, 2151 (2021). The highest paid public employee in most states is usually a college football or basketball coach. Highest-Paid Public Employee by State 2023 in the USA, Kemer Power, <https://kemer-power.com/highest-paid-public-employee-by-state-2022-in-the-usa/> [https://perma.cc/RM79-936F].

143. Grenardo, *supra*, note 30 at 231. If boosters could pay off Nick Saban's \$3.1 million mansion in Alabama to entice him to stay there as the head football coach of the University of Alabama, which they did, then they could also pay the players. Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN (Oct. 27, 2014), http://espn.go.com/college-football/story/_/id/11772033/alabama-crimson-tide-boosters-pay-coachnick-saban-home [https://perma.cc/A5MG-UWYJ].

144. See Grenardo, *supra*, note 2 at 211, 214.

145. See *id.* at 183.

146. A base salary in a twelve-game season using \$10,000 a game for starters (22 total players, eleven on offense and eleven on defense), \$8,000 a game for second-team players (22 players), \$6,000 a game for third-team players (22 players), \$4,000 a game for all other scholarship players on the team (19 players), \$7,000 a game for the starting kicker, and \$5,000 a game for the other four special teams players starting

A non-Power Five conference team might be able to afford to pay a player a fraction of that amount, such as \$4,000 per game as a starter and \$48,000 for the season.¹⁴⁷ This will not create a new imbalance in college athletics as the top players already choose to attend schools in the most profitable conferences, which are the Power Five conferences.¹⁴⁸

B. Athletic Bonuses Available for Individual Accomplishments

The Duke Model provides for athletic bonuses to further compensate athletes for their performance on the field or court. The external athletic achievements include winning the Heisman Trophy or being a finalist, national player of the year honors at a particular position or being a finalist, and all-conference honors (e.g., player of the year, first-team, second-team, etc.). The more prestigious the honor, the more money a player would earn. For example, Robert Griffin III won the Heisman Trophy playing quarterback for Baylor University. The estimated increase in sales and revenue for Baylor University due to his Heisman Trophy win was \$250 million.¹⁴⁹ The previous Duke Model provided for a \$25,000 bonus for winning the Heisman (without

a game (i.e., punter, long snapper, kick returner, punt returner), would equal a total base salary of \$7,616,000 for the team. Teams in Power Five conferences, based on, among other things, the amount of money each earns through broadcasting deals, NCAA tournament success, and the College Football Playoff System, as described in detail in the paragraphs in this section, could certainly afford this amount.

147. A base salary in a twelve-game season using \$4,000 a game for starters (22 total players, eleven on offense and eleven on defense), \$3,000 a game for second-team players (22 players), \$2,000 a game for third-team players (22 players), \$1,000 a game for all other scholarship players on the team (19 players), \$2,500 a game for the starting kicker, and \$1,500 a game for the other four special teams players starting a game (i.e., punter, long snapper, kick returner, punt returner), would equal a total base salary for the entire team of \$2,706,000.

148. *On The Outside Looking In: How Non-Power 5 Players Are Woefully Overlooked*, FOX SPORTS (Apr. 22, 2021), <https://www.foxsports.com/stories/nfl/power-5-recruiting-nfl-draft-trey-lance> [<https://perma.cc/85MY-BD97>]; Zach Barnett, *Here's How Much Each Power 5 Conference Made Last Year*, FOOTBALL SCOOP (May 20, 2021), <https://footballscoop.com/news/heres-how-much-each-power-5-conference-made-last-year> [<https://perma.cc/9RCN-5G52>].

149. Howard Bloom, *How Much is Winning Heisman Worth?*, SPORTS BUS. NEWS (Dec. 7, 2012), <http://sportsbusinessnews.com/content/how-much-winning-heisman-worth> [<https://perma.cc/5PK9-LC6Q>].

any bonus for the finalists). A current and revised Duke Model would pay a bonus of \$100,000 for the Heisman winner and \$50,000 for each finalist (usually there are three or four finalists who appear on the Heisman Trophy Presentation special on television). Internal athletic achievements include leading one's team in statistical categories, such as passing, receiving, rushing, tackles, sacks, interceptions, etc. for football, and points, rebounds, assists, steals, and blocks for basketball. Players would receive bonuses for leading their teams in each major statistical category and additional bonuses for breaking school, conference, and/or national records in those categories.¹⁵⁰

Since payment is determined at a conference level under the Duke Model, conferences could decide how much money they can spend, and whether they can afford bonuses for all of these categories. If a non-Power Five conference wanted to compensate its athletes for playing, then it could pay less than what the Power Five conferences are paying in base salaries and/or pay fewer (or no) bonuses. There is inherent flexibility in the Duke Model to accommodate different levels of wealth across the conferences.

C. Athletic Bonuses Available for Team Accomplishments

Players can currently earn a maximum of \$5,980 for athletic (individual or team) achievements.¹⁵¹ The Duke Model would allow players to earn much more compensation in bonuses based on how well the team performs. For example, each basketball player on a team would earn a bonus based on how far the team advances in the NCAA tournament at the end of the year. The same approach applies to football and the college football playoff system, as well as bonuses for playing in a bowl game (depending on the magnitude of the bowl game).¹⁵²

150. See Grenardo, *supra*, note 2 at 193.

151. Dan Murphy, Only 22 of 130 NCAA FBS-level schools say they have plans to provide allowed academic bonus payments to athletes this year, ESPN (Apr. 6, 2022), https://www.espn.com/college-sports/story/_/id/33684066/only-21-130-ncaa-fbs-level-schools-say-plans-provide-allowed-academic-bonus-payments-athletes-year [<https://perma.cc/9TD3-KGPC>].

152. See Grenardo, *supra*, note 2 at 193.

D. Academic Bonuses Available

College athletes could also earn bonuses based on their academic achievements under the Duke Model. If a player earned a spot on an academic team, such as academic All-American, All-District, or All-Conference, then they would receive a monetary bonus. Tangible academic accomplishments such as making the Dean's List or President's List, graduating, and graduating with honors would each allow a college athlete to earn a financial bonus.¹⁵³

The Duke Model provides a way for college athletes to earn compensation for playing and academics based entirely on performance and merit. The other major and likely approach the conferences and schools may use to pay college athletes is a free market model, which is described next.

III. EXAMINING THE FREE MARKET MODEL FOR COMPENSATING COLLEGE ATHLETES

A. The Market Dictates Salaries and Bonuses

The beauty of the free market model, which the U.S. economy is based on, lies in its simplicity. The market will determine how much conferences and schools pay players for salaries and bonuses. Take, for example, the legal industry. Law firms pay attorneys certain salaries and bonuses to compete with other law firms to retain the best talent.¹⁵⁴ Salaries and bonuses vary across the legal industry from Big Law to medium-sized firms to firms of two to ten people.¹⁵⁵ Each type of law firm (Big Law, medium, small) offers different advantages and disadvantages to attorneys. Big Law offers higher salaries and bonuses, on average, but less experience on billable cases.¹⁵⁶ Small firms

153. See *id.* at 199.

154. *Law Firms Competing for Talent in 2022*, THOMSON REUTERS (2022), <https://www.thomsonreuters.com/en/reports/law-firms-competing-for-talent-in-2022.html> [<https://perma.cc/BHX3-2UML>].

155. *Salaries of Legal Professionals 2019*, PUBLIC LEGAL (May 2019), <https://www.ilrg.com/employment/salaries/> [<https://perma.cc/4MWV-ZFJ8>].

156. Jesse Yount, 'A Culture That Gives You Your Evenings and Weekends': Why Some Associates Are Jumping to Midsize Firms, *RECORDER* (Jan. 25, 2022), <https://www.law.com/therecorder/2022/01/25/a-culture-that-gives-you-your->

often pay less than Big Law, but attorneys in small firms typically obtain much more experience on billable cases than attorneys in Big Law.¹⁵⁷

The salaries and bonuses in law firms can be analogized to paying college athletes. The Power Five Conferences (Big Law in this analogy) will likely pay higher salaries and bonuses (on average) than the Group of 5 Conferences and the other conferences, but playing time will be harder to achieve based on all of the best players selecting Power Five Conferences.¹⁵⁸ Meanwhile, a player in the Group of 5 Conferences or other non-Power Five conferences may receive less pay than Power Five Conference players, but their chances of obtaining significant playing time are much higher than if they played in a Power Five Conference. Just like Big Law, which is competitive and highly selective to get into, so too are roster spots on teams in the Power Five Conferences.

Also, as demonstrated in a previous article on the free market model for compensating college athletes, non-Power Five Conference schools could better compete with Power Five Conference schools for a handful of players.¹⁵⁹ For instance, if the free market determines that colleges will pay initial salaries for playing coming into college based on their recruiting ranking, which usually goes from two stars to five-star recruits, which are the top recruits, then even if Ohio State could pay its five-star recruits \$100,000, its four-star recruits \$90,000, its three-star recruits \$80,000, and its two-star recruits \$70,000, then Rice University could spend less (and maybe much less) than Ohio State because Rice's recruits are mainly two- and three-star recruits while

evenings-and-weekends-why-some-associates-are-jumping-to-midsize-firms/?slreturn=20221011154727 [https://perma.cc/36TY-7HG2].

157. *Id.*; see also Jonathan R. Tung, *Salary Differences and Considerations: BigLaw vs Small Law*, FINDLAW (Oct. 8, 2015), <https://www.findlaw.com/legal-blogs/strategist/salary-differences-and-considerations-big-law-vs-small-law/> [https://perma.cc/THK3-USWZ].

158. The Group of Five conferences include the “American Athletic Conference, Conference USA, Mid-American Conference, Sun Belt Conference, and the Mountain West Conference.” See Bill Bender, *Power 5 vs. Group of 5: College Football's Split Decision*, SPORTING NEWS (June 9, 2014), <http://www.sporting-news.com/ncaa-football/news/power-5-conferences-autonomy-ncaa-group-of-5-nick-saban-mike-slive-division-iv-split/1151s8k6rrjvilgph46mditvr8> [https://perma.cc/SF29-BJG7].

159. Grenardo, *supra*, note 30 at 240.

Ohio State mostly signs four- and five-star recruits. Rice could potentially offer one or two recruits over \$100,000 (more than Ohio State on average) to attract five-star players that Rice would never get under the current system of recruiting. This, in turn, would make Rice a better team if it could secure a few top-tier players, which would mean a better product on the field for Rice. Rice could not then compete consistently against Power Five Conference teams, but Rice would be better than it is now because it would have more talented players.¹⁶⁰

The free market would also dictate how long each contract lasted for, which could vary by player. Currently, schools can offer multi-year scholarships, but most do not.¹⁶¹ Many of the Power Five Conferences do.¹⁶² Prior to 2013, universities only offered one-year renewable scholarships, which is surprising to many people, including me when I played.¹⁶³ I thought a college athletic scholarship at Division I schools automatically lasted for four or five years, but that was (and is) not the case.¹⁶⁴ In any event, the free market would allow schools to enter into contracts for renewable one-year agreements or multi-year agreements. The bonuses put into each player's contract might be different based on what the player wants and the school wants. For instance, a player might want bonuses for playing time, statistics

160. *Id.* at 240–41.

161. Kyle Winters, *NCSA: Are Athletic Scholarships Guaranteed for Four Years?*, USA TODAY (July 23, 2019), <https://usatodayhss.com/2019/ncsa-are-athletic-scholarships-guaranteed-for-four-years> [<https://perma.cc/9NB5-Q75C>]; *Which Schools Offer Multi-Year Athletic Scholarships?*, GO BIG RECRUITING (Sept. 19, 2014), <https://www.gobigrecruiting.com/blog/2014/09/schools-offer-multi-year-athletic-scholarships/> [<http://perma.cc/5U6Y-X27C>].

162. Winters, *supra*, note 161; *Which Schools Offer Multi-Year Athletic Scholarships?*, *supra*, note 161.

163. Randy Haight, *Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics*, 21 JEFFREY S. MOORAD SPORTS L.J. 19, 32 (2014) (footnote omitted) (discussing the self-serving and abrupt change in the NCAA bylaws after the Department of Justice began its investigation of the NCAA for previously prohibiting multi-year scholarships but before the DOJ completed that investigation). I was a four-year letterwinner in football at Rice University from 1995 to 1998.

164. Haight, *supra*, note 163 at 32 (footnote omitted) (discussing the self-serving and abrupt change in the NCAA bylaws after the Department of Justice began its investigation of the NCAA for previously prohibiting multi-year scholarships but before the DOJ completed that investigation); Winters, *supra*, note 161; *Which Schools Offer Multi-Year Athletic Scholarships?*, *supra*, note 161.

achieved, honors won, or grades achieved, while the school might want higher bonuses for grades if the athlete is at risk academically, which would provide added incentive to perform well in school.¹⁶⁵

Given the frequency in which athletes use the transfer portal nowadays to change schools, the free market would determine the proper amounts for transfers, along with incentives and bonuses.¹⁶⁶ If certain positions or players were being paid too much for whatever reason, then the market would adjust. For instance, running backs in the NFL used to be among the highest-paid players, but now that running backs are not featured as much in the offense because of more passing and many teams use two running backs throughout a game instead of just one, running backs are usually drafted later and paid less than other positions, while quarterbacks, left tackles, and strong safeties are paid the most because they play what are considered three of the most important and difficult positions in the NFL.¹⁶⁷

College athletics, except when it comes to compensating college athletes for playing, uses the free market system. Coaches, conference commissioners, athletic directors, announcers and sports analysts on television and radio, and NCAA executives each make as much money as the market allows, including salary and bonuses. Head coaches in the smaller Division I conferences make as much as \$5 million while the highest paid head coaches in the Power Five Conferences make over \$10 million a year in salary alone.¹⁶⁸ Conference commissioners

165. See, e.g., Grenardo, *supra*, note 30 at 245–46.

166. James Parks, *Numbers Show the Transfer Portal is Very Risky Move for Most College Football Players*, FANNATION (Apr. 25, 2022), [https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-transfer-portal-numbers-risky-move-for-athletes#:~:text=Sport%2Dby%2Dsport%20num-bers&text=That's%20a%20big%20enough%20number,men's%20players%20did%20the%20same](https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-transfer-portal-numbers-risky-move-for-athletes#:~:text=Sport%2Dby%2Dsport%20num-bers&text=That's%20a%20big%20enough%20number,men's%20players%20did%20the%20same.). [<https://perma.cc/RU4D-CC74>].

167. *NFL Positional Payrolls*, SPOTRAC (2022), <https://www.spotracc.com/nfl/positional/> [<https://perma.cc/BC62-4RYD>].

168. Shehan Jeyarajah, *Luke Fickell Contract: Cincinnati Coach Grabs Power Five-level Extension at \$5 million Annually, per Reports*, CBS SPORTS (Feb. 14, 2022), <https://www.cbssports.com/college-football/news/luke-fickell-contract-cincinnati-coach-grabs-power-five-level-extension-at-5-million-annually-per-reports/> [<https://perma.cc/AQZ6-HGZ9>]; Julia Elbaba, *Looking at the Top College Football Head Coach Salaries in 2022*, NBC SPORTS (Sept. 8, 2022), <https://www.nbcsports.com/chicago/college-football-head-coach-salaries-kirby-smart-2022-new-contract> [<https://perma.cc/7AEP-E46C>].

in the Power Five Conferences receive an average of about \$3.5 million a year, athletic directors can make between \$300,000 at a small school and \$1-2 million at a Power Five Conference school.¹⁶⁹ Top NCAA executives receive over \$1.7 million a year.¹⁷⁰ College sports announcers and analysts, such as Dick Vitale, Jay Bilas and Kirk Herbstreit, receive salaries between \$2 and \$3 million a year.¹⁷¹ No one is clamoring about how difficult it is to pay all of these individuals in a free market system because our country's economy already operates under a free market, capitalist society.¹⁷²

B. Standard Players' Contracts

A free market model should include standard players' contracts, like those used in the NBA and NFL, to reduce the transaction costs for each negotiated player's contract with a university. The standard players' contracts, an exemplar of which can be found in my previous

169. Jon Wilner, *How Much Should the Pac-12 Pay Its Next Commissioner? Our Plan to Avoid Another Mistake*, MERCURY NEWS (Jan. 26, 2021), <https://www.mercurynews.com/2021/01/26/how-much-should-the-pac-12-pay-its-next-commissioner-our-plan-to-avoid-another-mistake/> [https://perma.cc/AH6E-6JEQ]; Robert Lattinville, *2020-21 Power 5 Athletics Directors' Compensation Survey*, ADU (2021), <https://athleticdirectoru.com/articles/2021-fbs-athletics-directors-compensation-survey/#:~:text=The%20average%20age%20of%20a,the%20median%20age%20is%2050.&text=Annual%20fixed%20compensation%20for%20Power,the%20time%20of%20the%20analysis> [https://perma.cc/R3FM-YY7B].

170. Steve Berkowitz, *NCAA President Mark Emmert Credited with \$2.9 Million in Total Pay for 2019 Calendar Year*, USA TODAY (July 19, 2021), <https://www.usatoday.com/story/sports/college/2021/07/19/ncaa-mark-emmert-total-pay-2019/> [https://perma.cc/NJ5Q-SUXT 8015855002/].

171. *50 Highest Paid Sports Commentators 2022*, SPORTSCRIBER (Feb. 14, 2022), <https://sportscrubber.com/money/highest-paid-sports-commentators/> [https://perma.cc/G4CB-F68A].

172. Furthermore, The University of Texas System, which includes the University of Texas at Austin and the University of Texas at San Antonio, employs more than 116,000 individuals consisting of faculty, health care professionals, support staff, researchers, and student workers. About: The University of Texas System, The University of Texas System (2023), <https://utsystem.edu/about> [https://perma.cc/9ZXB-CYSA]. No one is worried about if and how the University of Texas System can pay its employees; it pays them based on a free market system. There are very smart people at universities who could also figure out how much to pay college athletes using the free market approach.

article, *The Blue Devil's in the Details: How A Free Market Approach to Compensating College Athletes Would Work*,¹⁷³ would contain certain clauses to protect the university and player. These clauses are discussed in detail in that article and include the following for the university that sets forth the athletes' obligations:

- Meet the admission requirements of the university;
- Maintain academic eligibility;
- Adhere to all academic and conduct policies of the university, conference, and NCAA to protect the academic integrity of the school and to uphold the reputation of the university;
- Attend all mandatory practices, workouts, meetings, and games;
- Refrain from engaging in physical activities that are either outside of playing the sport for the university or involve a significant risk of injury unless the university consented in writing beforehand.¹⁷⁴

The players would want the following clauses in the standard contract:

- Multi-year contracts;
- Compensation for any injuries that arise based on playing for the university;
- Independent verification of their grades to avoid being removed from the team for non-academic or athletic performance issues;
- Injury will not result in the loss of salary for that school year, but the university would not be required to pay the player's salary for the remaining years on the contract if he was unable to play;
- An athlete could not lose his scholarship based on poor performance or injury during the term of the

173. Grenardo, *supra*, note 30 at 254–64.

174. *Id.* at 254.

contract.¹⁷⁵

“Under a free market system, the teams could choose any combination of compensation, including base salaries, signing bonuses, athletic bonuses, and academic bonuses,” and those combinations could change for different players on a team and across schools and conferences.¹⁷⁶ A school could put in a bonus if an athlete gained and accepted admission to a graduate school, such as medical, law, or business. The possibilities, just as in the rest of the economy of the United States that uses a free market model, are endless. The only constraint would be the imagination of the parties. Conferences and universities will likely be choosing between a performance-based model and a free market model to compensate college players. The following discussion compares and contrasts those two models.

IV. COMPARING THE DUKE MODEL VERSUS THE FREE MARKET MODEL

The beauty and advantages of the Duke Model are threefold: (1) it represents a pure performance-based model that rewards excellence on and off the field or court; (2) it is flexible in that the values paid to the players can be increased or decreased based on the money available to pay the players; and (3) it eliminates substantial transaction costs, such as negotiating individual contracts with players, as well as renegotiating contracts with players, that would otherwise be present in a free market model. On the other hand, the free market model allows the parties to negotiate and renegotiate contracts that reflect the true values of each position and each player in light of expected and actual performance. In addition, teams in non-Power Five Conferences could procure the services of top-tier recruits and players that would otherwise always choose Power Five Conference teams under the Duke Model because the Duke Model would likely provide higher amounts of compensation. The free market model would create a better product for those non-Power Five Conference teams because they would have better players on their teams who would play better in games than the current players on the non-Power Five Conference teams. These

175. *Id.* at 257.

176. *Id.* at 233.

differences are discussed below in detail in this Part. Similarities or commonalities between the two approaches are also discussed.

A. The Duke Model Represents a Pure Performance-Based Model

The Duke Model compensates based entirely on performance by paying more for starting, production on the field or the court, and measurable academic success.¹⁷⁷ It uses objective criteria, such as games played as a starter, game statistics (passing, rushing, touchdowns, etc., in football, and points, rebounds, assists, etc. in basketball), and GPA to pay college athletes.¹⁷⁸ The world of sports prides itself on being a meritocracy where success and accolades are based on actual achievements, as opposed to subjective factors or potential.¹⁷⁹ The free market model lags behind in this regard. In a free market, a high school senior would be signing a contract with a school based on his achievements in high school and *potential* in college. A top-rated prospect determined by scouts to be a “can’t miss” prospect might actually miss in college, yet remain the highest paid or one of the higher paid players on the team (if the player secured a multi-year contract) because of what the player accomplished in high school, not in college.

B. The Duke Model Provides Great Flexibility

The Duke Model also provides flexibility regarding how much money a player earns. This remains important for two main reasons. First, if a conference earns more revenue in a given year, then the values paid to the players can rise in proportion to the increased revenue.¹⁸⁰ For example, if a conference receives 1% or 2% more revenues

177. See, e.g., Grenardo, *supra*, note 2 at 186, 192, 199.

178. See, e.g., Grenardo, *id.* at 186, 192, 199.

179. Gerald Early et al., *Baseball, Boxing and the Charisma of Sport and Race*, in *THE CHARISMA OF SPORT AND RACE*, 8 DOREEN B. TOWNSEND CENTER OCCASIONAL PAPERS 5 (Christina M. Gillis ed., 1996) (discussing how sports are a meritocracy, which is something that attracts people to sports).

180. If compensation is based on a shared revenue theory, then the Duke Model rewards conferences that earn higher revenues and are thus able to pay their players more. Success in the College Football Playoff (CFP) system rewards conferences whose team(s) reach the CFP. It makes sense that the players should attain a portion of the increased revenues since it is their play and efforts that are generating the increased revenue. Similarly, if television broadcast networks decide to increase the

than expected, and the compensation is coming partly or entirely from shared revenues, then the amounts paid to the players can simply increase by the corresponding percentage. In a free market model, though, if a conference earns more revenue, then a clause in the contract could conceivably increase each player's salary a certain percentage, such as 1% or 2%, but that may not be equitable if a lesser-performing player contracted for a higher salary based on their potential while a greater-performing player contracted for a lower salary. Universities and players in a free market instead might contract for a clause that increases a player's compensation based on performance (which would need to be explicitly set forth in the contract whether it is based on playing time, production, awards, or all of the above) if additional revenue becomes available to share, but this simply reinforces the fairness and equity of compensating athletes based completely on performance.

Second, the ability to change how much players are paid allows for a fairly uniform system of paying college athletes that can be replicated amongst different conferences on different scales. For instance, the Big 10 and SEC conferences may have more money to spend on players enabling them to pay starters \$10,000 per game, while Conference USA and the Mid-America Conference may have less money to pay college athletes, but they can still utilize the Duke Model on a smaller pay scale. Thus, the Group of Five conferences may only generate 30% or 60% of what the Power Five conferences generate in revenue, meaning the Group of Five could pay starters \$3,000 or \$6,000 per game, respectively at 30% or 60%.

C. The Duke Model Eliminates Significant Transaction Costs

Under the Duke Model, one of the few transaction costs would be to figure out how the salaries and bonuses would change based on increased revenues (or a higher salary cap if one is used, which is discussed below), but that could be done with a preexisting formula, which would eliminate that transaction cost as well. Also, the conferences

value of their contracts with a conference because the viewer demand exists for that conference, then the players should receive the increase in compensation because the viewers want to see these players more. Predictably, the NCAA currently prohibits revenue sharing with players, including in the context of NIL. *See NCAA Division I, supra*, note 86.

and players would need to negotiate which, if any, of the bonuses for athletics and academics would be included as compensation. In a free market model, each school would need to negotiate individual contracts with every single athlete, which may include not only different salaries but different bonus amounts (and different types of bonuses), and then renegotiate those contracts if the contracts were not four- or five-year contracts. Given the steady use of the transfer portal, universities would need to negotiate individual contracts with every transfer athlete as well, which would be extensive and time-consuming. Players in a free market model might also demand renegotiation of their contracts during the period of their contract (e.g., in year two of a three-year contract) if they are outperforming their contract or if a comparable or lesser player enters into a more lucrative contract than theirs at another school or their own school. The Duke Model avoids these negotiation and renegotiation transaction costs altogether.

D. The Free Market Model Allows Universities to Negotiate and Re-Negotiate Contracts that Reflect the Market Value of Each Position and Player Based on Potential and Actual Performance

The Duke Model would pay the same base salaries to a starting quarterback and a starting fullback, but each player brings different value to the team. Because of the amount of responsibilities a quarterback has and the difficulty of playing the position, quarterbacks are typically paid much more than other positions in the NFL.¹⁸¹ The same rationale applies to college football. The free market model would allow universities to pay each player what the market believes they are worth based on their position and how they play (or are projected to play for the initial contract), or a school could pay more to try to lure a player away from a different program. Why should a quarterback make the same amount of money as a left guard in college when that would never occur in the NFL? A left guard is typically regarded as less valuable and more easily replaceable than a quarterback; compensation under the free market model would reflect that reality.

181. *NFL Positional Payrolls*, SPOTRAC (2022), <https://www.spotracc.com/nfl/positional/> [https://perma.cc/BC62-4RYD].

E. The Free Market Model Would Allow Teams in Non-Power Five Conferences to Improve while the Duke Model will Likely Perpetuate the Status Quo

Under the Duke Model, depending on how much money is available to pay the athletes, the salary for a player that starts every football game might be \$120,000 at a Power Five Conference team and \$36,000 at a Group of 5 Conference team. Thus, a player who would want to make the top money would always choose to play for a Power Five Conference school. Under a free market model, though, a Group of 5 Conference team or another non-Power Five Conference team could offer two or three players higher salaries than Power Five Conference teams, and thereby improve their team with players it would otherwise not obtain. This, in turn, would make the non-Power Five Conference team better and improve the product, the game, for the consumer.

There are advantages and disadvantages to each payment model. The Duke Model is preferable to the free market model because of the Duke Model's flexibility, limited transaction costs, and ease with which it can be implemented and replicated.

V. REMAINING ISSUES WITH PAY-FOR-PLAY

This Article addressed several issues regarding pay-for-play, such as team comradery/chemistry and amateurism. This Part addresses several other issues that remain for skeptics of pay-for-play. The main ones include compliance with Title IX, the effect of non-revenue generating sports, taxation of college athletes, and employing a salary cap. Each of those issues will be addressed below in this Part.

A. Compensating College Athletes While Complying with Title IX

Title IX of the Education Amendments of 1972 states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance."¹⁸² Title IX requires that schools provide equal athletic opportunities for females, but it does not require a dollar-for-dollar

182. 20 U.S.C. §1681(a) (2012).

expenditure on men's and women's athletic programs. Nevertheless, to avoid all issues of non-compliance with Title IX, portions of revenue or alumni, booster, or donor contributions can be used to compensate athletes in non-revenue generating sports, including female sports. Alternatively, the same amount of money spent on compensating the athletes in the revenue-generating sports of football and men's college basketball could also be contributed or allotted to female sports, which would enhance women's athletics to pay coaches' higher salaries, improve the women's facilities, and provide better training and equipment to women athletes. For example, if a school spends \$10 million to pay its college football players for playing, then that same amount could be spent across women's athletic programs and/or used to compensate female athletes.

B. Applying a Compensation Model to Non-Revenue Generating Sports

Some argue that it would be unfair to pay only college football and men's college basketball players, but not pay other college athletes, such as swimmers, baseball players, or volleyball players, even though football and men's college basketball teams generate billions of dollars while other sports often operate at a loss.¹⁸³ The Duke Model could easily be applied to compensate athletes in non-revenue generating sports based on playing time/starts, production (volleyball, for example, would use statistics regarding aces, kills, digs, and blocks), individual and team achievements and awards, and academic success (e.g., academic all-conference teams, GPA, Dean's List, graduating with honors). The pay scale for non-revenue generating sports would likely be much lower than it would be for football and men's college basketball, but those athletes in non-revenue generating sports would likely prefer some type of payment rather than none.

183. Mark J. Drozdowski, *Do Colleges Make Money From Athletics?*, BEST COLLEGES (Aug. 24, 2022), <https://www.bestcolleges.com/news/analysis/2020/11/20/do-college-sports-make-money/> [<https://perma.cc/MLQ5-W7PN>].

C. Compensating College Athletes in Light of Taxes

The tax issue always arose as an impediment to paying college athletes for their NIL or pay-for-play.¹⁸⁴ Would college athletes rather receive \$50,000 of income and pay taxes on that income, or would they rather earn no income? Colleges should provide free tax advice and assistance to college athletes if they earn compensation for playing.¹⁸⁵ Graduates of universities and colleges would likely line up for the opportunity to help athletes at their alma maters with their taxes. Agents who assist or represent athletes in NIL deals might also provide tax services at no cost (or a low cost) to athletes. In fact, some colleges are already providing tax advice to athletes regarding their NIL deals.¹⁸⁶ After nearly two years of NIL deals for college athletes, there have not been any major stories or scandals relating to taxes.

D. Utilizing a Salary Cap In College Sports

A salary cap constitutes horizontal price-fixing, which is a significant anticompetitive restraint under antitrust law.¹⁸⁷ If a salary cap preserves competitive balance amongst the teams that leads to more competitive games for consumers, and presumably a better product, then the salary cap would likely survive antitrust scrutiny as an acceptable procompetitive justification.¹⁸⁸ The NFL's salary cap, for instance,

184. See, e.g., Ron L. Brown, *Tax Implications When NCAA Student Athletes Make Money*, KIPLINGER (July 21, 2022), <https://www.kiplinger.com/taxes/604955/tax-implications-when-ncaa-student-athletes-make-money> [<https://perma.cc/Y9U9-65ZA>].

185. Durham, *supra*, note 86 (stating that “schools generally can and should provide education to current student-athletes, including on topics like financial literacy, taxes, social media practices and entrepreneurship”).

186. Durham, *supra*, note 86 (stating that “schools generally can and should provide education to current student-athletes, including on topics like financial literacy, taxes, social media practices and entrepreneurship”); *NCAA Division I, supra*, note 86.

187. See Alan M. Levine, Note, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports League*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 248 (1995); (arguing a salary cap restrains players’ salary); Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 171 (1985).

188. Foraker, *supra*, note 187 at 176.

promotes parity amongst its teams.¹⁸⁹ A pure free market model involves unrestricted competition, which would not include a salary cap.¹⁹⁰ Nevertheless, a salary cap could be useful in college athletics to ensure some type of competitive balance, at least among the conferences that generate the highest revenue.

A salary cap would also be valuable in preserving competition at the highest level of college sports if funds beyond shared revenue could be used to compensate players. Otherwise, alumni, booster, and donor contributions to paying players would have no limit, and the best teams would then include the universities with the richest alumni, boosters, and donors who care the most about football or basketball. Alabama boosters paid off Nick Saban's \$3.1 million mansion to entice him to remain head coach at Alabama.¹⁹¹ How much money would they spend to secure the top players each year in the hopes of winning even more national titles? Collectives provide a solid indication that fans of a team will open their checkbooks to secure the top talent for their teams.

Critics of a salary cap could argue that there is very little competitive balance currently, even at the highest level, as the same teams consistently compete for and win the national championships in college football and basketball.¹⁹² Moreover, one could argue there should not be a cap on college athlete compensation because there is no cap on earnings for anyone else involved in college athletics, such as coaches, athletic directors, broadcasters and analysts, and NCAA executives, some of whom make millions of dollars a year.

189. Christopher R. Deubert, Glenn M. Wong & Daniel Hatman, *National Football League General Managers: An Analysis of the Responsibilities, Qualifications, and Characteristics*, 20 JEFFREY S. MOORAD SPORTS L.J. 427, 436, 437 n.60 (2013).

190. *What Is a Free Market? Definition and Meaning*, MARKET BUSINESS NEWS, <https://marketbusinessnews.com/financial-glossary/free-market/> (last visited January 12, 2023).

191. Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN (Oct. 27, 2014), http://espn.go.com/college-football/story/_/id/11772033/alabama-crimson-tide-boosters-pay-coach-nick-saban-home [<https://perma.cc/5CMW-LBCY>].

192. Dan Wolken, *College Football Playoff Pairings Feel Like a Rerun, Lack Drama*, USA TODAY, <https://www.usatoday.com/story/sports/columnist/dan-wolken/2020/12/20/college-football-playoff-semifinals-lack-drama/3982997001/> (Dec. 20, 2020); Daniel Bates, *ESPN Names the 'Only' 8 Teams That Can Win NCAA Tournament*, THE SPUN, <https://thespun.com/more/top-stories/espn-names-the-only-8-teams-that-can-win-ncaa-tournament> (Mar. 9, 2022).

CONCLUSION

Some believed NIL would spell the doom of college football as we knew it.¹⁹³ The ills would outweigh the positives, and, just as the NCAA has argued for years, less people would watch college sports.¹⁹⁴ The actual advent of NIL failed to result in the destruction or even deterioration of college sports; the same will be true for pay-for-play once it arrives. Given the signs of the times, paying college athletes for playing their sport will arrive sooner rather than later. Once it does, a performance-based model will likely provide the most efficient and flexible way to compensate college athletes for their athletic and academic accomplishments. Arguments about pay-for-play serving as the final straw to destroy college athletics should fall on deaf ears as we already know how consumers will react to pay-for-play based on how they reacted to NIL—not only will fans accept pay-for-play, but they will also gladly spend their own money to procure the best players for their beloved teams.

193. See, e.g., Terrence Moore, *NCAA Had No Choice, But NIL Rule Will Damage College Football and Basketball*, FORBES (last visited Jan. 4, 2023), <https://www.forbes.com/sites/terencemoore/2021/07/06/the-ncaa-hadnt-a-choice-but-nil-rule-will-damage-college-football-and-basketball/?sh=6b75d9fc2c0d> [https://perma.cc/DX74-VXM3]; Matt Hughes, *NIL Will Ruin College Sports*, JOURNAL ENTERPRISE (Sept. 7, 2021), https://www.journalenterprise.com/nil-will-ruin-college-sports/article_99f54b8a-a4ac-5cbd-829e-f98f5953fa3d.html [https://perma.cc/G9PH-RJ9C].

194. See, e.g., Moore, *supra*, note 193; Hughes, *supra*, note 193.