

THE AMATEURISM MYTH: A CASE FOR A NEW TRADITION

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The myth of amateurism is on the verge of being eliminated. It suffered a fatal blow in the modern Olympic Movement when the international federation for boxing agreed to allow professionals to compete at the Rio Games in 2016. Although the National Collegiate Athletic Association (NCAA) still defends amateurism in the United States as an important theme, many challenges to the NCAA's amateurism rules have arisen in the courts and most recently at the National Labor Relations Board (NLRB). This Article examines the tradition of amateurism in college sports from both cultural and legal perspectives. It looks at the historical underpinnings of amateurism in the parallel dimensions of the Olympics and the NCAA. Born in nineteenth century England as a means to separate the aristocracy from the working classes, American universities adopted the theme of amateurism in sports to promote competitive balance. However, as collegiate athletics grew in popularity and developed into a massive commercial enterprise, universities, under the leadership of the NCAA, used amateurism to ward off challenges from their athletes. Although the NCAA has found some judicial support for the "revered tradition" of amateurism, more recent court challenges have enjoyed some success under claims that the NCAA's rules violate antitrust laws. More recently, student-athletes at Northwestern University gained support from the NLRB for the proposition that players should be deemed "employees" under the law. Moreover, significant challenges to the NCAA's position on amateurism are working their way through the court system.

This Article concludes that it is time for the NCAA to abandon the theme of amateurism and proposes a new tradition in college sports—one that takes into account the players whose efforts make the enterprise possible. This new tradition would have two prongs: First, collegiate players—like their counterparts in the Olympics—should have the right to exploit their name and likeness for commercial purposes. Second, practical guidelines should be established to compensate college athletes (regardless of whether they participate in the money sports of football and basketball) reasonably for their labors.

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INTRODUCTION

Amateurism, a once-vaunted theme in the Olympic Movement, came to an end in 2016 when the International Boxing Association, international federation for the sport of boxing,¹ ruled that professionals could compete in the Rio Olympic Games.² French aristocrat, Baron Pierre de Coubertin, recognized as the father of the modern Olympics, embraced amateurism at the outset of the Olympic Movement. The European ideal at the time was an athlete who competed in sport purely for the love of competition.³ But over the 120-year history of the modern games, from the first modern Olympics held in Athens,

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1. This is the sports federation for amateur boxers. The acronym used by this Association is AIBA (Association Internationale de Boxe Amateur).

2. See IANS, *AIBA Decides to Allow Pro Boxers at Olympics*, SPORTSKEEDA (June 1, 2016), <https://www.sportskeeda.com/boxing/aiba-decides-to-allow-pro-boxers-at-olympics> (noting that the vote favoring professionals to compete carried 84 out of 88 member federations of the AIBA); see also Ken Belson, *Pro Boxers at the Olympics: An Opportunity, or a Dangerous Power Grab?* N.Y. TIMES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/16/sports/olympics/pro-boxers-at-the-olympics.html?>. But see Greg Beacham, *IBF will Punish Boxers Who Compete in the Rio Olympics*, ASSOCIATED PRESS (June 20, 2016), <http://bigstory.ap.org/article/bab16b299e1849209bcb126e891f8105/ibf-will-punish-boxers-who-compete-rio-olympics> (noting that the professional governing bodies for boxing, International Boxing Federation and World Boxing Council, opposed the AIBA's ruling on safety concerns. However, one former Olympian, now turned pro, is quoted as saying that the pros will be ready by the 2020 Tokyo Games to adapt to the Olympics' different style of boxing.).

3. See Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213, 219 n.26 (2004).

Greece (1896) to the most recent iteration held in Rio de Janeiro (2016), amateurism, as an Olympic theme, has eroded into virtual oblivion.⁴

Despite amateurism's demise in the context of the modern Olympics, the notion that athletes must not be paid has found sanctuary in college sports in the United States, defended by the National Collegiate Athletic Association (NCAA). Despite an increasing barrage of attacks by college athletes in the courts and, more recently, with the National Labor Relations Board, the "tradition" of amateurism in collegiate athletics has survived.

This Article examines the tradition of amateurism in college sports and assesses its continued viability. Part I looks at the historical underpinnings of amateurism in the parallel dimensions of the Olympic Movement and the NCAA. It concludes that the NCAA's perpetuation of amateurism as a noble ideal is a disingenuous application of the myth conceived by the nineteenth century British landed gentry to avoid having to face (and risk being beaten by) the working class on the field of play. Part II looks at the legal and cultural arguments related to amateurism as a tradition in the United States. U.S. courts have struggled with the theme of amateurism applied against the mandates of antitrust and labor law and the principles protecting the commercial rights of individuals. Part III proposes ideas related to the compensation of collegiate athletes toward the establishment of a new tradition to replace the arcane and flawed tradition of the past. This Article concludes that the NCAA should follow the Olympic Movement's example of how to treat players' publicity rights. In addition, this Article proposes some practical guidelines related to the inevitable reality that college athletes should be reasonably compensated for their labors.

I. AMATEURISM AS A FLAWED CULTURAL THEME

In the important case *Board of Regents of the University of Oklahoma v. NCAA*, Justice John P. Stevens, writing for the majority, referred to the "revered tradition of amateurism in college sports."⁵ It is true that traditions, or cultural themes, play an important part of our lives.⁶ So what exactly is this "revered tradition," and why is it so controversial today?

4. I use the word "virtual," because there are differences in the way that the respective international sports federations apply their rules, but it is safe to say that *amateurism*—i.e., the requirement that a participant in the Olympics not be a professional athlete—is no longer a general barrier to eligibility in the Olympics.

5. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

6. For these purposes the term "tradition" means "cultural continuity in social attitudes, customs and institutions." See *Tradition*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/tradition> (last visited May 10, 2017). The term "culture" means a group of people who share a common way of life that includes basic common attitudes, behavior, and response to material stimuli. See, e.g., EDWARD T. HALL, *THE SILENT LANGUAGE* 51 (1959) (viewing culture as a communication network in which everyone is capable of putting like meaning on words and symbols that represent traditions.);

A. *Origins of Amateurism as a Cultural Tradition*

Although it has been argued by some that amateurism in sports idealized by and descended from the ancient Olympics, this notion has been soundly repudiated. In his book *The Olympic Myth of Greek Amateur Athletes*, Professor David C. Young reported that he found: “no mention of amateurism in Greek sources, no reference to amateur athletes, and no evidence that the concept of ‘amateurism’ was even known in antiquity. The truth is,” he wrote, “that ‘amateur’ is one thing for which the ancient Greeks never even had a word.”⁷

Scholars agree that the modern tradition of amateurism in sports began in England’s class-conscious society of the early 1800s. Several versions of the story exist, but certain common elements predominate: Organized sport was the province of the aristocracy—young men of title who attended elite colleges such as Oxford and Cambridge. They espoused the notion that glory, not remuneration, was the only true motivation for sports.⁸ A more cynical view, asserted by several scholars,⁹ is that these young aristocrats promoted the glory of amateurism to avoid having to mingle with and risk losing to the working class individuals.¹⁰ As such, society positioned the leisure class as noble amateurs who played solely for the love of sport while painting the working class as lowly professionals.¹¹ Kenneth Shropshire, a noted author on sports law, explains that the term “professional” in Victorian England “did not merely connote one who engaged in athletics for profit, but was primarily indicative of one’s social class.”¹² The prevailing view in the latter half of the nineteenth century was that persons who competed for money were inferior in nature and of “questionable character.”¹³ The aristocratic imperative of the time was

see also HUGH DUNCHAN, *SYMBOLS IN SOCIETY* 44 (1968) (“Society arises in, and continues to exist through, the communication of significant symbols.”).

7. See Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 10 n.10 (1991) (first quoting DAVID C. YOUNG, *THE OLYMPIC MYTH OF GREEK AMATEUR ATHLETICS* (1984); then citing Professor Young’s description of the misguided and fraudulent efforts of one “scholar” to literally manufacture an ancient amateur Greek athlete as a “moral lesson to modern man”); see also Sara L. Keller-Smith & Sherri A. Affrunti, *Going for the Gold: The Representation of Olympic Athletes*, 3 VILL. SPORTS & ENT. L. J. 443, 449 (1996) (“In the world of ancient Greece . . . ‘athlete’ literally meant, and always meant, ‘competitor for a prize.’”) (citation omitted).

8. See Shropshire, *supra* note 7.

9. See, e.g., Kristin R. Muenzen, *Weakening Its Own Defense?: The NCAA Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 259 (2003) (“[Amateurism was] clearly attached to the elite establishment [of England] . . . Those of the leisure class were the accepted amateurs and the working class, professionals.”); Keller-Smith & Affrunti, *supra* note 7; Shropshire, *supra* note 7.

10. Shropshire, *supra* note 7 (“The Amateur Athletic Club of England was established to give English gentlemen the opportunity to compete against each other without having to involve and compete against professionals.”).

11. See, e.g., Muenzen, *supra* note 9.

12. Shropshire, *supra* note 7.

13. *Id.*

deeply rooted in the notion of class discrimination. Shropshire notes that when “an amateur lost a contest to a working man he lost more than the race . . . he lost his identity . . . his life’s premise disappeared; namely that he was innately superior to the working man in all ways.”¹⁴

The nineteenth century theme of amateurism was a cultural construct, foisted by the aristocracy on collegiate athletics and international sporting events reserved for the upper class, and was not the norm for sports at the time. Professor William Gerberding, in his historical analysis of amateurism, notes that “most people nowadays think that amateurism was somehow the original condition of our own organized sports, and that professional sports encroached on an earlier amateur system. The reverse is true.”¹⁵ The dominant practice in most competitions during the nineteenth century was “professionalism,” or engaging in contests for prize money.¹⁶

B. *Amateurism in the Modern Olympic Movement*

Against this backdrop, the modern Olympic Movement began, in the late 1880s. In 1890, the young French noble Baron Pierre de Coubertin attended the so-called Wenlock Olympic Games organized by British physician, William Penny Brookes.¹⁷ Coubertin was profoundly influenced by these games, ironically organized by Dr. Brookes for the working classes, and organized the International Olympic Committee (IOC) in 1894 to resurrect the ancient Olympics in our time.¹⁸ Baron de Coubertin, although skeptical about how amateurism would be implemented,¹⁹ was heavily influenced by the British who lobbied to have their brand of amateurism adopted by the IOC.²⁰

14. *Id.*

15. William Gerberding, *Historical Perspective of Amateurism*, 22 J.C. & U.L. 11, 13 (1995) (quoting Chapin Clark, *Amateurs or Professionals in the Olympics* (Oct. 11, 1988) (unpublished remarks, presented to the Eugene, Oregon Roundtable)).

16. *See id.* at 14 (“Sporting events were primarily an arena for betting in the 18th and 19th centuries. The forerunner of modern track and field, the Highland Games of Scotland, always offered cash prizes to the victors.”).

17. The Wenlock Olympic Games was an annual event from 1860. Coubertin gave Doctor Brookes much credit for the modern Olympic Movement. *See WENLOCK OLYMPIAN SOC’Y, MINUTE BOOK 2* 169 (Apr. 5, 2014).

18. *See, e.g.,* CATHERINE BEALE, *BORN OUT OF WENLOCK: WILLIAM PENNY BROOKES AND THE BRITISH ORIGINS OF THE MODERN OLYMPICS* 42-43 (2011).

19. *See* OLYMPIC STUDIES CTR., *INTERNATIONAL OLYMPIC COMM., AMATEURISM – PROFESSIONALISM & THE OLYMPIC GAMES ‘QUICK REFERENCE’ 1* (“It is impossible to conceive of the Olympic Games with money prizes. But these rules, which seem simple enough, are more complicated in their practical application by the fact that definitions of what constitutes an amateur differ from one country to another, sometimes even from one club to another.”).

20. *See* PIERRE DE COUBERTIN, *OLYMPISM, SELECTED WRITINGS* 653-54 (2000). Baron de Coubertin was not particularly enamored by artificial rules that deprived athletes of the opportunity to participate but finally agreed that some form of the amateurism concept should be adopted, noting that “[t]he English, particularly, felt very strongly about the whole matter.” *See id.* Coubertin also commented, however, that the one of the prongs of the

It was this view that eventually led to the stripping of gold medals from one of greatest athletes of all time, Jim Thorpe, who effortlessly won the two new multi-discipline events, pentathlon and decathlon, at the Stockholm Olympics of 1912.²¹ Thorpe lost his medals when an American newspaper published an article about his payment for playing semi-professional baseball prior to the Games. Thorpe, a Native American, had been paid small amounts (essentially “expense money”) for playing but tried to defend himself by writing a letter to the Amateur Athletic Union—the forerunner of the NCAA—stating that he did not understand the rules.²²

Another American Olympic athlete who attended the Stockholm Games and competed against Thorpe in the Pentathlon, Avery Brundage became the president of the International Olympic Committee in 1952.²³ Brundage held adamantly to the view that amateurism must be embraced by the Olympic Movement. Brundage stated, for example, that “sport must be amateur or it is not sport. Sports played professionally are entertainment.”²⁴ Brundage went so far as to strip Olympic hurdler Lee Calhoun of his amateur status for accepting wedding gifts in conjunction with his appearance on the television show, *Bride and Groom*.²⁵ Notwithstanding all this high-minded posturing, the desire to win gave rise to secret payments to athletes and flouting of the rules that plagued the Olympics during Brundage’s tenure.²⁶

When Brundage retired in 1972, the IOC re-examined its position on amateurism. Despite Brundage’s dogmatic views and draconian methods of enforcement, Lord Killanan, President of the IOC from 1972 to 1980, presided over the shifting tides within the Olympic Movement. “The Olympic Games are a gathering of amateurs, non-professionals, but the changing social climate

definition of “amateur” submitted by the English was “a form of social protection, a relic of the class system.” *See id.*

21. *See* Gerberding, *supra* note 15, at 14-15.

22. *See, e.g., Jim Thorpe*, NEW WORLD ENCYCLOPEDIA, http://www.newworldencyclopedia.org/entry/Jim_Thorpe (“I hope I will be partly excused by the fact that I was simply an Indian schoolboy and did not know all about such things. I did not know that I was doing wrong[] because I was doing what I know several other college men had done, except that they did not use their own names.”). The AAU nevertheless invalidated Thorpe’s amateur status, and the IOC took his medals. Thorpe’s medals were restored in 1983. *See also* Ron Flatter, *Thorpe preceded Deion, Bo*, ESPN (Dec. 5, 1999), <http://www.espn.com/sportscentury/features/00016499.html>.

23. *See* Gerberding, *supra* note 15, at 15 (noting that when Thorpe was disqualified, Brundage rose from sixth place to fifth place and that Brundage, after becoming president of the IOC, rebuffed several attempts to have Thorpe’s medals reinstated).

24. Erin Abbey-Pinegar, *The Need for a Global Amateurism Standard: International Student-Athlete Issues and Controversies*, 17 IND. J. GLOBAL LEGAL STUD. 341 (2010).

25. Shropshire, *supra* note 7.

26. *Id.*; *see also* OLYMPIC STUDIES CTR., *supra* note 19, at 4 (discussing the similar cases with different results of Karl Schranz (Austria—who was ruled ineligible to compete) and Annie Famose (France—who competed and won Silver), and describing the reinstatement in 1987 of the Silver Medal to Marika Kilius and Jugen Baumler in pair figure skating after being stripped of their medal in 1972).

in the world, the spread of interest in sport, to which the Olympic Movement has contributed, and many other factors must lead to a fresh application of this rule.”²⁷ Juan Antonio Samaranch, President of the IOC from 1980 to 2001, pushed for a new tradition. Samaranch understood that allowing athletes to receive financial support from endorsements and competitions would be crucial to ensure the participation of the world’s top performers.²⁸ Samaranch felt that the “tradition” of amateurism should give way to the notion that the Olympic Games—like the ancient games on which the modern games were predicated—should feature open contests of the best against the best, regardless of amateur or professional status.²⁹ In part, this was also motivated by the public’s awareness that many nations, particularly in the so-called “Eastern Bloc,” were providing “support” in the form of housing and other financial assistance to athletes in training. According to one observer, these athletes were essentially “state-supported amateurs who had no other job except to train and compete in sports.”³⁰

In 1981, the IOC, having dropped the word “amateur” from the Olympic Charter, allowed the international sports federations to determine the eligibility rules for their own sports.³¹ Not every sport opened to professionals immediately. But soon a new “tradition,” pitting the best against the best, began to emerge. Losses by the United States men’s basketball team at the 1972 Munich Games (in one of the most controversial sports contests in history) and at the 1988 Seoul Games (where the Americans placed a mere third) led to basketball opening the doors to the 1992 “Dream Team.” This American squad featured a number of contemporary NBA stars, including Michael Jordan, Charles Barkley, Larry Bird, Clyde Drexler, Magic Johnson, Karl Malone, and John Stockton. According to one observer, the lure of the “greatest and most famous athletes” in the world would turn the Olympics into a “bottomless goldmine.”³² With the International Boxing Association’s 2016 decision to allow professional boxers to compete, the Olympic Movement became fully agnostic to an athlete’s amateur or professional status.³³

27. OLYMPIC STUDIES CTR., *supra* note 19, at 4.

28. See John McHenry, *Supporting Our Young Stars Key to Professional Success*, IRISH EXAMINER (Nov. 24, 2016), <http://www.irishexaminer.com/sport/columnists/john-mchenry/supporting-our-young-stars-key-to-professional-success-432154.html>.

29. OLYMPIC STUDIES CTR., *supra* note 19, at 5 (“We have opened the door to professional athletes because we wish to establish the principle that the Olympic Games are open to the world’s best athletes and we leave it to the international sports federations to define the eligibility criteria for these athletes.”).

30. See JOHN GRASSO, BILL MALLON & JEROEN HEIJMANS, *HISTORICAL DICTIONARY OF THE OLYMPIC MOVEMENT* 10 (5th ed. 2015).

31. See Wheeler, *supra* note 3, at 220.

32. Bob Greene, *What Changed Olympics Forever*, CNN (July 22, 2012), <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs>.

33. See GRASSO, *supra* note 30, at 10 (noting that in 2015, when the book was published, “boxing may be the only sport that prohibits professionals from competing at the Olympic Games”). Boxing joined the rest of the Olympic sports in 2016 for the Rio Games.

Has this new tradition harmed the Olympic Movement in the way that Brundage and others predicted? “The Games will be destroyed in eight years,” a Brundage adherent famously prophesied.³⁴ However, these predictions did not come true. As Bill Mallon, an Olympic historian who supported the eradication of amateurism during the Samaranch era,³⁵ recently put it: “If anything, the Olympics are more popular and powerful than ever. It has been decades since they opened up the Games to the professionals, and they're still going strong.”³⁶

In this regard, it is important to note the inevitable course of amateurism’s evolution. Amateurism as handed down from the first modern Olympic Games, in Athens, Greece in 1896, to its ultimate demise in 2016 was a flawed tradition—exclusive, as opposed to inclusive; restrictive as opposed to open. Sportsmanship, fair play, good will and the other valid virtues promoted by Coubertin and his idealistic co-founders of the modern Olympics are in no wise compromised by open eligibility or the fact that athletes are free to trade on their fame and success. It is true that some amateur athletes may not get their chance because now they must compete against those who made it to the professional ranks, but that is the essence of competition. Choosing one’s opponents, or limiting the field to gain a competitive advantage, does not exactly comport with the notion of fair play.

C. *Amateurism and American Collegiate Sports*

With the demise of amateurism as a viable cultural theme for the Olympics, amateurism’s last great bastion of defense is the NCAA.³⁷ Amateurism migrated to America from England in the 1800s, from the same

34. See Luisa Thomas, *Doping and an Olympic Crisis of Idealism*, NEW YORKER (July 29, 2016), <http://www.newyorker.com/news/daily-comment/doping-and-an-olympic-crisis-of-idealism>.

35. LinkedIn Exchange between Kelly C. Crabb, Partner, Sheppard Mullin Richter & Hampton, and Bill Mallon, Historian, U.S. Olympic Comm. (Apr. 11, 2017) (on file with author). Bill Mallon has written extensively about the history of the Olympic Games and voiced his support for professionals in the Olympics to Bob Ryan of the Boston Globe around 1980. Ironically, the prediction that the Olympic Games would be “destroyed in eight years” has erroneously been attributed to Mallon. See, e.g., McHenry, *supra* note 28.

36. See Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275>.

37. There are other athletic institutions (for example, high schools and Little League Baseball) where the participants are “amateurs.” These institutions also derive revenues from broadcasting and other forms of commerce, but there are broad distinguishing characteristics that make the analogy to the NCAA difficult. For example, public high schools do not uniformly charge tuition while the rules related to professionalism are not uniformly applied and are typically focused on an athlete’s prospective college sports opportunities. Little League deals with children twelve and under. That is not to say that some of the points applicable to the NCAA’s brand of amateurism are irrelevant in these other contexts, but such a discussion is beyond the scope of this Article.

aristocratic roots described above. American universities, such as Harvard, were anxious to follow the trends set by their elite British forbearers, Oxford and Cambridge.³⁸ It was natural in a collegiate setting to include sports contests, but there was a fundamental problem in importing the tradition of amateurism in sports as espoused in late nineteenth-century England. America was founded, in part, on a break with the British aristocracy and the notion of class discrimination. The idea of promoting amateurism in sports so that the elite classes could avoid playing with or competing against the working classes was antithetical to basic American thought. Amateurism in sports as an American cultural tradition had to change.³⁹

From the very beginning, American universities struggled with the adaptation of the European-born tradition. Harvard University expounded the view that collecting gate receipts for athletic contests had an “undesirable professional tone,” but in the 1880s and 1890s, most institutions of higher learning in America (including Harvard) accepted money from spectators to view and attend athletic contests.⁴⁰ In the 1850s, Harvard’s rowing team competed for a first-place prize of \$100.⁴¹ In 1855, prior to a race against archrival Yale, Harvard recruited a rower who had already graduated.⁴² Although the governing board of rowing ironically adopted decidedly British amateurism rules, when American football emerged as a popular intercollegiate sport in the elite American universities, the desire to win seemed to trump all other concerns. In some cases, the college institutions and even the student body paid money to non-student-athletes to participate in the games.⁴³ As noted by one commentator, student-athletes in the United States were paid “throughout the history of college athletics. The NCAA didn’t come around until 190[6] and didn’t start penalizing anybody until the 1950s; college sports was largely unregulated until then.”⁴⁴

The NCAA came together as an institution with the support of then-President Theodore Roosevelt, an avid football fan, after the deaths of a

38. Marc Edelman, *How Antitrust Law Could Reform College Football: Section 1 of the Sherman Act and the Hope for Tangible Change*, 68 RUTGERS U. L. REV. 809, 810 (2016).

39. See Shropshire, *supra* note 7, at 15 (“The English amateur system, based upon participation by the social and economic elite . . . would never gain a foothold in American college athletics. There was too much competition, too strong a belief in merit over heredity, too abundant an ideology of freedom of opportunity for the amateur ideal to succeed . . . It may be that amateur athletics at a high level of expertise can only exist in a society dominated by upper-class elitists.” (quoting RONALD A. SMITH, *SPORTS & FREEDOM: THE RISE OF BIG TIME COLLEGE ATHLETICS* 174 (1988))).

40. Christian Dennie, *He Shoots, He Scores: An Analysis of O’Bannon v. NCAA on Appeal and the Future of Intercollegiate Athletics*, 93 N.C. L. REV. 90, 128 (2015).

41. Shropshire, *supra* note 7, at 13.

42. See RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* 213 (2012).

43. Edelman, *supra* note 38, at 812.

44. Reed Karaim, *Paying College Athletes: Are Players School Employees?*, 24 CQ RESEARCHER 579, 586.

number of college football players.⁴⁵ At least initially, it was not as concerned about the amateurism issue as it was about modifying the rules of an inherently violent game to avoid further injuries.⁴⁶ The NCAA's version of amateurism prohibited financial remuneration to student-athletes and precluded student-athletes with professional experience. This policy was apparently motivated by university administrators and professors who began to recognize the goodwill created by athletic victories, which translated into larger student enrollment.⁴⁷ As a result, schools became incensed when their rivals began to use non-student players to help them win. Universities formed sports conferences and adopted rules to level the playing field and create a competitive balance. Among these included a mandate that players had to be students and could not be professionals.

Meanwhile, the NCAA emerged as a convenient watchdog for the conferences. In its earliest permutations, the NCAA began codifying and normalizing the various rules and applying them to an increasing number of member schools. In 1929, however, a Carnegie Foundation study performed by the Carnegie Foundation found that the majority of member universities ignored the NCAA's recommendations related to compensation to student-athletes. According to one source, the violations ranged from "open payrolls to disguised booster funds to no-show jobs at movie studios."⁴⁸ In 1939, freshmen football players at the University of Pittsburgh went on strike because the upperclassmen on the team were getting more money than they were.⁴⁹ The "tradition" of amateurism at this point was pretty weak.

In the 1950s, several things brought about a change in the power of the NCAA. First, the various sports conferences, exemplified by the powerful Big Ten Conference in the Mid-West and the emerging Southeastern Conference (SEC), began to compete with each other for national dominance. This included, of course, concerns about recruiting and competitive balance. The upstart SEC was promising talented athletes benefits—reportedly payments—to attract them to its constituent schools. Rather than compete with the SEC by duplicating these financial benefits for its recruits, the Big Ten, which had no jurisdiction over the SEC, began to lobby college coaches and athletic directors around the country to advance the argument that, to prevent a radical change in the way that sports conferences operate, payments to athletes must be prohibited and a system of enforcement must be put into place. The Big Ten's ultimate goal was to expand the power granted to the NCAA and to strengthen, once and for all, the principle of amateurism.⁵⁰

45. Edelman, *supra* note 38, at 814-15.

46. *Id.*

47. *Id.*

48. See Karaim, *supra* note 44, at 586. The Carnegie Foundation's report was originally published in HOWARD J. SAVAGE, ET AL., *AMERICAN COLLEGE ATHLETICS* (1929).

49. *Id.*

50. See generally Edelman, *supra* note 38. Coincidentally in the 1950s, several scandals arose involving the practice of "point shaving" by collegiate basketball teams in

At the same time, a threat arose that galvanized universal support by the member universities for increased power to the NCAA and the “tradition” of amateurism in college sports.⁵¹ The threat was that NCAA athletes could be identified as *employees* by the state, the result of which would mean that the universities would become subject to the state labor rules respecting wages, overtime, and workers compensation. Wally Byers, head of the NCAA at the time, later reported that in response “we crafted the term *student-athlete*, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes.”⁵² As a result, the NCAA reinvented and promulgated “The Principle of Amateurism,” which is that:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.⁵³

As with all of the permutations of the amateur tradition, it is important to look behind the curtain. From the formation of the NCAA in 1906 to the promulgation of the “Principle of Amateurism” in the 1950s, the world of college sports was going through a radical change. In one of the ultimate examples of irony (or more appropriately framed as hypocrisy), the sports conferences were turning into substantial commercial enterprises, particularly in basketball and football. Sports broadcasting began in 1911 when about one thousand college football fans met in downtown Lawrence, Kansas—the home of the Jayhawks—to listen to a near-simultaneous report (via live telegraph) of a football game being played in Columbus, Missouri.⁵⁴ By 1952, the aforementioned Wally Byers had negotiated college football’s television contract up to \$3.1 million, more than what the National Football League received at the time.⁵⁵ Giant college football stadiums, which cost significant

different conferences. Led by Wally Byers, the NCAA began to impose penalties, which its member universities backed in the hopes of avoiding further damage to the reputation of collegiate sports. See Karaim, *supra* note 44, at 586.

51. Wheeler, *supra* note 3. See also Edelman, *supra* note 38.

52. Wheeler, *supra* note 3, at 215 (emphasis added).

53. See, e.g., NCAA, 2016-2017 NCAA DIVISION I MANUAL § 2.9 (Apr. 28, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

54. See, e.g., *History of Sports Broadcasting*, <http://beonair.com/history-of-sports-broadcasting> (last visited Dec. 20, 2016).

55. Karaim, *supra* note 44, at 589.

sums of money, started to appear in the early 1900s.⁵⁶ College football coaches who could win were paid large salaries.⁵⁷

In this context, with the large amounts of money flowing to support this commercial enterprise, the NCAA's promotion of the "student-athlete" and the "Principle of Amateurism," as a protection against the purported evils of professionalism, proved to be a convenient way for the NCAA and its member universities to escape the "employee" label for college players. This, in turn, protected the "bottom line" of the burgeoning business of college sports. Universities could avoid minimum payments to student-athletes as employees, overtime restrictions, increases to benefits, and other mandates of applicable labor laws. Thus, the NCAA rose to power, and the "revered tradition" of amateurism was restyled with a spoonful of sugar to help the public—the consumers of college sports—swallow it.

This is certainly not the end of the evolution of the "revered tradition" of amateurism being promoted by the NCAA, but a summary is needed here. While this will be explored in Part II in the discussion on the legal challenges to amateurism, it is important to note that the cultural tradition adopted and defended by the NCAA in the 1950s had strayed from its original ideals and had taken on the feel of a marketing campaign designed to promote high-minded notions to achieve a commercial objective. The chart below captures the major development of ideals about amateurism from the nineteenth century to that point in time.

56. See Mathew Michaels, "4 Oldest College Football Stadiums," *12UP* (Mar. 6, 2016), <http://www.12up.com/posts/3008803-4-oldest-college-football-stadiums>. The four oldest stadiums were built in (1) 1917 at the University of Wisconsin; (2) 1915 at the University of Mississippi; (3) 1914 at Mississippi State University; and (4) 1913 at Georgia Tech University. *See id.*

57. Paul Campos, *A Brief History of College Football Coaching Salaries in the Context of the New Gilded Age*, *LAWYERS, GUNS & MONEY* (Dec. 30, 2014), <http://www.lawyersgunsmoneyblog.com/2014/12/brief-history-college-football-coaching-salaries-context-new-gilded-age>.

CHART 1: Major Development of Ideals About Amateurism
from the Nineteenth Century to the 1950s

<i>When</i>	<i>Theme</i>	<i>Desired Impact</i>
England (late 1800s)	<i>True athletes play only for the love of sport.</i>	<i>Separation of the classes. Upper classes need not mingle or compete with, or risk losing to, the working classes. Professionals are of “questionable character.”</i>
USA (late 1800s and early 1900s)	<i>College athletes must be students and not professionals.</i>	<i>Maintaining competitive balance among universities. One school need not compete with and lose to ringers (i.e., non-students or professionals) brought in by another school willing to pay for the ringer’s services.</i>
NCAA in the face of legal threats (1950s)	<i>Student-athletes must be motivated by education. Students must be protected from professional enterprises.</i>	<i>Preserve the economics of college sports. The payment of student-athletes above any grant-in-aid will result in the universities being subject to labor laws (minimum wage, workers comp, etc.) and will upset the commercial enterprise of college athletics.</i>

II. ENTER THE COURTS AND REGULATORS

By the 1950s, owing to the advent of television and the nascent sports broadcasting industry, intercollegiate athletics had grown into a massive enterprise, on its way to becoming a multibillion-dollar industry, while the NCAA consolidated its power. Nevertheless, this led to challenges. Part II will look at some of the more significant legal challenges, particularly as they relate to the “revered tradition” of amateurism. Challenges to amateurism in the courts have been based on antitrust laws and, more recently, labor laws. The NCAA has won some of these skirmishes but has also suffered several significant setbacks, with additional serious challenges on the horizon.

Although the NCAA dodged the “athletes are employees” bullet in the 1950s, recent challenges by athletes brought to the National Labor Relations Board have resurrected this specter for the NCAA.

A. *The Antitrust Law Cases*

Arguably, the key case in this area is *NCAA v. Board of Regents of the University of Oklahoma*.⁵⁸ The case did not deal directly with the issue of amateurism, but as it was rendered by the Supreme Court, the majority opinion’s dicta dealing with the NCAA’s amateurism rules have been cited in subsequent cases for the proposition that paying college athletes will violate the “revered tradition” of amateur athletics. The Court ruled that the NCAA’s rules granting it control over national collegiate television rights was a violation of antitrust laws⁵⁹ but noted in dicta that, “[t]o preserve the character and quality of the ‘product,’ athletes must not be paid.”⁶⁰ The court added that the NCAA plays a critical role in the maintenance of the “revered tradition of amateurism in college sports” and that it needs “ample latitude” to play that role.⁶¹

Following *Board of Regents*, the Fifth Circuit adopted the dicta in a case involving football student-athletes challenging the NCAA’s “death penalty” against Southern Methodist University. In *McCormack v. NCAA*, the Fifth Circuit stated that “the eligibility rules create the [amateur] product and allow its survival in the face of commercializing pressures.”⁶² The Seventh Circuit further advanced the dicta from *Board of Regents* in *Banks v. NCAA*.⁶³ Banks was a Notre Dame University football student-athlete who challenged the NCAA’s ‘no agent and no draft’ legislation. These rules prohibited student-athletes from obtaining athlete-agents and entering professional drafts during their respective tenures as student-athletes. The Seventh Circuit panel upheld the no agent and no draft legislation by concluding the NCAA’s rules amply prevent commercialism and promote educational pursuits. However, Judge Flaum’s dissenting opinion took a justified cynical view of the rules and chastised the majority for succumbing to an “outmoded image of intercollegiate sports that no longer jibes with reality.”⁶⁴ In fact, the dissent stated the NCAA’s no agent and no draft rules are an “agreement among colleges to

58. See generally *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

59. Ironically, in the 1980s, the NCAA had amassed sufficient power to become the target of a lawsuit on antitrust grounds by its own constituent members, including the University of Oklahoma and the University of Georgia, which were the plaintiffs in *Board of Regents*.

60. *Id.* at 102.

61. *Id.* at 120.

62. *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1345 (5th Cir. 1988).

63. See generally *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081 (7th Cir. 1992).

64. *Id.* at 1099.

eliminate an element of competition in the college football labor market.”⁶⁵ Other decisions have agreed with the dissent's analysis.⁶⁶ To that extent, the NCAA's hypocritical stance that its amateurism rules promote competition is viewed with a lack of reverential appeal.⁶⁷

In *O'Bannon v. NCAA*, former UCLA basketball player and Most Valuable Player of the 1995 NBA Finals, Ed O'Bannon, brought suit on behalf of himself and other former collegiate athletes (including NBA greats, Bill Russell and Oscar Robertson) against the NCAA, alleging that the latter's rules requiring amateur status of collegiate athletes violated the Sherman Antitrust Act.⁶⁸ The O'Bannon case centered on NCAA Form 08-3a, which all college athletes were required to sign. The form authorized the NCAA or a third party acting on behalf of the NCAA to use the athletes' "name or picture to generally promote NCAA championships or other NCAA events, activities or programs."⁶⁹ Based on this grant of players' publicity rights from the NCAA, EA Sports, an affiliate of Electronic Arts (EA), created a video game featuring the likeness of O'Bannon and the other former collegiate athletes involved in the case. The video game made money, but the athletes were not paid, even though they were no longer students. Indeed, when EA released the video game, these former NCAA athletes were all professionals.

The NCAA moved for summary judgment on several grounds. First, the NCAA asserted that the dicta in *Board of Regents* discussed above precluded any finding of antitrust violation based on the principle of amateurism. The District Court, however, distinguished *Board of Regents* by pointing out that it "focused on a different set of competitive restraints" and noting that the Supreme Court has "never examined whether or not the ban on student-athlete compensation actually had a pro-competitive effect on the college sports market."⁷⁰ The District Court, moreover, concluded that *Board of Regents* "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving

65. *Id.* at 1097.

66. *See generally* Dennie, *supra* note 40.

67. *Id.*

68. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014). The *O'Bannon* case was ultimately joined with another similar case, *Keller v. Elec. Arts, Inc.*, No. 09-1967, 2010 WL 530108 (N.D. Cal. 2010), *appeal docketed*, No. 10-15387 (9th Cir. 2010) (featuring former collegiate football stars including Sam Keller). The two cases were referred to as *In re NCAA Student-Athletes Name & Likeness Licensing Litig.*, 802 F.3d 1049, 1055 (9th Cir. 2015).

69. *See* NCAA Form 08-3a, *Student-Athlete Statement—Division I, Part IV: Promotion of NCAA Championships, Events, Activities or Programs* (2010-11), <http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SASStatementForm.pdf>.

70. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1002 (N.D. Cal. 2013).

any monetary compensation for the commercial use of their names, images, and likeness.”⁷¹

The NCAA then appealed to the rule of reason under antitrust law, arguing that the amateurism restriction is a reasonable restraint of trade because it is pro-competitive. The NCAA’s argument was that if monetary compensation is limited to the actual costs of attending college (room, board, tuition, and other educational fees), larger, more affluent colleges could not take advantage through financial incentives. In effect, this was the crux of the competitive balance argument first adopted by colleges in the early days of intercollegiate athletics. Kenneth Shropshire has noted that:

This argument is flawed, because little parity currently exists between the major and smaller collegiate sports programs. There is a further irony in that it is difficult to compete unless “bidding” can occur for athlete services with varying levels of compensation, not the same. The beauty of respective campuses, the varying educational opportunities, and other factors are forms of differentiation, but direct monetary compensation is not allowed.⁷²

The court in *O’Bannon* rejected the “pro-competitive” argument because of these other factors.⁷³ In addition, the court found the plaintiffs’ evidence persuasive in showing that the Olympics, which was formerly restricted to amateurs, remained popular after amateurism was eliminated as an eligibility requirement.⁷⁴

The court went on to find that the “current restrictions on student-athlete compensation . . . are not justified by the definition of amateurism set forth in [the NCAA’s bylaws].”⁷⁵ The NCAA countered by arguing that Board of Regents supports the idea that athletes must not be compensated. The court rejected this argument, noting that the NCAA’s lawyers in Board of Regents had conceded that the NCAA might be able to get more viewers if it had semi-professional clubs rather than amateur ones.⁷⁶

71. *Id.* at 1006.

72. Kenneth L. Shropshire, *The Erosion of the NCAA Model*, 14 ANTITRUST 26 (2000). Shropshire’s point is well illustrated by Auburn University’s decision to pay \$14 million for a jumbotron. See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills>.

73. *O’Bannon*, 7 F. Supp. 3d at 1005. The court did recognize that there could be pro-competitive justifications for capping compensation to student-athletes, such as a possible increase of consumer demand for the amateur “product” and that student-athlete integration may improve education. However, the plaintiff athletes offered three *less restrictive alternatives* to the restraints in question that the colleges could rather: (1) raise the grant-in-aid benefits to allow award stipends derived from specified revenue sources (such as licensing); (2) allow schools to deposit a share of licensing revenue into a trust fund for the athletes after graduation; and (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.

74. *Id.* at 977.

75. *Id.* at 975.

76. *Id.* at 999.

Significantly, the judge found that the NCAA did not define amateurism in a consistent way and often allowed certain student-athletes to receive compensation for athletic performance.⁷⁷ The court concluded that amateurism was not the driving force behind athletics and “played a limited role in driving consumer demand.”⁷⁸ This ruling drove home the point that amateurism is a flawed cultural tradition as applied to collegiate sports.

Ultimately, the court held the NCAA’s practice violated the Sherman Antitrust Act and issued an injunction against the NCAA with respect to the enforcement of “any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires.”⁷⁹ The “limited share” was capped at \$5,000 per year per player.⁸⁰ Electronic Arts settled,⁸¹ but the NCAA appealed to the Ninth Circuit. The NCAA correctly reasoned that the case could drastically alter the face of amateurism on the college level and defended its use of amateur players’ names and likenesses for its commercial purposes.

The Ninth Circuit panel affirmed the lower court’s ruling, holding that certain NCAA amateurism rules violated federal antitrust law but scrapped the mandate for publicity rights payments, holding instead that the NCAA member schools only need to provide up to the cost of attendance to their student-athletes.⁸² Ultimately, the U.S. Supreme Court refused to hear the case.⁸³

77. There are those who claim that athletes at the power conferences are not amateurs in the strict sense of the word. For example, the NCAA has allowed (or turned a blind eye) toward many types of benefits and perks that have nothing to do with educations. *See, e.g.*, David Broughton & Brandon McClung, *Gift Suite Debuting at Women’s Final Four*, SMITH & STREET’S SPORTS BUS. J. (Mar. 6, 2017), <http://www.sportsbusinessdaily.com/Journal/Issues/2017/03/06/Colleges/NCAA-gifts.aspx> (describing the benefit of gift suites for teams making it to the finals). Other examples of such perks abound.

78. *O’Bannon*, 7 F. Supp. 3d at 1001 (concluding that the NCAA’s restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products).

79. *Id.* at 1008.

80. *Id.*

81. *See* NCAA Video Game Settlement, <https://www.rt.com/usa/310142-ncaa-video-game-settlement> (last visited Jan. 1, 2017); *see also* Karaïm, *supra* note 44, at 592 (noting that just as the *O’Bannon* case was coming to trial, a second case, *Keller v. National Collegiate Athletic Ass’n*, No. C 09-1967 CW (N.D. Cal. 2015), was being settled by EA Sports); *id.* (“That agreement followed one by EA Sports, originally named as a codefendant in the *O’Bannon* case, in which EA agreed to pay \$40 million, minus legal fees, to former college athletes who played as far back as 2003. The size of the payments will depend on the number of players who file claims, but many players could receive up to \$951 for each year they appeared in a video game.”).

82. Michael McCann, *What the Appeals Court Ruling Means for O’Bannon Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), <http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling>.

83. *See* Steve Berkowitz & A.J. Perez, *Supreme Court Will not Consider the Ed O’Bannon Antitrust Case Against NCAA*, USA TODAY (Oct. 3, 2016), <http://www.usatoday.com/story/sports/college/2016/10/03/supreme-court-ed-obannon-ncaa-antitrust-case/91462090>.

O'Bannon stands for the proposition that even a "revered" tradition must be consistent and just. *Jenkins v. NCAA*, another collegiate athlete class action lawsuit before the presiding judge in O'Bannon, Judge Claudia Wilken, could lead to the removal of this flawed tradition.⁸⁴ The Jenkins plaintiffs, represented by well-known antitrust lawyer Jeffrey Kessler, have argued that the agreement between the NCAA and its member schools to preclude athletes attending college from being compensated in excess of an agreed amount is a core restraint of trade under Section 1 of the Sherman Antitrust Act and that the model affecting remuneration for student-athletes should be changed.⁸⁵ In Kessler's own words, the object of the Jenkins lawsuit is to "strike down permanently the restrictions that prevent athletes in Division I basketball and the top tier of college football from being fairly compensated for the billions of dollars in revenue that they help generate."⁸⁶

In yet another case in Judge Wilken's docket, the NCAA and members of a class led by West Virginia running back Shawne Alston reached a settlement recently in the antitrust lawsuit of *Alston v. NCAA*.⁸⁷ The NCAA agreed to pay \$208.7 million to Alston and other class members. The players argued, among other things, that the NCAA and its member colleges conspired to illegally cap the grant-in-aid amount below the actual cost of attending school. While the settlement must still be approved by Judge Wilken, it has not ended the case. The NCAA was quick to note that it "will continue to vigorously oppose the remaining portion of the lawsuit seeking pay for play . . ." In addition, it observed that the settlement agreement maintains the cost of attendance as "an appropriate dividing line between collegiate and professional sports."⁸⁸ Ramogi Huma, who helped found the National College Players Association and served as an advisor to both the Alston and Jenkins plaintiffs,

84. See Edelman, *supra* note 38 (discussing the *Jenkins* case and its potentially far-reaching impact).

85. See, e.g., Michael McCann, *In Denying O'Bannon Case, Supreme Court Leaves Future of Amateurism in Limbo*, SPORTS ILLUSTRATED (Oct. 3, 2016), <https://www.si.com/college-basketball/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court> (noting that "[i]f Jenkins prevails, it would upend the NCAA's system of amateurism"—NCAA member institutions could no longer conspire with each other to keep the level of remuneration low).

86. See Karaim, *supra* note 44, at 591 (quoting Kessler's statement to ESPN).

87. *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 14-1011 (N.D. Cal. Aug. 19, 2015). This case was combined with other cases and referred to as *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust litigation*. See, e.g., Michael McCann, *How Tentative Grant-in-aid Class Action Settlement Affects NCAA, Student-Athletes*, SPORTS ILLUSTRATED (Feb. 5, 2017), <http://www.si.com/college-football/2017/02/04/shawne-alston-grant-aid-class-action-lawsuit-ncaa-settlement>; Tom Farrey, *NCAA Agrees to Historic \$209M Settlement over Scholarship Shortages*, ESPN (Feb. 4, 2017), http://www.espn.com/college-sports/story/_/id/18616780/ncaa-agrees-historic-209m-settlement-scholarship-shortages; see also Christian Dennie, *Alston v. NCAA: The Reincarnation of White v. NCAA*, BARLOW, GARSEK & SIMON (Mar. 13, 2014), <http://www.bgsfirm.com/college-sports-law-blog/alston-v-ncaa-the-reincarnation-of-white-v-ncaa> (noting the connection between the *Alston* and *White* cases).

88. See Farrey, *supra* note 87.

noted that the ruling in *Alston* augers in favor of Jenkins: “It gives momentum to the Jenkins case which can be a real game-changer financially for current and future college athletes.”⁸⁹

B. *Labor Law*

The issue of whether student-athletes are legally university “employees” has been around since the 1950s. At the time, Wally Byers, then-president of the NCAA, acknowledged that this question “prompted most of the colleges to unite and insist with one voice that, grant-in-aid or not, college sports were only for ‘amateurs.’”⁹⁰ The issue has resurfaced in a series of rulings by the National Labor Relations Board. In addition, both a Seventh Circuit panel and a court in the Northern District of California have reviewed this question.

In the latter case, Lamar Dawson, a former University of Southern California (USC) football player, filed a lawsuit on behalf of himself and other NCAA athletes, seeking “unpaid wages, including unpaid overtime compensation,” among other relief under the Fair Labor Standards Act.⁹¹ Dawson’s complaint stated that: “College football is a big business for the NCAA’s top-tier Division I Football Bowl Subdivision . . . teams and for the athletes who play football for these teams”;⁹² college athletic programs generate about \$6.1 billion annually;⁹³ the NCAA and Pac-12 operate their football operations like major business enterprises;⁹⁴ and the NCAA and Pac-12 ignore to their advantage the wage entitlements of Dawson and the other similarly-situated athletes under federal and state laws.⁹⁵ In addition, the complaint noted the NCAA rules that prevent the athlete from receiving financial aid in excess of a certain amount.⁹⁶

The complaint also noted the degree of control the NCAA and Pac-12’s exerted over their athletes. They promulgated and enforced extensive rules and regulations that covered the conditions under which the athlete provided services, including the days, hours, and conditions of both practice and games, while prohibiting certain personal activities and monitoring athletes’ academic performance.⁹⁷

Dawson’s complaint also described how the Pac-12 is organized like a large corporation. It has senior officers and a commissioner. The latter was paid

89. *Id.*

90. *See* Wheeler, *supra* note 3.

91. *See* Class/Collective Action Complaint at 2, Dawson v. Nat’l Collegiate Athletic Ass’n, No. 16-5487 (N.D. Cal. 2017), 2016 WL 5405638.

92. *Id.* ¶ 8.

93. *Id.* (citing RANDY R. GRANT, JOHN C. LEADLEY & ZENON X. ZYGMONT, THE ECONOMICS OF INTERCOLLEGIATE SPORTS 66 n.17 (2nd ed. 2015)).

94. *Id.* ¶ 9.

95. *Id.* ¶ 10.

96. *Id.* ¶ 58.

97. *Id.* ¶¶ 51-60.

\$4.05 million in 2014-15, with a “base salary of \$2.55 million, a \$12.5 million bonus, \$142,000 in reportable income, and \$77,500 in retirement benefits.”⁹⁸ The complaint observed that this was “competitive with the compensation packages earned by CEOs at major U.S. corporations.”⁹⁹

In essence, Dawson’s argument was very much in the vein of: ‘If it walks and talks like an employee, it must be an employee.’ Dawson asserted that he was an employee because he worked for a large commercial organization that pays its administrators (e.g., the Pac-12 Commissioner and the USC coach, who was Dawson’s immediate supervisor) substantial wages. Moreover, this organization exercised substantial control over Dawson’s life by mandating practice hours and requiring him to adhere to its other regulations. It was also well known that coaches often ignored practice limits. An NCAA study on the experiences of college athletes observed that coaches do not follow the NCAA-mandated 20-hour per week limit.¹⁰⁰ Of course, the student-athlete has little ability to resist or complain, as a recalcitrant athlete risked benching or being dropped from the team. According to Dawson, the only thing missing from this equation was his paycheck.

Dawson’s arguments leaned on two rulings by the National Labor Relations Board (NLRB). On January 28, 2014, football players at Northwestern University sought to unionize and filed a petition for a representation election with the NLRB’s Region 13 office. The players wanted to be represented by the College Athletes Players Association, an organization led by current and former college athletes, including Ramogi Huma, to fight for college athlete causes.¹⁰¹ The players wanted to impose a collective bargaining system on the university related to wages and other benefits.¹⁰² In response to the petition, Northwestern University argued that the scholarship players are not employees under Section 2(3) of the National Labor Relations Act (NLRA). However, on March 26, 2014, the Regional Director for Region 13 Peter Sung Ohr issued a decision, finding that the university’s grant-in-aid scholarship football players were “statutory employees” under the NLRA and directing that the representation election take place in April of that year.¹⁰³ On April 24,

98. *Id.* ¶ 45.

99. *Id.*

100. See *NCAA Athletes Work Long Hours, Survey Says*, DIVERSE ISSUES IN HIGHER EDUCATION (Sept. 4, 2009), <http://diverseeducation.com/article/13021/> (discussing a 2006 NCAA survey of 21,000 athletes). The NCAA study also goes on to talk about how stressed out student-athletes are trying to balance practice with studies, social life, and sleep. See *id.*; see also PENN SCHOEN BERLAND, PAC-12: STUDENT-ATHLETE TIME DEMANDS (2015).

101. See Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaaf-football/nlr-b-says-northwestern-football-players-cannot-unionize.html>.

102. See *Northwestern University Fact Sheet*, NAT’L LABOR RELATIONS BD., <https://www.nlr.gov/case/13-RC-121359> (last visited on Jan. 23, 2017).

103. *NLRB Director for Region 13 issues Decision in Northwestern University Athletes Case*, NAT’L LABOR RELATIONS BD. (Mar. 26, 2014), <https://www.nlr.gov/news->

2014, however, the NLRB granted Northwestern University's request to review the Regional Director's decision.¹⁰⁴ On August 17, 2015, based on arguments submitted by the university, the NLRB decided unanimously to decline jurisdiction over Northwestern University football players and dismissed the petition. In its decision, the NLRB did not determine whether the scholarship football players are employees under the Act. Instead, the NLRB, exercising its discretion to not assert jurisdiction, concluded that maintaining jurisdiction in this case would not effectuate the policies of the NLRA to promote stability in labor relations due to the nature and structure of the NCAA Division I Football Bowl Subdivision (FBS).¹⁰⁵ By law, the NLRB does not have jurisdiction over state-run colleges and universities, which constitute 108 of the 125 FBS teams. As every school in the Big Ten, except Northwestern, is a state-run institution, the NLRB felt that asserting jurisdiction over a single team in the conference would likely have ramifications for those other conference teams.¹⁰⁶

The NLRB's ruling left open the door for a later ruling on the issue of employee status for college athletes. The Board emphasized that the Northwestern University case involved novel circumstances and that its decision was based on the unique facts in the case.¹⁰⁷

Notwithstanding the NLRB's refusal to assert jurisdiction, the NLRB's general counsel declared in October of 2016 that Northwestern University must eliminate "unlawful" rules restricting players' ability to express themselves.¹⁰⁸ The ruling states that the players must be allowed to freely post on social media, discuss issues related to their health and safety, and speak with the media.¹⁰⁹ It was not the direct ruling that the players were hoping for, but the NLRB's reference in the ruling to FBS players as "employees" gave cause for optimism.

On January 31st of 2017, General Counsel of the NLRB Robert Griffin vindicated that optimism when he opined in a memorandum to the NLRB's regional directors that FBS football players are "employees" under the NLRA.¹¹⁰ Griffin's memo offered several reasons reminiscent of the arguments

outreach/news-story/nlrb-director-region-13-issues-decision-northwestern-university-athletes.

104. *NLRB Grants Request for Review in Northwestern University Athlete Case*, NAT'L LABOR RELATIONS BD. (Apr. 24, 2014) <https://www.nlrb.gov/news-outreach/news-story/nlrb-grants-request-review-northwestern-university-athletes-case>.

105. *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NAT'L LABOR RELATIONS BD. (Aug. 17, 2015), <https://www.nlrb.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case>.

106. *Id.*

107. *See generally* Strauss, *supra* note 101.

108. Lester Munson, *Free to Tweet: Northwestern's Restrictions on Football Players Ruled Unlawful*, ESPN (Oct. 10, 2016), http://www.espn.com/espn/otl/story/_/id/17765516/nlrb-rules-northwestern-restrictions-unlawful.

109. *Id.*

110. Sue Reisinger, *NLRB Top Counsel Sides with College Players as Employees, but Does It Matter?* NATIONAL L.J. (Feb. 2, 2017), <http://www.nationallawjournal.com/id=1202>

cited by *Dawson* plaintiffs.¹¹¹ He cited the 2016 NCAA study showing that college football players report an average of 42 hours per week on football-related activities during the season.¹¹² The teams publish daily schedules that regulate the players' hours. Players must comply with academic standards while football activities interfere with classes. Coaches can penalize players. Coaches can even "fire" players, resulting in the loss of their scholarships. Players must seek permission from the coaches to live off campus, apply for outside employment, drive personal vehicles, travel on campus, and post items on the Internet. In short, FBS players are employees because "they perform services for their college and the NCAA, subject to their control, in return for compensation."¹¹³

Naturally, the NCAA pushed back, denying that college football players are employees as a matter of law. Donald Remy, the NCAA's chief legal officer, pointed out that Griffin's memorandum does not affect the NLRB's previous decision to not exercise jurisdiction regarding the employment status of college football players.¹¹⁴ Remy was also quick to reference *Berger v. NCAA*, a late 2016 decision by the Seventh Circuit upholding a district court ruling that two University of Pennsylvania track and field athletes were not school employees and, therefore, not entitled to minimum wages under the Fair Labor Standards Act.¹¹⁵ The court in that case acknowledged that student-athletes spend a substantial amount of time at their sport but that this was part of the tradition of college athletics and that there was not real expectation of earning an income. It found that "[s]imply put, student-athletic 'play' is not 'work,' at least as the term is used in the FLSA. Appellants in this case have not, and quite frankly cannot, allege that the activities they pursued as student-athletes qualify as 'work' sufficient to trigger the minimum wage requirements of the FLSA."¹¹⁶ The court noted that participation in sport is "entirely voluntary" and, citing the familiar dicta in the *Board of Regents* case, stated that "the long tradition of amateurism in college sports shows that the student-

778307454/NLRB-Top-Counsel-Sides-With-College-Players-as-Employees-But-Does-It-Matter?mcode=1202617074964&curindex=0&slreturn=20170125192656.

111. *Id.*; see also Class/Collective Action Complaint at 2, *Dawson v. Nat'l Collegiate Athletic Ass'n*, No. 16-5487 (N.D. Cal. 2017), 2016 WL 5405638.

112. Memorandum GC 17-01 from Richard Griffin, Jr., Gen. Counsel, NLRB, on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context to All Reg'l Dirs., Officers-in-Charge, and Resident Officers (Jan. 31, 2017), <http://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

113. See Jon Solomon, *NLRB Counsel: Football Players at Private FBS schools Are Employees*, CBS SPORTS (Feb. 2, 2017), <http://www.cbssports.com/college-football/news/nlr-counsel-football-players-at-private-fbs-schools-are-employees>.

114. *Id.*

115. *Berger v. NCAA*, 843 F.3d 285, 293 (7th Cir. 2016); see Vin Gurrieri, *7th Cir. Won't Declare UPenn Athletes as Employees*, LAW360 (Dec. 5, 2016), <https://www.law360.com/articles/869358/7th-circ-won-t-declare-upenn-athletes-as-employees>.

116. *Berger*, 843 F.3d at 293.

athletes—like all amateur athletes—participate in their sports for reasons that are entirely unrelated to immediate compensation.”¹¹⁷

Dawson’s lawyers tried to distinguish his case from the *Berger* case by pointing out that track and field, the sport of the *Berger* plaintiffs, does not generate the massive amounts of revenue as collegiate football. In the end, however, Judge Richard Seeborg dismissed Dawson’s case, ruling that the amount of revenue generated was irrelevant and that Dawson had failed to offer any legal authority backing his claim. Judge Seeborg was not moved by the non-binding ruling of the regional director of the NLRB in *Northwestern University v. Collegiate Athletes Players Association*.¹¹⁸

The view espoused by Remy, the NCAA, and the Seventh Circuit panel in *Berger* (cited as authority by the NCAA in *Dawson*) runs full circle back to the “revered” and now “long” tradition of amateurism myth conjured up to protect the spoiled youth of the nineteenth century and perpetuated by the NCAA to obfuscate the hypocrisy of large-scale commercialism by the very institutions preaching against commercialism on the part of athletes.¹¹⁹ Griffin’s memorandum to the NLRB simply looked at the actual relationship between the athlete and the school and concluded logically that the long hours and control mandated by the NCAA member institutions looked more like an employer-employee relationship than a group of young people motivated solely by the high-minded ideal of playing for the love of sport. Certainly, participation in sport is voluntary, but with the guidelines imposed by the NCAA member universities, it is often at the sacrifice of part-time employment and grades.

Griffin’s opinion was neither binding on public universities nor purporting to be a mandatory rule for private universities and ultimately did not help Lamar Dawson in his case. Theoretically, however, it could provide a pathway

117. *Id.* at 293; see also Solomon, *supra* note 113 (noting that the majority concluded that college athletes have no more right to be called employees of universities than inmates are employees of the prison).

118. See Christian Dennie, *Dawson v. NCAA & PAC-12 Conference: Motion to Dismiss Granted*, BG&S (Apr. 25, 2017), <http://www.bgsfirm.com/college-sports-law-blog/dawson-v-ncaa-and-pac-12-conference-motion-to-dismiss-granted>; see also Dorothy Atkins, *NCAA Dodges Ex-USC Football Player’s Wage Class Action*, LAW360 (Apr. 25, 2017), <http://www.law360.com/articles/917185>.

119. The *Berger* opinion has been criticized by several commentators. See, e.g., Marc Edelman, *Court Decision in Berger v. NCAA Creates Bad Case Law about College Athletes’ Employment Status*, FORBES (Dec. 23, 2016), <https://www.forbes.com/sites/marcedelman/2016/12/23/court-decision-in-berger-v-ncaa-creates-bad-case-law-about-college-athletes-employment-status/#50d8fbcf1593> (noting that the *Berger* case is odd because the two complaining athletes were women in a sport—track and field—that does not generate revenue: “The Seventh Circuit’s recent decision in *Berger* is off in that the case’s facts did not mandate . . . [a broad decision] across all sports, including revenue-generating BCS football and Division I men’s basketball”). See also Paul H. Sinclair, *NCAA Wins “Employment” Case, but the Debate About Paying Student Athletes Is Far from Over*, ICEMILLER (Feb. 23, 2016), <http://www.icemiller.com/ice-on-fire-insights/publications/ncaa-wins-in-a-rout-court-dismisses-student-athlet> (last visited May 17, 2017).

for athletes to circumvent the NCAA and the member schools in seeking redress for their issues.¹²⁰ John Adam, an attorney who represented the Northwestern University athletes in their efforts to organize, noted that Griffin's memorandum meant that any interested party could bring an unfair labor practices charge to the NLRB about private football players. A union or interested group could file charges with general evidence, and it doesn't have to be about a specific player.¹²¹ Ramogi Huma, National College Players Association director, believes that Griffin's memorandum shows athletes that they have rights they can assert. "One hurdle is that most players have no idea whether or not their school is violating labor law. But it doesn't hurt to ask. It doesn't hurt to reach out [to us] and see if they're being treated fairly under the labor law."¹²²

The courts and the NLRB are two possible fora for the ultimate determination of the viability of the tradition of amateurism in sports. The NCAA did successfully get the Supreme Court in its *Board of Regents* dicta to support the notion of this "revered tradition,"¹²³ which was in turn perpetuated by the Seventh Circuit in the *Berger* case as the "long tradition of amateurism."¹²⁴ However, not all courts have accepted the notion that the tradition is culturally significant to the point that there is no room for change. For example, the NCAA and its member schools have seen an erosion in the viability of the legal footing of amateurism in sports in antitrust cases like *O'Bannon*. In addition, the NLRB has taken notice of the issue from a labor law perspective. Perhaps this is enough to urge the court in the *Jenkins* case to recognize and eliminate the amateurism myth.¹²⁵

III. A NEW TRADITION IN COLLEGE SPORTS

Having concluded that the NCAA-made tradition of amateurism in sport is flawed and coming under scrutiny of the judicial system and the NLRB, Part III will examine the elements of a proposed new tradition that harmonizes the current commercial reality of college sports with the valuable contribution of the athletes. These elements are:

Athletes should be allowed to be compensated in the same way that Olympic athletes are allowed to be compensated—through the legitimate and organized exploitation of their publicity rights. In this connection, the NCAA

120. See Solomon, *supra* note 113.

121. *Id.*

122. *Id.*

123. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 85 (1984).

124. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 293 (7th Cir. 2016).

125. For a reasoned argument that the employee-student narrative should be the basis for analysis in antitrust cases concerning remuneration for college athletes, see William W. Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245 (2017).

can replicate established rules and parameters like those employed by the IOC and the United States Olympic Committee (USOC). Given the relative stability that has existed after affording Olympic athletes commercial freedom, these mechanisms should alleviate any of the NCAA's legitimate concerns.

Athletes should be compensated for their services based on their time commitment, service, and contribution. The rules related to this compensation should be established upon negotiations between the NCAA, acting as the representative of the member institutions, and a representative of the athletes collectively. The source of this compensation should naturally flow from the exploitation of collegiate athletics as a business. The rules should give substantial priority to the education of the athlete.

In accomplishing the last step, universities will be required to make some financial adjustments. Like the managers of any business, those responsible for the operation of the multi-billion dollar enterprise of collegiate athletics may have to reallocate available funds to allow for the fair compensation of students who make the enterprise possible.

A. *The Olympic Model – Free use of the Right of Publicity*

Significantly, the first element of the new tradition for college athletes does not directly implicate the major revenue sources derived from collegiate athletics. Rather, this element of the new tradition is based on the idea, espoused by the IOC, that the publicity rights of an athlete, in particular the right to use one's name, image and likeness (NIL) for commercial purposes, belong exclusively to the athlete. The corollary idea, of course, is that the NCAA and the universities should have no claim to revenues derived from the athlete's publicity rights. The IOC and even professional leagues have no problem dealing with this issue. The NCAA should follow their lead.

In the United States, as determined by case law and state statutes, every person has the exclusive right to his or her own name, image, likeness, and other identifying characteristics for the purposes of commerce.¹²⁶ The history of the right of publicity is intertwined with sports. In 1941, the Fifth Circuit handed down its decision in David O'Brien's suit against the Pabst Brewing Company.¹²⁷ O'Brien was a professional football player whose image Pabst used on its beer cans. This upset O'Brien because he had been part of a group urging teens not to drink and had turned down opportunities to endorse beer.¹²⁸ Nevertheless, the court found that Pabst's use of O'Brien's likeness was not an

126. An important case in this area is *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). There, the Supreme Court stated that a tort-based action for the "right of publicity" is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. *Id.* at 569-72.

127. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167, 167-72 (5th Cir. 1941), *cert denied*, 315 U.S. 823 (1942).

128. *Id.* at 168-69.

infringement of O'Brien's rights.¹²⁹ A dissenting judge noted that the time was ripe to allow a claim for compensation for the unauthorized commercial use of an athlete's image.¹³⁰ And in 1953, that time came in the form of the famous *Haelan Laboratories v. Topps Chewing Gum* case.¹³¹ Haelan, a chewing gum company, sued a rival company that induced baseball players to allow their images to be used on the rival's trading cards, notwithstanding the fact that the athletes had signed exclusive agreements with Haelan for that purpose.¹³² The defendant argued, based on the rule in *O'Brien*, that the athletes' contracts with the plaintiff could not be exclusive and were simply a waiver of the right of privacy and not a grant of rights.¹³³ However, the court held for the plaintiff Haelan and recognized for the first time a right of publicity that was separate from the right of privacy.¹³⁴ From *Haelan* onwards, the rule has been that athletes control the commercial application of their NIL rights.

The NCAA, like the IOC and the professional leagues that have allowed athletes to exploit their own right of publicity, can legitimately offer several concerns related to athletes' use of these rights. First, there is the risk that the athletes allowed to do endorsements will be tempted to trade on the good will of the universities and/or the NCAA and thereby interfere with the legitimate merchandising or sponsorship programs of the universities and/or the NCAA. The IOC and the professional leagues handle this issue by making a bright-line distinction between the trademarks of the institution and the athlete's NIL. For example, a National Basketball Association player can sign a product endorsement deal with a shoe company, but may not wear the uniform, display the logo, mention the name of his NBA team, or use any other NBA league or team intellectual property in advertisements for the shoes without the NBA's consent.

Universities and the NCAA might be legitimately concerned about commercial enterprises using athletes in "ambush marketing" ploys. Many manufacturers who are not official sponsors of the universities or the NCAA will be tempted, for example, to use their relationship with athlete endorsers to "ambush" official games and championship series. In other words, they would create the impression that the manufacturer is an official sponsor without paying a sponsorship fee to the NCAA or the universities. However, the IOC handles this issue through legitimate and fair restrictions on athletes' actions related to such events. For example, the Olympic Charter contains Rule 40, which puts restrictions on each participating athlete related to the athlete's

129. *Id.* at 170.

130. *Id.* at 171.

131. *Haelan Labs. v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953); *see also* J. Gordon Hylton, *Baseball Cards and the Birth of the Right of Publicity: The Curious Case of Haelan Laboratories v. Topps Chewing Gum*, 12 MARQ. SPORTS L. REV. 273, 274 (2001).

132. *Haelan Labs.*, 202 F.2d at 867.

133. *Id.*

134. *Id.* at 869.

participation in ad campaigns for non-Olympic sponsors during periods leading up to and during an Olympic Games.¹³⁵ Rule 40 limits social media posts and other forms of advertising—even congratulatory posts—that could confuse the public with respect to the manufacturer’s relationship with the Olympic Movement.¹³⁶ It would be a simple matter for the NCAA to adopt a similar rule and program to protect its own sponsors, while allowing some freedom for the athletes to explore commercial endorsement opportunities involving their NIL rights.

The district court in the *O’Bannon* case was persuaded by O’Bannon’s argument that the Olympic Games remained popular after athletes were allowed to exploit their NIL rights. It is a matter of common sense today that the higher the Olympic athlete’s profile (e.g., Michael Phelps), the more demand there will be for tickets and broadcast rights. This same phenomenon will exist for collegiate sports.

Finally, the NCAA could be concerned about the proliferation of branded merchandise on the field of play. The IOC and the major sports leagues in the United States (e.g., Major League Baseball, the National Football League, the National Basketball Association and the National Hockey League) handle this by establishing rules related to the size and placement of logos on athlete equipment and clothing. For example, the NBA allows players to select and wear shoes of their own choice but controls all other “real estate” on the player’s uniform.¹³⁷ The NCAA could adopt a similar rule. Another example comes from the Olympics, which limits the number of marks identifying the clothing manufacturer to one per clothing item and the size of the marks to specific measurements.¹³⁸ The NCAA could adopt many of the IOC’s conventions related to the use of trademarks on items that will appear in broadcasts or on the field of play.

135. See, e.g., INT’L OLYMPICS COMM., USE OF A PARTICIPANTS’ IMAGE FOR ADVERTISING PURPOSES DURING THE RIO 2016 OLYMPIC GAMES (2016).

136. See, e.g., James Love, *Social Media, Rule 40, Ambush Marketing, and the Olympics*, INFOTRUST (Aug. 1, 2012), <http://content.infotrustllc.com/social-media-rule-40-ambush-marketing-and-the-olympics>.

137. See, e.g., Darren Heitner, *Blue Diamond Serves Up \$5 Million per Year for Sacramento Jersey Sponsorship*, FORBES (Oct. 10, 2016), <https://www.forbes.com/sites/darrenheitner/2016/10/10/blue-diamond-serves-up-5-million-per-year-for-sacramento-kings-jersey-sponsorship/#6fbd9586e0e> (describing the “jersey patch” from the NBA as one such example).

138. The rule for authorized identification on clothing worn by participants at the Rio Olympics was: “The size of an Identification of the Manufacturer shall not exceed 30cm² for Clothing. One additional identification, strictly limited to Product Technology Identifications, shall be permitted per clothing item and shall not exceed 10cm². Where one-piece body suits are used in competition, such Identifications shall be permitted once above and once below the waist, provided all other principles are respected.” INT’L OLYMPICS COMM., GUIDELINES REGARDING AUTHORISED IDENTIFICATIONS: GAMES OF THE XXXI OLYMPIAD, RIO (2016), https://www.fina.org/sites/default/files/rio_2016_-_guidelines_regarding_authorised_identifications_-_en_-_dec_2015.pdf (last visited May 18, 2017).

There is no doubt, of course, that this form of athlete compensation will benefit only a limited percentage of the athlete population and could become a distraction to certain individuals, taking them away from their studies and even their athletic duties. There is also the risk stemming from other problems related to human nature and the unpredictable impact that money has on a given person. But none of these facts excuse taking from the athlete a personal right granted by law—especially in the face of the Olympics’ successful experience allowing athletes to benefit financially from their success without harming the sport.¹³⁹

To continue following the status quo perpetuates an untenable result. One observer put it this way: “College athletes are unique: their images may be exploited while they are prohibited from enjoying the monetary benefits stemming from such use. No other student body members face such extreme restrictions.”¹⁴⁰

In this regard, following the Olympic model toward implementation should lead to the abolition of the NCAA’s ban against agents. College athletes able to attract endorsement deals will need professional guidance. This guidance should not be handled or administered by the NCAA. Sports agents for professional athletes are regulated by the states¹⁴¹ and by the applicable professional collective bargaining units.¹⁴² This system can easily be adapted for college athletes.¹⁴³ Olympic athletes have agents to help with endorsement deals and appearances. The same system can work on the collegiate level.

B. *Establishing a Reasonable Student Compensation Model*

The new tradition in college sport should provide student-athlete “compensation” without artificial limits or restrictions. Looking at the two

139. In a touch of irony, former Chairman of the USOC Peter Ueberroth filed a declaration in support of the NCAA in connection with the *O’Bannon* and *Keller* cases, arguing that allowing college athletes to receive payments related to their constitutional right of publicity would deprive colleges from funding training for would-be Olympic athletes. In fact, he said that removing this source of revenue from collegiate athletic programs other than basketball and football “could mean the death of the Olympic Movement in the United States.” See Declaration of Peter V. Ueberroth in Support of the NCAA’s Opposition to Summary Judgment, *In re* NCAA Student-Athlete Name and Likeness Licensing Litigation at ¶ 7, No. 09-1967, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

140. Matthew G. Matzkin, *Gettin’ Played: How the Video Game Industry Violates College Athletes’ Right of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 250 (2001).

141. See, e.g., NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIF. ATHLETE AGENTS ACT (2000).

142. For an example of requirements imposed on agents for professional football players, see *How to Become an Agent*, NFLPA, <https://www.nflpa.com/agents/how-to-become-an-agent> (last visited July 29, 2016).

143. See Solomon, *supra* note 113. For example, the National College Players Association, which assisted Northwestern University football players in trying to organize is set up to fill this role.

main legal theories used by challengers against the NCAA's amateurism rules, the compensation system could be logically structured in one of two ways: (1) The approach suggested by plaintiff's arguments in *Jenkins*, where individual schools (or conferences) would unilaterally set their own rules (or chose to be free from rules) related to compensation (without regard for the NCAA's amateurism rules or its collusion with the power conferences to impose a cap on benefits) or (2) a collective bargaining approach, where the NCAA and/or the schools (or conferences) negotiate a collective bargaining agreement with a certified players union.

In a post-*Jenkins* world, there could be any number of scenarios dependent on whether the conferences adopt unilateral rules to replace the NCAA's artificial limitations or other collusive rules. In a no-rules world, the *Jenkins* approach would pit schools against each other in competition for players. Schools would no longer be subject to any cap on benefits provided to athletes and theoretically would be able to place their own value on an upcoming high school standout, with the result that the desired athlete would receive whatever the market would bear.¹⁴⁴

Jenkins, however, does not appear to mandate the chaos of an open market system. In fact, Judge Wilken, of *O'Bannon* fame, has voiced her expectation that payments to athletes in excess of the value of athletic scholarships (or the so-called "cost of attendance") must have some relationship to educational expenses,¹⁴⁵ which will limit the ability of the schools or conferences to create full-scale bidding wars. Moreover, the more likely scenario is that the schools (or conferences) would adopt their own rules related to the disbursement of sports-derived revenues. In a world with no limitations on the maximum limit for grant-in-aid packages or the number of scholarships that can be allocated per athletic program at a given university, schools would be able to allocate the money received from sports-related activities in a variety of ways. The schools would be able, for instance, to foster a broad-based athletic program involving many sports programs. Schools could decide to pay all athletes the same benefits, regardless of sport.

Of course, allowing the individual conferences to set their own rules or adopting a system with no rules presents a challenge with respect to the long-standing goal of maintaining some semblance of competitive balance among the conferences—one of the early motivations for the awkward application of amateurism in college sports. The *Jenkins* plaintiffs argue that competitive balance does not exist across all NCAA member institutions,¹⁴⁶ and there is some truth to that. However, there seems to be some benefit in trying to level the playing field across the entire spectrum of collegiate sports.

144. See McCann, *supra* note 87.

145. *Id.*

146. See Consolidated Amended Complaint at 147, *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, No. 04-2541 (N.D. Cal. July 11, 2014).

The collective bargaining approach, envisioned by the players at Northwestern University and supported by the NLRB (despite the NLRB's opinion does not have the force of law), borrows the blueprint utilized in the major professional leagues. There, players associations represent athletes and negotiate collective bargaining agreements related to compensation schemes that are applicable to all players in the league. In the context of the NCAA, this negotiated scheme could be applied across the NCAA's current broad footprint or across a cluster of competitive schools or conferences. This type of system, applied in the context of the NCAA divisions, for example, could acknowledge some benefit to the notion of competitive balance—at least in the case of remuneration. Universities have different campuses, academic reputations, athletic traditions, and geographical locales, among other things that make them inherently different than their competitors. But if a compensation scheme established at an arm's length provides for rules that apply equally to every Division I institution, then at least athletes will not be overly swayed toward one school over another merely because of the economic benefits bestowed.

The actual terms of any such collective bargaining agreement must be worked out between (a) the NCAA, its conferences, and/or its member universities and (b) one or more recognized collective bargaining units established to represent the players.¹⁴⁷ This process will alleviate continued antitrust concerns¹⁴⁸ and would level the playing field for all athletes involved.

The following are general considerations for inclusion into such a collective bargaining agreement:

- Compensation should be geared to participation in athletic programs, regardless of the sport. All athletes who are accepted and participate on any athletic team (whether or not recruited and whether or not the team that provides surplus revenues) will be members of the union and receive the benefits. For example, the number of hours worked can be used as a threshold for benefits, but a player who puts in the minimum hours in practice and performs up to the minimum level—regardless of “playing time”—should receive benefits. Basing compensation on participation (measured by a minimum number of hours of work, for example), rather than star status (which is rightfully compensated by allowing college athletes to freely exploit their individual rights of publicity like Olympic athletes), allows the university to support a wide variety of student-athletes equally, including those who participate in sports other than football and basketball.

147. See Solomon, *supra* note 113. The College Athletes Players Association exists to fight for student-athlete causes and has interacted with the NLRB's Chicago office on matters related to the Northwestern University athletes. There are other possible approaches as well. For example, the players associations for the NFL, MLB, and NBA could form college athlete divisions.

148. See *Brown v. Pro Football*, 518 U.S. 231, 235-36 (1996) (“[T]he ‘nonstatutory’ labor exemption from the antitrust laws” has been inferred “from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining . . .”).

- Academic participation and standards of academic performance should also be part of the benefit criteria. Very few college athletes turn pro,¹⁴⁹ and the new tradition need not be focused on professional opportunities. Rather, the system should promote education and provide incentives to student-athletes to achieve success in this arena.
- As a baseline proposition, similar to the District Court’s ruling in *O’Bannon*, benefits from the model should at least include all direct and indirect costs of attendance (tuition, housing, books, meals and other normal expenses applicable to attendance at the institution) on a uniform basis, competitive with academic scholarships. Because participation in athletics often means that an athlete will have limited ability to seek or maintain even part-time employment, the compensation model might also reasonably provide for spending money on some logical basis, including need.¹⁵⁰
- Student-athletes generally should be free to explore post-graduate employment opportunities, even if these opportunities come from professional sports. The no-agent, no-draft rules of the NCAA should be eliminated in favor of a rational system providing athletes with access to professional opportunities. Agents and professional league representatives could be registered and vetted by the collegiate athlete union and NCAA. Given the value that the professional leagues potentially gain from the NCAA’s big scale athletic programs—particularly football and basketball (that act in many ways as the leagues’ “farm system”¹⁵¹), it would not be unreasonable to imagine a system whereby professional leagues pay an administrative fee to cover the costs related to establishing a uniform system for contacting contact student-athletes.

149. See, e.g., *Estimated Probability of Competing in Professional Athletes*, NCAA (updated Mar. 10, 2017), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics>.

150. See *In re National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, No. 04-2541 (N.D. Cal. July 11, 2014); *supra* at note 146, at 99 (paraphrasing a statement by Michael Young, President of the University of Washington, to the effect that academic scholarships, which are based on federally reported cost-of-attendance figures, are often greater in value than athletic scholarships. Moreover, a student on an academic scholarship can get a job, while employment opportunities for student-athletes are limited by time and NCAA restrictions.).

151. See John Cronin, *Truth in the Minor League Class Structure: The Case for the Reclassification of the Minors*, 42 *BASEBALL RES. J.* 87, 87 (2013); see also Kevin Blackistone, *Does the NFL Need a Minor League System? Our Commentator Thinks So*, NPR: MORNING EDITION (Jan. 18, 2017), <http://www.npr.org/2017/01/18/510383942/does-the-nfl-need-a-minor-league-system-our-commentator-thinks-so> (noting that the NFL has no farm system of its own and draws almost exclusively from the NCAA pool of football players). The NBA started the D-League, but most of the rookies for the NBA are still drafted out of the NCAA.

C. *Toward Fiscal Responsibility*

Naturally, the adaptation of a compensation model for collegiate sports will come with various challenges. At the top of the list are three common fiscal arguments asserted by the NCAA against enhanced payments to student-athletes. The first is that Title IX of the Civil Rights Act of 1964, as amended by the Education Amendments of 1972, makes any form of compensation beyond the existing structure impossible. The second argument is that if the universities pay only the revenue-generating athletes, the non-revenue sports and participants will be treated unfairly. Lastly, the universities argue that there is not enough money to go around.¹⁵²

The first two arguments are different sides of the same coin. The new tradition advocated above should be designed such that student-athletes in sports other than FBS football and Division I men's basketball, particularly women's programs, receive the same uniform benefits. Basing compensation on hours worked and academic achievement or some other measure of full participation should be uniform across the board for all sports.

The real issue is the third one: Is there enough money to fund the new tradition? Colleges complain that they cannot afford to compensate athletes beyond the current levels. Looking at the statistics offered by the NCAA in support of its position against paying athletes, it is true that only about 15 to 25 athletic departments in each year are "profitable."¹⁵³ In 2008, former NCAA president Myles Brand refuted the assumption that the NCAA is "awash in excess revenue," stating that "[i]t just isn't so."¹⁵⁴ In 2014, NCAA President Mark Emmert presented the argument in a narrated video in connection with the *O'Bannon* case wherein he stated: "Any way you cut it, a very small portion of the NCAA institutions are actually generating a profit."¹⁵⁵

This argument has many critics and has garnered little sympathy. The general sentiment is that the alleged lack of funds to pay athletes is not evidence of rising costs or fiscal impossibilities but of bloated spending. Dan Rascher, a sports economist who has testified against the NCAA, put it this way: "I just wonder if these school officials who claim they can't afford anything, if they actually believe what they're saying."¹⁵⁶ Rascher points out that there are athletic departments like the University of Indiana that remain profitable year after year despite being in the middle of the pack of the Power Five in earnings. "We don't spend more than we take in," Indiana Athletic Director Fred Glass is quoted as saying.¹⁵⁷ In his memoir, the irrepressible

152. *See, e.g.*, Shropshire, *supra* note 72.

153. Hobson & Rich, *supra* note 72.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

Wally Byers comes out as no longer an NCAA apologist¹⁵⁸: “Do any major sports programs make money for their universities? Sure, but the trick is to overspend and feed the myth that even the industry’s plutocrats teeter on insolvency. At the heart of the problem is an addiction to lavish spending.”¹⁵⁹

In the final analysis, the argument that there is not enough money to pay athletes is simply laughable. For the 2012-2013 season, the University of Michigan’s football revenues were posted at \$81,475,191.¹⁶⁰ Against these revenues, there are certainly going to be expenses, but at the end of the day, with a reasonable amount of management, any college athletic program can turn a profit. In Michigan’s case, those revenues led to a net surplus of \$58,413,817.¹⁶¹ On the other hand, there are examples of profligate spending at universities. For example, Auburn University’s decision to buy a \$14 million video board—one of the largest in America—was at the discretion of the athletic department.¹⁶² In addition, Alabama’s decision to pay \$11 million dollars to its football coach¹⁶³ was aimed similarly at the promotion of commerce over the interests of the student-athletes. Professor David Ridpath, at Ohio University and board member for the Drake Group has said, “It’s frustrating to see universities, especially public ones, pleading poverty . . . and it is morally wrong for schools bringing in millions extra on athletics to continue to charge students and academics to support programs that, with a little bit of fiscal sense, could turn profits or at least break even.”¹⁶⁴ For Ridpath, the failure to make a profit is not inevitable, but the result of the athletic director’s decision to outspend income.

158. See Doug Tucker, *Byers: Pay College Athletes*, SEATTLE POST-INTELLIGENCER, Jan. 5, 1995, at D1, D2. Walley Byers, the president of the NCAA during the critical moment in the early 1950s when the concept of “student-athlete” became the NCAA’s mantra, is quoted in the 1990s as follows: “Dramatic changes are necessary to permit athletes to participate in the enormous proceeds . . . I believe the athlete should have the same access to the commercial marketplace that the supervisors and overseers as well as other students have.” See *id.* Byers also said that: “When you say the amateur principles of 1956 should control the commercial realities of 1995, it is an illogical and defenseless position.” See *id.*

159. *Id.*

160. Kristi Dosh, *College Football Revenues: Running the Numbers*, SMARTYCENTS (Sept. 14, 2014), <http://smartycents.com/articles/college-football-revenue/>.

161. *Id.*

162. Hobson & Rich, *supra* note 72. Hobson notes that Athletic Director Jay Jacobs convinced Auburn’s board of trustees to approve the \$13.9 million expense by telling them that it would help recruit star athletes. The school made the expenditure, “even though the athletics department posted a deficit of more than \$17 million the previous year . . . one of the worst fiscal years in Auburn athletics history.” See *id.*

163. See Morgan Moriarty, *At \$11M, Nick Saban Might Be America’s Highest-Paid Sports Coach in 2017*, SB NATION (May 2, 2017), <http://www.sbnation.com/college-football/2017/5/2/15515544/nick-saban-11-million-salary-highest-paid-sports-coach-2017>.

164. *Id.*

The result of the *Alston* case, discussed above, reflects the attitude of the NCAA and many of its member schools.¹⁶⁵ In that case, the NCAA was required to pay over \$200 million to players because the NCAA and the universities were found to have conspired to cap the grant-in-aid owed to college athletes illegally at a value below the actual cost. The NCAA then announced that it would pay this amount from its own reserves.¹⁶⁶ Perhaps the better approach would have been to apply such reserves to the payment of aid packages in the first place.

Noted author Michael Lewis wrote an opinion column in the *New York Times* that contained the following:

Everyone associated with [intercollegiate athletics] is getting rich except the people whose labor creates the value. At this moment there are thousands of big-time college football players, many of whom are black and poor. They perform for the intense pleasure of millions of rabid college football fans, many of whom are rich and white The poor black kids put up with it because they find it all but impossible to pursue N.F.L. careers unless they play at least three years in college. Less than one percent actually sign professional football contracts and, of those, an infinitesimal fraction ever make serious money. But their hope is eternal, and their ignorance exploitable. Put that way the arrangement sounds like simple theft; but up close, inside the university, it apparently feels like high principle.¹⁶⁷

CONCLUSION

The “revered tradition of amateurism in sport” has evolved over the years into a hollow anachronism from the past. It has been revealed as a man-made aphorism designed in part to take advantage of young people seeking a dream. The evolution of sports, from nineteenth-century England to the well-documented demise of amateurism as a major theme for the Olympics, clearly indicates that the issue will not simply go away for the purposes of the NCAA and its member institutions. Adopting a new tradition—one that takes advantages of the lessons learned by the Olympics and which recognizes the reality of college sports as big business—will not impede America’s love of college sports nor work to impair the concomitant economics that have allowed universities to flourish. The new tradition, moreover, will harken back to the ideals of fair play and sportsmanship—ideals of the past that are worth saving in the context of acknowledging the rights and the contributions of the young athletes who have for years made the system work. But to do so will require the NCAA and the universities to make the needed fiscal adjustments and to loosen their grip on the hypocritical tradition of the past. Sadly, it might take a courageous decision by the courts or the NLRB to get the ball rolling.

165. See Farrey, *supra* note 87.

166. *Id.*

167. Michael Lewis, *Serfs of the Turf*, N.Y. TIMES (Nov. 11, 2007), <http://www.nytimes.com/2007/11/11/opinion/11lewis.html>.