

AMENDING AMATEURISM
 SAVING INTERCOLLEGIATE ATHLETICS THROUGH
 CONFERENCE–ATHLETE REVENUE SHARING

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ABSTRACT

College sports remains at a crossroads, with the NCAA's defense of amateurism facing the dual threats of increased commercialization and antitrust lawsuits. By most accounts, this current status quo seems unsustainable. As such, this Article seeks to propose a middle ground—a compromise solution—that provides greater remuneration for athletes in revenue sports in a way that would largely preserve both the NCAA and the virtues of the current system.

Specifically, this Article argues that the conferences, not the institutions, should provide compensation for student-athletes in the form of revenue sharing. Further, this Article advocates the formation of conference-athlete unions that could negotiate compensation with the conferences and use the non-statutory labor exemption as a shield against antitrust lawsuits. As such, this proposal would amend the concept of amateurism to allow for payments from athletic conferences without altering the current relationship between student-athletes and their universities.

Part I of the Article outlines the first problem—the shifting definition of amateurism—and how it creates increasing pressure on the current system. Part II explains the second problem—the anticompetitive characteristics of the current system and their vulnerability to antitrust lawsuits. Then, in Part III, the Article advances its proposal, which addresses both problems and offers a novel solution to them. Finally, in Part IV, the Article justifies this proposal demonstrating how this compromise solution can improve the situation of student-athletes without sacrificing the status quo.

INTRODUCTION

Progress is impossible without change, and those who cannot change their minds cannot change anything. – George Bernard Shaw¹

College athletics remains at a crossroads. For several years, an ongoing debate has raged in the media, on college campuses, and among fans concerning whether intercollegiate athletes should receive remuneration for participation in sports beyond their education-related compensation of tuition, room, and board.² Most of the conversation has focused on the

1. GEORGE BERNARD SHAW, EVERYBODY'S POLITICAL WHAT'S WHAT 330 (1945).

2. See, e.g., Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?_r=0; Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN.COM (Jul. 18, 2011), http://espn.go.com/college-sports/story/_id/6778847/college-athletes-deserve-paid; Associated Press, *NCAA Prez: Stipend Not*

larger principle itself—whether paying student-athletes compromises the identity of college athletics by violating the NCAA’s long-held principle of amateurism.³ The conversation treats this decision as a sort of Rubicon—a point which if passed will end the current status quo and transform college athletics from an amateur into a professional endeavor.⁴

The advocates of pay-for-play cite the commercial windfall generated by the athletic contests in the form of ticket revenue, advertising, television revenue, and other contributions to the university to suggest that the professional atmosphere has already arrived.⁵ Further, everyone tangentially related to the athletic contests, including sponsors, vendors, networks, coaches, athletic department personnel, and the universities, reap financial gain with the exception of the athletes who actually provide the central source of entertainment.⁶

On the other side of the debate, defenders of the status quo, including the NCAA, cite the principle of amateurism as the central reason for proscribing such payments.⁷ Allowing universities to compensate student-athletes beyond paying for their education and related expenses would undermine the character of intercollegiate athletics, according to such advocates.⁸ Rather than financial gain serving as a by-product of college

³ ‘Pay For Play,’ ESPN.COM (Nov. 3, 2011), http://espn.go.com/college-sports/story/_id/7187028/ncaa-stipend-not-lean-pay-play-president-mark-emmert-says.

⁴ Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019 (2014); Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009); Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008); Note, Alex Moyer, *Throwing Out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761 (2015).

⁵ With apologies to Caesar, many claim that paying athletes will create a fundamental shift that will change college sports forever. See O’ Bannon v. NCAA, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (“The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is . . . a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point . . .”) (footnote omitted); Richard Amaral, *College Football: No Turning Back*, EXAMINER.COM, Oct. 31, 2011 (making a similar argument).

⁶ See, e.g., Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; Nocera, *supra* note 2.

⁷ Linda Chavez, *How Colleges Exploit Athletes*, N.Y. POST (Mar. 28, 2014), <http://nypost.com/2014/03/28/how-colleges-exploit-athletes/>; Editorial, *Pay to Play (and Study) in College Sports*, CHICAGO TRIBUNE (Feb. 2, 2015), <http://www.chicagotribune.com/news/opinion/editorials/ct-ncaa-football-pay-edit-0202-20150130-story.html>.

⁸ See, e.g., Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid>; Ekow N. Yankah, *Why N.C.A.A. Athletes Shouldn’t Be Paid*, THE NEW YORKER (Oct. 14, 2015), <http://www.newyorker.com/news/sporting-scene/why-ncaa-athletes-shouldnt-be-paid>.

⁹ See, e.g., Dan Duggan, *Charles Barkley: Paying College Athletes is ‘Ridiculous,’* NJ.COM (Mar. 10, 2015),

sports, pay-for-play arrangements would transform the intercollegiate sports model into a minor league in which the virtues of college sports, particularly its connection to higher education, would disappear.⁹

Also threatening the status quo is increasing evidence that, at least for some, the current model compromises the quality and scope of the education received by student-athletes, particularly in revenue sports.¹⁰ The academic scandal at the University of North Carolina¹¹ provides the most obvious example of academic malfeasance, but there are many other past instances where the classroom education of student-athletes has amounted to no more than a sham.¹² Participating in what constitutes a full-time job in season makes academic success a challenge even with an army of tutors employed to help students.¹³ And even then, student-athletes may have a limited range of classes and majors available to them because of the requirements of their sport. The recent clustering phenomenon—where

http://www.nj.com/rutgersfootball/index.ssf/2015/03/charles_barkley_paying_college_athletes_is_ridiculous.html; Victor Lipman, *Why Considering College Athletes Pro Athletes is a Really Bad Idea*, FORBES (Apr. 1, 2014), <http://www.forbes.com/sites/victorlipman/2014/04/01/why-considering-college-athletes-pro-athletes-is-a-really-bad-idea/#7c361a664b31>.

9. Scoop Jackson, *The Myth of Parity*, ESPN (Sept. 12, 2013), http://espn.go.com/college-sports/story/_/id/9666004/pay-play-answer-college-athletics (suggesting that college football without the university label would just be the NFL).

10. Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/> (finding that 10% of revenue sport athletes read below the fourth-grade level).

11. Dan Kane, *UNC Records Show Deep Dependence on Fake Classes*, NEWS & OBSERVER (Nov. 7, 2015), <http://www.newsobserver.com/news/local/education/unc-scandal/article43622670.html>.

12. For instance, the basketball assistant coach at the University of Georgia taught a class where the final exam consisted of 20 questions, including “[h]ow many points is a 3-pointer worth?” *Coach Gave Every Student an A*, ESPN (Mar. 4, 2004), <http://espn.go.com/ncb/news/story?id=1750279>. Members of the Syracuse academic services team used student athletes’ usernames and passwords to turn in tutored papers for them. Jon Solomon, *What Syracuse’s NCAA Case Revealed About Academic Fraud*, CBSSPORTS.COM (Mar. 7, 2015), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25096871/what-syracuses-ncaa-case-revealed-about-academic-fraud>; Minnesota likewise had similar problems. *NCAA Gives Minnesota Four Years Probation; No Postseason Ban*, MINN. PUB. RADIO (Mar. 11, 1999), http://news.minnesota.publicradio.org/features/199903/11_newsroom_cheating/.

13. An NCAA survey reports that football players spend 42 hours per week on athletic commitments and spend another 38.5 hours per week on academics. NCAA rules limit countable activities to twenty hours per week not to exceed four hours per day during season. Players are required to have one day off every calendar week. This can be structured so that players are required to have almost two weeks of practice without a day off from practice. Many football-related activities like travel and watching performance tape do not count towards the hour limitation. Making workouts and training sessions “voluntary” is another bypass to the counted hours limitation. See *Countable Athletically Related Activities*, NCAA, <http://www.ncaa.org/sites/default/files/20-Hour-Rule-Document.pdf> (last visited Oct. 2, 2016); *NCAA GOALS Study of the Student-Athlete Experience*, NCAA (Jan. 2016), http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf.

large numbers of student-athletes “cluster” in the same major—underscores this point.¹⁴

In recent years the NCAA and its member institutions have entertained increasing compensation at the margins, while holding firm in their commitment to the principle of amateurism. These changes have included allowing universities the ability to provide student-athletes with cost of living increases that cover basic expenses falling outside the provision of room and board, and relaxing restrictions on the provision of food to student-athletes.¹⁵ Part of the outcome of such debates internally at the NCAA has been a growing gap in views between schools that have the resources to provide added benefits to student-athletes and ones that do not.¹⁶

Further, student-athletes, union leaders, and lawyers have sought to use legal avenues to force the issue and gain both increased benefits and remuneration. In 2014, football players at Northwestern University filed a petition with the National Labor Relations Board to form a union.¹⁷ The stated goal of this action was not to receive financial compensation, but other welfare benefits for the student-athletes, including enhanced medical care and insurance post-graduation for injuries suffered while playing college football.¹⁸

Similarly, former UCLA basketball star Ed O’Bannon sued EA Sports and the NCAA for using his likeness in video games without compensating him.¹⁹ This antitrust lawsuit expanded into a class action including both current and former student-athletes and challenging all uses of student-

14. Mark Dent, Michael Sanserino & Sam Werner, *Do Colleges Drop the Ball with Student-Athletes?* PITTSBURGH POST-GAZETTE (May 31, 2014), <http://www.post-gazette.com/sports/college/2014/06/01/Do-colleges-drop-the-ball-with-student-athletes/stories/201406010120>.

15. Steve Berkowitz & Andrew Kreighbaum *College Athletes Cashing in With Millions in New Benefits*, USA TODAY (Aug. 19, 2015), <http://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost—attendance-meals-2015/31904839/>.

16. Dan Friedell, *Cost of Attendance Might be Price Smaller D-I Schools Must Pay to Win*, AM. SPORTS NETWORK (Sept. 30, 2015), <http://americansportsnet.com/cost-of-attendance-might-be-the-price-smaller-d-i-schools-must-pay-for-winning/>.

17. See, e.g., Chip Patterson, *Northwestern Players Start Union Movement in College Athletics*, CBSSPORTS.COM (Jan. 28, 2014), <http://www.cbssports.com/college-basketball/news/northwestern-players-start-union-movement-in-college-athletics-24422762/>; Ben Strauss, *In a First, Northwestern Players Seek Unionization*, N.Y. TIMES (Jan. 28, 2014), <http://www.nytimes.com/2014/01/29/sports/ncaafootball/northwestern-players-take-steps-to-form-a-union.html>.

18. See, e.g., Ben Strauss, *Northwestern Quarterback Makes His Case for Players’ Union*, N.Y. TIMES (Feb. 18, 2014); Jeffrey Eisenband, *Northwestern Football’s Union Effort: Bringing Context to the Saga*, THEPOSTGAME (Aug. 22, 2015), <http://www.thepostgame.com/blog/daily-take/201508/kain-colter-union-northwestern-football-fitzgerald-ncaa>.

19. *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015); Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 31, 2014) http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

athlete likenesses, including in television broadcasts.²⁰ The plaintiffs won a victory of sorts at the district court level, with U.S. District Judge Claudia Wilken finding that the NCAA's conduct violated § 1 of the Sherman Act, illegally restraining the ability of the student-athletes to participate in the market.²¹ The court's remedy, however, was a paltry \$5,000 per student per year.²² On appeal, the Ninth Circuit Court of Appeals upheld the lower court's finding that the NCAA's conduct violated antitrust law, but struck down the remedy adopted by the lower court.²³

Another pending class action lawsuit, *Jenkins v. NCAA*, goes further in challenging the current system.²⁴ Unlike the *O'Bannon* case, which focused solely on the use of student-athletes' names and likenesses, *Jenkins* challenges the entire amateurism structure, arguing that restricting the ability of individual institutions to compensate their athletes constitutes an unlawful restriction on commerce.²⁵

Amidst this background, there remains the open question of whether a compromise solution exists.²⁶ The commercial pressures on the current system make the current model seem increasingly unsustainable.²⁷ The pending antitrust lawsuits, as explained below, threaten the future of intercollegiate athletics in a very real way.²⁸

Given that these cases can destroy the status quo, this Article seeks to propose a middle ground—a compromise solution—that provides greater remuneration for athletes in revenue sports in a way that would largely preserve both the NCAA and the virtues of the current system.

Specifically, this Article argues that the conferences, not the institutions, should provide compensation for student-athletes in the form of revenue sharing. Further, this Article advocates the formation of a conference-athlete employee relationship with student-athlete unions to enable the NCAA to use the non-statutory labor exemption as a shield

20. *O'Bannon*, 802 F.3d at 1055–56.

21. *Id.* at 1052–53.

22. *Id.* at 1053.

23. *Id.* at 1079.

24. *Jenkins v. NCAA*, 311 F.R.D. 532 (N.D. Cal. 2015).

25. *Id.*

26. See, e.g., Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <http://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html>; Jalen Rose, *Paid College Athletes: A Reasonable Compromise*, HUFFINGTON POST: THE BLOG (May 25, 2011, 9:37 AM), http://www.huffingtonpost.com/jalen-rose/paid-college-athletes-a-r_b_836449.html.

27. See Donna Lopiano & Gerald Gurney, *Don't Reform NCAA – Replace It*, INSIDE HIGHER ED (Sept. 11, 2014), <https://www.insidehighered.com/views/2014/09/11/ncaa-cant-be-reformed-congress-should-replace-it-essay>.

28. See *infra* Section II.C. At the very least, the cost of defending the many lawsuits has to, at some point, start to threaten the viability of the NCAA itself. See, e.g., Roger Groves, *A New Slew of College Player Lawsuits May Cost NCAA and Conferences a Billion Dollars*, FORBES (Dec. 11, 2015), <http://www.forbes.com/sites/rogergroves/2015/12/11/a-new-slew-of-college-player-lawsuits-may-cost-ncaa-and-conferences-a-billion-dollars/#25b1aba65acf>.

against antitrust lawsuits. As such, this proposal would amend the concept of amateurism to allow for payments from athletic conferences without altering the current relationship between student-athletes and their universities.

Part I of the Article outlines the first problem—the shifting definition of amateurism—and explains how it creates increasing pressure on the current system. Part II describes the second problem—the anticompetitive characteristics of the current system and their vulnerability to antitrust lawsuits. Then, in Part III, the Article advances its proposal, which addresses both problems and offers a novel solution to them. Finally, in Part IV, the Article justifies this proposal by demonstrating how this compromise solution can improve the situation of student-athletes without sacrificing the status quo.

I. THE AMATEURISM PROBLEM

The concept of amateurism, at least as embraced by the NCAA and institutions of higher education, remains a fluid one.²⁹ In addition, as explained below, its current iteration has become increasingly less justifiable in the context of increased commercialism in intercollegiate athletics.

A. *The Shifting Definition of Amateurism*

In its purest form, amateurism contemplates that athletes perform simply “for the love of the game.”³⁰ The distinction between amateur and professional athletes began in England during the nineteenth century, where it reflected a difference in social class.³¹ The upper class sportsmen,

29. See, e.g., Kristen R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003) (exploring evolution of amateurism defense over time) *Coach K Backs NCAA Changes*, ESPN (Oct. 3, 2013), http://www.espn.com/mens-college-basketball/story/_/id/9762424/duke-coach-mike-krzyzewski-says-ncaa-needs-new-definition-amateurism-report-says (discussing possible NCAA changes that would shift the definition of amateurism).

30. See, e.g., THE INTERNATIONAL OLYMPIC COMMITTEE AND THE MODERN OLYMPIC GAMES (1950), http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1950-Olympic_Charter.pdf (“You will be a true sportsman[, a]n athlete . . . [i]f you take part in sport for the love of it . . .” (emphasis omitted)).

31. See, e.g., Anna McCullough & Aswin Tony Subketaew, *Ancient Greek “Amateurism,” the NCAA and the Courts*, 31 INT’L J. HIST. SPORT 1033 (2014); Kay Hawes, *Debate on Amateurism has Evolved Over Time*, NCAA NEWS, Jan. 3, 2000; Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (Jul. 25, 2014), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/>.

the gentlemen, participated as amateurs without pay, while the working classes played as professionals with compensation.³²

While ameliorating the class distinction, the modern Olympic games adopted a similar distinction related to compensation. The 1956 Olympic charter's definition of an amateur is as follows: "An amateur is one who participates and always has participated in sport solely for pleasure and for the physical, mental or social benefits he derives therefrom, and to whom participation in sport is nothing more than recreation without material gain of any kind, direct or indirect."³³ At its core, then, amateurism is simply participation in sport as "recreation without material gain of any kind, direct or indirect."³⁴

At its founding, the NCAA adopted a similar, but even broader conception of amateurism. The 1906 NCAA Constitution identified the Principles of Amateur Sport to prohibit

[p]roselyzing [sic][t]he offering of inducements to players to enter Colleges or Universities because of their athletic abilities and of supporting or maintaining players while students on account of their athletic abilities, either by athletic organizations, individual alumni, or otherwise, directly or indirectly[; t]he singling out of prominent athletic students of preparatory schools and endeavoring to influence them to enter a particular College or University[; t]he playing of those ineligible as amateurs[; t]he playing of those who are not bona-fide students in good and regular standing[; and i]mproper and unsportsmanlike conduct of any sort whatsoever, either on the part of the contestants, the coaches, their assistants, or the student body.³⁵

This notion also extended to the initial eligibility requirements, which mandated that

32. See GEOFFREY SHERINGTON & STEVE GEORGAKIS, SYDNEY UNIVERSITY SPORT 1852–2007: MORE THAN A CLUB 52 (2008) (providing the British Amateur Rowing Association definition of "amateur" as anyone "who is or has been by trade or employment for wages, a mechanic, artisan, or labourer, or engaged in any menial duty"); KENNETH L. SHROPSHIRE ET AL., THE BUSINESS OF SPORTS AGENTS (3d ed. 2016) (providing the Amateur Athletic Club of England definition: "any gentleman who has never competed in an open competition or for public money, or for admission money . . . [nor has] at any period of his life taught or assisted in the pursuit of athletic exercises as a means of livelihood; nor is a mechanic, artisan, or labourer").

33. INT'L OLYMPIC COMM., THE OLYMPIC GAMES 19 (1956), http://www.olympic.org/Documents/Olympic%20Charter/Olympic_Charter_through_time/1956-Olympic_Charter.pdf.

34. *Id.*

35. THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES: PROCEEDINGS OF THE FIRST ANNUAL MEETING 33 (Forgotten Books 2016) (1906), https://www.forgottenbooks.com/en/books/Proceedings_of_the_Annual_Convention_of_the_National_Collegiate_1000727416.

[n]o student shall represent a College or University in any intercollegiate game or contest who has at any time received, either directly or indirectly, money, or any other consideration, to play on any team, or for his athletic services as a college trainer, athletic or gymnasium instructor, or who has competed for a money prize or portion of gate money in any contest, or who has competed for any prize against a professional.³⁶

In 1906, the NCAA took a position on paid summer baseball, deciding that playing in the minor leagues during the summer violated conceptions of amateurism, but left enforcement up to individual institutions.³⁷ This issue remained contentious, however, based largely on uneven enforcement, until the NCAA adopted a new definition of amateurism in 1916. That definition provided that “[a]n amateur athlete is one who participates in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom.”³⁸

The NCAA, however, did not enforce amateurism rules nationally until 1954, when it formed the Committee on Infractions.³⁹ Over time, the definition of amateurism broadened to include athletics grants-in-aid and allow recruitment of high school athletes.⁴⁰ Another major change occurred in 1974, when the NCAA modified its rules to allow athletes to compete in one sport as a professional, while maintaining their amateur status in another.⁴¹

The modern definition of amateurism employed by the NCAA focuses on education as its conceptual cornerstone. Section 2.9 of the NCAA Manual provides:

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.⁴²

The NCAA website further explains that

36. *Id.* at 34.

37. *See id.* at 26–27, 34, 36. A similar problem arose in the 1920s when students who had returned from the war played professional football on the weekends for pay. *See Hawes, supra* note 31.

38. Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 676–77 (2003).

39. *Id.* at 677.

40. *See id.* at 697.

41. *Id.* at 677.

42. NCAA, DIVISION I MANUAL § 2.9 (2016–17) (emphasis added).

[a]mateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are *students first, athletes second*.⁴³

Generally, the NCAA's amateurism rules prohibit contracts with professional teams, receiving a salary for participating in athletics, receiving prize money above actual and necessary expenses, play with professionals, tryouts, practice or competition with a professional team, benefits from an agent or prospective agent, agreements to be represented by an agent, and any delay of initial full-time collegiate enrollment to participate in organized sports competition.⁴⁴

The bright-line rule that the NCAA has attempted to draw, then, rests on the concept of education.⁴⁵ Funds provided in support of education, including scholarships, room, board, and most recently, cost of attendance, all fall within the concept of amateurism because they are expenditures related to education.⁴⁶

The complex nature of the NCAA rules, however, demonstrates the difficulty in both applying and policing this distinction.⁴⁷ The increasing challenge of enforcing the rules has led to a proliferation of compliance staff members, as well as controversy in enforcement.⁴⁸

B. *The Conflict Between Educational and Commercial Interests*

As the NCAA has settled in recent years on a definition of amateurism linked to education, the increasing commercialism of intercollegiate

43. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (emphasis added) (last visited Oct. 2, 2016).

44. *Id.*

45. See, e.g., Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 336–37 (2007); Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1 (2000); Mitchell, *supra* note 7.

46. See *Amateurism*, *supra* note 43; C. Peter Goplerud III, *Stipends for Collegiate Athletes: A Philosophical Spin on a Controversial Proposal*, 5 KAN. J.L. & PUB. POL'Y 125, 125–26 (1996).

47. Many of these distinctions have become the source of public ridicule. See, e.g., Holly Anderson, *Seeds of Change in NCAA Bagel Regulation*, SPORTS ILLUSTRATED (Jan. 18, 2013), <http://www.si.com/college-football/campus-union/2013/01/18/seismic-shift-in-ncaa-bagel-regulation>; Joe Nocera, Opinion, *The Stupidest N.C.A.A. Rule*, N.Y. TIMES (Feb. 17, 2012, 12:56 PM), <http://nocera.blogs.nytimes.com/2012/02/17/the-stupidest-n-c-a-a-rule/>.

48. Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, THE ATLANTIC (Oct. 23, 2012), <http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/>.

athletics has raised questions about the fairness of this approach. Where the environment is one where the athletic contests appeared supplementary to the educational experience, the concept of amateurism seems justified. For many of the non-revenue sports, and even in the Ivy League, which has no athletic scholarships, the concept of participation for the love of the game and for personal enrichment seems to be an appropriate characterization.⁴⁹

The reality, though, in the revenue sports of men's football and men's basketball, is that the entire enterprise has the feel of a professional economic machine.⁵⁰ One has to look no further to the level of seriousness that many fans accord to the recruitment of high school athletes as evidence that these sports go far beyond the simple joy of participation.⁵¹

The economics reflect this reality. In most states, the highest paid public employee is a football coach or a basketball coach, with the salaries of many *assistant* coaches exceeding the salaries of college presidents.⁵² The budget of the athletic department is by far the largest departmental budget at many universities.⁵³

Indeed, at many institutions, the athletic department remains deeply interrelated to the fortunes of the university. Increasingly, it operates (thanks to broad television coverage) as a front porch for the university, attracting students, alumni donors, and the general public into the university community.⁵⁴ The benefits for the university are obvious, even

49. See, e.g., KATHY ORTON, *OUTSIDE THE LIMELIGHT: BASKETBALL IN THE IVY LEAGUE* (2009); Angela J. Schneider & Robert B. Butcher, *For the Love of the Game: A Philosophical Defense of Amateurism*, 45 *QUEST* 460 (1993).

50. See, e.g., RANDY R. GRANT ET AL., *THE ECONOMICS OF INTERCOLLEGIATE SPORTS* (2008); Adam Hoffer et al., *Trends in NCAA Athletic Spending*, 6 *J. SPORTS ECON.* 576 (2015); James V. Koch & Wilbert M. Leonard, *The NCAA: A Socio-Economic Analysis: The Development of the College Sports Cartel from Social Movement to Formal Organization*, 37 *AM. J. ECON. & SOC.* 225 (1978).

51. See, e.g., Travis L. Brown, *College Football Recruiting Has Created an Industry of Its Own*, *STAR-TELEGRAM* (Jan. 13, 2013), <http://www.star-telegram.com/sports/article3833614.html>; Jon Solomon, *Has the College Football Recruiting Media Industry Hit a Bubble with Fans?*, *AL.COM* (Feb. 4, 2014), http://www.al.com/sports/index.ssf/2014/02/has_the_college_football_recr.html.

52. See, e.g., Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, *DEADSPIN* (May 9, 2013), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228>; Emily Jane Fox, *The Highest Paid Public University Presidents*, *CNN MONEY* (June 8, 2015), <http://money.cnn.com/2015/06/07/pf/college/highest-paid-public-university-presidents/>; *NCAA Salaries: NCAAF Coaches*, *USA TODAY*, <http://sports.usatoday.com/ncaa/salaries/> (last visited Sept. 29, 2016); *NCAA Salaries: NCAAF Assistant Coaches*, *USA TODAY*, <http://sports.usatoday.com/ncaa/salaries/football/assistant> (last visited Sept. 29, 2016).

53. See Cliff Peale, *Athletics Cost Colleges, Students Millions*, *CINCINNATI ENQUIRER* (Sept. 15, 2013), <http://www.usatoday.com/story/news/nation/2013/09/15/athletics-cost-colleges-students-millions/2814455/>; Brad Wolverton et al., *Sports at Any Cost*, *HUFFINGTON POST* (Nov. 15, 2015), <http://projects.huffingtonpost.com/ncaa/sports-at-any-cost>.

54. See, e.g., Jason Belzer, *The Priorities of University Presidents: Where Do College Athletics Fit In?*, *FORBES.COM* (Nov. 23, 2015), <http://www.forbes.com/sites/jasonbelzer/2015/11/23/the-priorities-of-university-presidents-where-do-college-athletics-fit-in/#1c19912e31b9>.

apart from revenue raised by the athletic department.⁵⁵ The continued success of athletic programs remains a high priority, particularly for large public institutions.⁵⁶

Further, the creation of conference-based television stations has added to the revenue for higher education institutions.⁵⁷ The SEC Network, in particular, has been quite successful, generating millions of dollars in revenue and providing widespread national exposure for its universities.⁵⁸ Indeed, almost all of the SEC football and basketball games are now televised nationally.⁵⁹

As the economic side of intercollegiate athletics continues to grow, the tension between the commercial enterprise of athletics and the goal of education embedded in the concept of amateurism continues to increase.⁶⁰ At one level, the idea that institutions and their employees, coaches, advertisers, television networks, conferences, refreshment vendors, and other involved parties all benefit financially from revenue sporting events offends notions of fairness when compared with the absence of remuneration provided to student-athletes.⁶¹ The appearance that increasingly persists is that the universities and the aforementioned third parties benefit off of the student-athletes in a way that is exploitative and unfair.⁶²

The wealth gap between the coaches and the many student-athletes that come from poor backgrounds is particularly striking.⁶³ Similarly, university

55. See, e.g., KRISTI DOSH, *SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES* (2013); Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, 75 SOUTHERN ECON. J. 750, 750–53 (2009).

56. See, e.g., Adam G. Walker, *Division I Intercollegiate Athletics Success and the Financial Impact on Universities*, SAGE OPEN, Oct.–Dec. 2015, at 1, <http://sgo.sagepub.com/content/spsgo/5/4/2158244015611186.full.pdf>.

57. See, e.g., Brett McMurphy, *SEC Schools to Each Receive Record \$31.2 Million Payout*, ESPN (May 29, 2015), http://espn.go.com/college-sports/story/_/id/12974161/southeastern-conference-distribute-record-435m-revenue-member-schools.

58. Steve Berkowitz, *Tax Return Shows SEC Made \$527.4 Million in First Year of CFP, SEC Network*, USA TODAY (Jan. 20, 2016), <http://www.usatoday.com/story/sports/college/2016/01/19/sec-tax-return-college-football-playoff-sec-network-mike-slive/79006606/>.

59. See generally *SEC Network – TV Schedule*, SEC, <http://www.secsports.com/tv-schedule> (last visited Sept. 29, 2016).

60. See, e.g., ANDREW ZIMBALIST, *UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS* (1999); Fitt, *supra* note 3, at 556–59; Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213, 213–15 (2004).

61. See, e.g., Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41 (2006); Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 26 (1996).

62. See, e.g., Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT'L REV. SOC. SPORT 550 (2013); Ahmed E. Taha, *Are College Athletes Economically Exploited?*, 2 WAKE FOREST J.L. & POL'Y 69 (2012).

63. See, e.g., BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINATELY WHITE NCAA INSTITUTIONS* (2010); Joseph N. Cooper, *Personal Troubles and*

sales of athletes' jerseys seem unfair when not shared with the athletes.⁶⁴ As discussed below, the use of athletes' physical characteristics by the NCAA to create video game avatars, drawn from game film of the athletes, again supports the perception that the student-athletes do not receive fair treatment under NCAA rules.⁶⁵

Even more problematic, though, is the evidence that the educational experience of student-athletes may not be meaningful, or at the very least becomes compromised.⁶⁶ As the beacon of the concept of amateurism, the idea that student-athletes receive academic benefits from their respective institutions lies at the heart of the justification of denying pay-for-play.⁶⁷

Certainly, where academic fraud occurs, this standard appears to be a sham.⁶⁸ But even where universities follow NCAA rules, there is an open question concerning the degree to which the athletic requirements placed on student-athletes limit or compromise their academic opportunities.⁶⁹

The widespread unpreparedness for college, as evidenced by the test scores and high school grade-point averages of many athletes, particularly in the revenue sports, highlights this issue.⁷⁰ Even with tutoring, the

Public Issues: A Sociological Imagination of Black Athletes' Experiences at Predominately White Institutions in the United States, 2 SOC. MIND 261, 264–66 (2012).

64. Kathryn Young, *Deconstructing the Façade of Amateurism: Antitrust and Intellectual Property Arguments in Favor of Compensating Athletes*, 12 VA. SPORTS & ENT. L.J. 338 (2013); *The Fab Five*, (ESPN Films 2011).

65. Jon Solomon, *Ed O'Bannon Plaintiffs: EA Sports Used Actual Game Footage to Create Video Game Players*, AL.COM (June 19, 2013), http://www.al.com/sports/index.ssf/2013/06/ed_obannon_plaintiffs_ea_sport.html. This differs from the EA Sports franchises that center around professional athletes where actual names and numbers are used and the athletes sometimes provide in-studio footage to aid in the creation of the avatars.

66. See, e.g., MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2000); Patricia S. Miller & Gretchen Kerr, *The Athletic, Academic and Social Experiences of Intercollegiate Student-Athletes*, 25 J. SPORT BEHAV. 346 (2002).

67. See, e.g., Eddie Comeaux & Keith C. Harrison, *A Conceptual Model of Academic Success for Student-Athletes*, 40 EDUC. RESEARCHER 235 (2011); Janice M. Jordan & Eric L. Denson, *Student Services for Athletes: A Model for Enhancing the Student-Athlete Experience*, 69 J. COUNSELING & DEV. 95 (1990).

68. See, e.g., Bradley David Ridpath, Gerald Gurney & Eric Snyder, *NCAA Academic Fraud Cases and Historical Consistency: A Comparative Content Analysis*, 25 J. LEGAL ASPECTS SPORT 75 (2015).

69. See, e.g., Josephine R. Potuto & James O'Hanlon, *National Study of Student-Athletes Regarding Their Experiences as College Students*, 41 C. STUDENT J. 947 (2007); Joy Gaston Gayles & Shouping Hu, *The Influence of Student Engagement and Sport Participation on College Outcomes Among Division I Student Athletes*, 80 J. HIGHER EDUC. 315 (2009).

70. See, e.g., Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199 (1995); Tiffany Marie Peters, *Academically Underprepared Student-Athletes: A Dilemma in Higher Education*, INDIANA AHPERD J., Fall 2013, at 33 (2013), <http://www.inahperd.org/wp-content/uploads/Iahperd-Volume-42-Number-3-Fall-2013.pdf#page=35>; Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, STAN L. & POL'Y REV., Winter 1997, at 141; Jeffrey M. Waller, *A Necessary Evil: Proposition 16 and Its Impact on Academics and Athletics in the NCAA*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 189 (2003).

educational prospects of such students can diminish.⁷¹ The temporal requirements on the student-athletes make the idea that education comes first somewhat dubious in many situations.⁷² Where athletics require a commitment of forty to sixty hours a week, engaging in academic matters in a robust way seems like a difficult proposition.⁷³

Increasingly, the pressure on students and universities to cut corners can compromise the educational experience of students.⁷⁴ Without a doubt, participation in a revenue sport can limit the academic choices of student-athletes.⁷⁵ The question is whether these demands eviscerate their choices entirely. The recent phenomenon of clustering majors at some universities suggests such compromising might occur at many schools.⁷⁶ To be sure, many student-athletes want more time away from their athletic obligations.⁷⁷

The NCAA and its member institutions are not unaware of these issues. Nonetheless, the NCAA has demonstrated its reluctance to double down on its emphasis on education, largely allowing athletic departments and coaches to dictate the schedules of student-athletes.⁷⁸

71. See, e.g., Leah P. Hollis, *Service Ace? Which Academic Services and Resources Truly Benefit Student Athletes*, 3 J. C. STUDENT RETENTION 265 (2001); Josephine R. Potuto, *Academic Misconduct, Athletics Academic Support Services, and the NCAA*, 95 KY. L.J. 447 (2006); Alyssa Ego, *Student-Athletes and Academic Peer Mentors: A Case Analysis of Expert/Novice Relationships in Intercollegiate Athletics* (Apr. 25, 2013) (unpublished master's thesis, University of Arizona), <http://hdl.handle.net/10150/293640>.

72. See, e.g., Christopher Lai & Matthew S. Wiggins, *Burnout Perceptions Over Time in NCAA Division I Soccer Players*, 7 INT'L SPORTS J. 120 (2003); Herbert D. Simons et al., *Academic Motivation and the Student Athlete*, 40 J. C. STUDENT DEV. 151 (1999).

73. See, e.g., Tanya R. Upthegrove et al., *Big Money Collegiate Sports: Racial Concentration, Contradictory Pressures, and Academic Performance*, 80 SOC. SCI. Q. 718, 722 (1999).

74. Peter Adler & Patricia A. Adler, *From Idealism to Pragmatic Detachment: The Academic Performance of College Athletes*, 58 SOC. EDUC. 241 (1985); Kavitha A. Davidson, *Why Don't Colleges Care About Athletes' Grades?*, BLOOMBERGVIEW (Aug. 21, 2014), <https://www.bloomberg.com/view/articles/2014-08-21/why-don-t-colleges-care-about-athletes-grades>.

75. Joshua Castle, Robin Ammon & Les Myers, *The 9 Credit Rule: A Look at Its Impact on Academic Advising for Intercollegiate Football Athletes*, 5 J. PHYSICAL EDUC. SPORTS MGMT. 59 (2014); Cheresse F. Fine, *The Dynamics Between Intercollegiate Athletics & Academics: A Phenomenological Case Study Approach* (May 2015) (unpublished Ph.D. dissertation, Clemson University), http://tigerprints.clemson.edu/all_dissertations/1500.

76. Kristina M. Navarro, *An Examination of the Alignment of Student-Athletes' Undergraduate Major Choices and Career Field Aspirations in Life After Sports*, 56 J. C. STUDENT DEV. 364 (2015); Cathy Monteroso, *The Lived Experiences of the Student Athletes and the Phenomenon of Academic Clustering* (Aug. 2015) (unpublished Ph.D. dissertation, Northcentral University), <http://gradworks.umi.com/37/28/3728290.html>.

77. Brad Wolverton, *Many College Athletes Say They Want More Time Away from Sports*, CHRON. HIGHER EDUC. (Jan. 12, 2016), <http://chronicle.com/blogs/ticker/many-college-athletes-say-they-want-more-time-away-from-sports/107806>.

78. See Davidson, *supra* note 74.

While the NCAA has made clear that most of its athletes “go pro in something [else],”⁷⁹ it has done little to ensure that universities provide the academic rigor for student-athletes, particularly in revenue sports, that the institutions often require of their other students.⁸⁰ The proxy that it uses—graduation rates—ignores the quality of education student-athletes receive.⁸¹ Adding more robust limitations on the time spent participating in sports might make the achievement of a meaningful education a more realistic goal.⁸² Instead, the appearance remains that an eligibility-at-all-costs approach prevails at many institutions.⁸³

C. *The Northwestern Union Case*

In 2014, football players at Northwestern University attempted to unionize by petitioning the National Labor Relations Board (NLRB) to recognize their election.⁸⁴ In a decision that the NLRB later vacated, Regional Director Peter Sung Ohr held that the football players are university employees for purposes of the NLRB.⁸⁵ The significance of this decision was not in its outcome—there will be no union on the Northwestern campus anytime soon—but rather arose from the language of the decision and the compelling case it made for understanding the relationship of athletes to the university in terms of employment.⁸⁶

The Director explained that the central reason the athletes attended Northwestern was to play football.⁸⁷ Education, if a reason at all, was secondary.⁸⁸ Further, he cited the economic benefit to the institution that accrued revenue of \$235 million over a nine-year period.⁸⁹ The athletes provided the services that resulted in this revenue, working between forty

79. Press Release, NCAA, NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website (Mar. 13, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html>.

80. Macy McCarty, *Academic Progress or Academic Failure?: Reform of the NCAA Academic Performance Program*, 4 MISS. SPORTS L. REV. 302, 313–17 (2014).

81. See *Academic Progress Rate Explained*, NCAA, <http://www.ncaa.org/about/resources/research/academic-progress-rate-explained> (last visited Sept. 29, 2016).

82. I have argued this elsewhere. See William W. Berry III, *Educating Athletes: Re-Envisioning the Student-Athlete Model*, 81 TENN. L. REV. 795 (2014).

83. D. Randall Smith, *It Pays to Bend the Rules: The Consequences of NCAA Athletic Sanctions*, 58 SOC. PERSP. 97 (2015).

84. See sources cited *supra* note 18.

85. Nw. Univ. Emp’r & Coll. Athletes Players Ass’n (CAPA), 2014-15 N.L.R.B. Dec. P 15781, at *1 (2014), *dismissed on other grounds*, 362 NLRB 167 (2015).

86. See *id.*

87. *Id.* at *9.

88. *Id.*

89. *Id.* at *12.

and sixty hours per week.⁹⁰ In addition, the athletes received remuneration in the value of \$76,000 per year, counting the cost of education, room, board, and books.⁹¹ The picture he painted was clear—the intercollegiate athletics enterprise is a financial one in which universities accrue revenue from the performance of their athlete-employees.

While the NCAA and its member institutions might decry this characterization, the increasing perception makes this understanding a growing problem. And the continued economic growth of intercollegiate athletics will only serve to increase the pressure to share the wealth with the athletes.

II. THE ANTITRUST PROBLEM

In addition to an amateurism problem, the NCAA has an antitrust problem. No fewer than four major lawsuits are pending against the NCAA, challenging various aspects of its rules and structure under antitrust law.⁹² In *Hartman v. NCAA*, the plaintiffs, a class comprised of women's basketball players, are challenging the NCAA limits on the amount of money student-athletes can receive as part of their grants-in-aid, arguing that this restriction violates federal antitrust law.⁹³ In *Gregory-McGhee v. NCAA*, football players are challenging the limits to the grants-in-aid for intercollegiate athletes, arguing that the NCAA and the Big 5 conferences have colluded in violation of antitrust law to depress the value of the grants-in-aid such that it fails to cover the cost of attendance of the student-athletes.⁹⁴ In *Alston v. NCAA*, the plaintiffs raise a similar claim, arguing that NCAA limits on the amount of grants-in-aid violate federal antitrust laws.⁹⁵ Finally, in *Jenkins v. NCAA*, the plaintiffs' antitrust challenge includes all football and basketball players, and more broadly challenges the restrictions the NCAA and its member institutions place upon student-athletes.⁹⁶

At the core of these cases is the same central claim—that the NCAA is a cartel that restricts the market for intercollegiate athletes to receive paid

90. See *id.* at *6, *8, *15, *16.

91. *Id.* at *12.

92. See Complaint, *Hartman v. NCAA*, No. 3:15-cv-00178-JCS, 2015 WL 163575 (N.D. Cal. Jan. 13, 2015); Complaint, *Gregory-McGhee v. NCAA*, No. 3:14CV01777, 2014 WL 1509247 (N.D. Cal. Apr. 17, 2014); Complaint, *Alston v. NCAA*, No. 3:14CV01011, 2014 WL 843274 (N.D. Cal. Mar. 5, 2014); *Jenkins v. NCAA*, 311 F.R.D. 532 (N.D. Cal. 2015).

93. See Complaint, *Hartman*, No. 3:15-cv-00178-JCS, 2015 WL 163575.

94. See Complaint, *Gregory-McGhee*, No. 3:14CV01777, 2014 WL 1509247.

95. See Complaint, *Alston*, No. 3:14CV01011, 2014 WL 843274.

96. See *Jenkins*, 311 F.R.D. 532.

services.⁹⁷ All available employer institutions⁹⁸ in the market for college athletes have agreed to abide by a central set of rules that require intercollegiate athletes to maintain amateur status.⁹⁹

A. NCAA Antitrust Challenges

The NCAA is no stranger to antitrust challenges.¹⁰⁰ Indeed, the *Board of Regents* case from the 1980s has deprived it of its largest potential source of revenue—money from television rights for college football games.¹⁰¹

In the early 1980s, the NCAA regulated universities through its College Football Association (CFA).¹⁰² The CFA limited the number of times a university could appear on television and limited the number of games televised each weekend.¹⁰³ Although unthinkable in the current era of wall-to-wall coverage in which there is a game almost every night of the week,¹⁰⁴ the CFA system capped appearances of member institutions and prohibited them from entering into their own agreements with networks.¹⁰⁵

The University of Oklahoma and the University of Georgia, football powerhouses at the time, petitioned the NCAA for the right to enter into their own agreements with television networks.¹⁰⁶ The NCAA refused, citing the fear that televising more games could threaten attendance at college football games.¹⁰⁷

Georgia and Oklahoma challenged the NCAA's restrictions, arguing that they violated the Sherman Act, the federal antitrust law that prohibits

97. See complaints cited *supra* note 92; see also Zachary Stauffer, *Does the NCAA Rule College Sports Like a "Cartel"?*, FRONTLINE (June 11, 2014), <http://www.pbs.org/wgbh/frontline/article/does-the-ncaa-rule-college-sports-like-a-cartel/>.

98. See *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA)*, 2014-15 N.L.R.B. Dec. P 15781, at *2 (2014) (establishing the college institution as an employer).

99. Indeed, the major shift in the courts has been one from believing that there is no market because of amateurism, see, e.g., *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990), to the assumption that there is a market, *O'Bannon v. NCAA*, 802 F.3d 1049, 1078-79 (9th Cir. 2015).

100. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

101. *Bd. of Regents*, 468 U.S. 85.

102. *Id.* at 89.

103. *Id.* at 94.

104. The infancy of ESPN, which had no rights to televise football games at the time, was also part of this phenomenon. BILL RASMUSSEN, *SPORTS JUNKIES REJOICE!: THE BIRTH OF ESPN* (1983).

105. See Mark Dent, *Television is the Ruling Body of College Sports*, PITTSBURGH POST-GAZETTE (Aug. 26, 2012), <http://www.post-gazette.com/sports/college/2012/08/26/Television-is-the-ruling-body-of-college-sports/stories/201208260123>.

106. *Bd. of Regents*, 468 U.S. at 89-90.

107. *Id.* In hindsight, this fear seems a bit shortsighted. See *2014 National College Football Attendance*, NCAA, http://fs.ncaa.org/Docs/stats/football_records/Attendance/2014.pdf (last visited Sept. 29, 2016).

unreasonable restraints of trade.¹⁰⁸ Specifically, the universities claimed that the NCAA restrictions constituted an anticompetitive restraint of trade.¹⁰⁹

Applying the Rule of Reason test, the Supreme Court found that the restraint was indeed anticompetitive.¹¹⁰ The NCAA offered a procompetitive justification for the restriction—the restriction was necessary to preserve its product in the market.¹¹¹ In other words, it was necessary to restrict the ability of member institutions to appear on television in order to protect the live attendance at the football games.¹¹²

The Supreme Court disagreed.¹¹³ It held that this justification was inadequate because it was “not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games.”¹¹⁴ The proffered reason, then, was simply an argument against competition in the marketplace, not a means to promote economic competition.¹¹⁵

The NCAA also lost an antitrust challenge to its attempt to restrict the salaries of restricted-earnings basketball coaches.¹¹⁶ In *Law v. NCAA*, the Tenth Circuit held that such restrictions were anticompetitive in violation of the Sherman Act.¹¹⁷ The court rejected the NCAA’s procompetitive justifications, including the reduction of cost.¹¹⁸

Challenges to the NCAA’s eligibility rules, however, have not until recently been as successful. In *Smith v. NCAA*, the Third Circuit denied an antitrust challenge to the NCAA bylaw that restricted participation in NCAA sports as a graduate student at an institution other than one’s undergraduate institution.¹¹⁹ The court held that the rule restricted athletic competition, but not economic competition.¹²⁰ The amateur nature of

108. *Bd. of Regents*, 468 U.S. at 88.

109. *Id.*

110. *Id.* at 120.

111. *Id.* at 118.

112. *Id.* at 115–16.

113. *Id.* at 116.

114. *Id.*

115. *Id.* at 120.

116. *Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998). The REC rule limited the salaries of restricted-earnings coaches to \$16,000 in an attempt to protect the hiring of graduate assistants. *Id.* Coaches had been filling that position with recently fired head coaches from other institutions. *Id.*

117. *Id.*

118. *Id.* at 1024.

119. The Postbaccalaureate Bylaw provides that a student-athlete may not participate in intercollegiate athletics at a postgraduate institution other than the institution from which the student earned her undergraduate degree. *Smith v. NCAA*, 139 F.3d 180, 184 (3d Cir. 1998).

120. *Id.* at 187.

intercollegiate athletics meant, according to the court, that antitrust law did not apply to NCAA eligibility rules.¹²¹

Other cases challenging NCAA rules, including its no-draft rule and its no-agent rule, likewise did not prevail.¹²² At the heart of these cases was the amateurism defense advanced by the NCAA—that antitrust law did not apply to NCAA eligibility rules because the relationship between student-athletes and their member institutions was not an economic one.¹²³ As discussed below, this understanding has started to shift, arguably as a result of commercial growth in college sports.

B. O’Bannon v. NCAA

In 2008, former UCLA basketball star Ed O’Bannon filed suit against EA Sports and the NCAA for misappropriating his likeness and using it in a video game without his consent and without compensating him.¹²⁴ The class of plaintiffs broadened to include current and former intercollegiate athletes.¹²⁵ EA Sports settled with the plaintiffs pictured on the video games, leaving a class action lawsuit of current athletes against the NCAA, in which the athletes sought an injunction against the enforcement of the NCAA’s amateurism rules.¹²⁶ Specifically, the athletes sought the ability to receive remuneration for the use of their names, images, and likenesses.¹²⁷

At trial, the plaintiffs argued that the NCAA’s amateurism rules violated the Sherman Act as anticompetitive restraints of trade in two distinct markets: (1) the college education market and (2) the group licensing market.¹²⁸ The district court held that the NCAA rules constituted price-fixing in the college education market in that they limited the ability of athletes to bargain in the market for benefits, including the full cost of attendance of their grants-in-aid.¹²⁹ As to the group licensing market, the

121. *Id.* at 185.

122. *E.g.*, *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *Agnew v. NCAA* 683 F.3d 328 (7th Cir. 2012); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004).

123. Over time, commentators increasingly took issue with this assessment. *See, e.g.*, WALTER BYERS, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES*, 374, 384 (1995); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 207–08 (1990); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081 (1997); Lazaroff, *supra* note 45; James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1985); Matthew J. Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 S. TEX. L. REV. 59, 77–78 (1995); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631 (1996).

124. *O’Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

125. *Id.* at 1055–56.

126. *Id.*

127. *Id.*

128. *Id.* at 1056–57.

129. *Id.* at 1057–58.

court held that the NCAA's restrictions were not anticompetitive because the plaintiffs failed to show that a group market existed for their names and likenesses.¹³⁰

Under the Rule of Reason, the next question before the court was whether the NCAA could offer procompetitive justifications for the anticompetitive restrictions in the college education market.¹³¹ The NCAA offered four justifications—(1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets.¹³²

The district court held that the first and third justifications had some procompetitive impact.¹³³ As to the preservation of amateurism, the NCAA argued, in a similar vein to its losing argument in *Board of Regents*, that allowing intercollegiate athletes to receive remuneration unrelated to education would threaten the “product” of college football.¹³⁴ In other words, allowing athletes to receive remuneration would compromise intercollegiate athletics economically.¹³⁵

The district court found that this idea had some value—the economic product of college football and basketball might suffer economically if the athletes' amateur status changed.¹³⁶ Interestingly, the court also recognized that the integration of academics and athletics provided an economic value that might suffer with the professionalization of college sports.¹³⁷

Neither notion, however, was dispositive under the Rule of Reason; the court had to determine whether a less intrusive means was available than the amateurism restrictions imposed by the NCAA.¹³⁸ Seizing on a comment by expert witness Neil Pilson, the court held that providing a \$5,000 per year stipend would provide an appropriate remedy to the anticompetitive conduct.¹³⁹ Furthering the ideals of amateurism, such funds would stay in a trust until after the intercollegiate athlete left the university.¹⁴⁰

The Ninth Circuit Court of Appeals, however, partially reversed the district court's opinion.¹⁴¹ While the court agreed with the district court's

130. *Id.* at 1058.

131. *Id.* at 1057–58.

132. *Id.* at 1058.

133. *Id.* at 1060.

134. *Id.* at 1066.

135. *Id.*

136. *Id.* at 1059.

137. *Id.* at 1075.

138. *Id.* at 1074.

139. *Id.* at 1078.

140. *Id.*

141. *Id.* at 1079.

general assessment with reference to the anticompetitive conduct of the NCAA, it found that the antitrust laws did not require the \$5,000 per year stipend imposed by the district court.¹⁴² The court explained that the NCAA and its rules could not escape antitrust scrutiny, but that the procompetitive justification of amateurism provided a reasonable basis for the NCAA's prohibitions against provision of financial compensation to intercollegiate athletes.¹⁴³

Interestingly, both the lower court and the court of appeals were clear that the NCAA's rules are anti-competitive.¹⁴⁴ The only questions were whether there existed a legitimate justification for such rules, and if not, what the appropriate remedy ought to be.¹⁴⁵

To be sure, the idea that the enterprise of intercollegiate athletics would suffer as an economic product in the marketplace if it allowed student-athletes to share in some of the profits appears tenuous at best. In many ways, it echoes the NCAA's argument in *Board of Regents* that televising games would hurt attendance.¹⁴⁶

Indeed, in many ways, *the future of intercollegiate athletics hinges on this argument*. With the current structure clearly creating an anticompetitive restraint in the market, the only procompetitive justification appears to be the idea that paying intercollegiate athletes would destroy the economic market for college sports. In other words, the NCAA is arguing that fans would not attend games or watch them on television if schools paid their athletes any money—such that amateurism is essential to preserve the economic product of college sports.

Both the district court and the court of appeals seemed to suggest compromise solutions to the amateurism problem—one implicit and one explicit. Judge Wilken's solution of providing intercollegiate athletes a stipend of \$5,000 per year seems like a way to provide some money to intercollegiate athletes without destroying the status quo.¹⁴⁷

For Judge Bybee, that step launches the entire enterprise down a slippery slope toward professionalization.¹⁴⁸ While the slippery slope fallacy certainly applies here—one small incremental step does not amount to a sprint where one never looks back—the possibility of a significant

142. *Id.* at 1075–76.

143. *Id.* at 1079.

144. *Id.*

145. *Id.*

146. This argument clearly turned out to be incorrect and quite shortsighted. *See, e.g., College Athletics Revenues and Expenses - 2008*, ESPN, <http://espn.go.com/ncaa/revenue> (last visited Sept. 21, 2016) (showing ticket and television revenue are not mutually exclusive concepts).

147. *O'Bannon*, 802 F.3d at 1053.

148. *Id.* at 1078–79.

paradigm shift looms larger and larger as financial revenues continue to explode.

Instead, Bybee's implicit compromise solution is to clothe remuneration as an extension of education.¹⁴⁹ Covering additional expenses related to education, or even offering more education, does not, for Bybee, cross the Rubicon from amateurism to professionalism.¹⁵⁰

C. Pending Litigation

A number of lawsuits, however, continue to force the issue. As *O'Bannon* made clear, the rules and regulations of the NCAA with respect to intercollegiate athletes remain anticompetitive restraints on trade in the market for the services of those athletes.¹⁵¹ It is also clear, and increasingly the case, that the market is one that involves large commercial enterprise, even with respect to the athletes.¹⁵² What less than a decade ago was a one-year scholarship has become a multi-year scholarship with the full cost of attendance covered.¹⁵³ There is, without a doubt, an economic character to the relationship between athletes and their universities, and by extension, the NCAA.¹⁵⁴

Equally troubling for the NCAA and its member institutions is the weak justification that has protected its amateurism conception to date—the idea that the amateur nature of college sports is inextricably tied to its financial success.¹⁵⁵ It might be just as easy to argue, though, that it is not the concept of amateurism, but the nature of the institutions themselves and their relationships (and rivalries) with each other that make the economic product of intercollegiate sports so lucrative.¹⁵⁶

Whether the college basketball player receives money or not will likely not diminish interest in college sports, particularly in the context of in-state

149. *Id.* at 1079.

150. *Id.*

151. *Id.* at 1073.

152. See, e.g., Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 871–77 (2002) (the NCAA “reap[s] significant revenues from the players’ work product”); Schott, *supra* note 61, at 36–37 (college sports are “marketed, packaged and sold just like other commercial products”).

153. *Power 5 Leagues Pass Cost of Attendance Proposal, Don't Stop There*, CBSSPORTS.COM (Jan. 17, 2015), <http://www.cbssports.com/collegefootball/eye-on-college-football/24970569/power-5-leagues-pass-cost-of-attendance-proposal-dont-stop-there>.

154. See *Bloom v. NCAA*, 93 P.3d 621, 622–23 (Colo. App. 2004) (allowing standing to challenge NCAA).

155. See generally, e.g., Jeffrey J.R. Sundram, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543 (2010).

156. See, e.g., Jason Kirk, *NCAA President Faces Fact that Colleges Sell Jerseys with Real Player Numbers*, SBNATION (June 20, 2014), <http://www.sbnation.com/college-football/2014/6/20/5827802/ncaa-player-jerseys-numbers-mark-emmert-obannon> (taking issue with this argument).

rivalries. The idea that fans will not attend or watch the Auburn–Alabama football game if the universities pay the athletes seems unlikely and farfetched.

At the very least, the tenuous nature of the antitrust defense exposed by *O'Bannon* has encouraged more litigation against the NCAA.¹⁵⁷ The cost of defending the lawsuits alone makes considering a compromise solution worth the energy of the NCAA and its member institutions.¹⁵⁸

Likewise, the consequence of losing one of these lawsuits also counsels in favor of pursuing a compromise solution. Such suits, in many ways, are bet-the-company lawsuits, such that the enterprise of college athletics, as it currently exists, might well be lost as a consequence. If the court finds that the current rules violate antitrust law, one remedy could be the development of an open market for the services of athletes. In such a context, the need for any form of education for athletes disappears.¹⁵⁹

Having lost the rights to revenue from college football as a result of its unwillingness to compromise in the *Board of Regents* case, it is, on some level, surprising that the NCAA has drawn such a fierce line in the sand in this context to preserve its brand of amateurism—which involves a significant amount of pay for student-athletes—at all costs.¹⁶⁰ Its failure to double down on the concept of education—the cornerstone of this brand of amateurism—further suggests that its motives may be largely economic.

To that end, the next Part proposes a compromise solution—one that provides some compensation for intercollegiate athletes, addresses the amateurism problem without sacrificing education, and provides protection against antitrust lawsuits.

III. THE PROPOSAL: CONFERENCE–ATHLETE REVENUE SHARING

Given the current landscape of uncertainty, both in terms of the future of amateurism and the pending antitrust lawsuits, this Article proposes a compromise solution—conference–athlete revenue sharing. The core idea would be to allow student-athletes, particularly those in revenue-generating sports, to share in the revenues. This remuneration, though, would occur at the conference level.

157. See cases cited *supra* note 92.

158. See Jon Solomon, *Inside College Sports: Mark Emmert's Pay, NCAA Legal Fees Increase*, CBSSPORTS.COM (June 30, 2015), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25229481/inside-college-sports-mark-emmerets-pay-ncaa-legal-fees-increase>.

159. Non-revenue sports also would likely disappear in such a scenario. See Pat Forde, *U.S. Olympic Committee 'Candidly Concerned' Non-Revenue College Sports Will Be Cut*, YAHOO! SPORTS (Apr. 1, 2015), <http://sports.yahoo.com/news/u-s—olympic-committee—candidly-concerned—non-revenue-college-sports-will-be-cut-212917571-ncaab.html>.

160. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

A. The Revenue-Sharing Model

Most major conferences engage in revenue-sharing arrangements in which they share in the profits generated by their members, including television contracts, the college football playoff and bowl games, conference championship games and tournaments, and appearances in the NCAA basketball tournament. Typically, conferences share this revenue equally, irrespective of which institution's team actually qualified for the postseason event.

The proposal here is to give the student-athletes at the institutions a "share" of the revenues. In the Southeastern Conference, for instance, the fourteen universities divide the revenue into fourteen equal shares.¹⁶¹ In 2014, this amount was around \$455 million.¹⁶² Under the proposed model, the universities would add a fifteenth share to compensate the student-athletes. The conference would thus share revenue among fifteen entities, not fourteen.

For the student-athlete share, the conferences would then allocate the amount by sport—men's football, men's basketball, women's basketball, etc.—depending on the amount of revenue generated by competitions of the particular sport. So, if the revenue came from bowl games, intercollegiate football athletes would benefit. If the revenue came from the NCAA women's basketball tournament, those athletes would receive a share of that money. Under this model, it would not be difficult for the conference TV network to allocate revenues based upon the contests it chose to televise.

Among student-athletes in a particular sport, each student-athlete would receive an equal share. For head count sports like football and basketball, this would not be difficult. In the SEC, for instance, if each school's basketball team has thirteen scholarship athletes and there are fourteen universities, then the basketball part of the student-athlete share of the revenue would be divided into 182 equal parts.¹⁶³ In non-head count sports, the conference would have to determine a number of participants of each sport and then divide evenly by university.

Under the current fiscal model, students in revenue sports would receive anywhere from \$5,000–\$25,000 per year, with students in non-revenue sports receiving much less, and maybe nothing in some cases. Again, the per-sport allocation of revenue would directly depend on the amount of money that sport generated.

161. 2014-15 SEC Revenue Distribution, SEC (May 29, 2015), <http://www.secsports.com/article/12975224/2014-15-sec-revenue-distribution>.

162. *Id.*

163. Dividing this money evenly would be more consistent with the concept of tying the funds to participation in the university, rather than as a professional in an open market.

B. The Conference–Athlete Employment Relationship

For this model to work, however, the conferences must establish contractual relationships with the student-athletes. These contracts would be independent of the scholarship contracts students enter into with their universities.

The contracts would be employment contracts for the term of the student-athletes' scholarships. The contracts, for the purpose of this proposal, would simply provide for sharing remuneration generated from athletic contests and television rights for athletic competitions accumulated by the conferences. The relationship could also provide for added benefits for student-athletes, including health care insurance if the conference so desired.

C. The Development of Labor Unions

Rather than have individualized negotiations between each student-athlete and the conference, the student-athletes would form a labor union to negotiate with the conference. The collective-bargaining arrangement would involve only the conference and the athletes, much like the arrangement in professional sports such as football, baseball, and basketball.

Intercollegiate athletes would then have a voice as to their arrangement with the conference, including the provision of additional benefits, including health care. In hardship situations, the conference, not the institutions, could likewise fill in gaps and provide for student-athletes' basic needs in a way that would not undermine NCAA prohibitions against such activities.

Rather than the institution or boosters, the conferences would provide a neutral third party that could administrate needed benefits to student-athletes and have an arms-length negotiation with them. In addition, the institutions would not have to compete directly with each other with respect to athlete payments. The competition would be inter-conference, not intra-conference.

One question would be whether all of the athletes would be in a single union with the conference, or whether each sport would need its own union. Either way might be palatable. On a macro level, intercollegiate athletes are similarly situated, with similar interests. One might argue, though, that each sport has its own economic interests—so the football athletes may need a different union than other sports. In theory some groups might have more bargaining power vis-à-vis the conference. This could be a reason to separate the unions or to keep them together.

As discussed below, the union-management relationship would serve several purposes. First, it would insulate the NCAA, the conferences, and the universities from antitrust lawsuits, as explained below. Second, it could provide an arbitration-based dispute resolution system, discouraging the filing of lawsuits against the NCAA.

The intercollegiate athletes would also have a much more significant voice, both in terms of economics, but also in terms of conditions on campus. The conference could regulate such issues as education-athletic balance, better police campus environments, and would have some insulation from the pressures of winning that drive campus decision-making.

As explained in the next Part, this model—while not the ideal of either the pay-for-play faction or the NCAA—would provide a reasonable compromise that could provide a win-win scenario for all involved.

IV. WHY CONFERENCE–ATHLETE REVENUE SHARING WORKS

The conference revenue-sharing model attempts to balance the concerns of student welfare with the concerns of amateurism and education. In essence, it follows the prior path of amending the definition of amateurism to address the changing realities of intercollegiate athletics.

In some ways, this approach is analogous to the Olympic approach to amateurism, in which the athletes remain amateurs as long as they do not receive compensation for participation.¹⁶⁴ Other forms of remuneration from third parties, including endorsements and sponsorships, do not compromise their amateur status for Olympic purposes.¹⁶⁵

In the conference–athlete revenue sharing model, the conference becomes the sponsor. A pure Olympic model in college athletics, while advocated by some, would be the worst of all worlds for many universities because it would transfer economic control over college sports programs to third party boosters. Under the conference–athlete revenue sharing model, though, such worries dissipate because centralized institutions provide the economic support.

A. *Conference Revenue Sharing Meets the NCAA's Goals*

At the heart of the traditionalist push to restrain the move away from amateurism and compensation for athletes lie two central ideas: (1) avoiding open-market professional status for the athletes and (2) a desire to

164. Hruby, *supra* note 31.

165. *Id.*

keep intercollegiate athletes from sharing in the largesse produced by the revenue sports.

Putting aside the Pollyannaish notion that intercollegiate athletes in revenue sports are purely amateurs who play purely for the love of the game, there still remains a sense in which the university experience possesses unique characteristics that offer value to the athlete.

Indeed, the concept of education lies at the heart of the NCAA's stated mission. The current model, though, creates inherent pressures that place education to the side of the equation. Allowing intercollegiate athletes some remuneration would not compromise education, particularly if conferences made the distributions.

Sharing some of the revenue would slow the arms race that has proliferated in the Big 5 conferences. The number of minor infractions cases would likely dissipate with the provision of small amounts of money to athletes by the conferences. The NCAA would have more ability to focus on its stated mission—to promote education. To be sure, the idea that providing a few thousand dollars to intercollegiate athletes would undermine the character of college athletics seems shortsighted.

1. Conference Revenue Sharing Improves Athlete Welfare

Under the current status quo, many student-athletes struggle, particularly those from poor socio-economic backgrounds. Even with the increase in grants-in-aid to cover cost-of-attendance, some student-athletes face real financial struggles, and have little margin for error. The parents of those athletes often cannot afford to travel to visit the athletes on campus, much less attend the games.

By providing the athletes with a share of conference profits, the athletes certainly will not become wealthy. But for many students, a few thousand dollars could make a major difference. Removing financial stress from revenue sport athletes also increases the possibility that these athletes will be able to better balance the demands of academics and athletics.

At the same time, this model will not convert athletes into professionals. In some sense, the imbalance between athletics and academics at some institutions places those kinds of burdens on the athletes without any compensation. This model does not abdicate their role as students; rather, it provides some compensation to make that experience more robust.

2. Conference Revenue Sharing Saves the Status Quo

Perhaps most important, at least from the perspective of the NCAA, is that the conference-athlete revenue sharing model saves the status quo. It

does so in two senses. First, it largely retains the amateur characteristics of the athletes, particularly with respect to their relationship to the university. Second, as considered in the next part, it shields the NCAA and its member institutions from antitrust lawsuits.

Indeed, the relationship between the institution and the student-athlete remains the same under this model. While it is true that the institutions of higher education comprise the conference, the conference itself (much like the NCAA) is its own separate entity. As such, the university–student relationship remains just that, with students only receiving from the university economic benefits related to the provision of education.

The separate relationship between the athlete and the conference also enhances the amateur character of the relationship to the university because it differentiates the amateur nature of the student–university relationship from the employee–conference relationship.

In this model, the NCAA can continue to profit off of the NCAA basketball tournament and exercise control over the role of the student-athletes inside and outside the competitions. In addition, the NCAA already works with the conferences extensively—which would enable better connection to student interests.

3. *Conference Revenue Sharing Can Reduce Excess*

The conference-revenue sharing model can take pressure off of the current system as well. By slowing down the economic growth of athletic programs, the conference-revenue sharing model will stunt the arms race between universities and encourage fiscal responsibility within athletic departments. Giving the athletes a share of the revenue might cause athletic departments to slow facility upgrades and coach salary increases.

The idea that athletic departments are struggling with most not making a profit results from two different sources. First is the attempt of schools with lesser resources to compete with schools with greater resources. Strengthening a conference-based model will slow some of the overreaching for some institutions. Second, schools are simply overspending to compete with each other. This practice has arguably gone too far, with many universities using student fees to support athletics.¹⁶⁶ With a share of the money going to the athletes, the impetus to spend at all costs might not disappear, but it might slow down with the uncertainty of another expense.

166. Indeed, I have argued elsewhere that it should be the other way around, with athletics giving to academics. See William W. Berry III, *Playoff Profits for Academic Programs*, 5 MISS. SPORTS L. REV. 1 (2016).

B. Conference Revenue Sharing Provides an Antitrust Defense

In addition to preserving the amateurism model, albeit in an amended form, the conference–athlete revenue sharing provides a shield against antitrust claims.¹⁶⁷ This shield has two different manifestations. First, the difference between conferences, as discussed below, lessens the anticompetitive restraint in the college market. Second, the non-statutory labor exemption serves as a defense to anticompetitive behavior by the NCAA and its member institutions.

1. Inter-Conference Competition

Currently, there is no real economic competition between institutions for athletes. The coaches can offer many things, but extra financial benefits are not one of them. As a result, the NCAA amateurism rules create an anticompetitive restraint in the market for college athletes.

Under the conference–athlete revenue sharing model, each conference has a different amount of revenue, and this number shifts from year to year. Athletes would be able to choose institutions based in part upon their conference, and the amount of remuneration they would be likely to receive. If labor unions developed, the athletes could likewise compare the respective collective bargaining agreements when choosing an institution.

The result would then be economic competition between conferences. This would not eliminate the anticompetitive restraint created by institutions, but would shift the market to the conferences. This move could either minimize the level of the anticompetitive restraint or create an alternative procompetitive justification that could serve as a defense against antitrust claims. This would, at the very least, make the NCAA's antitrust defenses extend beyond its tenuous amateurism defense.

2. The Non-Statutory Labor Exemption

The better defense, however, would be the non-statutory labor exemption to antitrust law. Developed in the sports context in a series of NFL cases, the exemption generally precludes the application of antitrust law to organized labor relations.¹⁶⁸

While the goal of antitrust law is to promote competition, the goal of labor law is the opposite—to restrict competition and create one bargained

167. I have argued for the benefits of unions in this way in other contexts. William W. Berry III, *How Unions Can Save the NCAA*, SLATE (Mar. 31, 2014), http://www.slate.com/articles/business/moneybox/2014/03/northwestern_football_players_allowed_to_unionize_how_labor_unions_can_save.html.

168. *Id.*

agreement between similarly situated workers and management. As such, the process of creating restraints where such restraints are part of a collective bargaining agreement receives an exemption from antitrust law. Courts have created this exemption to encourage and enable individuals to form labor unions.

In the context of conference–athlete revenue sharing, the decision of the conferences to place limits on athlete compensation would avoid antitrust scrutiny because it would be part of a collectively bargained agreement. The value of protecting the collectively bargained would outweigh the antitrust claims by individual athletes or high school athletes.¹⁶⁹

In other words, the conference–athlete revenue-sharing agreement would *block* all antitrust claims against the NCAA and intercollegiate athletics. By paying the athletes through conferences, the athletes would not be able to challenge the rules under antitrust law. Labor law, instead, would provide the remedy for athletes that wanted to increase their share of profits. Conferences and athletes would collectively bargain this revenue sharing.

C. Other Benefits of Conference–Athlete Revenue Sharing

One concern of paying athletes would be violating Title IX by not mandating gender equity in payments. The conferences, however, would not be subject to Title IX. The Court has held as much with respect to the NCAA.¹⁷⁰ In addition, the payments under the conference–athlete revenue sharing model would be gender-neutral. Whichever sport brought in the revenue, those athletes would receive the remuneration. Women’s basketball players, for instance, might receive more money than men’s baseball players. Revenue would reflect the preferences of the market, not gender preferences.

Another advantage of this approach would be its consistency with the broader trend toward developing conference identities. With the advent of conference television networks, each conference, particularly the Big 5 conferences, has developed a richer culture around its institutions and athletic competitions. For traditionalists, strengthening the relationship between the athletes and the conference, and the conference providing financial support to the athletes, may be less objectionable.

169. See *Clarett v. NFL*, 369 F.3d 124, 131 (2d Cir. 2004); *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976).

170. See *generally* *NCAA v. Smith*, 525 U.S. 450, 470 (1999).

CONCLUSION

The current status quo in college athletics seems unsustainable. From one direction, the increased commercialism of college football and basketball continues to undermine the perception that the athletes are amateurs, or that they should be amateurs. The relationship between amateurism and education also has, in some cases, become increasingly weak.

From the other direction, antitrust lawsuits threaten to create an open market for athlete compensation. The procompetitive defense at the heart of the lawsuits—that the amateur nature of college sports provides a unique product that depends on the amateurism to preserve its own financial market—appears fragile and potentially unsustainable.

This Article, then, has sought to offer a compromise solution that largely preserves the status quo while defending against amateurism and antitrust attacks. Specifically, the Article has proposed amending amateurism to allow for athletes to become employees of the conferences. This arrangement would provide for some remuneration and sharing of the wealth with athletes without altering their relationship with the universities. Also, to the extent that athletes could form unions and collective bargaining agreements with conferences, such arrangements would provide a shield against antitrust lawsuits through the non-statutory labor exemption. By bending its definition of amateurism slightly, the NCAA could (1) ensure its survival, (2) preserve the status quo, and (3) save millions in litigation costs.

Clearly, solving this issue outside of the courts is preferable for all parties involved. And it appears that the resources are present to accomplish a compromise solution. Perhaps this proposal will generate increased conversation about how to address the amateurism and antitrust problems before outside forces (and the courts) destroy the status quo.