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NEITHER EMPLOYEES NOR INDENTURED SERVANTS: A NEW AMATEURISM FOR A NEW MILLENNIUM IN COLLEGE SPORTS

BRIAN L. PORTO*

I. INTRODUCTION

No word engenders more controversy among academics who study college sports than “amateurism.” According to the National Collegiate Athletic Association (NCAA), the premier governing body for college sports in the United States, amateurism is the cornerstone of its philosophy of athletic governance.¹ That philosophy has spawned what the NCAA terms “the collegiate model of sports,” within which “the young men and women competing on the field or court are students first, athletes second.”² Amateurism, as the NCAA envisions it, prohibits college athletes from

1. signing a contract with a professional team in their collegiate sport;
2. receiving a salary for playing their collegiate sport;
3. receiving prize money in excess of actual and reasonable expenses;
4. playing in games with professional athletes;
5. trying out for, practicing with, or competing with a professional team;
6. receiving “[b]enefits from an agent or prospective agent”;

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1. *Amateurism*, NCAA.ORG, <http://www.ncaa.org/amateurism> (last visited June 9, 2016).

2. *Id.* The NCAA uses the term “student-athlete,” which I will not use because it originated to help colleges avoid workers’ compensation liability for injured athletes after the adoption of athletic scholarships and because it separates athletes from their classmates, who are not called “student-musicians” or “student-journalists.” This Article will instead refer to “college athletes” or “athletes” and will use the terms synonymously.

7. agreeing to representation by an agent; and
8. “[d]elay[ing] initial full-time colleg[e] enrollment to participate in organized sports competition.”³

Lincoln Allison, a British academic who has studied amateurism extensively, explains that “a human activity is amateur in so far as it is chosen in order to enrich experience and that choice is not coerced by economic or social forces.”⁴ By Professor Allison’s definition, amateurism lives on in American college sports today, not only in the NCAA’s Division III, where athletic scholarships are prohibited and athletes usually do not envision careers in professional sports, but sometimes even in Division I, which features the NCAA’s most competitive and commercialized athletic programs. On the women’s crew team at the University of Oklahoma, for example, forty-nine of the seventy members seek synchronization in the early-morning chill, day after day, without the benefit of an athletic scholarship.⁵

Despite the remaining outposts of traditional amateurism, by the 1990s, in the wake of million-dollar salaries for coaches, almost constant expansion and upgrading of athletic facilities, and burgeoning revenues from licensing collegiate products, “amateurism had come to seem” in Professor Allison’s words “outdated, inefficient and reactionary”; it was, he observes, “thoroughly tainted by elitism and hypocrisy.”⁶ Therefore, “the generation [of journalists] in power in the 1990s seemed to accept its demise where they did not actually despise it.”⁷

The elitism associated with amateurism is evident in what Professor Allison terms the Roger Bannister Syndrome, which refers to the lanky, articulate young physician and Oxford graduate who was the first person to run a mile in under four minutes.⁸ At the heart of this syndrome, Allison writes,

is the image of the gentleman athlete, as amateur and as honest as the day is long, an educated man with an income from another profession, exhausting himself to run faster than anybody had run before, as Bannister did to become the first runner to complete the mile in under 4 minutes at Oxford in

3. *Id.*

4. LINCOLN ALLISON, *AMATEURISM IN SPORT: AN ANALYSIS AND A DEFENCE* 10 (2001).

5. Eric Snyder, *Amateurism and Intercollegiate Athletics*, HIGHEREDJOBS (Sept. 16, 2014), <https://www.higheredjobs.com/articles/articleDisplay.cfm?ID=560>.

6. ALLISON, *supra* note 4, at 13.

7. *Id.*

8. *Id.* at 37.

1953.⁹

Amateurism's distaste for commercialism restricted athletics to athletes whose personal or family finances permitted them to train and compete without the need to profit from their athletic labors.

The hypocrisy that amateurism can produce has been a favorite subject of American journalists and legal commentators for a generation or more, and the critiques continue unabated today. For example, prominent journalist and historian Taylor Branch characterizes amateurism as a "cynical hoax[], [a] legalistic confection[] propagated by the universities so they can exploit the skills and fame of young athletes. The tragedy at the heart of college sports," Branch writes, "is not that some college athletes are getting paid, but that more of them are not."¹⁰ To illustrate the hypocrisy of amateurism, Branch told the story of A.J. Green, a former wide receiver at the University of Georgia, who "confessed that he'd sold his own jersey from the Independence Bowl the year before, to raise cash for a spring-break vacation."¹¹ Green's penalty from the NCAA was a four-game suspension, but "[w]hile he served the suspension," Branch relates, "the Georgia Bulldogs store continued legally selling replicas of [his] . . . jersey for \$39.95 and up."¹² The implicit conclusion here, of course, is that if athletic commerce is good for the goose (the university), it should also be good for the gander (the athlete).

Legal academics have echoed Branch, although in more precise legal language. One recent commentary criticizes the NCAA's rule prohibiting the payment of athletes beyond their athletic scholarships, claiming the rule "is illegal because it prevents its members from engaging in competitive 'bidding' to recruit student-athletes."¹³ Another commentary argues that NCAA proscriptions against paying athletes "violate the federal antitrust laws because they facially restrict price competition among schools, limit consumer choice, and lower product quality."¹⁴ Still another commentary maintains that college

9. *Id.* Although the quotation states 1953, Bannister actually set his record on May 6, 1954. See *Roger Bannister Breaks Four-Minutes Mile*, HISTORY.COM, <http://www.history.com/this-day-in-history/roger-bannister-breaks-four-minutes-mile> (last visited June 9, 2016).

10. Taylor Branch, *The Shame of College Sports*, ATLANTIC MONTHLY, Oct. 2011, at 80, 82, <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

11. *Id.* at 94.

12. *Id.*

13. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 82 (2013) (citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 684, 693 (1978)).

14. Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS LAW. J. 241, 242 (2013) (citing Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA.

sports have become so commercialized that they should be subject not only to the antitrust laws but to the labor and tax laws too.¹⁵

In light of these condemnations, Professor Maureen Weston's question, posed in 2013, remains apropos today: "Is amateurism dead, should it be or what will happen to the non-revenue sports?"¹⁶ The future of nonrevenue sports is beyond the scope of this Article. The answer to the first two questions is no, but amateurism must change to accommodate current conditions. The purpose of this Article is to present a modern amateurism model for the modern world. Part II will discuss the origins of the concept and its application to American college sports and will address both its appropriateness to a university-based athletic system and its shortcomings under modern social and economic conditions. Part III will examine the legal case against amateurism, especially in relationship to antitrust law. Part IV will assess the recent decisions of the trial court and the Ninth Circuit, respectively, in *O'Bannon v. NCAA* and the likely results for amateurism.¹⁷ Part V will present a modern amateurism model for the modern era and recommend its adoption as a preferable alternative to the employment model of college sports offered by its critics.

II. A SHORT HISTORY OF AMATEURISM

Like the societies of which it has been part, amateurism has changed considerably since its beginnings on the playing fields of England's elite boarding schools during the Nineteenth Century. At that time, young males who attended elite schools in England participated in a variety of sports because athletic participation was thought to be a key ingredient of a liberal education that trained both mind and body for leadership positions in British society.¹⁸ The same idea became the model for school and college-based sports in the United States.¹⁹

SPORTS & ENT. L.J. 51, 52, 86, 88 (2006)). For other commentaries in this vein, see generally Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249 (2014); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007).

15. See generally 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).

16. Maureen Weston et al., *Symposium Transcript - Amateurism and the Future of the NCAA*, 3 MISS. SPORTS L. REV. 1, 10 (2013).

17. See generally *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

18. See Kay Hawes, *Debate on Amateurism Has Evolved over Time*, NCAA.ORG (Jan. 3, 2000), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate+on+amateurism+has+evolved+over+time++1-3-00.html>.

19. See *id.*

In England, amateurism was overtly class-conscious, indeed classist.²⁰ It was based on the notion “that aristocrats engaged in leisure activities purely for enjoyment and to become well-rounded gentlemen.”²¹ Such activities substituted for employment because having the luxury of time to pursue leisure was the great privilege of being an aristocrat.²² Accordingly, the Amateur Rowing Association, which limited its competitions to amateurs, decreed

that an amateur must never have taken money [to compete], . . . “nor ever taught, pursued, or assisted in the pursuit of athletic exercises of any kind as a means of livelihood, nor have ever been employed in or about boats, or in manual labour; nor be a mechanic, artisan or labourer.”²³

This “‘mechanics’ clause also [barred] those who worked with their hands from competing against those who did not,” apparently on the theory “that manual laborers had an unfair physical advantage over ‘gentlemen’” in contests of physical strength and endurance.²⁴ Ironically, it “led to the exclusion of the Olympic sculling champion J.H.B. Kelly . . . from the 1921 Diamond Sculls [rowing race] at Henley” because he was a bricklayer.²⁵ Mr. Kelly’s daughter, Grace, an iconic American actress, became Princess Grace of Monaco in 1956.²⁶

Amateurism was not confined to England, though. Indeed, it was the philosophical underpinning of the Olympics for most of the Twentieth Century. The Baron de Coubertin, the French aristocrat who revived the Olympics in 1896, shared the amateurism ideal and envisioned an international athletic competition conducted for the love of sport, without any financial rewards for the participants.²⁷ He saw, in the athletic competitions of the British public schools, “a revival and modernization of ancient traditions,” worthy of emulation on a larger scale.²⁸ Still, amateurism was, as Professor Allison notes, both classist and racist; it “was ‘classist’ in that it distinguished between social classes in favour of those already dominant” and “‘racist’ in that within the British Empire and the United States it favoured ‘white’ elites over

20. *Id.*

21. *Id.*

22. *See id.*

23. ALLISON, *supra* note 4, at 20.

24. Hawes, *supra* note 18.

25. ALLISON, *supra* note 4, at 20.

26. *See id.*

27. *See* Hawes, *supra* note 18.

28. ALLISON, *supra* note 4, at 36.

other races.”²⁹

Amateurism, warts and all, became the underpinning for American college sports in 1906, when the Intercollegiate Athletic Association, the NCAA’s precursor, held its first national convention.³⁰ The participants banned the “recruiting ([or] ‘proselytizing’ [as they called it]) of top [high] school athletes” and the awarding of scholarships based on athletic ability.³¹ Still, the infant organization, which adopted its present name in 1910, had no means of enforcing its amateur ideal, so its stated prohibitions were voluntary, which meant that some institutions honored them and others did not.³²

“In 1916, the Association’s members finally agreed to insert a definition of amateurism into the bylaws.”³³ That definition stated, “An 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.”³⁴ Similarly, in 1929, when the Carnegie Foundation for the Advancement of Teaching published a report that was highly critical of the growing commercialism and professionalism in college sports,³⁵ the definition of amateurism to which the NCAA and its Olympic counterpart, the Amateur Athletic Union, adhered stated, “An amateur sportsman is one who engages in sport solely for the pleasure and physical, mental, or social benefits he derives therefrom, and to whom sport is nothing more than an avocation.”³⁶

Not all NCAA member institutions practiced that philosophy though, so in 1948, the NCAA tried to force them to do so by promulgating a Sanity Code designed to punish those who funneled unauthorized financial assistance to athletes.³⁷ It restricted financial aid to athletes to tuition and fees and prohibited awards of aid “based on athletic ability” rather than financial need or academic merit.³⁸ But colleges continued to find the potential for economic gain from athletics, especially football, too enticing to comply with the Sanity Code.³⁹ Indeed, “seven colleges called the NCAA’s bluff by violating the

29. *Id.* at 71.

30. Virginia A. Fitt, Note, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 560 (2009) (citing Hawes, *supra* note 18).

31. *Id.* at 560–61.

32. *See* Hawes, *supra* note 18.

33. *Id.*

34. *Id.*

35. *See generally* HOWARD J. SAVAGE ET AL., AMERICAN COLLEGE ATHLETICS (1929).

36. Snyder, *supra* note 5.

37. Kyle R. Wood, Note, *NCAA Student-Athlete Health Care: Antitrust Concerns Regarding the Insurance Coverage Certification Requirement*, 10 IND. HEALTH L. REV. 561, 569–70 (2013).

38. *Id.* at 570 (quoting Lazaroff, *supra* note 14, at 333).

39. *Id.*

Sanity Code and gambling that their fellow members would not banish them from the NCAA.⁴⁰ The gamble worked; not only were the so-called Sinful Seven not punished, but at the 1951 NCAA Convention, opponents of the Sanity Code, chiefly southern and southwestern schools that had awarded athletic scholarships since the 1930s, “eliminated the section of the [NCAA C]onstitution that contained it.”⁴¹ The following year, the delegates “rewrote Article III, Section 4, of the NCAA Constitution to give each college the freedom to establish its own financial aid policies for athletes, so long as the college itself was the source of the aid.”⁴²

In 1956, a major modification of the NCAA’s amateurism philosophy occurred when the members voted to permit athletic scholarships—that is, “full grants-in-aid based on athletic participation.”⁴³ Each grant covered “tuition, fees, room and board, books, and [fifteen dollars] per month for ‘laundry money.’”⁴⁴ In future years, amateurism would undergo additional modifications; for example, in 1974, athletes earned the right “to compete as . . . professional[s] in one sport while [retaining] their [college] eligibility in [an]other sport[.]”⁴⁵ They could also “teach, coach and officiate” (although not for professional games) and could “tryout with a professional team,” as long as “they paid their own expenses and did not accept any” money for the tryout.⁴⁶ These changes showed that even though tension remained between amateurism and commercialism, over time they appeared to develop, according to Professor Allison, a degree of compatibility akin to “democracy and monarchy.”⁴⁷

Amateurism has been more enduring in American college sports than it has in the Olympics, though. Avery Brundage, who was the president of the International Olympic Committee (IOC) from 1952 until 1972, defended amateurism fiercely, but after he retired, the IOC changed its rules, removing the term “amateur” from the Olympic charter in the 1970s and, in the 1980s, giving international sports federations “the power to determine age limits [for participants] and the eligibility of professional athletes” to compete in the Games.⁴⁸ Under the modern Olympic model, “athletes are not paid for their [Olympic] participation, but rather are just not forbidden from profiting from

40. BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* 36 (2003).

41. *Id.* at 37.

42. *Id.*

43. Wood, *supra* note 37, at 570.

44. *Id.* (citing Lazaroff, *supra* note 14, at 334 n.24).

45. Hawes, *supra* note 18.

46. *Id.*

47. ALLISON, *supra* note 4, at 70.

48. Hawes, *supra* note 18.

the attention their participation brings them.”⁴⁹

Still, in the past generation, as college sports, especially football and men’s basketball, have become increasingly commercialized, even a casual observer could see the tension between the amateurism that supposedly justifies the games and the commercialism that characterizes them. On the one hand, the philosophy of amateurism is nicely encapsulated in the following elements, as conceived by sports sociologist D. Stanley Eitzen:

1. The amateur derives pleasure from the contest.
2. The activity is freely chosen.
3. The process is every bit as important as the outcome.
4. The motivation to participate comes from the intrinsic rewards from the activity rather than the extrinsic rewards of money and fame.⁵⁰

Those conditions remain in effect for lacrosse players at Middlebury, rowers at Amherst, and cross-country runners at Gettysburg and Ohio Wesleyan.

But those are not the schools or the sports featured on television throughout the academic year; the featured schools belong instead to the Football Bowl Subdivision (FBS) and to basketball’s NCAA Division I and, within those groups, to a still more exclusive club known as the Power Five conferences.⁵¹ In their world, commerce is king, as is evident in the mission statement featured in the 2014 handbook of the Big 12 Conference, one purpose of which is to “optimize revenues.”⁵² The Big 12 is not alone in that aim, as collegiate sport has become a \$12 billion industry, “making [it] more profitable than any professional sports league.”⁵³

In this environment, much is expected of the players whose exploits make that profitability possible; accordingly, coaches try to maximize players’ productivity by controlling their time and requiring that much of it be spent on

49. Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 817 (2015) (citing Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/>).

50. ALLISON, *supra* note 4, at 21–22.

51. The Power Five conferences include the Atlantic Coast Conference (ACC), the Big Ten Conference, the Big 12 Conference, the Southeastern Conference (SEC), and the Pac-12 Conference.

52. Snyder, *supra* note 5 (emphasis omitted).

53. Moyer, *supra* note 49, at 765 (citing James Monks, *Revenue Shares and Monopsonistic Behavior in Intercollegiate Athletics* 1 (Cornell Higher Educ. Research Inst., Working Paper No. 155, 2013), <https://www.ilr.cornell.edu/sites/ilr.cornell.edu/files/WP155.pdf>).

their sport. For example, a recent National Labor Relations Board case involving an attempt by Northwestern University football players to form a labor union revealed that they spent between forty and fifty hours per week on football during the regular season.⁵⁴ Between January 1st and the start of preseason practice in August, the players enjoy only nine “discretionary” weeks, when they are not required to be on campus and practicing or working out.⁵⁵

Some evidence suggests that excessive time demands on college athletes exist in sports other than football and men’s basketball. A study of athletes in all sports, both men and women, at nine of the Pac-12 schools revealed that they are, in a word, “stressed.”⁵⁶ The athletes “report[ed] spending an average of [twenty-one] hours per week on required athletic activities” during the season, but “an additional [twenty-nine] hours on other [sport-related] activities, including [participating in] voluntary” (but often expected) training, “receiving [medical] treatment . . . and traveling for competitions.”⁵⁷ The bulk of the additional hours are spent on “traveling for competitions,” which the athletes characterize as “extremely stressful” because “it forces [them] to miss class[es]” and it consumes time that could otherwise be spent studying or sleeping.⁵⁸ Apparently, even if the revenues associated with football and basketball have not trickled down to other sports, the high expectations that football and basketball players have long faced have indeed migrated to other sports, too.

In any event, football and men’s basketball players are increasingly seen as short-term indentured servants or, at least, as woefully underpaid workers in a multibillion-dollar industry. As early as 2000, an author writing in an NCAA publication appeared to recognize this development, writing that “the debate over amateurism may have changed in recent years from an attempt [to] define athletics purity to questioning the degree to which athletes should receive [their] fair share.”⁵⁹ More recently, the questioning has become a demand that athletes receive their fair share, whether by redefining amateurism (again) to permit

54. *Nw. Univ. & Coll. Athletes Players Ass’n*, Case 13-RC-121359, 2014 WL 1246914, at *6 (N.L.R.B. Mar. 26, 2014). In this decision, the regional director of the NLRB’s Chicago office concluded that the football players were university employees and directed that an election be held to determine if the players wished to form a union. *Id.* at *21. However, their union bid ended when the full NLRB, on appeal by Northwestern, declined to assert jurisdiction over a labor dispute involving college athletes. *See Nw. Univ. & Coll. Athletes Players’ Ass’n*, 362 N.L.R.B. 167, at *6 (2015).

55. *See Nw. Univ.*, 2014 WL 1246914, at *7 n.20.

56. PENN SCHOEN BERLAND, *STUDENT ATHLETE TIME DEMANDS 2* (2015), <http://www.cbssports.com/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf>.

57. *Id.*

58. *Id.*

59. Hawes, *supra* note 18.

payments to athletes beyond their traditional athletic scholarships⁶⁰ or by making them university employees and paying them salaries for their athletic work.⁶¹ This demand, which has been front and center in the *O'Bannon* lawsuit alluded to earlier, prompted another change to the amateurism model when, in late 2014, the Power Five conferences voted to increase the value of athletic scholarships to cover the full cost of college attendance, including travel and incidental expenses.⁶² At the University of Alabama, for example, athletes receive stipends of \$5,386 per year for nonresidents and \$4,172 per year for Alabama residents.⁶³

Part III will discuss the legal underpinnings of the demand for increased compensation for athletes. It will also discuss the alternative forms such compensation could take.

III. THE CASE AGAINST AMATEURISM

The case against amateurism must be understood in light of the commercial environment in which FBS football and Division I basketball operate today. To its critics, amateurism is a cruel anachronism for college athletes considering that “[i]n 2010, the NCAA [signed] a fourteen-year, \$10.8 billion contract with CBS and Turner Sports for the exclusive right[s] to televise its lucrative] NCAA Men’s Basketball Championship Tournament.”⁶⁴ Amateurism seems equally out of step with the \$7.3 billion contract the FBS schools signed with ESPN to broadcast the College Football Playoff, which began in 2014.⁶⁵ In 2013, the Big Ten Conference alone, thanks to “the Big Ten Network and its other television contracts averaging \$248.2 million annually . . . distributed more than \$26 million to each member school . . . [an amount] that . . . is expected to rise to \$35 million per school for the 2016-2017 season.”⁶⁶ In

60. See Fitt, *supra* note 30, at 580–87.

61. See generally McCormick & McCormick, *supra* note 15.

62. Jake New, *Colleges Inflate Full Cost of Attendance Numbers, Increasing Stipends for Athletes*, INSIDE HIGHER ED (Aug. 12, 2015), <https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes>.

63. *Id.*

64. Moyer, *supra* note 49, at 769 (citing Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 109 n.1 (2012)).

65. *Id.* (citing James Andrew Miller et al., *College Football’s Most Dominant Player? It’s ESPN*, N.Y. TIMES (Aug. 24, 2013) <http://www.nytimes.com/2013/08/25/sports/ncaaf-football/college-football-most-dominant-player-its-espn.html>).

66. *Id.* (citing Kristi Dosh, *A Comparison: Conference Television Deals*, ESPN (Mar. 19, 2013), http://espn.go.com/blog/playbook/dollars/post/_id/3163/a-comparison-conference-television-deals; Chris Smith, *How Massive Conference Payouts Are Changing the Face of College Sports*, FORBES (Dec. 26, 2013), <http://www.forbes.com/sites/chris-smith/2013/12/26/how-massive-conference-payouts-are-changing-the-face-of-college-sports/>).

2014, “seventy-two head [football] coaches earned [more than \$1] million” in salary, and nearly thirty of them earned more than \$3 million.⁶⁷ Nobody benefits more from the college sports juggernaut, though, than the television networks. The late William Friday, former chancellor of the University of North Carolina System, told Taylor Branch

“We do every little thing for them . . . We furnish the theater, the actors, the lights, the music, and the audience for a drama measured neatly in time slots. They bring the camera and turn it on.” . . . If television wants to broadcast football from here on a Thursday night . . . “we shut down the university at 3 o’clock to accommodate the crowds.”⁶⁸

Despite such unabashed commercialism all around them, the players remain bound by the NCAA’s code of amateurism. “The NCAA’s direct regulation of amateurism [occupies] two . . . categories: the prevention of [compensation] and the creation of a barrier between amateur and professional athletics.”⁶⁹ Regulations in the first category prevent college athletes from using their athletic ability “‘directly or indirectly’ for pay in any form”; that is, they cannot use their “name[s], reputation[s], or athletic popularity for [financial] gain.”⁷⁰ Regulations in the second category “prohibit[athletes from] . . . signing a contract or [making] any commitment . . . to play professional[ly]” and from reaching an “agreement with an agent for representation and promotion,” even if the agreement does not take effect until after the completion of collegiate eligibility.⁷¹ This category of regulations bars the hiring of an agent who contacts professional teams on the athlete’s behalf, “the presence of [an] agent during negotiations” between the athlete and a pro team, and the receipt by college athletes of benefits provided by agents.⁷²

Both types of regulation seem less aimed at preserving an honorable tradition or protecting athletes from commercial exploitation than at maintaining a low-cost workforce in a high-dollar industry so as to maximize earnings. Indeed, the regulations often appear not only unduly punitive, but

67. *Id.* at 770–71 (citing Steve Berkowitz et al., *2015 NCAA Coaches Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> (last visited June 9, 2016)).

68. Branch, *supra* note 10.

69. Fitt, *supra* note 30, at 564.

70. *Id.* at 564–65 (citing 2008-09 NCAA DIVISION I MANUAL arts. 12.1.2(a), (d), 12.4–5 (2008) [hereinafter 2008-09 NCAA MANUAL]).

71. *Id.* at 565 (citing 2008-09 NCAA MANUAL, *supra* note 70, arts. 12.1.2(g), 12.3).

72. *Id.* at 566 (citing 2008-09 NCAA MANUAL, *supra* note 70, art. 12.3).

petty, nonsensical, and even likely to expose athletes to exploitation instead of protecting them from it. For example, in 2012, Jonathan Benjamin, a walk-on basketball player at the University of Richmond, unwittingly violated NCAA Bylaw 12.4.4, which allows an athlete to establish a business while in school, so long as “the student-athlete’s name, photograph, appearance or athletics reputation are not used to promote the business.”⁷³ Benjamin designed a line of athletic clothing called “Official Visit” and posted pictures of himself wearing his creations on his company’s Facebook and Twitter pages.⁷⁴ Ironically, neither the University of Richmond nor the Atlantic 10 Conference discovered the violation until Benjamin asked Richmond’s athletic compliance officer about it because the company that produced his T-shirts wanted to feature him in its newsletter.⁷⁵ When it was discovered, Richmond had no choice but to declare him ineligible to play basketball merely because he modeled his own creations instead of hiring a non-athlete classmate to do so.⁷⁶

Had Jonathan Benjamin been a sculptor or a classical guitarist, he could have modeled as many T-shirts as he wished, but because he was an athlete, his entrepreneurialism was limited to designing and producing T-shirts and could not extend to modeling them. Had Jonathan Benjamin been a professional actor, as Natalie Portman was when she filmed *Star Wars Episode II: Attack of the Clones* while a student at Harvard, his clothing line would likely have been the subject of gushy feature stories, not an NCAA rules violation.⁷⁷

If NCAA rules against using one’s athletic visibility to earn income seem silly and antiquated, NCAA rules designed to keep college and professional sports separate from one another sometimes expose athletes to exploitation instead of protecting them from it. For example, the NCAA’s prohibition on a college player (or a high school player whom colleges are recruiting) hiring an agent to assess the player’s marketability in a professional draft adversely affects baseball players, whose annual draft occurs before the high school and college seasons conclude.⁷⁸ The high school player wants to know what his professional prospects are before deciding whether to turn pro or commit to a college. Similarly, the college player wants to know what his professional prospects are before deciding whether to sign with a pro team or return to college. In both instances, the best person to obtain that information for the

73. Patrick Hruby, *The Worst Fit*, SPORTS ON EARTH (Aug. 21, 2013), <http://www.sportsonearth.com/article/57680744/how-the-ncaas-amateurism-policy-negatively-affected-former-richmond-basketball-player-jonathan-benjamin> (emphasis omitted).

74. *Id.*

75. *Id.*

76. *See id.*

77. *Id.*

78. Fitt, *supra* note 30, at 571–72.

player is an agent, but hiring an agent to negotiate with a pro team will cause the athlete to lose his collegiate eligibility. As a result, the player faces an unhappy choice between (1) following the no-agent rule and participating in what will likely be a bargaining mismatch between the team and the player (and his parents) or (2) reaching a secret agreement with an agent for negotiations with professional teams.⁷⁹ In other words, with an agent, the player risks collegiate ineligibility, but without an agent, he risks commercial exploitation.

Beyond their flaws, note the critics, the NCAA's amateurism rules are unnecessary to preserve the uniqueness, hence the popularity, of college sports. According to one critic,

[w]hen Arizona faces Stanford, no one cares if the one team's scholarships are worth more, or if the other squad's star quarterback is getting a cash handshake from an overzealous booster. Eliminate amateurism tomorrow, and big-time college football and basketball fans won't desert en masse; if anything, they might like NCAA sports more, given that hypocrisy and corruption will no longer be core components of the exercise.⁸⁰

Another critic contends that the amateurism rules are not key to the continued popularity of college sports because the factors that distinguish college sports from their professional counterparts are "loyalty to one's alma mater, instate and conference rivalries, and school spirit," not amateurism.⁸¹ The critic adds that because "teams are associated with universities . . . there is a built-in demand from students, alumni, and local fans for an athletic team to represent their university and community."⁸² Besides, still another critic observes, the NCAA's claim that its amateurism rules must remain in place if college sports are to retain their popularity does not withstand scrutiny under the current commercial conditions.⁸³ "At this point," the critic notes, "there is no question that the NCAA's focus on the *student-athlete* is harder to stomach than it was thirty years ago, at least with respect to the top one percent of men's

79. See *id.* at 571. For a more complete discussion of the NCAA's no-agent rule and its consequences for baseball players, see Brian L. Porto, *What Recruiters Don't Tell Athletes and Athletes Don't Think to Ask: A Critique of the NCAA's Nonacademic Eligibility Rules*, 13 VA. SPORTS & ENT. L.J. 240, 259–67 (2014).

80. Hruby, *supra* note 49.

81. Moyer, *supra* note 49, at 814 (quoting Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLIN L. REV. 24, 55 (2000)).

82. *Id.* at 814–15 (citing Hruby, *supra* note 49).

83. Feldman, *supra* note 14, at 254–55.

football and basketball.”⁸⁴ And, the critic adds, “there is no empirical evidence to support the conclusion that college football cannot exist without ‘amateurism’ restrictions on its players.”⁸⁵

Perhaps the most insightful critique of the amateurism rules, though, was the one that Professor Daniel Lazaroff offered several years ago. He observed, “[I]f the NCAA really wishes to maintain a clear line of demarcation between amateur and professional sports, it should realize that such a distinction probably rests less on the question of compensation and more on emphasizing the ‘student’ part of student-athlete.”⁸⁶

But the criticisms of the NCAA’s amateurism rules are not confined to policy assessments; they also include legal evaluations, such as one commentator’s contention that the prohibition on paying athletes “is illegal because it prevents [NCAA] members from engaging in competitive ‘bidding’ to recruit student-athletes.”⁸⁷ The commentator adds that “the NCAA’s principle of amateurism likely violates [S]ection 1 of the Sherman Act by artificially prohibiting student-athlete pay and by eliminating from the college sports marketplace those colleges that wish to recruit top student-athletes.”⁸⁸ Similarly, another commentator charges that the amateurism rules “violate the federal antitrust laws because they facially restrict price competition among schools, limit consumer choice, and lower product quality.”⁸⁹ They constitute “price-fixing,” the commentator contends, by “restrict[ing] the amount of money, in the form of scholarships, that schools are permitted to provide their [athletes].”⁹⁰

Besides criticizing the NCAA’s rules, antitrust experts have taken aim at the courts’ treatment of those rules, specifically, courts’ tendency to divide them into two overarching categories: “(1) rules designed to promote and preserve the eligibility and amateur status of student-athletes; and (2) other forms of regulation with a more economic purpose.”⁹¹ According to Professor Lazaroff, “[c]ourts tend to routinely validate” the former, while subjecting the

84. *Id.* at 255.

85. *Id.*

86. Lazaroff, *supra* note 14, at 368.

87. Edelman, *supra* note 13.

88. *Id.* at 98.

89. Powell, *supra* note 14.

90. *Id.* at 245.

91. Lazaroff, *supra* note 14, at 329, 329 n.1 (citing Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (stating “the NCAA engages in ‘two distinct kinds of rulemaking activity’—one rooted in concern for amateurism and the other ‘increasingly accompanied by a discernible economic purpose.’”)).

latter to “closer judicial scrutiny.”⁹² The origins of this dichotomy in favor of amateurism lie in dicta from the Supreme Court’s majority opinion in *NCAA v. Board of Regents*,⁹³ in which the Court invalidated the NCAA’s longstanding Football Television Plan on antitrust grounds.⁹⁴

Two quotations in particular from Justice Stevens’s majority opinion provide the justification, according to antitrust scholars, for courts’ traditional favoritism toward the NCAA’s amateurism rules. The respective quotations are as follows:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.⁹⁵

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.⁹⁶

Because of the language quoted above, *Board of Regents* provided a doctrinal foundation for a “two-pronged antitrust approach to NCAA regulation.”⁹⁷ The majority opinion suggested that joint economic action by member institutions that did not address the regulation of players (e.g., the Football Television Plan) “should be subjected to rule of reason analysis under [S]ection 1 of the Sherman Act” to determine if the challenged action was an unreasonable restraint of trade.⁹⁸ But that opinion also suggested “that the antitrust laws should not invalidate restraints on competition for the services of

92. *Id.* at 329–30.

93. *See generally* 468 U.S. 85 (1984).

94. *See id.* at 120; Feldman, *supra* note 14, at 251.

95. *Bd. of Regents*, 468 U.S. at 120.

96. *Id.* at 101–02.

97. Lazaroff, *supra* note 14, at 340.

98. *Id.*

NCAA student-athletes.”⁹⁹ Since *Board of Regents*, then, courts have typically followed traditional antitrust methodology when addressing antitrust claims in college sports unrelated to the athletes.¹⁰⁰ Employing the Rule of Reason test, they inquire whether (1) the challenged action had anticompetitive effects on interstate commerce and, if so, whether (2) the defendant could show pro-competitive effects that outweigh the anticompetitive effects, and (3) whether the plaintiff could demonstrate that less restrictive means could achieve those precompetitive effects.¹⁰¹

In *Agnew v. NCAA*,¹⁰² however, the United States Court of Appeals for the Seventh Circuit abandoned the traditional judicial distinction between commercial and non-commercial (e.g., amateurism-related) rules, holding instead that the Sherman Act generally applies to NCAA rules.¹⁰³ According to the *Agnew* court, “[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program.”¹⁰⁴ Despite this reasoning, the court failed to overturn NCAA-imposed limits on the number of athletic scholarships colleges can award per team, because the court concluded that the plaintiffs failed to identify a relevant market in which the challenged restraint occurred.¹⁰⁵ The Seventh Circuit affirmed the district court’s dismissal of the suit.¹⁰⁶ *Agnew* may have signaled a sea change in judicial responses to the NCAA’s amateurism rules, though, because the *O’Bannon* decision, which will be the focus of Part IV, also assumed that the Sherman Act applies to NCAA rules regulating athletes.

For now, however, the spotlight should pivot from criticisms of NCAA rules to proposals for changing them. Several authors recommend replacing the current no pay amateur model with an Olympic model, under which colleges would not pay athletes directly, but athletes could obtain endorsement deals and be paid for signing autographs.¹⁰⁷ Another supporter of the Olympic model argues that college athletes “should be able to access the free market and capitalize on [their] popularity, such as by endorsing products or being paid for

99. *Id.* at 339.

100. *Id.* at 340.

101. *See id.* at 357.

102. 683 F.3d 328 (7th Cir. 2012).

103. *Id.* at 341; Feldman, *supra* note 14, at 260–61.

104. *Agnew*, 683 F.3d at 340.

105. Feldman, *supra* note 14, at 261.

106. *Agnew*, 683 F.3d at 348.

107. *See, e.g.,* Powell, *supra* note 14, at 258.

appearances, autographs, and memorabilia.”¹⁰⁸ But the Olympic model’s supporters disagree about whether revenue from the colleges’ use of their players’ names, images, and likenesses should be put in a trust fund for players to receive when their athletic eligibility ends or given to them as they earn it, the amounts of money to be paid, and whether those amounts can vary according to a player’s value to the team.¹⁰⁹

Other commentators advocate more of an employment relationship between athletes and their institutions. One points out that “in June 2011, seven Southeastern Conference [head] football coaches proposed designating a share of their . . . salaries to establish stipends of \$300 per game for their [players].”¹¹⁰ The plan was never implemented, though, because athletic administrators opposed it for fear of incurring the NCAA’s wrath.¹¹¹ According to this commentator, “[I]f the seven Southeastern Conference colleges had not quashed their coaches’ stipend plan, those colleges would have been able to use the stipends to recruit better players—producing a stronger on-field football product and thus leading to greater fan satisfaction.”¹¹²

Two other commentators argue jointly for an even more explicitly employment-based relationship between athletes and their institutions. In their view, “[b]ecause the athlete-university relationship is primarily commercial, not academic, the athletes should be considered employees under [the National Labor Relations Board’s decision in] *Brown University*,¹¹³ not amateurs or ‘student-athletes’ as the NCAA incessantly asserts.”¹¹⁴ Moreover, because of what they call “[t]he overwhelmingly commercial nature of major college athletics,” these commentators maintain that college sports should be subject not only to antitrust law, but to labor and tax law, too.¹¹⁵

Thus, the prescriptions for changing the NCAA’s amateurism rules range from replacing them with an Olympic model that would improve athletes’ financial circumstances without making them university employees to unabashedly designating them as employees and, presumably, paying them

108. Moyer, *supra* note 49, at 827 (citing RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLL. PLAYERS ASS’N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 5 (2011), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>).

109. *Compare id.* at 826 (arguing college athletes should receive “immediate stipend[s]”), with Powell, *supra* note 14, at 258 (arguing colleges should create trusts for college athletes for after graduation).

110. Edelman, *supra* note 13, at 69.

111. *Id.*

112. *Id.*

113. *See* 342 N.L.R.B. 483, 490–91 (2004) (holding that graduate assistants are not employees because their relationship to their university is primarily academic).

114. McCormick & McCormick, *supra* note 15, at 500.

115. *See id.*

salaries. Ultimately, this Article will stake out its own position in the amateurism debate. Before doing so, however, it will review the most recent judicial attempt to address the amateurism conundrum: *O'Bannon v. NCAA*.

IV. AMATEURISM ON TRIAL: *O'BANNON V. NCAA*

A. *The Trial Court's Decision*

In *O'Bannon*, the district court followed the path charted by the Seventh Circuit in *Agnew*; that is, it abandoned the tradition of treating all NCAA rules directed at athletes as non-commercial, hence beyond the reach of the antitrust laws. Like the *Agnew* court, the district court in *O'Bannon* applied Rule of Reason analysis to the claims of the plaintiffs, including former University of California, Los Angeles basketball star Ed O'Bannon, that the NCAA's prohibition on athletes profiting from the use of their names, images, and likenesses in television broadcasts, videogames, and other media violated the Sherman Act.¹¹⁶ Under Rule of Reason analysis, the court explained, a plaintiff must show that the challenged "restraint produces 'significant anticompetitive effects' within a 'relevant market.'"¹¹⁷ If the plaintiff makes that showing, the defendant must present "evidence of the restraint's procompetitive effects."¹¹⁸ If the defendant clears that hurdle, the plaintiff, to prevail, "must 'show that 'any legitimate objective[the restraint might serve] can be achieved [by] . . . less restrictive'" means.¹¹⁹

In opting for Rule of Reason analysis, the *O'Bannon* court explicitly rejected the notion that the NCAA's amateurism rules do not implicate antitrust concerns.¹²⁰ It observed that "the Supreme Court's incidental phrase in *Board of Regents* does not establish that the NCAA's current restraints on compensation are procompetitive and without less restrictive alternatives."¹²¹ That is because the college sports industry has become considerably more commercial than it was in 1984 when *Board of Regents* was decided and because *Board of Regents*, after all, was not about athlete compensation.¹²²

Thus distinguishing *Board of Regents*, the district court proceeded to fact-finding and found that "absent the challenged NCAA rules, teams of FBS

116. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 963, 985 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

117. *Id.* at 985 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

118. *Id.* (quoting *Tanaka*, 252 F.3d at 1063).

119. *Id.* (quoting *Tanaka*, 252 F.3d at 1063).

120. *Id.* at 999–1000.

121. *Id.* at 1000.

122. *See id.*

football and Division I basketball players would be able to create and sell group licenses for the use of their names, images, and likenesses in live game telecasts.”¹²³ In other words, “the NCAA has the power—and exercises that power—to fix prices and restrain competition in the college education market that Plaintiffs have identified.”¹²⁴ As a result, the court continued, athletes are forced to bear a greater portion of the cost of attendance than they would if NCAA rules permitted compensating the athletes.¹²⁵ “In the absence of this restraint,” the court observed, “schools would compete against one another by offering to pay more for the best recruits’ athletic services and licensing rights—that is, they would engage in price competition.”¹²⁶

For its part, “[t]he NCAA [argued] that the challenged restr[aint]s . . . are reasonable because they are necessary to preserve . . . amateurism, maintain competitive balance among . . . teams, promote the integration of academics and athletics, and increase the total output of its product,” college sports.¹²⁷ But “[t]he [c]ourt f[ound] that the NCAA’s current restrictions on student-athlete compensation, which cap athletics-based financial aid below the cost of attendance,” were not necessary to preserve “amateurism” as the NCAA defined it.¹²⁸ The court also found that the evidence the plaintiffs presented at trial (e.g., loyal fan bases, regional loyalties, school ties, etc.) showed that the NCAA’s restrictions on athlete compensation did not, as the NCAA contended, fuel consumer interest in FBS football and Division I basketball.¹²⁹ Accordingly, said the court, consumer preferences “do not justify the rigid restrictions [on athlete compensation] challenged in this case.”¹³⁰

The court went on to find that the NCAA’s restrictions on paying athletes did not promote “competitive balance” between teams, as the NCAA maintained, because the NCAA had not endeavored to restrict institutional

123. *Id.* at 969.

124. *Id.* at 973.

125. *Id.* at 989.

126. *Id.* at 991–92.

127. *Id.* at 973.

128. *Id.* at 975. In the 2015-16 NCAA Manual, the “Principle of Amateurism” is explained as follows:

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.

2015-16 NCAA DIVISION I MANUAL art. 2.9 (2015), <http://www.ncaapublications.com/productdownloads/D116OCT.pdf>.

129. *O’Bannon*, 7 F. Supp. 3d at 975–78.

130. *Id.* at 978.

spending on athletic facilities, coaches' salaries, and recruiting, all of which affected competitive balance.¹³¹ Still, the court did not reject the NCAA's "procompetitive justifications" entirely, "find[ing] that certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic communities of their schools, which may in turn improve the schools' college education product."¹³² But the court did reject the fourth and final of those justifications that "[t]he NCAA's challenged restrictions on compensation . . . increase the number of opportunities for" athletes and their institutions to compete in college sports.¹³³ In this regard, the court found that, based on the testimony at trial, institutions would not leave the FBS or Division I basketball if the prohibition on paying athletes were lifted.¹³⁴

Proceeding to its conclusions of law, the district court determined, in accordance with its factual findings, that although the NCAA's goal of preserving amateurism might justify prohibiting "large payments to student-athletes" to maintain fan support for college sports, that goal "d[id] not justify the rigid prohibition on" all payments beyond an athletic scholarship.¹³⁵ The court reiterated its earlier rejection of the NCAA's claims that the pro-competitive goals of maintaining competitive balance¹³⁶ and increasing the "total output" of college games justified the no-pay rule.¹³⁷ Finally, addressing the NCAA's stated goal of integrating academics and athletics, the court acknowledged that "by preventing student-athletes from being cut off from the broader campus community[, l]imited restrictions on student-athlete compensation may help [institutions] achieve [the] narrow procompetitive goal."¹³⁸ However, achieving that goal, the court admonished, cannot justify the NCAA's "sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes' names, images, and likenesses."¹³⁹

Thus, in the context of Rule of Reason analysis, the plaintiffs established the existence of anticompetitive restraints, but the NCAA showed that the restraints served two procompetitive goals, namely, preserving consumer interest in college sports and ensuring the integration of academics and

131. *See id.* at 978–79.

132. *Id.* at 980.

133. *Id.* at 982.

134. *Id.*

135. *Id.* at 1001.

136. *Id.* at 1001–02.

137. *Id.* at 1003–04.

138. *Id.* at 1003.

139. *Id.*

athletics at NCAA institutions.¹⁴⁰ The final step in this dance between amateurism and antitrust law was for the plaintiffs to show that less restrictive means to the NCAA's two procompetitive goals were available.¹⁴¹

The district court quickly concluded that two of the three less restrictive means the plaintiffs suggested were appropriate.¹⁴² For example,

the NCAA could permit [its members] to award stipends to student-athletes up to the full cost of [college] attendance [T]he NCAA could [also] permit its [members] to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their [collegiate] eligibility [ends].¹⁴³

But the NCAA members could not allow athletes to receive income from endorsing products or signing autographs, because such arrangements would undermine the NCAA's efforts to protect athletes from "commercial exploitation."¹⁴⁴

Based on these findings and conclusions, the court held that the challenged "NCAA[] rules unreasonably restrain trade" in the market in which institutions "compete to acquire [their] recruits' athletic services and licensing rights," thereby violating § 1 of the Sherman Act.¹⁴⁵ Therefore, "the Court . . . enjoin[ed] the NCAA from enforcing any rules . . . that would prohibit its member schools . . . from [providing] their . . . [athletes] a limited share of the revenues generated from the use of their names, images, and likenesses."¹⁴⁶ The injunction prevented the NCAA from capping the athletes' individual shares of

140. *Id.* at 1004.

141. *Id.*

142. *Id.* at 1005.

143. *Id.*

144. *Id.* at 984.

145. *Id.* at 1007. Although the court agreed with the plaintiffs that NCAA rules were anticompetitive in the market for college athletes, it disagreed that those rules were also anticompetitive in the group-licensing market. *Id.* at 995. The court observed, "Plaintiffs have not presented any evidence to show that, in the absence of the challenged restraint, teams of student-athletes would actually compete against one another to sell their group licenses." *Id.* Instead, television networks would acquire only the group licenses of the teams to be featured in particular telecasts. *Id.* Neither did the plaintiffs show how buyers of group licenses might compete against each other. *Id.* at 996. According to the court, "[a]llowing student-athletes to seek compensation for group licenses would not increase the number of television networks in the market or otherwise enhance competition among them." *Id.* Thus, the district court found an antitrust injury in only one of the two markets identified by the plaintiffs. *Id.* at 996–97.

146. *Id.* at 1007–08.

those revenues at less than \$5,000 per year, which amount the court justified as comparable to Pell Grants, for which some athletes were also eligible, depending on their financial need.¹⁴⁷

B. The Appellate Court's Decision

The NCAA appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit.¹⁴⁸ The question before the appellate court was "whether the NCAA's rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade."¹⁴⁹ The majority opinion signaled its conclusion early on by noting "that the district court's decision was largely correct."¹⁵⁰ Like the district court, the appellate court held that the NCAA's amateurism "rules are not exempt from antitrust scrutiny; rather, they must be analyzed under the Rule of Reason."¹⁵¹ Also like the district court, the appellate court concluded that an appropriate alternative to the prohibition on athlete compensation would be for the NCAA to allow member institutions to award athletes scholarships that covered the full cost of attendance, which would increase the value of an athletic scholarship by several thousand dollars per year.¹⁵² But unlike the district court, the appellate court rejected the notion of allowing athletes to be paid cash compensation of up to \$5,000 per year, thereby affirming the district court's opinion in part and reversing it in part.¹⁵³

The majority opinion began by considering the NCAA's claim that, under *Board of Regents*, all "NCAA[] amateurism rules are 'valid as a matter of law.'"¹⁵⁴ "[T]he NCAA contends," said the court, "that any Section 1 challenge to its amateurism rules must fail as a matter of law because the *Board of Regents* Court held that those rules are presumptively valid."¹⁵⁵ The appellate court disagreed, reasoning that in *Board of Regents*, the Supreme Court had not discussed the amateurism rules on their merits, but instead, "to explain why NCAA rules should be analyzed under the Rule of Reason, rather than held to be illegal per se."¹⁵⁶ Therefore, instead of approving the "amateurism rules as

147. *Id.* at 1008.

148. *See generally* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

149. *Id.* at 1052.

150. *Id.* at 1053.

151. *Id.*

152. *See id.*

153. *Id.*

154. *Id.* at 1061 (referencing NCAA v. Bd. of Regents, 468 U.S. 85 (1984)).

155. *Id.* at 1063.

156. *Id.*

categorically consistent with the Sherman Act,”¹⁵⁷ *Board of Regents* “held that, because many NCAA rules[, including] the amateurism rules[,] are part of the ‘character and quality of the [NCAA’s] ‘product,’” no NCAA rule should be invalidated without a Rule of Reason analysis.”¹⁵⁸ In short, the appellate court concluded, “[t]he [Supreme] Court’s long encomium to amateurism, though impressive-sounding, was [merely] dicta.”¹⁵⁹

Neither did “[t]he NCAA’s argument that its compensation rules are ‘eligibility’ restrictions” that do not regulate any commercial activity impress the appellate judges, who dismissed the NCAA’s contention as “a sleight of hand” because “[t]here is real money at issue here.”¹⁶⁰ Put another way, the rules prohibiting athlete compensation were more like rules affecting the NCAA’s relationships “with . . . coaches or . . . corporate business partners” than rules concerning academic eligibility to compete.¹⁶¹

The majority proceeded to conclude that the plaintiffs showed they suffered an antitrust injury because the NCAA’s rules prevented them from profiting from the use of their names, images, and likenesses in the videogame industry.¹⁶² The videogame example was sufficient to demonstrate the plaintiffs’ injury, so the court did not need to consider whether that injury extended to live television broadcasts or archival footage of college games.¹⁶³ The athletes must forego compensation for the use of their names, images, and likenesses (NILs) and accept an athletic scholarship, but nothing more, “because the NCAA [member institutions] have agreed to value the athletes’ NILs at zero, ‘an anticompetitive effect’” in the court’s eyes.¹⁶⁴ That anticompetitive effect was price-fixing, so under the Rule of Reason, the plaintiffs demonstrated an antitrust injury.¹⁶⁵

The baton was now in the hand of the NCAA, which needed to show procompetitive goals that justified its prohibition on athlete compensation.¹⁶⁶ The NCAA succeeded in that the appellate court agreed with the district court’s finding of a “procompetitive effect in the NCAA’s commitment to amateurism[,] namely, that the amateur nature of collegiate sports increases

157. *Id.*

158. *Id.* (alteration in original) (citation omitted) (quoting *Bd. of Regents*, 468 U.S. at 102).

159. *Id.*

160. *Id.* at 1065.

161. *Id.* at 1066.

162. *Id.* at 1067.

163. *Id.*

164. *Id.* at 1071 (quoting *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)).

165. *Id.* at 1071–72.

166. *See id.* at 1072.

their appeal to consumers.”¹⁶⁷ Therefore, the appellate court determined “that the NCAA’s compensation rules serve the two procompetitive purposes identified by the district court: integrating academics with athletics, and ‘preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.’”¹⁶⁸

Because the NCAA met its burden, the plaintiffs now had to show, as they did for the district court, that less restrictive alternatives to the current compensation rules could satisfy the NCAA’s procompetitive goals.¹⁶⁹ The majority opinion recalled the two such alternatives the district court identified—athletic scholarships that cover the full cost of attendance and a small amount of deferred compensation held in a trust fund—then accepted the former but rejected the latter.¹⁷⁰ The appellate court reasoned that the evidence presented to “the district court indicated that raising the . . . cap [on athletic scholarships] to the cost of attendance would have virtually no impact on amateurism.”¹⁷¹ Indeed, “Dr. Mark Emmert, the president of the NCAA, testified . . . that giving student-athletes scholarships up to their full costs of attendance would not violate the NCAA’s principles of amateurism because all the money given to students would be going to cover their ‘legitimate costs’ to attend school.”¹⁷² Furthermore, “nothing in the [trial] record,” the court emphasized, “suggested that consumers of college sports would become less interested in those sports if athletes’ scholarships covered their full cost of attendance, or that an increase in the [scholarship] cap would impede the integration of student-athletes into their academic communities.”¹⁷³ Thus, in the appellate court’s view, “[a] compensation cap set at . . . [the] full cost of [college] attendance is a substantially less restrictive alternative means of accomplishing the NCAA’s legitimate procompetitive purposes.”¹⁷⁴

But the trust fund is a different story, the majority concluded.¹⁷⁵ It reasoned that in validating the trust fund, the district court failed to recognize “that not paying student-athletes is *precisely what makes them amateurs*.”¹⁷⁶ Besides, the majority observed, as “far as we can determine, [former CBS Sports executive Neal] Pilson’s offhand comment under cross-examination is the sole support for

167. *Id.* at 1073.

168. *Id.* (quoting *O’Bannon*, 7 F. Supp. 3d at 1005).

169. *Id.* at 1074.

170. *Id.* (citing *O’Bannon*, 7 F. Supp. 3d at 1005–07).

171. *Id.* at 1074–75.

172. *Id.* at 1075 (citing *O’Bannon*, 7 F. Supp. 3d at 983).

173. *Id.* (citing *O’Bannon*, 7 F. Supp. 3d at 983).

174. *Id.*

175. *See id.* at 1076.

176. *Id.*

the district court's \$5,000 figure."¹⁷⁷ Most importantly, "offering student-athletes education-related compensation" is permissible, but "offering them cash sums untethered to educational expenses is not"; indeed, "it is a quantum leap" from education-related compensation.¹⁷⁸

Thus, the appellate court affirmed the portion of the district court's decision that raised the cap on athletic scholarships to the cost of attendance but reversed the portion that created the trust fund for college athletes.¹⁷⁹ "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes," the majority explained.¹⁸⁰ "It does not require more."¹⁸¹

Not everybody shared that view. The majority opinion prompted a partial dissent from the panel's chief judge, who pointed out that "sufficient evidence" indicated the trust fund "would not have a significant impact on consumer interest in college sports."¹⁸² Besides, players can now receive "Pell [G]rants in excess of their cost of attendance," and Division I tennis recruits can "earn up to \$10,000 per year in prize money from [competition] before . . . [entering] college," so \$5,000 per year in deferred compensation hardly seemed out of bounds.¹⁸³

Another basis for the partial dissent was that its author credited Mr. Pilson's testimony more than the majority did.¹⁸⁴ Noting that Pilson was an expert witness, he had testified at length, and the plaintiffs had not challenged his qualifications, the dissent reasoned that the majority should not dismiss that testimony based on Pilson's supposedly "offhand" demeanor (suggesting the \$5,000 figure when pressed) that the appellate panel did not see.¹⁸⁵ Finally, the dissenting judge also credited the testimony of expert witness Dr. Daniel Rascher, who stated that consumer demand typically does not decline when athletes are paid, as the Olympics, Major League Baseball, tennis, and rugby illustrate.¹⁸⁶ Thus, in the view of the dissent, both the raised cap on scholarships and the trust fund were permissible means of achieving the NCAA's

177. *Id.* at 1078.

178. *Id.*

179. *Id.* at 1079.

180. *Id.*

181. *Id.*

182. *Id.* at 1080 (Thomas, C.J., concurring and dissenting).

183. *See id.* (Thomas, C.J., concurring and dissenting) (citing *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 974, 1000 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015)).

184. *See id.* (Thomas, C.J., concurring and dissenting).

185. *Id.* (Thomas, C.J., concurring and dissenting).

186. *Id.* at 1081 (Thomas, C.J., concurring and dissenting).

procompetitive aims.¹⁸⁷

But the majority opinion carried the day, of course, so only the raised scholarship cap is the law at present. That is a victory of sorts for athletes, who, until recently, received scholarships that typically left them several thousand dollars short of covering the full cost of attending college. Moreover, the Ninth Circuit, like the district court, rejected the NCAA's longstanding argument, which courts have traditionally adhered to, that player-related NCAA rules are not commercial, hence are beyond the reach of antitrust law.

Any victory by the plaintiffs was modest, though, because the NCAA had already authorized the Power Five conferences to allow their members to raise the cap on athletic scholarships to cover the full cost of attendance.¹⁸⁸ And the Ninth Circuit's veto of the trust fund means that although athletes will now be better able to cover their costs, they still will not be compensated adequately for the value of their contributions to the wealth and the institutional brands of their respective universities.

Two weeks after the Ninth Circuit issued its decision, the plaintiffs sought an en banc rehearing by an eleven-member panel of Ninth Circuit judges.¹⁸⁹ The full Ninth Circuit panel subsequently denied the plaintiffs' request for an en banc rehearing.¹⁹⁰ In March 2016, the plaintiffs filed a petition for certiorari in the United States Supreme Court.¹⁹¹ At this writing, in the spring of 2016, the cert petition is pending; the Court has yet to decide whether to add the case to its calendar for the October 2016 Term.

187. *Id.* at 1083 (Thomas, C.J., concurring and dissenting).

188. *See* New, *supra* note 62.

189. Audrey C. Sheetz, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 881 (2016). After the plaintiffs petitioned for en banc review, the Ninth Circuit asked the NCAA to file a response, which the NCAA did in November 2015. Email from Sathya Gosselin, Esquire, Hausfeld, LLP, who represented the plaintiffs in *O'Bannon*, to Brian L. Porto, Professor, Vt. Law Sch. (Dec. 10, 2015) (on file with author).

190. *Id.* The entire *O'Bannon* lawsuit looks modest compared to another suit that is pending, *Jenkins v. NCAA*, which features a considerably broader antitrust challenge to amateurism in hopes of uprooting it in favor of a free-market approach that would blur, if not obliterate, any meaningful distinction between college and professional sports. *See* Benjamin A. Tulis & Gregg E. Clifton, *Ninth Circuit Holds NCAA Subject to Antitrust Scrutiny, but Vacates Injunction Allowing up to \$5,000 per Year Deferred Compensation to College Athletes*, NAT'L L. REV. (Oct. 1, 2015), <http://www.natlawreview.com/article/ninth-circuit-holds-ncaa-subject-to-antitrust-scrutiny-vacates-injunction-allowing>. On December 4, 2015, the same district court that decided *O'Bannon* granted the plaintiffs' motion for class certification in *Jenkins*. *See generally* *Jenkins v. NCAA*, 311 F.R.D. 532 (N.D. Cal. 2015). Two months later, the Ninth Circuit denied the NCAA's petition for permission to appeal the trial court's order granting class action certification.

191. Steve Berkowitz, *O'Bannon Plaintiffs Ask Supreme Court to Take Case*, USA TODAY (March 15, 2016), <http://www.usatoday.com/story/sports/college/2016/03/15/obannon-plaintiffs-ask-supre>; Jon Solomon, *NCAA Seeks Extension to Petition Supreme Court in O'Bannon Case*, CBS SPORTS (March 2, 2016), <http://mweb.cbssports.com/ncaaf/writer/jon-solomon/25502698/ncaa-seeks-extension-to-pet>.

In appealing to the Supreme Court, the plaintiffs have taken a risk because the Court could reverse the decisions of the two lower courts and hold that the NCAA's prohibition on payments to athletes beyond the limits of the traditional scholarship complies with the dictates of antitrust law. In that circumstance, not only would the plaintiffs lose the opportunity to expand compensation opportunities for college athletes, but the plaintiffs' counsel would lose the nearly \$46 million in costs and fees that a federal magistrate has awarded them.¹⁹² But if the Court accepts the case, the NCAA would also face a risk, because the Court could hold that the challenged prohibition deserves no deference under antitrust law and perhaps even that a trust fund is a permissible means of compensating college athletes for the use of their names, images, and likenesses.¹⁹³

The future contours of the athlete-institution relationship are too important to be left to courts and antitrust lawyers, though. Educators should shape that relationship because they work for educational institutions and care about the athletes as students. Part V unveils one educator's design for a modern amateurism model that seeks to serve both athletes and higher education.

V. MODERNIZING AMATEURISM

As Section II shows, amateurism has evolved over time and no longer fits the definition it had at the NCAA's founding in 1906. Two veteran observers of college sports, a sociologist and an economist, respectively, write in this regard: "[i]n short, amateurism in intercollegiate athletics is whatever the NCAA says it is."¹⁹⁴ Accordingly, amateurism need not conjure up images of cricket matches or shooting parties at Downton Abbey. Modern Americans can define it to fit modern conditions, while retaining its historic opposition to athletic employment. The modern amateur could be defined as one who does not play for a professional team in his or her collegiate sport, does not receive a salary (or a share of gate receipts) for playing the collegiate sport, but only reimbursement for educational costs and basic living expenses, is a full-time student in good standing, and, aside from having an athletic scholarship, is subject to the same rights and responsibilities as his or her classmates.¹⁹⁵ An amateurism redefined along such lines could liberate college athletes from

192. Berkowitz, *supra* note 191.

193. *Id.*; see also Solomon, *supra* note 191.

194. ANDREW ZIMBALIST & ALLEN SACK, THOUGHTS ON AMATEURISM, THE O'BANNON CASE AND THE VIABILITY OF COLLEGE SPORT 7 (2013), <https://drakegroupblog.files.wordpress.com/2013/04/drake-statement-obannon1.doc>.

195. This definition is derived from one put forth several years ago by another commentator. See Fitt, *supra* note 30, at 586–87.

perennially persnickety NCAA rules regarding agents, endorsements, and entry into a professional draft.¹⁹⁶

Amateurism is worth retaining in concept because it links athletics to academics. As long as academic institutions sponsor the teams, athletes must be required to pursue a degree and nudged to nurture interests and abilities unrelated to sport. Education is about long-term human development; hence, institutions that use athletes for short-term benefit, then discard them after four years without a degree or job skills, deserve our disgust and condemnation. But if the employment model governed college sports, athletes would have little or no incentive to study, because they would view themselves as professionals, and coaches would feel emboldened to occupy all their players' time with athletic obligations because the players would be employees, not students. Nobody would have to make sure they went to class or study hall or received remedial help if necessary. And the percentage who found employment in professional sports would still be negligible. Presumably, they would leave college with more money in the bank than they do now, but that money would not sustain them through what would likely be a lifetime of low-wage employment. Thus, despite all the problems associated with America's marriage of sport to higher education, retaining but modernizing it is preferable to a divorce that would make the athletes employees and "college sports" an oxymoron.

In preserving amateurism, though, one must take account of Professor Allison's sobering reminder "that when people live in dire material poverty . . . to offer them amateur institutions . . . is to mock their condition."¹⁹⁷ Applied to American college sports, this statement means that modern amateurism should account for the commercial success of the enterprise and the economically disadvantaged circumstances from which many college athletes, notably football and basketball players, come. Accordingly, modern amateurism should include the following components:¹⁹⁸

1. Athletic scholarships that remain in effect until graduation

196. *See id.* at 590.

197. ALLISON, *supra* note 4, at 161.

198. The components of modern amateurism reflect the positions of the Drake Group, of which the Author is a member and whose position papers the Author contributed to as a co-author and an editor. The Drake Group defines itself as a national organization of faculty and others whose mission "is to defend academic integrity in higher education from the corrosive aspects of commercialized college sports." *Vision, Mission and Goals*, DRAKE GROUP, INC., <http://thedrakegroup.org/2012/12/04/hutchins-award-2/> (last visited June 9, 2016). For all of the Drake Group's position papers cited in this Article, see *Policy Positions*, DRAKE GROUP, INC. <http://thedrakegroup.org/policy-positions/> (last visited June 9, 2016).

- (five years total) and cannot be revoked unless the recipient voluntarily withdraws from the team, “fails to meet academic requirements necessary . . . to retain” the scholarship, or “engages in serious misconduct” punishable by institutional rules and applicable to all students;¹⁹⁹
2. Athletic scholarships that cover the full cost of college attendance, as determined by federal student financial aid guidelines;²⁰⁰
 3. Deferred compensation, namely, a trust fund, comprised of revenues from the use of players’ names, images, and likenesses, in an equal amount per player and equal in amount to a maximum Pell Grant, but subject to an annual inflation allowance. Players could only withdraw funds at graduation or the completion of their collegiate eligibility and only for educational purposes, such as completing a Bachelor’s degree or pursuing a graduate degree;²⁰¹
 4. The right to endorse products and businesses and to sign autographs, as long as an athlete’s institution does not arrange for the endorsement, is not mentioned in it, and no identifying mark of an institution (e.g., logo, football jersey, etc.) is displayed in the endorsement;²⁰²
 5. The right to retain an agent to explore opportunities in professional sports (or the endorsement opportunities referenced above) and to negotiate a professional sports contract on the athlete’s behalf. Under this right, the athlete shall not be deemed a professional, hence ineligible for college sports, unless the athlete signs or verbally commits to an enforceable contract with, or receives money from, a professional team. An athlete who declares his or her eligibility for a professional draft can be drafted, yet remain

199. D. LOPIANO ET AL., RIGHTS OF COLLEGE ATHLETES 6 (2015), https://drakegroup-blog.files.wordpress.com/2015/06/athletesrights_final.pdf. Ironically, the NCAA did its best to abandon “amateurism in 1973 by prohibiting multi-year scholarships and” replacing them with annually renewable scholarships that empowered “coach[es] to cancel an athlete’s [financial aid] at the end of one year for [almost] any reason, including . . . the need to make room for a more talented recruit.” ZIMBALIST & SACK, *supra* note 194, at 4.

200. *See* D. LOPIANO ET AL., COMPENSATION OF COLLEGE ATHLETES INCLUDING REVENUES FROM COMMERCIAL USE OF THEIR NAMES, LIKENESSES, AND IMAGES 5 (2015), <https://drakegroup-blog.files.wordpress.com/2015/03/tdg-position-paper-name-image-likeness-final1.pdf>.

201. *See id.* at 3.

202. *Id.* at 9.

eligible for college sports provided the athlete does not sign or verbally commit to an enforceable legal contract and informs the institution and the NCAA of his or her intent to return to college within thirty days after the draft date;²⁰³

6. The right to transfer from one institution to another under the same rules as non-athlete students and be eligible to compete immediately at the new institution, provided the athlete is in good academic standing at the original institution and no evidence exists of “poaching” by the new institution.²⁰⁴

Adoption of the above proposals, either voluntarily by the NCAA or as a result of federal legislation, would go a long way toward harmonizing sport with higher education. These measures would modernize amateurism, thereby preserving a beloved American tradition of athletic skill demonstrated by full-time, legitimate university students, while honoring the athletes’ contributions to their institutions by better meeting their financial needs.

VI. CONCLUSION

The NCAA’s insistence on amateurism for athletes, while coaches and administrators reap the college sports industry’s bountiful harvest has left amateurism a “cynical hoax[]” and a “legalistic confection[]” in Taylor Branch’s florid prose.²⁰⁵ But it need not be so. The proposals offered here would strengthen the bond between sport and higher education, while also honoring athletes’ contributions to institutional wealth and visibility and enabling them to complete their educations in modest material comfort. Otherwise, the growing wealth gap between the college sports industry and its primary workers is likely to validate the employment model, which would sever any meaningful connection between “college” and “sports” for athletes and institutions alike.

203. *Id.* at 9–10; see also LOPIANO ET AL., *supra* note 199, at 4. Only the thirty-day right of return is not part of the Drake Group’s position on this subject.

204. See LOPIANO ET AL., *supra* note 199, at 2–4.

205. Branch, *supra* note 10.