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## The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular

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## The Concept of Amateurism: How the Term Became Part of the College Sport Vernacular

Professor Robert J. Romano, Esq.



Robert J. Romano

## THE CONCEPT OF AMATEURISM: HOW THE TERM BECAME PART OF THE COLLEGE SPORT VERNACULAR

1 U.N.H. Sports L. Rev. 29 (2022)

**ABSTRACT.** “How do you define the term amateurism?” is a question I frequently ask my students. Typical answers: “Non-professionals”, “Players who aren’t as good as professionals”, with the most frequent reply being, “Athletes who do not get paid”. For most of the 20th century, that is exactly what being termed an ‘amateur athlete’ meant for ‘non-professionals’ competing in either international or college sponsored sporting events – participation without compensation.

But where did this interpretation originate? The word amateur derives from the Latin word, *amator* or lover.<sup>1</sup> The French derivation means ‘lover of’ and in all practicality means a person who does something because he or she loves doing it.<sup>2</sup> It would be logical, therefore, to believe that an ‘amateur athlete’ would then be someone who devotes his or her talents and skills for the love of sport. But how did this concept develop into an ideology which prescribes that ‘amateurs’ should not be financially rewarded for their dedication to their trade? And most importantly, why has this interpretation been allowed to permeate into the sporting vernacular for upwards of a century and a half to the financial detriment of the athletes who compete at the so-called ‘amateur’ level?

This article provides a historical overview of how, over the last 100 years or so, the National Collegiate Athletic Association (NCAA) have consistently defined, redefined, and redefined again the terms ‘amateur’ and ‘amateurism’ in ways that have allowed them, the governing body, to profit substantially off their athletes’ skills and talents – commercially, financially, and otherwise. It will then explore how the concepts have been weakened by recent litigation involving the NCAA (O’Bannon and Alston), together with state-passed NIL laws, which are changing the narrative on how amateur student-athletes can and should be compensated for competing at the college level.

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<sup>1</sup> WORD SENSE DICTIONARY, <https://www.wordsense.eu/amator> (last visited July 23, 2022) [<https://perma.cc/W557-EWHS>].

<sup>2</sup> ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/amateur> (last visited July 27, 2022) [<https://perma.cc/QE6F-BDPY>].

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## I. THE ORIGINS OF THE CONCEPT OF AMATEURISM

The Ancient Greek Olympic Games (776 B.C. – 393 A.D.) are often falsely credited with creating this idea of amateurism as sporting competitions without financial reward.<sup>3</sup> However, during the time of the Greek Games, although winning did not necessarily provide a monetary prize, an athlete did receive financial and other rewards upon returning home to his city-state.<sup>4</sup> An event winner could be awarded upwards of 500 drachmae for his success at Mount Olympus, an amount which equaled roughly three years wages for a common laborer.<sup>5</sup> As Dr. Neil Faulkner stated in his work, *A Visitor's Guide to the Ancient Olympic Games*:

Ancient Olympic champions invariably became very rich men. They may have left Olympia with only an olive crown, but they could expect ample reward for their efforts at home, and they could earn generous prizes thereafter by appearing at any of some hundreds of local sports festivals.<sup>6</sup>

Interestingly, “no reference to amateur athletes and no evidence that the concept of amateurism was even known in antiquity... [T]he truth of the matter is that ‘amateur’ is one thing for which the ancient Greeks never had a word.”<sup>7</sup>

The first use of the term ‘amateur’ in our modern vernacular occurred around the year 1786, when an author for the publication entitled *European Magazine* wrote, “Dr. Percival writes on philosophical subjects as an amateur rather than as a master.”<sup>8</sup> Yet nowhere was it mentioned that Dr. Percival’s skills, although less than that of a master, should not be financially rewarded.<sup>9</sup>

By the mid to late 1800s, sport, being predominately an indulgence of the upper and middle classes, routinely allowed for the exclusion of the lower-tiered, working

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<sup>3</sup> Brian Cronin, *Were the Ancient Olympic Greek Athletes Really Amateurs?*, LOS ANGELES TIMES (Mar. 21, 2012), <https://www.latimes.com/sports/la-xpm-2012-mar-21-la-sp-sn-were-the-ancient-greek-olympic-athletes-really-amateurs-20120321-story.html> [<https://perma.cc/7AL3-Q764>].

<sup>4</sup> *Id.*

<sup>5</sup> James G. Thompson, *The Intrusion of Corruption into Athletics: An Age-Old Problem*, 38 THE J. OF GEN. EDUC., 144, 146 (1986) (discusses compensation of Ancient Olympic Games).

<sup>6</sup> Neil Faulkner, *Olympic Myth #1 – The Amateur Ideal*, YALE BOOKS (Apr. 23, 2012) <https://yalebooksblog.co.uk/2012/04/23/olympic-myth-1-the-amateur-ideal-author-article-by-neil-faulkner> [<https://perma.cc/LCT2-L3KA>].

<sup>7</sup> *Id.*

<sup>8</sup> L.A. Jennings, *For the Love of Money: A History of Amateurism in the Olympic Games*, VICE (June 7, 2016), [https://www.vice.com/en\\_us/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games](https://www.vice.com/en_us/article/gvaqdm/for-love-or-for-money-a-history-of-amateurism-in-the-olympic-games) [<https://perma.cc/R37H-YD82>].

<sup>9</sup> Firstpost, *'The Amateurs Will Beat the Professionals': Mike Tyson Ridicules Idea to Have Pro-Boxing in Olympics*, WWW.FIRSTPOST.COM, <https://www.firstpost.com/sports/the-amateurs-will-beat-the-professionals-mike-tyson-ridicules-move-to-have-pro-boxing-in-olympics-2800460.html> (quoting former world-champion boxer Mike Tyson, who told reporters, "It's ridiculous, it's foolish, and some of the pro fighters are going to get beaten by the amateurs.") [<https://perma.cc/G4FA-MA33>].

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class, and people of color.<sup>10</sup> This was because the notion of ‘classism’ was prevalent and was used as a way to prevent the ‘common folk’ from mixing with the elite and more sophisticated, but also because many believed that the lower classes had no conception of sportsmanship and fair play.<sup>11</sup>

It was during the time when ‘learned individuals’ such as Dr. William Penny Brookes<sup>12</sup> were extolling the virtues of sporting men who were not compensated for their athletic performance that this concept of ‘amateurism’ was created so that the “lower orders and working people, together with people of color, would be excluded from the play of the leisure class.”<sup>13</sup> Therefore, the genesis of amateurism was built around elitism and exclusion in that “those who performed manual labor for pay, whether tied to sport or not, were considered professionals and therefore barred from participating in various (amateur) competitions.”<sup>14</sup> Another way to say that is if a person did not have an independent source of income outside of actually working, that is, if they were not independently wealthy, that individual would be excluded from the amateur category.<sup>15</sup>

This original concept of amateurism came to be known as the ‘mechanics clause’ since a person would be denied amateur status if he or she were by trade or employment a mechanic, artisan, or laborer.<sup>16</sup> In all actuality this ‘mechanics clause’ was nothing more than a means of control and exclusion, disguised as a ‘moral imperative for sport’, allowing the wealthy to regulate working and lower-class people behind the screen of rhetorical morality.<sup>17</sup>

## II. THE NCAA’S VERSION OF AMATEURISM

When Mark Emmert, President of the NCAA, was interviewed by Frontline in February 2011, reporter Lowell Bergman didn’t pull any punches when he presented, quite frankly, the new head of the country’s largest intercollegiate sport

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<sup>10</sup> LIBRARY OF CONGRESS DIGITAL COLLECTION, <https://www.loc.gov/collections/america-at-work-and-leisure-1894-to-1915/articles-and-essays/america-at-leisure> (last visited July 23, 2022) [<https://perma.cc/3CSZ-KLRW>].

<sup>11</sup> See generally Steven A. Riess, *From Pitch to Putt: Sport and Class in Anglo-American Sport*, 21 J. OF SPORT HIST. 138, 140 (Summer 1994).

<sup>12</sup> Ben Johnson, *Much Wenlock*, HISTORIC UK, [https://www.historic-uk.com/HistoryMagazine/DestinationsUK/MuchWenlock/#:~:text=Much%20Wenlock%20is%20home%20to,Olympic%20Committee\)%20visited%20the%20Games](https://www.historic-uk.com/HistoryMagazine/DestinationsUK/MuchWenlock/#:~:text=Much%20Wenlock%20is%20home%20to,Olympic%20Committee)%20visited%20the%20Games) (last visited Aug. 4, 2022) (citing that Dr. William Penny Brookes was the founder of the Much Wenlock Olympian Games) [<https://perma.cc/GD2W-8CYP>].

<sup>13</sup> L.A. Jennings, *supra* note 8.

<sup>14</sup> JULES BOYKOFF, *POWER GAMES, A POLITICAL HIST. OF THE OLYMPICS* 20 (2016).

<sup>15</sup> ALAN GUTTMAN, *THE OLYMPICS: A HISTORY OF THE MODERN GAMES* 12-13 (2002).

<sup>16</sup> D.C. YOUNG, *THE MODERN OLYMPICS: A STRUGGLE FOR REVIVAL* 40 (1996).

<sup>17</sup> Boykoff, *supra* note 14, at 20.

governing body with a series of issues and concerns surrounding the commercialization of college athletics:

You don't see the contradiction that many have pointed out that when we're watching March Madness, when we're watching these games, you may have a coach who's being paid six figures, maybe seven figures in some cases. Everyone is being paid – the athletic director, everyone you can see on the screen, and many people you can't – are being paid as part of this, but the students aren't. The athletes who are actually performing are not paid.”<sup>18</sup>

Unphased, the newly appointed and polished administrator's reply was just as direct: “No, I don't find that contradictory at all. Quite the contrary. I think what would be utterly unacceptable is, in fact, to convert students into employees. The point of March Madness, of the Men's Basketball Tournament, is the fact that it's being played by students. We don't pay our student-athletes.”<sup>19</sup> He then commented that, “And our student-athletes remain student-athletes. And they are preprofessional. They are not professional in anything.”<sup>20</sup>

Not surprisingly, Mr. Emmert's responses were in line with what the NCAA has been selling to the American public since the early part of the twentieth century: amateur college athletes are those that play sport purely for the enjoyment, without being paid, as a way to develop his or her mental, physical, moral, and social skills. In other words – participation without compensation. But is it true that athletes were never compensated to compete in intercollegiate sports?

From its beginning, college athletics in the United States had a complex relationship when it came to the concept of amateurism and how it intersects with commercialization and the role that revenue plays within college sports. In what many considered the first intercollegiate sporting event, a rowing regatta between Yale and Harvard at Lake Winnepesaukee, New Hampshire in 1852, the Elkins Railroad Line sponsored the event while offering the competitors an all-expense paid vacation with lavish prizes – along with unlimited alcohol.<sup>21</sup>

In truth, the ‘amateur athletes’ who competed in sports at the advent of intercollegiate competition did receive various forms of compensation for their efforts. As early as the 1870s, Syracuse University's rowing team, with the help of a professional, raced and won \$400 in prize money.<sup>22</sup> While at another intercollegiate rowing regatta taking place at Lake Saratoga, New York, the winning crew team there was awarded a silver goblet worth an estimated \$500 (The average laborer's

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<sup>18</sup> Interview by Dateline with Mark Emmert, President, NCAA (Feb. 14, 2011).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Andrew Zimbalist, UNPAID PROFESSIONALS: COMMERCIALIZATION AND CONFLICT IN BIG-TIME COLLEGE SPORTS 7 (1999).

<sup>22</sup> William Galpin, Syracuse University Press, 1:151-15 (1952).

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income during this time was approximately \$300 annually.).<sup>23</sup>

Crew may have been in the lead initially, but football and baseball soon left rowing (crew) in their wakes when it came to the securing various forms of athlete compensation during the late 1800s. Three of the most noteworthy forms of athlete compensation, in addition to prize money, were: i) an allowance from the schools for professional training which including paying coaches, ii) the creation of the athlete 'training table' for team building and better nutrition, and iii) the fashioning of dorms to house athletes.<sup>24</sup> As the captain of the 1890s Princeton football team informed a prospective recruit, "You will find everything already provided for you in the way of room, food, etc., which of course . . . will be of no personal expense to you."<sup>25</sup> These costs were in no way insignificant, with the football training table in 1890s costing the Princeton University football team "over \$2,500 out of a budget of \$16,000."<sup>26</sup>

But the athletes were not the only ones to benefit from the interest surrounding college sports. Colleges and universities across the United States leveraged sport to attract attention to their school, resulting in increased revenue. This is evidenced by the fact that the 1893 Thanksgiving Day football game between Princeton and Yale attracted over 40,000 paying spectators,<sup>27</sup> generating \$26,000 in revenue,<sup>28</sup> with the Harvard and Yale game a year later, generating over \$119,000.<sup>29</sup>

By the end of the nineteenth century, a rising concern grew within the halls of academia for the need to control the economic excesses of intercollegiate athletics. President Charles Eliot of Harvard University, concerned about the impact commercialization was having on intercollegiate athletics, stated, "lofty gate receipts from college athletics has turned amateur contests into major commercial spectacles."<sup>30</sup> The same year, President Francis Walker of MIT bemoaned the fact

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<sup>23</sup> RONALD A. SMITH, *THE MYTH OF THE AMATEUR: A HISTORY OF COLLEGE ATHLETIC SCHOLARSHIPS*, UNIVERSITY OF TEXAS PRESS 45 (2022).

<sup>24</sup> *Id.*

<sup>25</sup> Garrett Cochran, *Princeton Football Captain, to Francis Lane*, Princeton University Archives, (Aug. 20, 1896).

<sup>26</sup> Princeton Football Financial Statements (1882-1893) (on file with Yale University Archives).

<sup>27</sup> ARTHUR A. FLEISHER III, ET AL., *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* 45 (1992).

<sup>28</sup> Kavitha A. Davidson, *The Ivy League Origins of Thanksgiving Football*, BLOOMBERG VIEW (Nov. 26, 2015), <https://www.bloomberg.com/opinion/articles/2015-11-26/the-ivy-league-origins-of-thanksgiving-football> (showing that \$313,297 in 2014 dollars as determined by the GDP deflator) [<https://perma.cc/R3JM-LJPZ>]; See generally Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar Amount – 1774 to Present*, MEASURING WORTH (last visited July 27, 2022), <https://www.measuringworth.com/calculators/uscompare> [<https://perma.cc/3RTD-GL5V>].

<sup>29</sup> Sean Gregory, *A Cut for College Athletes*, TIME MAGAZINE, Sept. 16, 2013, at 36-42.

<sup>30</sup> Rodney K. Smith, *The Nat'l Collegiate Athletic Ass'n's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988-989 (1987).

that intercollegiate athletics had lost its academic mooring and opined that ‘if the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics.’<sup>31</sup> Alongside the commercialization of college athletics was also the concerns revolving around the safety of student athletes after the *Chicago Tribune* in 1904 reported that college football witnessed the death of eighteen students and serious injuries to almost two-hundred more.<sup>32</sup>

With this convergence of attention now being placed on intercollegiate athletics, President Theodore Roosevelt called on university leaders to review interscholastic athletic rules and safety regulations.<sup>33</sup> In December 1905, the Chancellor of New York University, Henry MacCracken, heeding the call of the President, organized a meeting of thirteen institutions.<sup>34</sup> This, and a series of other meetings, led to a reform of intercollegiate athletics and the formation on March 31, 1906, of the Intercollegiate Athletic Association of the United States (IAAUS).<sup>35</sup> The IAAUS’ main objective was to regulate collegiate sports to ensure player safety. Four years later, in 1910, the IAAUS was renamed the National Collegiate Athletic Association (NCAA).<sup>36</sup>

At its inception, the NCAA, organized primarily as a standard-setting body, did not have the enforcement and revenue-producing responsibilities that it currently has control over today. Its primary function, as was its predecessor, the IAAUS, was that of a regulatory body whose purpose was to develop and standardize the rules of the various intercollegiate sports for the safety of their participants.<sup>37</sup> With the changeover, however, the ‘new’ NCAA was granted the power to establish amateurism as a core foundation for college athletics. Through its new-found authority, the NCAA designated an amateur collegiate athlete as someone that played sport purely for enjoyment and as a way to develop his or her mental,

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<sup>31</sup> Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Athletics*, 20 CAP. U. L. REV. 567, 569-570 (1991).

<sup>32</sup> Christopher Klein, *How Teddy Roosevelt Saved Football*, HISTORY.COM (July 21, 2019), <https://www.history.com/news/how-teddy-roosevelt-saved-football> [<https://perma.cc/G28Q-B4FD>].

<sup>33</sup> Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASHINGTON POST (May 29, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/> [<https://perma.cc/4D89-3FX5>].

<sup>34</sup> NCAA HISTORY, [ncaa.org/sports/2021/5/4/history.aspx#:~:text=The%20NCAA%2C%20a%20member-led,reputation%20as%20a%20brutal%20sport](http://ncaa.org/sports/2021/5/4/history.aspx#:~:text=The%20NCAA%2C%20a%20member-led,reputation%20as%20a%20brutal%20sport) (last visited July 23, 2022) [<https://perma.cc/5VBG-VZCF>].

<sup>35</sup> Palmer E. Pierce, *The Int'l Athletic Ass'n of the U.S.: Its Origin, Growth and Function*, in 1907 PROC., *supra* note 2, at 28 (reflecting on the history of the IAAUS).

<sup>36</sup> W. Burlette Carter, *Responding to the Perversion of In Loco Parentis: Using a Nonprofit Org. to Support Student-Athletes*, 35 IND. L. REV. 851, 874 (2002).

<sup>37</sup> NCAA HISTORY, *supra* note 34.

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physical, moral, and social skills,<sup>38</sup> admonishing that “no student shall represent a college or university in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money or financial assistance.”<sup>39</sup>

The newly formed NCAA capacity to curb the commercialization, and to establish the concept of amateurism as a core principle of college sports, however, was less than successful. According to a Carnegie Foundation Report published in 1929, college athletics was still “sodden with the commercial and the material and the vested interests that these forces have created.”<sup>40</sup> As stated by Howard Savage, when commenting on the *Carnegie Report in American College Athletics*, “schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California’s athletic revenue was over \$480,000, while Harvard’s football revenue alone came in at \$429,000.”<sup>41</sup> College football, he continued, was “not a student’s game”; it was an “organized commercial enterprise” featuring athletes with “years of training,” “professional coaches,” and competitions that were “highly profitable.”<sup>42</sup>

During the first half of the twentieth century, schools carried out whatever measures necessary to monetize their individual athletic departments with the objective of attracting talented athletes to their campuses.<sup>43</sup> Desiring the best players, the commercialization of college sports extended to the market for athletes, with many colleges and universities actively and openly participating in a system “under which boys are offered pecuniary and other inducements to enter a particular college.”<sup>44</sup> In 1939, it was alleged that the freshman at the University of Pittsburgh would not participate in practice because the upperclassmen were reportedly ‘earning more money’.<sup>45</sup> And in the 1940s, University of Washington halfback, Hugh McElhenny, allegedly became the first college player to ever take a cut in salary by playing professional football<sup>46</sup> when he was quoted saying “A wealthy guy puts big bucks under my pillow every time I score a touchdown. Hell, I

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<sup>38</sup> ALLEN L. SACK AND ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH* PRAEGAR 35 (1998).

<sup>39</sup> Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, Section 3 (1906).

<sup>40</sup> HOWARD J. SAVAGE, *AMERICAN COLLEGE ATHLETICS* 23 (1929).

<sup>41</sup> *Id.* at 87.

<sup>42</sup> *Id.* at viii.

<sup>43</sup> EDUCATION ENCYCLOPEDIA, <https://education.stateuniversity.com/pages/1846/College-Athletics-HISTORY-ATHLETICS-IN-U-S-COLLEGES-UNIVERSITIES.html> (last visited May 13, 2022) [https://perma.cc/XE5X-YRHN].

<sup>44</sup> Savage, *supra* note 40, at xiv-xv.

<sup>45</sup> Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN L. & POL’Y REV. 181, 190 (2017).

<sup>46</sup> Zimbalist, *supra* note 21, at 22–23.

can't afford to graduate."<sup>47</sup>

This free market for talent through athletic subsidies transitioned in the 1930s into what has come to be known today as 'grant-in-aid' or 'athletic scholarships'.<sup>48</sup> This concept of an 'athletic-scholarship' was developed by schools lacking the facilities and prestige to compete for recruits against the established powerhouses in the Ivy League and Big Ten Conference.<sup>49</sup> Lower-tiered, primarily southern schools that could not attract athletes based upon their academic reputation would offer recruits a 'free education' in return for their participation in athletics at their institution.<sup>50</sup>

Needing a form of subsidy to level the playing field, in 1935 the Southeastern Conference, a year after the NCAA called upon its member institutions to oppose all subsidies to athletes (loans, scholarships, remission of fees or employment of athletes), and only two weeks after the National Association of State Universities banned athletic scholarships, voted 11-1 to openly accept athletic payments to include tuition, fees, room, board, books, and laundry.<sup>51</sup> The value of the scholarship was approximately \$760.00 per year broken down as follows: \$200 for tuition, \$355 for board, \$90 for room, \$44 for fees, \$28 for books, and \$45 for laundry.<sup>52</sup>

These concepts of athletic subsidies and scholarships went into overdrive after the end of World War II when thousands upon thousands of soldiers, sailors, and Marines returned from overseas. These war-veterans represented potential college athletes and what followed was a "recruiting 'free-for-all', as athletic programs looking to insert themselves into the scene of top-flight college athletics began offering whatever financial inducements they could to incorporate this new talent into their programs."<sup>53</sup> This 'free-for-all' fight for talent resulted in the NCAA's adoption of the so-called Sanity Code in 1948.<sup>54</sup>

This Sanity Code, while still reinstating the NCAA's opposition to "pay in any form", did officially approve of the paying of an athlete's tuition by member institutions.<sup>55</sup> The Sanity Code also created an enforcement mechanism for the

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<sup>47</sup> Crabb, *supra* note 45, at 211.

<sup>48</sup> William C. Rhoden, *Sports of The Times; The System of Awarding Scholarships to Athletes Is Worth Saving*, N.Y. TIMES, <https://www.nytimes.com/2003/03/08/sports/sports-times-system-awarding-scholarships-athletes-worth-saving.html> [<https://perma.cc/JMB3-6KWJ>].

<sup>49</sup> WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 68 (1997).

<sup>50</sup> *Id.*

<sup>51</sup> Chicago Daily Tribune, 14 DECEMBER 1935 (Vanderbilt was the only SEC school that opposed athletic scholarships with Sewanee abstaining).

<sup>52</sup> Athletic Scholarships 1939-1940, Tulane University Archives.

<sup>53</sup> Neil Gibson, *NCAA Scholarships Restrictions as Anticompetitive Measures*, 3 WM & MARY BUS. L. REV. 203, 213 (2012) (effect of war veterans as potential recruits).

<sup>54</sup> *Colleges Adopt the 'Sanity Code' To Govern Sports*, N.Y. TIMES, Jan. 11, 1948 [hereinafter *Colleges Adopt the 'Sanity Code'*].

<sup>55</sup> Sports Conflict Institute, *The Sanity Code*, SPORTSCONFLICT.ORG, <https://sportsconflict.org/the-sanity-code> (last visited July 28, 2022) [<https://perma.cc/PKB6-LNDC>].

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NCAA which provided for the “suspension or expulsion” of “proven offenders.”<sup>56</sup> To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated.<sup>57</sup> To others, the code marked “the beginning of the NCAA behaving as an effective cartel,” by enabling its member schools to set and enforce “rules that limit the price they have to pay for their inputs (mainly the ‘student-athletes’).”<sup>58</sup>

During the 1950s, the NCAA significantly increased its scope as both a rule-making and regulatory body through the actions of newly appointed Executive Director, Walter Byers. In the early part of this decade Byers and the NCAA unilaterally granted itself broad sanctioning authority, while also creating the now commonly referred to expression of “student-athlete” – emphasizing the fact that a college athlete was a student first before being an athlete. Interestingly, and some would argue manipulatively, referring to the athletes as ‘student-athletes’ discourages colleges and universities from treating them as professionals by providing compensation beyond the NCAA regulated level, thus solidifying its concept of the college athlete as an ‘amateur’.<sup>59</sup>

By 1956, in compounding its stance that all ‘student-athletes’ are amateurs, and as an effort to respond to these aforementioned “illegal recruiting tactics” of the southern colleges and universities, the NCAA created what was a previously unknown concept, the four-year athletic scholarship.<sup>60</sup> This four-year athletic scholarship covered the cost of room and board, tuition, fees, books, and a \$15 a month cash allotment during the academic year.<sup>61</sup> The NCAA conceded that this was a form of payment but continued to call college athletes amateurs by reasoning “if a player received only expenses, even though it was more than what other students received, he or she was not being paid to perform.”<sup>62</sup>

However, the life span of the four-year athletic scholarship was short and a plan to end the practice began in the early 1960s.<sup>63</sup> Initially, the reason to end the practice was based upon reducing costs and not about a student-athlete who quit a team but continued to retain his or her guaranteed four-year scholarship. Sentiment began to shift as the University of Oklahoma's Earl Sneed publicly expressed his frustration with players who quit athletics but kept their scholarships.<sup>64</sup> Sneed

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<sup>56</sup> Colleges Adopt the 'Sanity Code', *supra* note 54.

<sup>57</sup> Zimbalist, *supra* note 21, at 10.

<sup>58</sup> *Id.*

<sup>59</sup> Liz Clarke, *The NCAA Coined the Term ‘Student Athlete’ in the 1950s. Its Time Might Be Up.*, WASHINGTON POST (Oct. 28 2021), <https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s> [<https://perma.cc/NMU7-FBC8>].

<sup>60</sup> Gibson, *supra* note 53, at 220.

<sup>61</sup> Byers, *supra* note 49, at 387-92.

<sup>62</sup> Gibson, *supra* note 53, at 219.

<sup>63</sup> Ray Yasser, *The Case for Reviewing the Four-Year Deal*, 86 TULANE LAW REV. 987, 996.

<sup>64</sup> *Id.* at 995 (reasoning for end of scholarship).

contended that the four-year athletic scholarship made it difficult for coaches because they were only allotted a certain number of scholarships per year.<sup>65</sup> For example, players who quit still held a percentage of a team's allotted scholarships; thus it made it difficult for a coach to field a competitive team. The NCAA initially resisted pressures from college coaches and athletic directors and maintained its position that a scholarship was for a 'scholar', a student first, and not for athletic performance.<sup>66</sup>

It did not take long, however, for the NCAA to cave to the will of its membership and in 1973, it eliminated the four-year athletic scholarships altogether, mandating that schools could now only give scholarships on a one-year renewable basis.<sup>67</sup> The NCAA explained the move as a response to the costs associated with athletes who would accept scholarships but fail to compete: "Member schools were uninterested in spending money on athletes in the form of multi-year scholarships, only to have those athletes quit their teams but keep the guaranteed education."<sup>68</sup> In 2012, the NCAA modified its position on the one-year scholarships and now allows for, but did not mandate, members to offer multi-year scholarships to student-athletes.<sup>69</sup>

From the 1970s forward, the NCAA, with the power it gained (or more accurately, seized) during the 1950s under then Executive Director, Walter Byers, and with the support of its member institutions, has initiated and enacted a series of rules to further solidify its position regarding the concept of 'amateurism' and that a 'student-athlete' is not entitled to compensation for his or her athletic skills above that of an athletic scholarship.<sup>70</sup>

Once such rule requires that any prospective student-athletes enrolling for the first time at a Division I or II school must register with the NCAA Eligibility Center and receive an 'amateurism certification' before being allowed to compete. which includes transfers from junior colleges, NAIA, international or Division III schools.<sup>71</sup> By registering, future college athletes agree that they are amateurs and will only compete as an amateur in accordance with NCAA Section 2.9, The Principle of Amateurism, which states:

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,

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<sup>65</sup> *Id.* at 996.

<sup>66</sup> *Id.*

<sup>67</sup> James V. Kock and William M. Leonard, *The NCAA: A Socio-Economic Analysis*, 37 AM. J. OF ECON. & SOC. 225, 226-227 (1997).

<sup>68</sup> *Id.* at 228.

<sup>69</sup> Associated Press, *NCAA Changes Scholarship Rules*, NEW YORK TIMES (Oct. 28, 2011).

<sup>70</sup> The word 'amateur' tends to have a very circular definition when applied by the NCAA. As Patrick Hruby has noted, "College sports are amateur because otherwise they wouldn't be college sports, which are amateur." Patrick Hruby, *Court of Illusion*, SPORTS ON EARTH (Oct. 10, 2013).

<sup>71</sup> NCAA Student Athletes, *Amateurism*, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> (last visited July 23, 2022) [<https://perma.cc/9YTX-47Y5>].

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and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>72</sup>

Additionally, Article 12 of the NCAA Division I manual governs rules related to an athlete's continued eligibility as an amateur,<sup>73</sup> with Section 12.1.2 detailing how a student-athlete would lose his or her 'amateur status':

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) uses his or her athletic skill (directly or indirectly) for pay in any form in that sport; (b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletic skill or participation, except as permitted by NCAA rules and regulations; (e) competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) after initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (g) enters into an agreement with an agent.<sup>74</sup>

Since according to Section 12.1.2, an athlete will lose 'amateur status' if he or she uses his or her athletic skill for **pay in any form** and the fact that an athletic scholarship is a form of payment, the NCAA implemented, for the benefit of its member institutions, Section 12.01.4 (emphasis added). This section provides an exception for payments provided by member schools, reasoning that "grant-in-aid administered by an educational institution **is not considered to be pay** or the promise of pay for athletic skill, provided it does not exceed the financial aid limitations set by the association's membership (emphasis added)."<sup>75</sup>

The NCAA, through the promulgation (and manipulation) of various rules and by-laws, together with the utilization and promotion of terms such as 'amateur', 'amateurism', and 'student-athlete', has unilaterally decreed that anyone who participates in athletics at the college level is not entitled to compensation above that of a student-athlete scholarship offered by their institution.<sup>76</sup> The NCAA sells this to the public by proclaiming that amateur competition is a bedrock principle of college athletics and that maintaining the concept of 'amateurism' is crucial in preserving an academic environment in which acquiring a quality education is the

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<sup>72</sup> NCAA Division I Manual, Constitution Art. 2.9.

<sup>73</sup> The NCAA Division I Manual is 420 pages in length and a student-athlete, upon accepting a Division I scholarship, certifies that he/she has read and understands the content of said manual. Albeit an athlete cannot retain the services of an attorney to assist him/her with review or understanding the content of said manual – to do so would be considered an NCAA violation. See *generally* NCAA Division 1 Manual, *supra* note 72.

<sup>74</sup> *Id.* at 12.1.2.

<sup>75</sup> NCAA Division I Manual, Constitution Art. 12.01.4.

<sup>76</sup> *Id.* at 12.02.14, 12.2.5, 12.01.1.

first priority.<sup>77</sup> The NCAA also maintains that through this college model, the young men and women competing are students first, athletes second and that although “amateurism” prevents athletes from claiming a salary, they still may receive a full scholarship for their abilities.<sup>78</sup>

This is not to say that the NCAA has not at times revamped its rules and by-laws when it comes to concept of the student-athlete and amateurism. In 1974, the NCAA modified its rules to allow a paid professional in one sport – to compete on an amateur basis in another.<sup>79</sup> And again, some forty years after implementing the one-year renewable scholarship, the NCAA announced that it would permit (not mandate) “athletic conferences to allow their member schools to increase scholarships up to the full cost of attendance.”<sup>80</sup> The latter rule change being more of a calculated move by the NCAA and its member institutions because of the federal litigation surrounding former UCLA All-American basketball player, Ed O’Bannon.

### III. CHALLENGING AMATEURISM AND THE FUTURE OF THE ‘AMATEUR ATHLETES’ IN THE NCAA

#### A. *Ed O’Bannon v. The NCAA: The Federal District and Appeal Courts’ Rulings Regarding the NCAA’s Concept of Amateurism*

One of the first noteworthy legal challenges to the NCAA’s longstanding concepts of ‘amateurism’ and the ‘amateur athlete’ was in 2009 when former UCLA All-American basketball player, College Player of the Year, and 1995 NCAA Men’s College Basketball Champion, Ed O’Bannon, sued the NCAA and EA Sports.<sup>81</sup>

O’Bannon’s lawsuit came about after he became aware, when a friend’s son recognized him from a video game, that the game’s number 31 ‘player avatar’ representing his 1995 UCLA men’s basketball team not only resembled him, but also shared the same jersey number, was similar in skin tone, height and weight, and played the same position.<sup>82</sup> Believing the NCAA engaged in illegal and exploitative practices through its selling of his image and likeness to EA Sports, the game’s developer, O’Bannon filed a federal antitrust and right of publicity lawsuit against both the NCAA and the video game company.<sup>83</sup> As detailed in his complaint, O’Bannon alleged that the NCAA’s licensing of his image to EA Sports was unlawful

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<sup>77</sup> NCAA, <https://www.ncaa.org> (last visited July 23, 2022) [<https://perma.cc/CGM9-6GJH>].

<sup>78</sup> *Id.*

<sup>79</sup> NCAA v Alston, 141 S. Ct. 2141, 2149 (2021).

<sup>80</sup> NCAA AMATEURISM, <https://www.ncaa.org/sports/2014/10/6/amateurism.aspx> (last visited August 1, 2022) [<https://perma.cc/W336-DMSE>].

<sup>81</sup> See generally O’Bannon v. NCAA, 2010 U.S. Dist. LEXIS 19170 (N.D. Cal. 2009) (No. CV 09-3329) [hereinafter referred to as O’Bannon Complaint].

<sup>82</sup> O’Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

<sup>83</sup> O’Bannon, 802 F.3d 1049 at 1055-56.

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since he neither gave his consent, nor did he share in any of the profits that both the NCAA and EA Sports secured from the sales of the video game.<sup>84</sup>

The NCAA defended itself against the federal antitrust claims by arguing that its long-standing definition of amateurism, supported by the 1984 U.S. Supreme Court case of *NCAA vs. Board of Regents*, shielded it from any liability,<sup>85</sup> and that the strict price cap it places on a college player's value (the cost of the student-athletes scholarship) is necessary to maintain competitive balance throughout its member institutions.<sup>86</sup> As for right of publicity claim, the NCAA asserted that Mr. O'Bannon, and those similarly situated, waived any right to assert this cause of action since its bylaws, of which all NCAA student-athletes signed off on, prohibit them from receiving compensation from the sale of their name, image, or likeness.<sup>87</sup>

In previous litigation concerning these legal issues, when the NCAA mentioned 'amateurism' or the 'amateur athlete', that predictably ended any arguments about student-athlete compensation. But in *O'Bannon*, the District Court announced that the NCAA now needed to prove how its current version of amateurism "actually contributes to the integration of education and athletics,"<sup>88</sup> stating that "It [the NCAA] cannot just tautologically argue that not paying the players is necessary to preserve the principle that the players are unpaid."<sup>89</sup>

Not persuaded by any of its arguments, the District Court rejected the NCAA's 'longstanding commitment to amateurism' as an acceptable defense against antitrust liability, finding instead that the NCAA's definition of amateurism "is 'malleable,' 'changing frequently over time' and in 'significant and contradictory ways.'"<sup>90</sup> The District Court, on August 8, 2014, then issued an injunction against the NCAA and ordered it to permit its member institutions to allot "up to \$5,000 in deferred compensation" for the players' names, images, and likenesses, holding the funds in trust until they leave school.<sup>91</sup>

The U.S. Appeals Court for the Ninth Circuit agreed, in part, with the District Court, finding, as per its September 30, 2015 decision, that the NCAA is not above

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<sup>84</sup> See generally *O'Bannon* Complaint.

<sup>85</sup> See generally *NCAA v. Bd. of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) [hereinafter *Bd. of Regents*].

<sup>86</sup> *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

<sup>87</sup> The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs. Student-Athlete Statement: You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs. NCAA Bylaw 12.5.1.1.

<sup>88</sup> *O'Bannon*, 7 F. Supp. 3d at 975.

<sup>89</sup> *Id.* at 978.

<sup>90</sup> *O'Bannon*, 802 F.3d at 1058.

<sup>91</sup> *Id.* at 1061.

antitrust law and that courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules.<sup>92</sup> The U.S. Appeals Court continued, stating that, "In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market."<sup>93</sup>

However, regarding the District Court's order for the NCAA to permit its member institutions to allocate "up to \$5,000 in deferred compensation", the Appeals Court found that the "NCAA is only required to allow its schools to provide up to cost of attendance to their student-athletes. It does not require more."<sup>94</sup> And with that "It does not require more" statement, the Appeals Court reversed the District Court's ruling which allow student-athletes to be compensated up to \$5,000 upon leaving their college or university.<sup>95</sup>

While the O'Bannon Courts' decisions did not ultimately allow a student-athlete to be compensated for his or her name, image, or likeness or for what has been termed 'pay to play', nor did they result in the NCAA changing its position regarding 'amateurism' or the 'amateur athlete'.<sup>96</sup> What the decisions did do, however, was provide an important departure from prior federal court holdings that protected the NCAA from antitrust liability.<sup>97</sup> This departure will open up the door to future litigants and will allow them the right to argue that these concepts 'amateurism' and the 'amateur athlete' do indeed violate federal antitrust laws. In addition, and very significantly, what O'Bannon did was create a framework artfully and subtly for the subsequent state NIL laws that allow student-athletes to receive some form of compensation through the sale of their name, image, or likeness.

### ***B. The NCAA v. Alston – The U.S. Supreme Court's Ruling Concerning the NCAA's Concept of Amateurism***

The second noteworthy lawsuit testing the NCAA's longstanding concepts of 'amateurism' and the 'amateur athlete' is the U.S. Supreme Court case of *NCAA v. Alston*.<sup>98</sup> In 2014, current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball filed a class-action federal antitrust lawsuit against the NCAA and eleven Division I conferences challenging the "current, interconnected set of NCAA rules that limit the compensation that they

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<sup>92</sup> *Id.* at 1079.

<sup>93</sup> *Id.*; See also Marc Tracy and Ben Straus, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html> (ruling upheld a federal judge's finding last year that the NCAA was, in the panel's words, "not above the antitrust laws" and that its rules had been too restrictive in maintaining amateurism.) [<https://perma.cc/8TEH-FDYG>].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> O'Bannon, 802 F.3d at 1079.

<sup>97</sup> *Id.* at 1053.

<sup>98</sup> See generally *Alston*, 141 S. Ct. at 2149.

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may receive in exchange for their athletic services.”<sup>99</sup>

The NCAA, defending itself in yet another antitrust matter, again attempted to persuade the federal courts that the 1984 U.S. Supreme Court case of *NCAA v. Board of Regents*’ finding that “the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports,”<sup>100</sup> was applicable, arguing that the uniqueness of its product, the status of student-athletes as amateurs, requires antitrust deference if not total immunity.<sup>101</sup>

Not persuaded by its plea for antitrust protection, the U.S. Supreme Court, on June 21, 2021, in a unanimous decision, upheld the U.S. Court of Appeals for the Ninth Circuit’s ruling which found that the placing of limits on a student-athletes’ educational-related compensation by the NCAA was a violation of federal antitrust law, specifically Section 1 of the Sherman Act which prohibits any “contract, combination, or conspiracy in restraint of trade or commerce.”<sup>102</sup>

Writing on behalf of his colleagues, Justice Gorsuch stated that the Court’s decision was based on the fact that the business of college sports has changed considerably since the 1984 Board of Regents’ case and that over the decades the NCAA has become a sprawling enterprise consisting of approximately 1,100 colleges and universities.<sup>103</sup> Justice Gorsuch remarked that since the *Board of Regents* decision, the NCAA’s broadcasting rights fees to March Madness<sup>104</sup> have grown from \$16 million in 1984, to \$1.1 billion in 2016.<sup>105</sup> The Court also noted that the current broadcasting fees for the FBS College Football Playoff series are worth approximately \$470 million annually for the NCAA and its member institutions and that in addition to this amount, the Division I conferences earn substantial revenue from regular season games.<sup>106</sup> As an example, Justice Gorsuch highlighted that the Southeastern Conference alone “made more than \$409 million in revenues from television contracts in 2017, with its total conference revenues exceeding \$650

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<sup>99</sup> Alston, Opinion of the Court at 8; *See also* Alston, D. Ct. Op., at 1062, 1065, n. 5.

<sup>100</sup> *See generally* Bd. of Regents, 468 U.S. 85.

<sup>101</sup> Alston, Syllabus at 3; Alston, Opinion of the Court at 22.

<sup>102</sup> Sherman Antitrust Act, 15 U.S.C. § 1.

<sup>103</sup> Alston, Opinion of the Court at 21; *See also* Alston, D. Ct. Op., at 1063.

<sup>104</sup> On April 22, 2010, the National Collegiate Athletic Association (NCAA) reached a fourteen-year agreement, worth \$10.8 billion (approximately \$770 million annually), with CBS and Turner Broadcasting System wherein the two media companies received joint broadcasting rights to the NCAA Division I Men’s Basketball Tournament known as March Madness. In April of 2016, the NCAA and CBS/Turner extended their agreement for an additional eight years, through 2032, while increasing the payment from CBS/Turner to the NCAA by an additional \$8.8 billion, averaging now more than one billion dollars per year.

<sup>105</sup> Alston, Opinion of the Court at 21.

<sup>106</sup> Alston, Opinion of the Court at 7; *See also* D. Ct. Op., at 1063; Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL STREET JOURNAL, (Nov. 21, 2021) <https://www.wsj.com/articles/SB10001424127887324851704578133223970790516> [<https://perma.cc/U8KR-QCMF>].

million that year.”<sup>107</sup>

Justice Gorsuch underscored this detail by recognizing that while student-athletes’ compensation is limited by the NCAA to that of the value of a scholarship, those who run ‘this enterprise’ profit significantly.<sup>108</sup> In his opinion, Justice Gorsuch noted that the president of the NCAA, Mark Emmert, earns nearly \$4 million per year, the Commissioners of the top college conferences earn between \$2 to \$5 million, college athletic directors average more than \$1 million annually, and the annual salaries for top Division I college football coaches approach \$11 million, with some of their assistants making more than \$2.5 million.<sup>109</sup>

Justice Kavanaugh, concurring with his colleagues in a separate opinion, was also critical of the NCAA’s century-long argument that compensation restrictions are necessary to separate amateurs from professionals, stating, “[b]usinesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.”<sup>110</sup> He continued, commenting that “nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate . . . The NCAA is not above the law.”<sup>111</sup>

Consequently, as a result of the continued commercialization of college athletics and the increased revenue it generates, the U.S. Supreme Court in *Alston* determined that the NCAA can no longer mandate its member schools to limit athletic scholarships to that of tuition, fees, room, board, books, and other expenses up to the value of the full cost of attendance.<sup>112</sup> Now, the Supreme Court concluded, the NCAA must allow its member institutions to reimburse student-athletes for expenses pertaining to other education-related benefits such as computers, equipment, and other tangible items not included in the cost of attendance calculation.<sup>113</sup>

The legal significance of *Alston* is that in future legal matters involving both the NCAA and federal antitrust laws, since the NCAA has become a massive, powerful, and as some would argue, ruthless commercial ‘enterprise’, it will no longer receive the special judicial dispensation on issues concerning student-athlete compensation that it had previously.<sup>114</sup> In addition, even with its limited holding, the *Alston* matter

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<sup>107</sup> *Id.*

<sup>108</sup> *See Alston*, 141 S. Ct. at 2151.

<sup>109</sup> *Alston*, Opinion of the Court at 8; *See Brief for Players Association of the National Football League et al. as Amici Curiae* 17.

<sup>110</sup> *Alston*, 141 S. Ct. at 2158.

<sup>111</sup> *Id.* at 2169.

<sup>112</sup> *Id.* at 2165.

<sup>113</sup> *Id.*

<sup>114</sup> Michael McCann, *Supreme Court Rules Unanimously Against NCAA in Alston Case*, SPORTICO (June 21, 2021, 10:29 AM), <https://www.sportico.com/law/analysis/2021/supreme-court-rules-unanimously-against-ncaa-in-alston-case-1234632182> [<https://perma.cc/US8A-JLQD>].

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will serve as the ‘catalyst for change’ that litigants will argue to further dismantle the NCAA’s views on ‘amateurism’ and the ‘amateur athlete’.<sup>115</sup> A change that in many respects has already begun through the various state laws involving name, image, and likeness, together with the pending legal cases dealing with the employment status of student-athletes.

### ***C. NIL Laws: Using the Legislative Branch to Dilute (Somewhat) the NCAA’s Concept of Amateurism***

After analyzing the significance and likely legal ramifications of the holdings in both *O’Bannon* and *Alston* and the impact that they may have on intercollegiate sports, the NCAA’s concepts of ‘amateur athletes’ and ‘amateurism’ changed ever so slightly on June 30, 2021. On that date, the NCAA, as various state laws were scheduled to go into effect, implemented rule changes that would, in principle, permit student-athletes to monetize their name, image and likeness (NIL) without the fear of losing either their scholarship or athletic eligibility.<sup>116</sup>

Although the NCAA did not officially adopt its own rule(s) allowing student-athletes to monetize their NIL, what it did was to approve of an ‘interim policy’ suspending any and all current NCAA name, image, and likeness regulations for all incoming and current student-athletes in all sports.<sup>117</sup> The NCAA’s specific ‘policy’ states that “if a student-athlete elects to engage in NIL activity that is consistent with and protected by a valid and enforceable law of the state in which the institution at which such individual enrolls is located, the individual’s eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12.”<sup>118</sup> What the NCAA is saying is, ‘yes, student-athlete – you can abide by the law of your state, if they have one, without subjecting yourself to punishment or other ramifications being enforced by the NCAA’.<sup>119</sup>

For those states which have not enacted NIL legislation, the NCAA is leaving it up to either the conferences or the individual colleges and universities to devise a policy, stating that “even if a student-athlete elects to engage in NIL activity and is enrolled at an institution in a state without effective NIL laws, the individual’s eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12.”<sup>120</sup>

On its face it appears as if the NCAA’s ‘non-position’ on the NIL issue is a meaningful departure from its time-honored proposition, that a college athlete is

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<sup>115</sup> *Alston*, 141 S. Ct. at 2165.

<sup>116</sup> Robert J. Romano, *Consider Insights into the NCAA’s Latest NIL (in)Decision*, 18 COLLEGE ATHLETICS & THE LAW 5 (2021).

<sup>117</sup> NCAA INTERIM NIL POLICY, NCAA, <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/7GYF-9LLB>].

<sup>118</sup> *Id.*

<sup>119</sup> Romano, *supra* note 116.

<sup>120</sup> NCAA INTERIM NIL POLICY, *supra* note 117.

someone who participates purely for the enjoyment of the game while forgoing any money or financial assistance above the value of a student-athlete scholarship.<sup>121</sup> However, the NCAA's act of not initiating its own formal policy may be deliberate, and somewhat strategic, because what is left is a complicated and confusing system based on different laws and rules for different student-athletes depending on where their college or university is located.<sup>122</sup> Sitting idly by and allowing state legislatures to enact various and varied laws was beneficial to the NCAA's pretense of amateurism since most of the state's NIL legislation placed some form of limitation on what type of 'deals' student-athletes can enter into with a brand or company.<sup>123</sup>

For example, some states allow a student-athlete to use his or her college's logo and team colors in promotional deals; other states prohibit that.<sup>124</sup> Some state's universities can broker NIL deals for athletes; other states bar schools from that role.<sup>125</sup> Specifically, Illinois' NIL law includes a 'market cap' that limits what a student-athlete can earn; it doesn't allow NIL deals for recruits who sign with colleges until they enroll or start mandatory sports participation; and it doesn't allow NIL deals that continue after an athlete transfers.<sup>126</sup> While California's *Fair Play to Pay Act* bans student-athletes from entering into agreements with brands or companies that conflict with their college's or university's sponsorship, media, or endorsement deals or with the image or mission of the school.<sup>127</sup>

These inconsistencies, overlaps, and possible contradictions, lead to disparities and inequities on how student-athletes can capitalize on their right of publicity, and may, in some instances, lead to a 'chilling effect' wherein a student-athlete passes on an opportunity for fear of violating one of these confusing laws or rules.<sup>128</sup> In essence, by allowing the states to take the lead in this area, the NCAA protected its

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<sup>121</sup> *Id.*

<sup>122</sup> Ryan Fagan, *NIL Need-to-Know: Answers to Basic Questions You Have to Know About New Rules for College Athletes*, SPORTING NEWS (July 1, 2021), <https://www.sportingnews.com/us/ncaa-football/news/nil-need-to-know-answers-to-the-basic-questions-you-have-about-new-rules-for-college-athletes/nc9f6trq3oh1dwd1m5vmnvw4> [<https://perma.cc/298J-6UKY>].

<sup>123</sup> Liz Clarke, *State-by-State Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASHINGTON POST (October 21, 2021), <https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings> [<https://perma.cc/52RA-28X4>].

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See Illinois Public Act 102-0042 (Il. 2021).

<sup>127</sup> See Cal. S.B. 206 §§ 67456(e)(1)–(3) (Ca. 2019) (limiting student-athletes' ability to seek endorsements if they conflict with their university's endorsements).

<sup>128</sup> As an example: How will the interpretation of federal immigration law and its relation to NIL agreements affect the recruiting of international athletes by U.S. colleges and universities? If federal immigration law bans international student-athletes from monetizing their NIL, is this fair and equitable compared to U.S. born athletes who can use their athletic notoriety to capitalize on their name, image, or likeness?

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ideals of ‘amateurism’ and the ‘amateur athletes’ since in doing so, it “slyly rebalanced the student-athletes’ *newfound bargaining freedoms* back in favor of the colleges and universities.”<sup>129</sup>

### ***D. The National Labor Relations Board and the NCAA’s Concept of Amateurism***

The National Labor Relations Board (NLRB) Regional Office in Chicago, after a petition was filed by then Northwestern University quarterback Kain Colter on January 28, 2014, determined that members of the university’s football team who received academic scholarships were to be considered “employees” within the meaning of the National Labor Relations Act (NLRA) and therefore, have the right to form a labor union.<sup>130</sup> The NLRB based its findings on the following:

The University’s football program generated revenues of approximately \$235 million between 2003 and 2012, such that the players performed valuable services for the University.

The players were “compensated” via scholarships equal in value of up to \$76,000 per year.

The players are engaged in football activities all year-round and devote between 40-50 hours a week to football activities during many months, which is often more time than they devote to academics.

The football coaching staff exerted incredible control over the players, not only requiring them to practice and attend meetings on a rigid schedule throughout the day but also requiring them to seek some type of approval before they could make living arrangements, apply for employment, purchase vehicles, travel off campus, post items on social media forums, and speak to the media.<sup>131</sup>

Northwestern University, unquestionably at the urging of the NCAA and its member institutions, appealed the decision of the Regional Office to the full National Labor Relations Board in Washington, D.C. The D.C. Office, in August 2015, dismissed Colter’s petition.<sup>132</sup> In its decision, the NLRB didn’t rule on the merits, but instead declined to exert jurisdiction of the matter and therefore, by not doing so, preserved one of the NCAA’s core principles: that college athletes are students

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<sup>129</sup> John Kealey, *Preserving Fabled Amateurism: The Benefits of the NCAA’s Adoption of the Olympic Amateurism Model*, 29 J. OF LAW & POLICY 1, 352-56 (2020).

<sup>130</sup> Archer Attorneys at Law, *NLRB Regional Director Rules Northwestern Football Players are Employees and Can Unionize*, [WWW.ARCHERLAW.COM](http://WWW.ARCHERLAW.COM), <https://www.archerlaw.com/nlr-regional-director-rules-northwestern-football-players-are-employees-and-can-unionize> (last visited July 23, 2022) [<https://perma.cc/8NYF-DB3Z>].

<sup>131</sup> Patrick Vint, *Explaining What the Northwestern College Football Union Decision Means*, SB NATION (Mar. 27, 2014), <https://www.sbnation.com/college-football/2014/3/27/5551014/college-football-players-union-northwestern-nlr> [<https://perma.cc/9CRJ-DZSW>].

<sup>132</sup> Robert J Romano, *Student-Athletes as Employees – Who Could Have Ever Thought? Well, Apparently the NLRB*, 18 SPORTS LITIGATION ALERT 19 (2021).

subject to its rules regarding amateurism. However, the NLRB's D.C. Office never determined whether or not the players are employees, instead it found that the novelty of the petition and its potentially wide-ranging impacts on college sports would not have promoted "stability in labor relations."<sup>133</sup> As stated in its decision, "The Board has never before been asked to assert jurisdiction in a case involving college football players, or college athletes of any kind. Even if scholarship players were regarded as analogous to players for professional sports teams who are considered employees for purposes of collective bargaining, such bargaining has never involved a bargaining unit consisting of a single team's players."<sup>134</sup>

But that was the decision of the NLRB in 2015. Since then, the U.S. Appeals Court for the Ninth District ruled in *O'Bannon*, the U.S. Supreme Court ruled in *Alston*, and a number of state legislatures enacted rules regarding a college athlete's right to profit from her or his NIL.<sup>135</sup> As a result of these changes regarding the concepts of 'amateurism' and the 'amateur athlete', on September 29, 2021, NLRB General Counsel, Jennifer Abruzzo issued an 'updated' memorandum which solidified the NLRB's *current* position and stated, unequivocally, that now 'certain' "Players at Academic Institutions (sometimes referred to as student athletes), are **employees** under the National Labor Relations Act, and, as such, are afforded any and all statutory protections (emphasis added)."<sup>136</sup>

Specifically, the updated NLRB memo states that –

Players at Academic Institutions perform services for institutions in return for compensation and subject to their control. Thus, the broad language of Section 2(3) of the Act, the policies underlying the NLRA, Board law, and the common law fully support the conclusion that certain Players at Academic Institutions are statutory employees, who have the right to act collectively to improve their terms and conditions of employment.<sup>137</sup>

In addition to finding that certain players at academic institutions are statutory employees, the NLRB warned colleges and universities that classifying players as 'student-athletes' leads to those players believing that they are not employees and

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<sup>133</sup> Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlr-says-northwestern-football-players-cannot-unionize.html> [<https://perma.cc/G9EB-MJSX>].

<sup>134</sup> *Id.*

<sup>135</sup> *O'Bannon*, 802 F.3d 1049 at 1055; *Alston*, 141 S. Ct. 2141 at 2149; Saul Ewing Arnstein & Lehr, *NIL Legislation Tracker*, SAUL.COM, <https://www.saul.com/nil-legislation-tracker> (last visited July 29, 2022) [<https://perma.cc/8MAV-ABVL>].

<sup>136</sup> NLRB, *NLRB General Counsel Jennifer Abruzzo Issues Memo on Employee Status*, NLRB.GOV, <https://www.nlr.gov/news-outreach/news-story/nlr-general-counsel-jennifer-abruzzo-issues-memo-on-captive-audienceand#:~:text=Today%2C%20National%20Labor%20Relations%20Board,labor%20rights%2C%20including%20captive%20audience> (last visited May 13, 2022) [<https://perma.cc/GX66-JC75>].

<sup>137</sup> *Id.*

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can ‘chill’ an employee’s rights.<sup>138</sup> In light of this, the NLRB announced that, in appropriate cases, it will “pursue an independent violation when a college or university misclassifies players at academic institutions as student-athletes.”<sup>139</sup>

Even with the NLRB’s updated memo and redefinition of a student-athlete as an employee, important legal questions remain. These include whether or not the NLRB will expand ‘employee’ protections and the right for student-athletes to unionize to include; i) all scholarship and non-scholarship athletes, ii) athletes competing in both men’s and women’s sports, iii) athletes playing in both revenue and non-revenue sports, iv) athletes participating at both private and public colleges and universities, v) international student-athletes in the United States attending college and competing on an F-1 student visa, and vi) non-NCAA member institutions who compete in associations such as the NAIA or NJCCA.<sup>140</sup>

Some of these questions may be answered soon though, because on August 25, 2021, the U.S. District Court for the Eastern District of Pennsylvania denied the NCAA’s motion to dismiss the case of *Johnson v. NCAA*, a lawsuit brought by a number of college athletes from various universities asking the court to find that they are employees of their athletic programs and therefore entitled to be paid for their services.<sup>141</sup> With the denial of the motion to dismiss, this case will proceed forward – to what end and as to what, if any, questions it may answer, we shall have to wait and see.

### IV. IN CLOSING

The concepts of the ‘amateur athlete’ and ‘amateurism’ as defined by the NCAA come from Victorian Era England. Specifically, the British elite who enjoyed rowing, winning, and keeping the unwashed, day-laboring masses at arm’s length.<sup>142</sup>

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<sup>138</sup> Doug Lederman, *NLRB Asserts That ‘Certain’ College Athletes Are Employees*, INSIDE HIGHER ED (Sept. 29, 2021), <https://www.insidehighered.com/quicktakes/2021/09/29/nlr-asserts-%E2%80%99certain%E2%80%99-college-athletes-are-employees> [https://perma.cc/F288-DAVJ].

<sup>139</sup> *Id.*

<sup>140</sup> Mike Ingersoll and Beth Tyner Jones, *Alston Aftermath: NLRB General Counsel Memo Confirms Employment Status for Certain College Football Players Under the National Labor Relations Act and Declares an End to the “Student-Athlete”*, WOMBLE BOND DICKINSON (Sept. 29, 2021), <https://www.womblebonddickinson.com/us/insights/news-and-insights/alston-aftermath-nlr-general-counsel-memo-confirms-employment-status> [https://perma.cc/BSB8-H6XZ].

<sup>141</sup> *Johnson v. Natl. Collegiate Athletic Assn.*, 556 F. Supp. 3d 491 (E.D. Pa. 2021) (motion to certify appeal granted sub nom. *Johnson v. National Collegiate Athletic Assn.*, CV 19-5230, 2021 WL 6125095 (E.D. Pa. Dec. 28, 2021)).

<sup>142</sup> Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (July 25, 2012), <https://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> [https://perma.cc/7Z6D-VQ2S].

“Amateurism really started when the people who were rowing boats on the Thames for a living started beating all the rich British aristocrats,” Olympic historian Bill Mallon said. “That wasn't right. So, they started a concept of amateurism that didn't exist in ancient Greece.”<sup>143</sup>

Fast-forward a couple hundred years, several antitrust lawsuits, a number of enacted state laws, and an NLRB memo later and it's finally being acknowledged that the contradiction and illogicality of not paying the athletes whose talents and skills are the catalyst that drives a billion-dollar industry is unfair, unjust, and inequitable. A contradiction that Lowell Bergman highlighted in the Frontline documentary wherein when the American public is watching March Madness, a sporting event that generates over \$900,000,000.00 annually for the NCAA, . . . the coaches are being paid, the athletic directors and administrators are being paid, everyone associated with the event is being paid, but the student-athletes aren't<sup>144</sup> – seems to, ever so slowly, be changing. And with that, the concepts of ‘amateur athlete’ and ‘amateurism’ being defined as participation without compensation may finally come to an end.

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<sup>143</sup> *Id.*

<sup>144</sup> PBS, *Money and March Madness*, PBS.ORG, <https://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html> (last visited July 29, 2022) [<https://perma.cc/NM8X-TZ8Z>]; See also Michael Shapiro, *Report: NCAA Paid Mark Emmert \$2.9 Million in 2019-20 Despite COVID-19 Revenue Drop*, SI.COM, <https://www.si.com/college/2021/07/19/mark-emmert-ncaa-salary-covid-19-revenue-drop> [<https://perma.cc/TU3Z-6KDB>].