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# The Duke Model

## A PERFORMANCE-BASED SOLUTION FOR COMPENSATING COLLEGE ATHLETES

David A. Grenardo<sup>†</sup>

### INTRODUCTION

“A man reaps what he sows,”<sup>1</sup> or at least he should. The limit that the United States Court of Appeals for the Ninth Circuit in *O’Bannon v. Nat’l Collegiate Athletic Ass’n*<sup>2</sup> placed on the damages college athletes can receive unfairly prevents college athletes from earning compensation that is commensurate with their valuable efforts.<sup>3</sup> The Ninth Circuit’s holding warrants a conversation between the National Collegiate Athletic Association (NCAA), its member institutions, and college athletes to address the inequities flowing from a situation in which the multibillion dollar business of college athletics continues to thrive and grow while those creating the product—college athletes—remain undercompensated and exploited.<sup>4</sup>

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<sup>1</sup> *Galatians* 6:7.

<sup>2</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015).

<sup>3</sup> *Id.* at 1052–53, 1079.

<sup>4</sup> See William B. Gould IV et al., *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 8–9 (2014) (discussing the multibillion dollar industry of men’s college basketball and football); see also NCAA, DIVISION 1 MANUAL § 12.1.2 (Aug. 1, 2017), <http://www.ncaapublications.com/productdownloads/D118.pdf> [<https://perma.cc/L98F-56P9>] [hereinafter DIVISION 1 MANUAL] (providing that a college athlete becomes ineligible if one “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport”); Amy C. McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496–97 (2008) (stating the NCAA is a \$60,000,000,000 industry);

Major college athletics have evolved into an \$11 billion-per-year industry, and everyone reaps the benefits,<sup>5</sup> except the athletes. College coaches, for example, receive millions of dollars in salary alone.<sup>6</sup> In fact, head coaches of the most prominent football programs “earn more than their schools spend on all athletic scholarships combined” when examining base salary alone.<sup>7</sup> Jim Harbaugh, head coach of the University of Michigan’s football team, received a salary of over \$9 million for the 2016 season.<sup>8</sup> Many men’s college basketball coaches receive seven-figure compensation packages,<sup>9</sup> including John Calipari, the head coach of the University of Kentucky’s men’s basketball team, who received over \$7.1 million in 2017.<sup>10</sup> Even some assistant football coaches, including three of Michigan’s football coaching staff, receive a base salary of \$1 million a year, while most assistant football coaches make six figures or more in base salary.<sup>11</sup> Forty-one percent of assistant football coaches received over \$250,000 in base pay without including the multiple performance bonuses and pay from apparel companies.<sup>12</sup>

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Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 846–47 (2014) (addressing the multibillion dollar industry of major college sports).

<sup>5</sup> Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes’ Rights Movement*, 38 CARDOZO L. REV. 1627, 1630–31 (2017).

<sup>6</sup> *2016 NCAAF Coaches Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> [<https://perma.cc/63DS-Q4J7>].

<sup>7</sup> Chris Isidore, *College Coaches Make More Than Players Get In Scholarship*, CNN MONEY (Jan. 11, 2016, 12:28 PM), <http://money.cnn.com/2016/01/11/news/companies/college-coaches-pay-players-scholarships/index.html> [<https://perma.cc/28A4-BXSW>].

<sup>8</sup> *2016 NCAAF Coaches Salaries*, *supra* note 6.

<sup>9</sup> See *2017 NCAAB Tournament Coaches’ Pay*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach> [<https://perma.cc/LW6F-3R9Z>]; see also *2017 Men’s Basketball Coaches Pay Methodology*, USA TODAY (Mar. 28, 2017, 7:50 PM), <http://sports.usatoday.com/2017/03/28/2017-mens-basketball-coaches-pay-methodology/> [<https://perma.cc/K5NU-WD3L>] (noting that school pay includes, among other things, salary and shoe and apparel deals through the school).

<sup>10</sup> *2017 NCAAB Tournament Coaches’ Pay*, *supra* note 9.

<sup>11</sup> See Mark Snyder, *Michigan Is First Football Program with 3 Assistants Making \$1M*, DET. FREE PRESS (Jan. 24, 2017, 3:55 PM), <http://www.freep.com/story/sports/college/university-michigan/wolverines/2017/01/24/michigan-football-assistants/97003278/> [<https://perma.cc/JU8D-A7PU>]; see also Richard Johnson & Jason Kirk, *NCAA Rule Expands Coach Salaries As Player Compensation Remains Unchanged*, SBATION (Apr. 17, 2017, 9:33 AM), <https://www.sbnation.com/college-football/2017/4/17/15318478/ncaa-football-10-assistant-coaches-rule-salaries-players> [<https://perma.cc/C2P9-E86G>] (analyzing the 963 public salaries of assistant coaches and concluding that 81 percent of those make six figures or more in base pay). Nearly 800 assistant football coaches make six figures, including coaches at the University of Texas San Antonio (UTSA). *2016 NCAAF Assistant Coaches Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/assistant> [<https://perma.cc/D56U-NEUG>]. The head coach of UTSA’s football team, notably, received \$835,000 in salary alone for the 2016 season. *2016 NCAAF Coaches Salaries*, *supra* note 6.

<sup>12</sup> Johnson & Kirk, *supra* note 11.

Many college football and men's basketball coaches also receive very large bonuses.<sup>13</sup> Most of the listed potential bonuses for head football coaches range from six figures to seven figures (at last count, there were thirty-two coaches with potential bonuses of at least \$1 million), with the highest potential bonus reaching over \$3.8 million.<sup>14</sup> In 2015, college football coaches received nearly \$12.4 million in bonuses based on championships, bowl game appearances, postseason awards (e.g., coach of the year), or simply exceeding the minimum NCAA Academic Progress Rate to avoid sanctions.<sup>15</sup> College basketball coaches also reap the rewards of performance based bonuses due to, among other measurables, the number of games won in a season and postseason wins.<sup>16</sup>

Not only do coaches flourish economically in the multibillion-dollar industry of football and men's basketball, but university athletic directors and NCAA executives also reap the benefits. Athletic directors often receive six-figure salaries, with the highest salaried athletic director making over \$3.2 million.<sup>17</sup> Similarly, the NCAA President reportedly made nearly \$2 million in 2014 and other NCAA executives reportedly made over \$400,000 each.<sup>18</sup> Universities and donors also pay millions

<sup>13</sup> 2017 NCAAB Tournament Coaches' Pay, *supra* note 9; see also 2016 NCAAF Assistant Coaches Salaries, *supra* note 11; 2016 NCAAF Coaches Salaries, *supra* note 6.

<sup>14</sup> 2016 NCAAF Coaches Salaries, *supra* note 6.

<sup>15</sup> Steven Berkowitz & Christopher Schnnaars, *College Football Coaches Piling Up More Cash Through Bonuses*, USA TODAY (Oct. 8, 2015, 12:43 PM), <https://www.usatoday.com/story/sports/ncaaf/2015/10/08/coaches-bonuses-gary-pinkel/73553784/> [<https://perma.cc/N9J9-8BRD>] (discussing the \$12.4 million total for bonuses paid in 2015); see also *College Football Coaches Salaries*, NEWSDAY, <http://sports.newsday.com/long-island/data/college/college-football/coaches-salaries/> [<https://perma.cc/2LPM-N737>] (providing information on 108 public schools to see "basic salary details along with the incentives and perks for each of these coaches"). For example,

Utah State's Matt Wells got \$5,000 for his team's win over in-state rival BYU. [While at Western Michigan, P.J. Fleck's bonus] totaled \$21,750 from his players' individual all-Mid-American Conference team and academic honors. In addition to the bonuses called for in his contract—which totaled \$95,000 and covered the Broncos' appearance in the Fiesta Bowl—Boise State's Bryan Harsin received an additional \$87,875 "for his success last season," according to a statement provided by athletics department spokesman Max Corbet.

*College Football Coaches Piling Up More Cash Through Bonuses, supra.*

<sup>16</sup> See Steven Berkowitz, *As Always, Big Bonus Bucks in Store for Sweet 16 Coaches*, USA TODAY (Mar. 22, 2017, 2:19 PM), <https://www.usatoday.com/story/sports/ncaab/2017/03/22/sweet-16-coaches-bonuses-march-madness/99494474/> [<https://perma.cc/C5JP-47PE>] (detailing the bonus opportunities for the 2017 Sweet 16 head coaches and starting bonuses given to basketball coaches for team wins, conference titles, rank, and post season wins for appearance in NCAA tournament, Sweet 16, Elite Eight, Final Four, and NCAA title).

<sup>17</sup> *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/all/director> [<https://perma.cc/9JFC-EX2N>]. Many athletic directors also can earn bonuses, often six-figures for some of them. *Id.*

<sup>18</sup> Steve Berkowitz, *NCAA Paid Mark Emmert \$1.9M in 2014, Tax Return Shows*, USA TODAY (June 23, 2016, 3:16 PM), <http://www.usatoday.com/story/sports/>

of dollars to upgrade their athletic facilities to attract new recruits and to retain their coaches. For example, Kansas State completed its new athletic facilities in 2015 at a staggering cost of \$68 million.<sup>19</sup> Meanwhile, boosters of the University of Alabama paid off Nick Saban's \$3.1 million mansion to keep him happy as the university's head football coach.<sup>20</sup>

While everyone else involved enjoys the lush rewards of major college football and men's basketball, those providing the product on the field and court—the athletes—remain forbidden from earning compensation above their scholarships for playing their sports.<sup>21</sup> Shabazz Napier, a former Most Outstanding Player of the men's NCAA basketball tournament,<sup>22</sup> told reporters that, even as he led the University of Connecticut to a national championship in 2014, he went to bed hungry some nights.<sup>23</sup> He told CNN, “[S]ometimes . . . there's hungry nights and I'm not able to eat and I still got to play up to my capabilities. . . . When you see your jersey getting sold—it may not have your last name on it—but when you see your jersey getting sold and things like that, you feel like you want something in return.”<sup>24</sup> Although the NCAA eventually changed its policy on scholarship application towards the meal plans for athletes by allowing unlimited meals, athletes remain the workhorses for major college sports who may not be hungry now, but they are still prohibited from earning compensation for playing.<sup>25</sup> College athletes should be treated like every other student at a university: free and encouraged to earn compensation based on

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college/2016/06/23/ncaa-tax-return-mark-emmert-jim-isch/86287914 [https://perma.cc/Y6RV-J9PF] (detailing how much NCAA executives were compensated in 2014).

<sup>19</sup> See The Capital Journal, *K-State Football Announces Plans for Next Bill Snyder Family Stadium Project: Next Phase Will Enclose Wildcats' Football Facility*, CJONLINE (Sept. 9, 2015, 10:19 AM), <http://cjonline.com/sports/catzone/2015-09-09/k-state-football-announces-plans-next-bill-snyder-family-stadium-project> [https://perma.cc/ZK8H-JVQZ].

<sup>20</sup> Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN (Oct. 27, 2014), [http://espn.go.com/college-football/story/\\_/id/11772033/alabama-crimson-tide-boosters-pay-coach-nick-saban-home](http://espn.go.com/college-football/story/_/id/11772033/alabama-crimson-tide-boosters-pay-coach-nick-saban-home) [https://perma.cc/9HYN-ZUE8].

<sup>21</sup> See DIVISION 1 MANUAL, *supra* note 4, at § 12.1.2. (providing that a college athlete becomes ineligible if one “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport”).

<sup>22</sup> Sara Ganim, *UConn Guard on Unions: I Go To Bed 'Starving,'* CNN (Apr. 8, 2014, 1:26 PM), <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html> [https://perma.cc/US3K-CRNZ].

<sup>23</sup> *Id.*

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

<sup>25</sup> Stephen Hobbs, *Approved NCAA Rule Allowing Unlimited Meals and Snacks to Affect Cal Athletes*, DAILY CALIFORNIAN (Apr. 24, 2014), <http://www.dailycal.org/2014/04/24/approved-ncaa-rule-allowing-unlimited-meals-snacks-affect-cal-athletes> [https://perma.cc/W7N6-LACH]; Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014, 4:25 PM), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules> [https://perma.cc/27ZS-MJ5X]; see also DIVISION 1 MANUAL, *supra* note 4, at § 12.1.2.

their efforts. Even student musicians, for example, can earn thousands of dollars by playing at off-campus events, including when affiliates of the university arrange the performance, without losing their ability to play in university performances.<sup>26</sup>

Moreover, college athletes, particularly football players, subject themselves to intense physical activities and life-altering injuries while providing the product on the field.<sup>27</sup> For example, a 2017 study conducted by researchers at Boston University and the VA Boston Healthcare System found that 87 percent of all football players in the study, which included high school, college, and professional players, suffered from Chronic Traumatic Encephalopathy, commonly known as CTE, which is a life-threatening condition resulting from repeated concussions.<sup>28</sup> The inherent inequity caused by the NCAA's prohibition against athletes earning compensation above their scholarship amounts despite bringing in billions of dollars smacks of hypocrisy, and numerous commentators agree.<sup>29</sup>

In *O'Bannon*, plaintiffs consisting of current and former college football players and men's basketball players sought compensation for the use of their names, images, and likenesses in, among other things, video games.<sup>30</sup> A three-judge panel of the Ninth Circuit acknowledged how critical college athletes are to the

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<sup>26</sup> See Karen Crouse, *When an Olympian Goes to College, Riches Stay Out of Reach*, N.Y. TIMES (Apr. 16, 2016), [http://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html?\\_r=2](http://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html?_r=2) [<https://perma.cc/2BTV-PWA2>]; Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) [hereinafter Telephone Interview with Jay Bilas] (on file with author) (“[E]very other student can make as much money as they want in their chosen endeavor and it doesn’t affect their academic standing” and “[t]here is no legitimate reason why an athlete should be any different.”).

<sup>27</sup> A.J. Perez, *Study: CTE Diagnosed in 99% of Former NFL Players, 87% of Ex-Players at All Levels*, USA TODAY (July 25, 2017), <http://www.msn.com/en-us/sports/nfl/study-cte-diagnosed-in-99percent-of-former-nfl-players-87percent-of-ex-players-at-all-levels/ar-AAoP6Lf?li=BBnba9I> [<https://perma.cc/7279-3FFP?type=image>].

<sup>28</sup> *Id.*; see also Sam Mellinger, *Doctors Couldn't Find What was Wrong with Michael Keck, But Football Star Knew it Would Kill Him*, KAN. CITY STAR (Nov. 21, 2015, 9:52 PM), <http://www.kansascity.com/sports/spt-columns-blogs/sam-mellinger/article45850180.html> [<https://perma.cc/ZUE7-EUVG>] (examining the death of a twenty-five-year-old who played in high school and the equivalent of just one year in college who was diagnosed with CTE).

<sup>29</sup> See, e.g., McCormick & McCormick, *supra* note 4, at 497–98 (arguing for the compensation of college athletes above their scholarship amounts); Kathryn Young, Note, *Deconstructing the Façade of Amateurism: Antitrust and Intellectual Property Arguments in Favor of Compensating Athletes*, 12 VA. SPORTS & ENT. L.J. 338, 343–47, 352–54 (2013) (stating college athletes should receive more money and incentives than just their scholarships); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/9GS3-HC5U>] (advocating for the payment of college athletes).

<sup>30</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052, 1055 (9th Cir. 2015).

product of major college athletics: “[T]he labor of student-athletes is an integral and essential component of the NCAA’s ‘product,’ and a rule setting the price of that labor goes to the heart of the NCAA’s business.”<sup>31</sup> Despite recognizing that college athletes serve as the first-hand suppliers of the NCAA’s business and product (i.e., the football and basketball games that the public consumes in droves<sup>32</sup>) the Ninth Circuit limited the damages that college athletes could receive.<sup>33</sup> In doing so, the court decided to treat college athletes, who are adults, differently than every other adult. But in the United States, both adults and children, are entitled to receive damages commensurate with their injuries.<sup>34</sup>

One cannot dispute that education for college athletes possesses value.<sup>35</sup> Nevertheless, some athletes contribute to a growing industry of major college athletics that generates billions of dollars of revenue.<sup>36</sup> Those athletes who create such a valuable

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<sup>31</sup> *O’Bannon*, 802 F.3d at 1066.

<sup>32</sup> See *College Sports (NCAA)—Statistics & Facts*, STATISTA, <http://www.statista.com/topics/1436/college-sports-ncaa/> [<https://perma.cc/W3AN-9XN8>] (approximating 49 million people attended college football games in 2012, 106 million people watched at least one college basketball game on TV in 2014, and 29 million people attended at least one college sports game in 2014). Attendance at the Ohio State University’s 2016 spring practice football game exceeded 100,000 people. Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, ESPN (Apr. 16, 2016), [http://espn.go.com/college-football/story/\\_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game](http://espn.go.com/college-football/story/_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game) [<https://perma.cc/TW5V-UH52>]. This last spring ESPN even broadcasted spring “practice” games for a number of college football teams. See *Every SEC Spring Game to Be Televised*, SEC NETWORK, <http://www.secsports.com/article/15048848> [<https://perma.cc/7QS5-6XV9>] (reporting ESPN or ESPNU broadcasted spring practices for Alabama, Auburn, and Mississippi); see also Derek Volner, *ESPN3 to Stream Six ACC College Football Spring Games*, ESPN MEDIA ZONE (Mar. 23, 2016), <http://espnmediazone.com/us/press-releases/2016/03/espn3-to-stream-six-acc-college-football-spring-games/> [<https://perma.cc/63JB-9LSW>] (showing ESPN3 streamed the spring games for Duke, Kansas, Clemson, Wake Forest, Florida State, Miami, Stephen F. Austin, and Georgia Tech).

<sup>33</sup> *O’Bannon*, 802 F.3d at 1079.

<sup>34</sup> See, e.g., *Wiltz v. Brothers Petroleum, LLC*, 140 So.3d 758, 787 (La. Ct. App. 2014) (awarding a teenage boy \$3 million in damages for suffering brain injury and paralysis in a drinking and driving car accident).

<sup>35</sup> See Val Ackerman & Larry Scott, *College Athletes Are Being Educated, Not Exploited*, CNN (Mar. 30, 2016), <http://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/> [<https://perma.cc/6QSY-C7QS>] (contending college athletes are not being exploited by the millions they are generating for their respective schools because they are students and are receiving an education); Howard P. Chudacoff, *Let’s Not Pay College Athletes*, WALL ST. J. (Mar. 28, 2016, 7:15 PM), <http://www.wsj.com/articles/lets-not-pay-college-athletes-1459206949> [<https://perma.cc/H63J-5Z67>] (arguing the perks of being a college athlete provides them with the opportunity to live opulent lifestyles in college and it is unfair for them to be allowed to live so lavishly while also receiving a free education).

<sup>36</sup> See generally Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 129 (2012) (describing the unjust enrichment the universities receive by using players images and likeness without compensating them); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011) <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [<https://perma.cc/92DY-MBM4>] (alleging college athletes contribute to the multibillion dollar industry of college sports, many without pay).

product should be able to earn compensation for their efforts just as every other American is entitled to do. The contributions for some athletes to major college athletics go beyond the value of scholarships that players receive, and that value beyond scholarships is what college athletes ought to receive regardless of their designations as both students and athletes.

The time has long come for the NCAA, its member institutions, and college athletes to sit down and discuss compensating college athletes for playing. Rather than continue a war of words with increasing animosity between college athletes and the NCAA,<sup>37</sup> the parties should take advantage of the existing infrastructures to begin a discussion that would lead to the abandonment of the prohibition on compensating athletes and the adoption of a model for payment. Once the parties begin that conversation about compensation for college athletes above their scholarship amounts, this article sets forth a proposal, the “Duke Model,” that serves as an archetype for how to pay college athletes.

The Duke Model would compensate college athletes in football and men’s basketball, which are the two revenue-generating sports,<sup>38</sup> based on their performance on and off the field.<sup>39</sup> In particular, the more a player plays, the more that player earns. The model also includes bonuses for athletic and academic performance through tangible measurements. The Duke Model earned its name for several reasons. First, its architect (i.e., the author of this article) graduated from Duke University School of Law. Second, the Duke University’s men’s basketball team (the Blue Devils) represents one of the most prestigious, successful, and profitable college basketball programs in the country. Finally, since men’s college basketball is one of the two sports included in the compensation model, the title is apropos.

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<sup>37</sup> Former player at Ohio State University, Cardale Jones, took to Twitter to make his opinion of the NCAA known. *Cardale Jones*, OHIO ST. BUCKEYES, [http://www.ohiostatebuckeyes.com/sports/m-footbl/mtt/cardale\\_jones\\_753504.html](http://www.ohiostatebuckeyes.com/sports/m-footbl/mtt/cardale_jones_753504.html) [<https://perma.cc/Z2FD-L46R>], *see, e.g.*, Cardale Jones (@Cardale7\_), TWITTER (Apr. 11, 2016, 9:57 AM), [https://twitter.com/CJ12\\_/status/719569962134847488](https://twitter.com/CJ12_/status/719569962134847488) [<https://perma.cc/3Z5E-7GRM>] (commenting how the NCAA’s rules and regulation exploit college athletes); Cardale Jones (@Cardale7\_), TWITTER (Apr. 11, 2016, 10:07 AM), [https://twitter.com/CJ12\\_/status/719572562179661826](https://twitter.com/CJ12_/status/719572562179661826) [<https://perma.cc/75HS-PBCN>] (alleging “[t]he [NCAA] control[s] [college athletes] lives with insane and unfair rules”).

<sup>38</sup> *See* Andy Schwarz, *Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes*, in SELECTED PROC. OF THE SANTA CLARA SPORTS L. SYMP. 46, 56–59 (2011) (noting that the football and men’s basketball programs’ revenues typically pay for the other sports programs at a school); *see also* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 97–98 (2006) (acknowledging football and men’s basketball as the revenue-generating sports).

<sup>39</sup> *See infra* Part III.



A one-size-fits-all base compensation and bonus structure might be affordable to some universities, but not others, or it may be too little for some schools that could readily afford more. Moreover, if all schools were required to pay a certain base salary compensation, some schools might not be able to afford it, potentially forcing those schools to withdraw from competition. By using a basic structure with varying amounts based on how much revenue each conference generates and how much schools in each conference can actually provide to their athletes, the Duke Model allows for consistency, a level of uniformity, predictability, and opportunity for every university to participate. The Duke Model provides a detailed and comprehensive compensation structure for athletes that the parties might agree on if they discussed a compensation system for athletes in football and men's basketball.

Part I provides the legal background, including the *O'Bannon* case, which demonstrates the pressing need for the NCAA and its member institutions to address the issue of compensating college athletes. Part II discusses the advantages of the Duke Model, and Part III provides the details of the Duke Model, including its three major parts: (1) base compensation; (2) athletic bonuses; and (3) academic bonuses. Part IV discusses the counterarguments to the Model and responds thereto. Finally, Part V discusses how the existing NCAA structures, such as Division I governance that includes college athlete participation in decision-making, provide the framework to begin a discussion on removing the prohibition on compensating athletes and developing and implementing the Duke Model, which will avoid litigation and potential labor complaints and strikes. This article provides a starting point, if not a complete model, to discuss how to compensate college athletes.<sup>40</sup>

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<sup>40</sup> Although other legal commentators and scholars have discussed models for paying college athletes, those models lack the specificity and breadth that this model includes. Robert Grimmett-Norris, *Roadblocks: Examining Title IX & the Fair Compensation of Division I Intercollegiate Student-Athletes*, 34 ST. LOUIS U. PUB. L. REV. 435, 448–56 (2015). The other models include the following: pay-for-play, revenue sharing, free market, and trust fund. *Id.* A pay-for-play model would “compensate student-athletes for their participation in various athletic programs through the provision of a monthly stipend.” *Id.* at 448. A revenue sharing model entails requiring universities to share “with their student-athletes a percentage of the revenues generated by their respective teams.” *Id.* at 450. A free market system allows the market to set “appropriate compensation for each athlete” depending on their skill level. *Id.* at 452–53. The trust fund model involves athletes receiving compensation for athletic competitions, as well as outside incidental activities, but the revenue would be “entered into a trust fund from which athletes are permitted to withdraw funds.” *Id.* at 454 (footnote omitted).

## I. RELEVANT LEGAL BACKGROUND

This Part provides background on how antitrust law intersects with major college athletics, the recent success of college athletes in the *O'Bannon* antitrust law case, and the imminent labor law issue lurking around major college athletics that can be solved via the Duke Model.

### A. *The Sherman Act and the Board of Regents: NCAA Rules Regarding Major College Athletics Fails an Antitrust Challenge but Judicial Deference to the NCAA's Ability to Govern College Athletes is Solidified*

The Sherman Act allows antitrust challenges to NCAA rules and policies. The Sherman Act, Section 1, makes it illegal to form any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”<sup>41</sup> Since every contract restrains trade to a certain extent, “the Supreme Court has limited the restrictions contained in Section 1 to bar only ‘unreasonable restraints of trade.’”<sup>42</sup>

A plaintiff bringing a claim under Section 1 of the Sherman Act must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a Rule of Reason analysis; and (3) that the restraint affected interstate commerce.”<sup>43</sup> A Rule of Reason analysis includes a burden-shifting test where “the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition.”<sup>44</sup> A plaintiff can show the “anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.”<sup>45</sup> If the plaintiff satisfies this initial burden, then the burden shifts to the defendant.<sup>46</sup> The defendant must then establish a procompetitive justification of the challenged

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<sup>41</sup> 15 U.S.C. § 1 (2012).

<sup>42</sup> *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 98 (1984)).

<sup>43</sup> *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996) (quoting *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991)).

<sup>44</sup> *Law*, 134 F.3d at 1019.

<sup>45</sup> *Id.* at 1019; *see also Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business” (citation omitted)).

<sup>46</sup> *Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n*, 468 U.S. 85, 113 (1984); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

restraint for the anticompetitive effect on the free market, which simply means the restraint promotes competition rather than destroys it.<sup>47</sup> This is a heavy burden for the defendant who must provide only legitimate procompetitive justifications that, on balance, actually show “the challenged restraint enhances competition.”<sup>48</sup> For example, “mere profitability or cost savings have not qualified as a defense under the antitrust laws.”<sup>49</sup>

In essence, “[u]nder this rule, the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”<sup>50</sup> One of the main questions that courts must decide under the Rule of Reason analysis is whether “the restraint . . . clearly tends to harm competition (as, for example, by raising prices to consumers or reducing output, product quality, or innovation), or [does the restraint] actually facilitate more effective competition or at least leave competition unaffected?”<sup>51</sup>

The U.S. Supreme Court in *Board of Regents of University of Oklahoma v. National Collegiate Athletic Ass'n* applied a Rule of Reason analysis to college athletics, and courts continue to do so.<sup>52</sup> *Board of Regents* involved the NCAA's

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<sup>47</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 113; *Visa U.S.A., Inc.*, 344 F.3d at 238; *Nat'l Soc. of Prof'l Engineers v. U. S.*, 435 U.S. 679, 691 (1978) (stating that the Rule of Reason analyzes whether the challenged restraint promotes competition or suppresses competition). Legitimate procompetitive objectives include “preventing free riding, lowering transaction costs, and facilitating other output-promoting transactions,” as well as “increasing output, creating operating efficiencies, enhancing product or service quality, and widening consumer choice.” ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 988 (2d ed. 2008); RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* (7th ed. (2011)).

<sup>48</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 104.

<sup>49</sup> *Law*, 134 F.3d at 1023. Procompetitive justifications require actual evidence, while speculative, unsubstantiated, or uncertain claims generally are deemed insufficient to refute evidence of anticompetitive effects. Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 774–75 (2012) (analyzing the Rule of Reason test).

<sup>50</sup> *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

<sup>51</sup> 1 HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* § 5:7 (2005); *see generally* Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007). Courts sometimes use the quick-look approach under the Rule of Reason. *Law*, 134 F.3d at 1020. The quick-look approach applies when the challenged restraint involves an obvious anticompetitive effect, such as an agreement not to compete in terms of price (price-fixing) or output. If that is the case, then “the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a ‘quick look’ rule of reason” analysis. *Id.*

<sup>52</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 103; *see also* *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010) (“The legality of that concerted action must be judged under the Rule of Reason.”); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 343 (7th Cir. 2012) (“[E]ither a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.”); *Law*, 134 F.3d

previous restrictions in the 1980s concerning televising college football games.<sup>53</sup> The NCAA capped the number of college football games that could be televised and the number of games that a school's team could appear on television.<sup>54</sup> Further, any contracts between television networks and universities needed approval from the NCAA.<sup>55</sup> The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association sued the NCAA, claiming that these restraints violated the Sherman Act.<sup>56</sup> The Supreme Court applied a Rule of Reason analysis and held for the plaintiffs, striking down the NCAA's restrictions as anticompetitive without any procompetitive justifications, and thus in violation of the Sherman Act.<sup>57</sup>

*Board of Regents* established an incredible deference to the NCAA in overseeing all competitive college athletics.<sup>58</sup> The Supreme Court stated that the NCAA must establish:

[R]ules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.<sup>59</sup>

The Supreme Court noted that the NCAA attempts to sell to the public a product brand of football, college football, necessarily

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at 1020 (“We find it appropriate to adopt such a quick look rule of reason in this case.”); *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (“The essential inquiry under the rule-of-reason analysis is whether the challenged restraint enhances competition. Applying this test, we have little difficulty in concluding that the challenged restrictions are reasonable.” (footnote omitted)); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 n.5 (N.D. Cal. 2013) (“Plaintiffs’ claims in this case must be analyzed under the rule of reason.”); *Metro. Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004) (“[T]he summary judgment evidence must be examined in accordance with ‘rule of reason’ analysis.” (citation omitted)); *Pocono Invitational Sports Camp, Inc. v. Nat’l Collegiate Athletic Ass’n.*, 317 F. Supp. 2d 569, 585 (E.D. Pa. 2004) (“I find that there is no *per se* restraint and will apply rule of reason analysis.”).

<sup>53</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 91–92.

<sup>54</sup> *Id.* at 94.

<sup>55</sup> *Id.* at 91–92.

<sup>56</sup> *Id.* at 95.

<sup>57</sup> *Id.* at 113, 120.

<sup>58</sup> *See id.* at 117 (giving deference to the NCAA); *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 802 F.3d 1049, 1063–64 (9th Cir. 2015) (deferring to the NCAA); *Agnew*, 683 F.3d at 347 (affirming the district court’s dismissal of the plaintiffs case because they failed to find “a relevant market for student-athlete labor”); *Rock v. Nat’l Collegiate Athletic Ass’n*, 928 F. Supp. 2d 1010, 1021–22 (S.D. Ind. 2013) (holding “[p]laintiff’s proposed market is impermissibly narrow” and “not legally cognizable”); *Justice v. Nat’l Collegiate Athletic Ass’n.*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (showing deference to the NCAA’s rulemaking activity since “the NCAA’s action does not constitute an unreasonable restraint under the Sherman Act”).

<sup>59</sup> *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101.

identified with and included in an academic tradition.<sup>60</sup> The Supreme Court asserted that “to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”<sup>61</sup> According to the *Board of Regents* Court, “the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”<sup>62</sup>

*Board of Regents* also established the Rule of Reason as the proper analysis for analyzing the business of major college athletics. Nearly thirty years later, the *O’Bannon* court followed suit when analyzing the NCAA’s rules regarding college athlete compensation.

*B. The O’Bannon Case Analyzes the NCAA’s Prohibition Against College Athlete Compensation and Finds an Antitrust Violation but Limits the Compensation Athletes Can Receive*

The *O’Bannon* case, although focused on the athlete’s name, image, and likeness, provides useful guidance because it analyzed whether college athletes could receive compensation above their scholarship amounts.<sup>63</sup> While the Ninth Circuit determined that the NCAA’s amateurism rules prohibiting compensation up to the full cost of attendance violated antitrust law, the court still prevented athlete compensation beyond the full cost of attendance.<sup>64</sup>

The plaintiffs in *O’Bannon* sought “to challenge the set of rules that preclude FBS football players and Division I men’s basketball players from receiving any compensation . . . for the use of their names, images, and likeness in videogames, live game telecasts, re-broadcasts, and archival game footage.”<sup>65</sup> The district court held that the NCAA’s compensation rules that prohibit college athletes from receiving compensation for the use of their names, images, and likenesses (NILs) violated the Sherman Act and constituted an unlawful anticompetitive effect.<sup>66</sup> As a result, the district court ordered two permanent

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<sup>60</sup> *Id.* at 101–02.

<sup>61</sup> *Id.* at 102.

<sup>62</sup> *Id.*

<sup>63</sup> See *infra* note 30–33 and accompanying text.

<sup>64</sup> See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

<sup>65</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

<sup>66</sup> *Id.* For example, a college athlete’s NIL would include his name on a jersey, his image and likeness in video games, and his appearance in a Sprite commercial endorsing that product.

injunctions: (1) the NCAA could not prevent its member institutions from providing full cost of attendance scholarships; and (2) the NCAA could not prohibit its member institutions from providing their athletes up to \$5,000 from the shared revenue that would be placed in trust for athletes, which could be collected by the athletes after graduation.<sup>67</sup> The Ninth Circuit affirmed the district court's ruling that the NCAA violated the college athletes' rights under the Sherman Act by upholding the first permanent injunction against the NCAA that allowed member institutions to provide athletes full cost of attendance scholarships. Yet the Ninth Circuit vacated the second injunction that allowed member institutions to pay athletes up to \$5,000 per year of deferred compensation, reasoning that it was "untethered to educational expenses."<sup>68</sup>

Under the Rule of Reason, both the district court and the Ninth Circuit held that the plaintiffs satisfied their initial burden by showing that the NCAA's prohibition on athletes receiving compensation for the use of their NILs constituted a significant anticompetitive effect on the relevant market. In particular, the courts deemed the relevant market as the college education market where "colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities."<sup>69</sup> If the NCAA prohibition did not exist, then the NCAA's member institutions would compete with each other by paying the college athletes for their "[NILs] as a part of obtaining the services of college athletes; instead, the prohibition functions as a price-fixing mechanism where the member institutions agree to pay the college athletes nothing for their NILs."<sup>70</sup> Also, "[a]bsent the NCAA's compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs."<sup>71</sup>

Looking at the second prong of the Rule of Reason analysis, the district court and the Ninth Circuit both accepted the NCAA's procompetitive justification of amateurism, which is discussed at length in the following Section.<sup>72</sup> The courts' analysis then shifted to the last part of the Rule of Reason analysis regarding less restrictive alternatives. The district court identified two: "(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of

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<sup>67</sup> *Id.* at 989, 1007–09.

<sup>68</sup> *O'Bannon*, 802 F.3d at 1053, 1078.

<sup>69</sup> *Id.* at 1070.

<sup>70</sup> *Id.* at 1052, 1069.

<sup>71</sup> *Id.* at 1067.

<sup>72</sup> *Id.* at 1072; *infra* Section I.C.

attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.<sup>73</sup> The Ninth Circuit held “that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their NILs is virtually as effective as the NCAA’s current amateur-status rule.”<sup>74</sup> The Ninth Circuit prohibited compensation for college athletes above their scholarship amounts, opining that compensation tied to college athletes’ educational expenses is much different from compensation for college athletes “untethered” to educational expenses.<sup>75</sup>

*O’Bannon* provided a blueprint for pending cases not yet decided, such as *Jenkins v. National Collegiate Athletic Ass’n*.<sup>76</sup> In *Jenkins*, plaintiffs’ purported class action consists of college football and men’s basketball players suing the NCAA and the Power Five conferences.<sup>77</sup> The named plaintiffs, “four current top-tier college football and men’s basketball players,” are suing on behalf of similarly situated college athletes who “are exploited by Defendants and their member institutions under false claims of amateurism.”<sup>78</sup>

The *Jenkins* complaint alleges that defendants “entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services.”<sup>79</sup> The *Jenkins* plaintiffs seek a free market model to compensate college athletes based on the illegal antitrust activities of the NCAA and the Power Five conferences.<sup>80</sup> If the plaintiffs in *Jenkins* prevail, universities may

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<sup>73</sup> *Id.* at 1074 (citing *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1005–07 (N.D. Cal. 2014)).

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

<sup>75</sup> *Id.* at 1078.

<sup>76</sup> See Complaint and Jury Demand-Class Action Seeking Injunction and Individual Damages at 2–3, 40 *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No.14CV01678, 2014 WL 1008526 (D.N.J. Mar. 17, 2014) [hereinafter *Jenkins v. NCAA Complaint*] (contending that NCAA rules deprive the college athletes “of the ability to receive market value for their services as college football and men’s basketball players in a free and open market”).

<sup>77</sup> See *id.* at 1–2. The *Jenkins* case is pending before the same Court that held for the plaintiffs in the *O’Bannon* case, the Northern District of California. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*, 24 F. Supp. 3d 1366, 1367 (J.P.M.L. 2014) (transferring the case from the District of New Jersey to the Northern District of California by a multidistrict litigation panel because three of the other six antitrust cases against the NCAA were already pending in the Northern District of California).

<sup>78</sup> *Id.* *Jenkins v. NCAA Complaint*, *supra* note 76, at 2–3.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 2–3, 40 (asserting that the “restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, . . . should

have to pay college athletes much higher salaries in a free market system than what is proposed in the Duke Model.

C. *Courts Continue to Accept the NCAA's Weak Amateurism Defense to Prohibit Compensation above Scholarship Amounts*

The NCAA's argument regarding amateurism boils down to this: if college athletes are paid to play, then they are no longer amateurs, which will change the nature of the product (i.e., the games) resulting in less consumer demand, meaning fewer people watching the games. The NCAA commissioned a study in *O'Bannon* to try to demonstrate that consumers generally oppose payment for college athletes.<sup>81</sup>

The relevant finding of the study showed that consumers, regardless of whether they self-identified as sports fans or simply members of the general public, tended to approve less of payment for college athletes the higher the potential payment amount rose for athletes.<sup>82</sup> For instance, 38 percent of the general public said they would be less likely to view or attend games if college athletes were paid \$20,000 a year.<sup>83</sup> Sixty-two percent of the general public indicated they would feel no more or less likely to view or attend games.<sup>84</sup> About 4 to 5 percent of the general public showed they would be more likely to view or attend games if college athletes were paid.<sup>85</sup> Disapproval rates increased as payment levels increased as follows: (1) disapproval rate at the \$20,000 level: 38 percent for the general public and 36 percent for the fans; (2) disapproval rate at the \$50,000 level: 47 percent for general public and 52 percent for the fans; and (3) disapproval rate at the \$200,000 level: 53 percent for general public and 62 percent for fans.<sup>86</sup>

Despite the NCAA's heavy reliance on the purported findings of the study, the study suffered from several fatal flaws, including how "the survey's initial question skewed the results by priming respondents to think about *illicit* payments to

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now be struck down and enjoined[.]" and prevent college athletes from "receiv[ing] market value for their services . . . in a free and open market").

<sup>81</sup> Transcript of Record at 2603–05, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. Aug. 8, 2014) (No. 266) [hereinafter June 24th Transcript of Record] (showing Dr. Michael Dennis' survey results on how the paying of college athletes affect demand, particularly in "viewing and attending college football games and basketball games").

<sup>82</sup> *See id.* at 2651–52.

<sup>83</sup> *Id.* at 2651.

<sup>84</sup> *Id.* at 2651–52.

<sup>85</sup> *Id.* at 2652.

<sup>86</sup> *Id.* at 2652–54.



student-athletes rather than the possibility of allowing athletes to be [legally] paid.”<sup>87</sup> The district court in *O’Bannon* found the study unpersuasive.<sup>88</sup> The study suffered further criticism from plaintiffs’ expert witness, Daniel Rascher, who discussed previous surveys regarding consumer demand.<sup>89</sup> Those respective surveys involved expected consumer demand (the consumers being the fans) in anticipation of professional baseball players’ salaries skyrocketing in the 1970s and professional athletes competing in the Olympics.<sup>90</sup> In both surveys, consumers indicated they would watch baseball and the Olympics less once the salaries increased in baseball and once professionals competed in the Olympics.<sup>91</sup> But data showed the opposite to be true: viewership actually increased after the players’ salaries rose and once professional athletes began participating in the Olympics.<sup>92</sup>

The district court also attacked the NCAA’s argument that amateurism served as a proper procompetitive justification.<sup>93</sup> Judge Claudia Wilken found that “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways.”<sup>94</sup> Judge Wilken noted that the NCAA’s “current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.”<sup>95</sup> Despite its harsh criticism, the district court noted that “some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball,” finding

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<sup>87</sup> *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1059 (9th Cir. 2015) (emphasis in original) (citation omitted).

<sup>88</sup> *O’Bannon*, 7 F. Supp. 3d at 975–76 (N.D. Cal. 2014).

<sup>89</sup> *Id.* at 976–77.

<sup>90</sup> See Transcript of Record at 901–06, *O’Bannon*, 7 F. Supp. 3d 955 (N.D. Cal. June 17, 2014) (4:09-cv-03329-CW).

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*; see also *O’Bannon*, 802 F.3d at 1081. (Thomas, S., concurring in part and dissenting in part) (showing the correlation of viewership to the payment of athletes).

<sup>93</sup> *O’Bannon*, 7 F. Supp. 3d at 999–1001.

<sup>94</sup> *Id.* at 1000.

<sup>95</sup> *Id.* The district court explained:

A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of “core principles.”

however that there were less restrictive means to achieve this procompetitive justification.<sup>96</sup>

The Ninth Circuit instead embraced the procompetitive justification of amateurism stating, “the amateur nature of collegiate sports increases their appeal to consumers.”<sup>97</sup> The Ninth Circuit asserted, “not paying student-athletes is *precisely what makes them amateurs*.”<sup>98</sup> Quoting the Supreme Court in the *Board of Regents*, the Ninth Circuit opined that amateurism allows the “market for college football” to remain “distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league [football].’”<sup>99</sup>

Traditional notions that college athletes should remain unpaid are undercut by several factors, including the rise of college athletics as a multibillion dollar industry and the important labor law concerns at issue. The Ninth Circuit admitted that college athletes provide the essential labor for the product of major college athletics, and General Counsel of the National Labor Relations Board (NLRB) asserts that college athletes, namely football players, are employees under the National Labor Relations Act.<sup>100</sup> If the NLRB deemed football players “employees” in an actual case before the NLRB, then it would create incredible instability within the NCAA as the NLRA only applies to private institutions and only 17 of the 125 college football teams in the FBS are private.<sup>101</sup> As a result, a small percentage of football players (i.e., the players at private institutions) would be considered employees under the NLRA (and likely eligible for payment with the ability to unionize and strike),<sup>102</sup> while most college football players (i.e., the players at public universities and colleges) would not be considered employees. The NCAA previously changed its policies or adopted

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<sup>96</sup> *O'Bannon*, 7 F. Supp. 3d at 1000 (acknowledging that “maximiz[ing] consumer demand for the product’ is a legitimate procompetitive justification” (alteration in original) (quoting Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 119–20 (1984)).

<sup>97</sup> *O'Bannon*, 802 F.3d at 1073.

<sup>98</sup> *Id.* at 1076 (emphasis in original).

<sup>99</sup> *Id.* at 1076–77 (alteration in original) (quoting *Bd. of Regents*, 468 U.S. at 102).

<sup>100</sup> *O'Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1066 (9th Cir. 2015); NAT’L LABOR & RELATIONS BD., GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT, 22–23 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> [<https://perma.cc/N99B-RM36>] [hereinafter GENERAL COUNSEL’S REPORT].

<sup>101</sup> *See* Nw. Univ., 362 N.L.R.B. No. 167, at 5-6 (2015). This instability is one of the reasons the full NLRB declined to exercise jurisdiction over the Northwestern football players’ attempt to unionize, as Northwestern is the only private institution in the Big 10 Conference. *See id.*

<sup>102</sup> *See, e.g.*, GENERAL COUNSEL’S REPORT, *supra* note 100, at 20–22.

new ones in the face of litigation or other external threats.<sup>103</sup> The Duke Model embraces the reality of major college athletics and provides an equitable and manageable approach to compensating college athletes. The next Part addresses the advantages of the Duke Model before discussing its intricacies.

## II. ADVANTAGES OF THE DUKE MODEL

The advantages of the Duke Model are plentiful, starting with the flexibility relating to the different forms and varying amounts of compensation that conferences and players can choose to adopt. The Duke Model includes three categories of compensation: (1) base salary; (2) athletic bonuses; and (3) academic bonuses. Conferences, depending on their available resources and their priorities, could choose to compensate their athletes using any of the three categories, any combination of the three categories, or all three categories. Conferences could also choose the amounts they pay the athletes based on the particular member schools' ability to pay.

The NCAA itself would also benefit from a system of payment created with the players, conferences, and the NCAA for several reasons. First, the NCAA would avoid the negative press and costs of continuing antitrust litigation brought on behalf of college athletes.<sup>104</sup> Second, if college athletes prevailed in any of those antitrust cases, a free market might be much more costly to universities than a controlled Duke Model.<sup>105</sup> For the same reasons the NCAA does, its member institutions also benefit from a compensation model, as conferences find themselves as defendants in antitrust cases with the NCAA.<sup>106</sup> Adopting the Duke Model also forestalls any efforts by the NLRB to rule officially that college athletes are employees,<sup>107</sup> and it would likely prevent

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<sup>103</sup> See, e.g., *infra* notes 253-255 and accompanying text.

<sup>104</sup> See, e.g., *Jenkins v. NCAA Complaint*, *supra* note 76, at 2 (involving football and men's basketball players seeking a free market system of payment for college athletes beyond their scholarship amounts).

<sup>105</sup> Moreover, if the governing bodies of the NCAA chose to pay college athletes in some form under the Duke Model, the parties could negotiate to change the terms and payment structure. Arguably, since such payment would be voluntary and not court-ordered, the NCAA could stop allowing the compensation of athletes. But once a compensation model is negotiated, implemented, and agreed to it would be difficult for the NCAA to reverse that decision entirely.

<sup>106</sup> See, e.g., *Jenkins v. NCAA Complaint*, *supra* note 76, at 1 (showing the Power Five conferences as defendants).

<sup>107</sup> On January 31, 2017, Richard Griffin, Jr., General Counsel of the NLRB (General Counsel), sent a memorandum to regional directors and officers of the NLRB, resolving the issue of whether Division I FBS scholarship football players at private institutions are considered employees pursuant to the NLRA. GENERAL COUNSEL'S REPORT, *supra* note 100, at 1-2 ("This Report also addresses the question left open in

Division I FBS scholarship athletes at private colleges and universities from bringing a labor complaint or striking.<sup>108</sup>

Moreover, the NCAA avoids any potential government pressure through legislation requiring member institutions to pay college athletes or through Department of Justice investigations involving antitrust laws. For example, in 2011, “the United States Justice Department announced an investigation to determine whether the NCAA’s prohibition on scholarships violates antitrust laws. Spontaneously, the NCAA changed the bylaw prohibiting multi-year scholarships in 2011 before the Justice Department completed its investigation. . . .”<sup>109</sup>

Furthermore, some members of Congress have already shown great interest in college athletics in the past, even going so far as to introduce legislation that would have removed the now-defunct Bowl Championship Series (the BCS) and created a college football playoff.<sup>110</sup> Eventually, the BCS did give way to the college football playoff. The first ever college football playoff began with controversy when top-tier teams Baylor University

Northwestern University, and sets forth the General Counsel’s position on whether scholarship football players at NCAA Division I Football Bowl Subdivision (‘FBS’) private colleges and universities are employees under the NLRA . . .”). General Counsel determined unequivocally that these football players are employees under the NLRA. *Id.* at 16 (“[W]e conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.”). The General Counsel’s memorandum is not a binding ruling or decision, but it provides guidance for “employers, labor unions, and employees that summarizes [NLRB] law . . . and explains how the office of the General Counsel will apply these representational decisions in the unfair labor practice arena.” *Id.* at 1; *see also* *Old Harbor Native Corp. v. Comm’r of Internal Revenue*, 104 T.C. 191, 206–07 (1995) (“First, a general counsel memorandum is not binding precedent on this Court. A general counsel memorandum is a legal opinion from one division of the Commissioner’s Office of Chief Counsel to another.” (citation omitted)).

<sup>108</sup> The General Counsel indicates that Division I FBS football players at private institutions are afforded the protections of Section 7 of the NLRA even if they never choose to “form or support a union.” GENERAL COUNSEL’S REPORT, *supra* note 100, at 21 (“Section 7 protections [are] afforded to all unorganized private sector employees who may never elect to form or support a union.”). Section 7 provides employees with the “right to engage in concerted activities for mutual aid or protection,” which includes striking. *Id.* (internal quotation marks omitted); *see also* 29 U.S.C. § 157 (2012); *The Right to Strike*, NAT’L LABOR REL. BOARD (July 31, 2017), <https://www.nlrb.gov/strikes> [<https://perma.cc/LPS8-R7ZB>] (“Strikes are included among the concerted activities protected for employees by [Section 7].”).

<sup>109</sup> Randy Haight, *Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics*, 21 JEFFREY S. MOORAD SPORTS L.J. 19, 32 (2014) (footnote omitted) (finding suspicion in the abrupt change in the NCAA bylaws); *Which Schools Offer Multi-Year Athletic Scholarships?*, GO BIG RECRUITING (Sept. 19, 2014), <https://www.gobigrecruiting.com/blog/2014/09/schools-offer-multi-year-athletic-scholarships/> [<http://perma.cc/5U6Y-X27C>] (stating a common complaint of college athletes is the restriction of scholarships).

<sup>110</sup> Rick Klein, *Rep. Joe Barton: College Football Playoff Will ‘Fail Every Year’; Congress May Examine Next Year*, ABC NEWS (Dec. 12, 2014, 5:25 PM), <http://abcnews.go.com/Politics/rep-joe-barton-college-football-playoff-fail-year/story?id=27568131> [<https://perma.cc/T7VB-AF5Y>].

and Texas Christian University failed to receive a bid to play in the national semifinal college playoff.<sup>111</sup> Republican Joe Barton of Texas, who “previously used his perch as chairman of the House Energy and Commerce Committee to convene hearings on the much-maligned BCS, even pushing legislation to prod the NCAA to ban it in favor of a playoff system,” wanted further hearings on the new system to add more teams to the four-team playoff.<sup>112</sup> As the push for college athlete compensation continues to gain steam and shows no signs of slowing,<sup>113</sup> particularly when revenues and television deals (such as the \$8.8 billion extension of the NCAA’s and CBS Sports’ (CBS) and Turner Broadcasting System Inc.’s (TBS) agreement for the men’s NCAA tournament)

<sup>111</sup> Chuck Culpepper, *College Football Playoff Field Set but Controversy Lingers with Ohio State in, TCU Snubbed*, WASHINGTON POST (Dec. 7, 2017), [https://www.washingtonpost.com/news/sports/wp/2014/12/07/college-football-playoff-field-set-ohio-state-in-tcu-snubbed/?utm\\_term=.fd7622a7f42d](https://www.washingtonpost.com/news/sports/wp/2014/12/07/college-football-playoff-field-set-ohio-state-in-tcu-snubbed/?utm_term=.fd7622a7f42d) [<https://perma.cc/ZWZ2-LRGE>].

<sup>112</sup> Klein, *supra* note 110.

<sup>113</sup> See, e.g., ALLEN L. SACK & ELLEN J. STAUROWSKY, *COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH* 23 (1998); Ellen J. Staurowsky, *Piercing the Veil of Amateurism: Commercialisation, Corruption and US College Sports*, in *THE COMMERCIALISATION OF SPORT* 143 (Trevor Slack ed., 2004); Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L. J. 367, 369 (2015); Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1081 (2012); Cesar F. Rosado Marzan & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 301–04 (2015); McCormick & McCormick, *supra* note 4, at 495–96; McCormick & McCormick, *supra* note 38, at 71–72; Michael J. Mondello & Joseph Beckham, *Workers’ Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295 (2002); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 25 (2000); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 25 (1991); Ellen J. Staurowsky, “A Radical Proposal”: *Title IX Has No Role in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L. REV. 575 (2012); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 65 (2014); Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 307 (1998); Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’S Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 372 (2012); Jamie Nicole Johnson, Note, *Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education*, 2015 U. ILL. L. REV. 959 (2015); Jay D. Lonick, Note, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 139–40 (2015) (arguing for athlete compensation); Charlotte M. Rasche, Note, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes*, 16 REV. LITIG. 219, 240 (1997); Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid up to \$125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/> [<http://perma.cc/Z9EX-73JY>] (“[T]he best college athletes gain valuable publicity from playing college athletics.”); Sean Gregory, *It’s Time to Pay College Athletes*, TIME (Sept. 16, 2013), <http://content.time.com/time/subscriber/article/0,33009,2151167,00.html> [<https://perma.cc/Z7RL-GXHK>].

continue to soar, the government may feel compelled to intervene, making the Duke Model a favorable option for the NCAA.<sup>114</sup>

The players obviously benefit from the Duke Model because they earn based on their performances and contributions to a multibillion dollar industry. There are a number of advantages, both direct and indirect, stemming from compensating college athletes above their scholarship amount. First, fairness and equity dictate that the laborers and direct providers of a product that generates billions of dollars should be compensated properly. Second, college athletes may stay longer in school if they were receiving compensation and bonuses while in school.<sup>115</sup> College athletes could earn money for their families and themselves, which may be extremely attractive for athletes from disadvantaged backgrounds or with lower socioeconomic statuses.<sup>116</sup> If the college athlete did stay in school longer, then he would benefit by maturing during that time.<sup>117</sup> Also, if the school paid bonuses for graduation, then that might also incentivize athletes to stay in school.

The Duke Model could also be applied to Division II and III conferences. Conferences in those divisions could choose to adopt any aspects of the Duke Model at whatever fraction of the original amounts that those conferences could afford. Moreover, the conferences and players could revisit the amounts detailed in the Duke Model every five years to adjust, if necessary, for drastic increases or decreases in the revenues and sources of reallocation. This periodic review ensures that colleges and universities are able to compensate athletes in a fiscally responsible manner that is fair to the athletes, which will depend on whether the revenues are increasing, decreasing, or staying relatively constant. If there are changes in revenue, the amount of compensation changes.

Furthermore, the Duke Model could be used to compensate female athletes. Some conferences, such as the American Athletic Conference where the University of Connecticut women's basketball team resides, may determine

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<sup>114</sup> See Eric Brady, *NCAA Extends Tournament Deal with CBS, Turner Through 2032 for \$8.8 Billion*, USA TODAY (Apr. 12, 2016, 2:02 PM), <http://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/> [<https://perma.cc/3A2P-XJMK>] (discussing the \$8.8 billion extension).

<sup>115</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1073 (9th Cir. 2015).

<sup>116</sup> Telephone Interview with Jay Bilas, *supra* note 26.

<sup>117</sup> See Jaimie Duffek, *Relative Age Effect: Is When You Are Born More Important Than How Good You Will Be?*, USA TODAY (May 3, 2017), <http://usatodayhss.com/2017/relative-age-effect-is-when-you-are-born-more-important-than-how-good-you-will-be> (finding that maturity is most likely a factor that plays a role in the athlete's future success).

that revenues in female athletics would enable female sports teams to receive compensation under a variation of the Duke Model. Some conferences and their players might determine that, rather than base compensation, the academic bonuses or athletic bonuses or both are feasible financially and best reflect the excellence sought by female athletes in certain conferences. For example, conferences could adopt academic bonuses in women's swimming in Conference USA. Another possibility is that universities spend more money on female athletic programs in proportion to the increase in spending on base compensation, bonuses for football and men's basketball, or both, which would improve women's college athletics and certainly align with Title IX, which is discussed in Section IV. The variations and possibilities of the Duke Model make it a highly attractive possibility for compensating college athletes. The next Part provides the details of how the Duke Model functions.

### III. THE DUKE MODEL: A PERFORMANCE-BASED SOLUTION

The Duke Model represents a novel approach to compensating college athletes based exclusively on how the athlete performs. The model includes a base compensation, derived from the performance of the athlete, bonuses for athletic performance, and bonuses for academic performance. The Duke Model is loosely based on the professional athlete payment model as it includes a base salary and potential bonuses.<sup>118</sup> The base salary for professional athletes, though, is not based entirely on their actual performance; it reflects on how they performed in the past and a prediction on how they will perform in the future.<sup>119</sup> Other models proposed by legal commentators and scholars fail to set up a system based entirely on performance, and they also lack the specificity and breadth that the Duke Model includes.<sup>120</sup>

The Duke Model would also likely overcome a Rule of Reason analysis because, although a restraint would exist on how much a player could make because of the limits set, those

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<sup>118</sup> See Joel Corry, *Agent's Take: Notable Players Who Cashed in on Performance Bonuses*, CBS SPORTS (Dec. 30, 2014), <http://www.cbssports.com/nfl/news/agents-take-notable-players-who-cashed-in-on-performance-bonuses> [<https://perma.cc/PW5T-26RB>] (noting performance bonuses, in the ways of incentives and salary escalators, are awarded to professionals in accordance with their contract and performance).

<sup>119</sup> See Lindsey Adler, *Here's What NBA Players Really Deserve to Make*, DAILY DOT (July 23, 2015, 8:00 AM) <https://www.dailydot.com/sports/most-overpaid-nba-players/> [<https://perma.cc/D7UN-HF87>] (showing the difference between what NBA players' salaries are versus how much they would get paid on a pure performance model).

<sup>120</sup> Grimmett-Norris, *supra* note 40.

limits possess a procompetitive justification to maintain a level playing field and competitive balance amongst the teams in each conference.<sup>121</sup> For example, if a team in a conference could set its own limits on compensation under the Duke Model, then the university with the richest donors and most avid football fans would attract all of the best players because it could offer the most money to players. By allowing conferences to set their own limits, particularly with the same number for the Power Five conferences, those conferences will remain competitive within their conference and amongst the Power Five conferences. If a non-Power Five conference adopts the Duke Model but in a limited form, such as 50 percent or 75 percent of the values that the Power Five conferences adopt, then those other conferences may not attract the same caliber of players as Power Five conferences, but they do not attract those players anyway under today's system. In evaluating the Duke Model, a court would look favorably on the compensation of college athletes when they are providing the labor for a product that generates billions of dollars, the procompetitive restraints on the amounts that athletes could earn, and the fact that conferences would only pay what they could afford.

In any event, as a former Division I athlete, the author of this article contends that this form of payment would be appealing to college athletes who view sports as a meritocracy where one should receive what they earn. Prior to discussing the three areas of compensation based on performance—base salary, athletic bonuses, and academic bonuses—some of the other rationale of the model must be explained.

A. *The NCAA Would Provide Basic Oversight for the Duke Model, Which Would Function at the Conference Level*

Under the Duke Model, the NCAA would serve as the purveyor of information regarding all finances of the conferences and schools. The NCAA would work with each conference to determine appropriate amounts of compensation based on the revenues generated by each conference, the ability of each school in the conference to pay, and the priorities of the conference with

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<sup>121</sup> Moreover, the NCAA, its member institutions, and players could seek an exemption from federal and state antitrust laws that might view any limitations on player compensation as violating antitrust law. See Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 874–75 (2014) (creating a new federal regulatory scheme for college athletics and proposing an antitrust exemption to help do so).



regard to payment. The priorities of certain conferences, for example, might be to compensate college athletes based solely on academic bonuses, other conferences may choose to compensate college athletes using only athletic bonuses, while others still may choose to compensate using all three areas—base compensation, athletic bonuses, and academic bonuses.

Each school would need to submit its financial data to the NCAA to help facilitate this process, which would include all of the revenue streams and expenses for each school, such as revenue from television contracts, ticket sales, and expenses for athletic directors' and coaches' salaries, facilities, and staff salaries.<sup>122</sup> The NCAA already maintains the NCAA fund that is based on its multibillion contract and extension with CBS and TBS that allows the networks to broadcast the NCAA Division I men's basketball tournament (NCAA basketball tournament).<sup>123</sup>

The NCAA would serve as a fact-finding instrument that works with all of the conferences to help determine how much a conference and its individual schools could pay athletes, while still attempting to keep the compensation at a level in line with the NCAA's purported issue with consumer demand concerns.<sup>124</sup> Those concerns, according to the NCAA, involve the notion that the more a college athlete is paid, the less people will watch college sports.<sup>125</sup> As set forth above, however, this argument lacks solid evidentiary support. Moreover, the average consumer would likely not be offended when a college athlete, who helps generate millions of dollars for his university while appearing on SportsCenter highlights and nationally televised games, earns a five-figure compensation above his scholarship amount based solely on his performance.

Implementation of the Duke Model would most likely occur at the conference level for several reasons. First, the university's payment of its athletes should be based on how much money the university has available to pay its athletes, understanding that money may be reallocated from coaches'

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<sup>122</sup> The NCAA already receives this information for numerous public schools that are required to release revenue and expense reports for their athletic departments. See USA Today Sports, *Methodology for 2016 NCAA Athletic Department Revenue Database*, USA TODAY (July 6, 2017, 12:36 PM), <http://sports.usatoday.com/2017/07/06/methodology-for-2016-ncaa-athletic-department-revenue-database/> [<https://perma.cc/6PYB-AU5C>].

<sup>123</sup> CBS Sports, *Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010), <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement> [<https://perma.cc/B6ZH-AJKR>]; Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money/> [<https://perma.cc/4ALN-RMML>].

<sup>124</sup> See discussion *supra* Part I.

<sup>125</sup> See discussion *supra* Part I.

salaries, athletic department personnel salaries, and money spent on facilities. Each university generates a different amount of revenue, some of which includes monies that are earned and shared based on conference-wide television contracts, performance in the men's NCAA basketball tournament, and the college football playoff system. For example, conferences such as the Pac 12, Big 10, SEC, and ACC share in the revenue from television contracts for football in their respective conferences.<sup>126</sup>

Also, the NCAA pays out money from its basketball fund based on, among other things, how well the conferences' schools perform in the NCAA tournament.<sup>127</sup> Each game played in the 2017 NCAA tournament was worth roughly \$266,000.<sup>128</sup> The conferences split the money earned amongst its members.<sup>129</sup> The ACC, by virtue of so many of its teams advancing far in the tournament in 2015, 2016, and 2017, earned over \$100 million for those three years.<sup>130</sup> The basketball fund comes from the NCAA's original \$10.8 billion television contracts with CBS and TBS.<sup>131</sup> Those parties reached agreement on the extension of that contract at \$8.8 billion for CBS and TBS to broadcast the tournament through 2032.<sup>132</sup> Similarly, the college football playoff system rewards conferences in the Power Five conferences with a set amount, as well as conferences whose teams qualify for the four-team college semifinals and non-playoff bowl games under this system.<sup>133</sup> Several other conferences, known as the Group of Five, also receive a set amount, but far less than the Power

<sup>126</sup> Jason Alsher, *5 College Conferences that Bring in Over \$250 Million*, CHEATSHEET (Feb. 15, 2017), <https://www.cheatsheet.com/sports/the-5-most-valuable-conferences-in-college-sports.html> [<https://perma.cc/SD9M-6FRG>].

<sup>127</sup> See Hobson, *supra* note 123 (providing that NCAA payouts increase the better a team performs).

<sup>128</sup> Michael Rogner, *Economics of the 2017 NCAA Tournament*, TOMAHAWK NATION (Mar. 14, 2017, 10:00 AM), <http://www.tomahawknation.com/2017/3/14/14918106/money-finances-2017-ncaa-tournament-basketball> [<https://perma.cc/NF29-N9M7>].

<sup>129</sup> *Id.*; Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 25, 2016), [http://espn.go.com/mens-college-basketball/story/\\_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament](http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament) [<https://perma.cc/4J75-EAAF>].

<sup>130</sup> Tim Daniels, *ACC Set to Make Combined \$100 Million from Last 3 NCAA Tournaments*, BLEACHER REPORT (Mar. 31, 2017), <http://bleacherreport.com/articles/2701113-acc-set-to-make-combined-100-million-from-last-3-ncaa-tournaments> [<http://perma.cc/Y6C7-KE84>].

<sup>131</sup> *CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, *supra* note 123.

<sup>132</sup> See Brady, *supra* note 114.

<sup>133</sup> *Revenue Distribution*, C. FOOTBALL PLAYOFF, <https://www.collegefootballplayoff.com/revenue-distribution> [<https://perma.cc/K7PE-EYLX>] (2016–2017 figure found on linked PDF); see also Kristi Dosh, *College Football Playoff Payouts by Conference for 2016–17*, FORBES (Dec. 21, 2016), <https://www.forbes.com/sites/kristidosh/2016/12/31/college-football-playoff-payouts-by-conference-for-2016-17/#83e7bf572d4a> [<https://perma.cc/9JVZ-6X9H>].

Five's payout.<sup>134</sup> Notably, the college football playoff pays out over \$500 million total.<sup>135</sup>

Conferences, in any event, generate varying amounts of revenue.<sup>136</sup> For example, the Southeastern Conference generated over \$122 million in revenue for football in 2014–2015, and the Pac-12 Conference generated over \$81 million in revenue in

<sup>134</sup> The Group of Five conferences include the following: “American Athletic Conference, Conference USA, Mid-American Conference, Sun Belt Conference, and the Mountain West Conference.” See Bill Bender, *Power 5 vs. Group of 5: College Football's Split Decision*, SPORTING NEWS (June 9, 2014), <http://www.sportingnews.com/ncaa-football/news/power-5-conferences-autonomy-ncaa-group-of-5-nick-saban-mike-slive-division-iv-split/1151s8k6rrjvi1gph46mditvr8> [https://perma.cc/SF29-BJG7]; Dosh, *supra* note 133. Other payments under the college football playoff system include: (1) a set amount for each conference (for 2017–2018 it is \$300,000) for each of its school's football teams that meets the NCAA's APR (Academic Progress Rate) for participation in a postseason football game, and each independent institution also receives a set amount (the \$300,000 in 2016–2017) when its football team meets that standard; (2) a set amount (for 2017–2018 it is \$2.16 million) for each conference whose teams play in the semifinal or national championship game to cover expenses for those games; (3) Notre Dame will receive \$2.65 million if it meets the APR standard, and the other three independents will share \$928,503; and (4) “certain conferences in the Football Championship Subdivision (FCS) conferences will receive \$2.53 million in aggregate.” *Revenue Distribution*, *supra* note 133; *Academic Progress Rate Explained: What Is the APR and How Is It Calculated?*, NCAA, <http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained> [https://perma.cc/D7ZL-JKVH ] (defining “Academic Progress Rate” as a system that “holds institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term”); *Revenue Distribution*, *supra* note 133 (2016–2017 figure found on linked PDF).

<sup>135</sup> See *College Bowl Payouts Surpass \$500 Million*, ESPN (Apr. 14, 2015), [http://espn.go.com/college-football/story/\\_id/12688517/college-bowl-game-payouts-surpass-500-million-first-year-college-football-playoff](http://espn.go.com/college-football/story/_id/12688517/college-bowl-game-payouts-surpass-500-million-first-year-college-football-playoff) [https://perma.cc/82EM-JFE3].

<sup>136</sup> See, e.g., DANIEL L. FULKS, REVENUES AND EXPENSES: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 2004–2013 (2014), <https://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf> [https://perma.cc/56M A-AHMA ] (showing revenue for Division I schools); Gould IV et al., *supra* note 4, at 16–26; Steve Berkowitz, *Pac-12 Zooms Past Big Ten, SEC in College Sports Revenue*, USA TODAY (May 23, 2014), <https://www.usatoday.com/story/sports/college/2014/05/23/pac-12-conference-tax-return-revenue-record/9497233/> [https://perma.cc/N6S2-PCH4] (recounting the increase in revenue from the Pac-12 conference); Randy Chua, *How Much Revenue Do College Sports Produce?*, INVESTOPEDIA (Nov. 15, 2011, 2:00 AM), <http://www.investopedia.com/financial-edge/1111/how-much-revenue-do-college-sports-produce.aspx> [https://perma.cc/U9TP-7N5P] (looking at revenues from both college football and basketball); *NCAA Finances: 2015–16 Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/> [https://perma.cc/6VST-GVTN] (ranking the NCAA schools by revenue); Jon Solomon, *Inside College Sports: SEC, Big Ten Dominate \$100M Revenue Club*, CBSSPORTS.COM (Dec. 17, 2015), <https://www.cbssports.com/college-football/news/inside-college-sports-sec-big-ten-dominate-100m-revenue-club/> [https://perma.cc/2GWN-GPX3] (recounting the revenue from 2014–2015 from the SEC and Big Ten); STATISTA, *Revenue of College Football Teams in 2014 (in Million U.S. Dollars)*, <http://www.statista.com/statistics/249745/us-college-football-teams-revenue/> [https://perma.cc/9ZFV-Y9HH] (showing statistics of revenue from college football programs).

football in that same year.<sup>137</sup> Both are Power Five conferences.<sup>138</sup> The Power Five conference school revenues are “five times greater than the revenues of these mid-major institutions,” which stem primarily from the extraordinary differences in ticket sales, rights, and licensing.<sup>139</sup> The annual ticket revenue for the athletic department at the University of Texas, for instance, brings in almost one hundred times the revenue of the athletic department at Troy University.<sup>140</sup>

Thus, a conference that generates more revenue can afford to pay its players more than a conference that generates less revenue. As a result, in football, the SEC would likely have a higher base compensation and higher bonuses than Conference USA, a non-Power Five conference. Opponents of differentiated pay scales might argue that this would lead to high school athletes wanting to play in the SEC or Big 10 instead of Conference USA. This, however, is already the case. Elite high school athletes want to, and typically do, play at high-profile schools in the Power Five conferences<sup>141</sup> to give themselves the most exposure, which will give them the best opportunity to make it to the professional ranks. Additionally, some conferences may place greater value on academics, choosing to adopt only the academic bonuses and not the base compensation or athletics bonuses. Compensation accomplished on a conference-level allows each conference to promote and reward the performance that its institutions value most.

Also, each conference has a Student Athlete Advisory Committee (SAAC) where college athletes collaborate

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<sup>137</sup> See Peter Berkes, *The SEC Makes More Money Than Every Other Conference, and It's Not Close*, SB NATION (Apr. 26, 2016, 8:39 AM), <http://www.sbnation.com/college-football/2016/4/26/11456612/athletic-department-finances-sec-big-ten-pac-12-acc> [<https://perma.cc/PQ8K-DVQC>] (“The SEC makes a per-team average of about \$14 million more in revenue than its closest peer and \$12 million more in average profit after expenses.”).

<sup>138</sup> See *Division I Committees*, NCAA, <https://www.ncaa.org/governance/committees?division=d1> [<https://perma.cc/K997-HNPF>] (denoting the Power Five to include “Atlantic Coast, Big 12, Big Ten, Pac-12, and Southeastern [C]onferences”).

<sup>139</sup> Gould IV et al., *supra* note 4, at 20–21.

<sup>140</sup> *Id.* at 21.

<sup>141</sup> See Matt Brown, *What We Learned on Signing Day*, SPORTS ON EARTH (Feb. 4, 2016), <http://www.sportsonearth.com/article/163622032/college-football-signing-day-what-we-learned> [<https://perma.cc/B9PM-Z2NS>] (breaking down the Power Five schools by ranked recruits signed and finding that the nation’s top recruits will play for Power Five schools). High school recruits are rated on a scale of two to five by recruiting services, with five serving as the top rating, and almost all five-star recruits attend Power Five conferences. See Jeff Nusser, *Rivals, Scout, ESPN, 247: Star Rating Systems Explained*, SB NATION: COUGCENTER (Jan. 31, 2016), <http://www.cougcenter.com/wsu-football-recruiting/2013/2/5/3956800/rivals-scout-espn-247-star-rating-system-national-signing-day> [<http://perma.cc/5DYD-DS9A>] (explaining the star rating system associated with high school recruits).

interactively with athletic directors, coaches, and players from other schools, to discuss and make rules and policies affecting college athletes' lives.<sup>142</sup> Similarly, autonomy legislation allows college athletes to work alongside athletic directors, coaches, and players from amongst the Power Five conferences to make policies affecting college athletes' lives.<sup>143</sup> Mechanisms, therefore, already exist to enable these conversations and changes to take place on a conference-wide scale.

*B. Rationale Behind the Duke Model's Starting Base Compensation*

The Duke Model includes a base compensation to protect every player, which is akin to what the National Football League and National Basketball Association utilize through minimum salaries.<sup>144</sup> Thus, if a player falls out of favor with a coaching staff for defensible or indefensible reasons, then that player still maintains some level of security that he will receive some compensation.

The Duke Model sets the highest base compensation for football players in a Power Five conference who start every game at \$40,000. This number is based on the NCAA's argument that amateurism requires college athletes to forgo payment above their scholarships, and if college athletes receive payment above their scholarships, then supposedly fewer consumers would watch college athletics.<sup>145</sup> Indeed, as discussed previously, the NCAA commissioned a study in the *O'Bannon* case measuring consumer attitudes regarding college athlete payment.<sup>146</sup> Even though the study was flawed, the NCAA might argue it tended to show that the more a college athlete would be paid, the more

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<sup>142</sup> See *NCAA Student-Athlete Advisory Committees (SAACs)*, NCAA, <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saac> [https://perma.cc/R5R2-64QD] (listing the functions of the committees).

<sup>143</sup> See Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015), 6:58 AM <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> [https://perma.cc/E8LL-UJQP] (where student athletes "push for involvement" in aspects of policies affecting them).

<sup>144</sup> Compare Michael Ginnitti, *NFL Minimum Salaries for 2015 and the Veteran Cap Benefit Rule*, SPOTRAC (Feb. 2, 2015), <https://www.spotrac.com/blog/nfl-minimum-salaries-for-2015-and-the-veteran-cap-benefit-rule> [https://perma.cc/E56X-JGUE] (showing that NFL rookies received a \$435,000 minimum salary for the 2015 season), with *What's the Minimum NBA Salary?*, HOOPSHYPE (Oct. 12, 2015), <http://hoopshype.com/2015/10/12/whats-the-minimum-nba-salary> [https://perma.cc/XF8L-WFNA] (finding a minimum salary for an NBA rookie was set at \$525,093 for the 2015–2016 season).

<sup>145</sup> *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1078 n.22 (stating that college athletes play for "the love of the game" and if they were to be paid it would "jeopardize" the public's view of college sports and result in less viewership).

<sup>146</sup> See *supra* notes 81–86 and accompanying text.

disapproving the consumer would be of payment.<sup>147</sup> Although this contention is highly questionable and lacking reliable evidentiary support, the Duke Model placates the NCAA's consumer demand argument by choosing a relatively low number for the highest base salaries that falls between the two lowest numbers used in the survey.

Moreover, the Duke Model sets the base compensation at a number that is considered (according to some methods) at the top of the lower class income range and below middle class income.<sup>148</sup> According to the Pew Research Center, which defines middle class as "two-thirds to two times the national median income for your household size," the range for middle class income is between \$46,960 and \$140,900.<sup>149</sup> A reasonable consumer would likely understand that a college athlete serves as the direct producer of a product that generates billions of dollars, and that consumer would likely not stop watching college sports simply because that college athlete earns a base compensation in the lower class range.

For that same reason, consumers would likely not oppose college athletes earning more than minimum wage for their efforts given the billions of dollars the athletes generate. Using the hours detailed in the Northwestern case, paying football players minimum wage (the federal minimum wage is \$7.25<sup>150</sup>) multiplied by the hours they spend devoted to football (approximately 1,750 hours) equals approximately \$12,687.50.<sup>151</sup> Under the Duke Model, even a scholarship athlete who was not on the first or second team in football would make a base compensation (\$10,000 for the third team or \$5,000 for being on the team as a scholarship athlete) lower than minimum wage, despite playing on a team that produced millions of dollars of revenue. As a result, the highest base compensation of \$40,000 represents a number that reasonable consumers would likely not oppose, while also adequately compensating college athletes who bring in millions in revenue to universities.

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<sup>147</sup> See June 30th Transcript of Record, *supra* note 81, at 2652–53.

<sup>148</sup> Tami Luhby & Tiffany Baker, *What is Middle Class, Anyway?*, CNN MONEY, <http://money.cnn.com/infographic/economy/what-is-middle-class-anyway> [<https://perma.cc/3JA2-KVXH>].

<sup>149</sup> *Id.*

<sup>150</sup> 29 U.S.C. § 206(a)(1)(C) (2012); see also *Minimum Wage*, U.S. DEP'T LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> [<https://perma.cc/JNE4-HVTH>] (detailing the minimum wage requirements).

<sup>151</sup> See Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN: MONEY (Mar. 31, 2014, 6:58 AM), <http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/index.html> [<https://perma.cc/B89D-CVRK>] (determining that football players at Northwestern spent 1,750 hours doing football-related activities according to the NLRB decision).

### C. *Forms of Compensation*

Under the Duke Model, football and men's basketball players would receive a lump-sum payment after the season, calculated based on different criteria. The following Sections use a Power Five conference example to illustrate how the Duke Model works. Non-Power Five conferences might agree on a percentage of the Power Five conference proposal, and that concept will be discussed below. Universities and college athlete representatives could arrive at different numbers, or the same numbers as the Duke Model, but the structure provides a functional and flexible method to compensate college athletes.

#### 1. Compensating Football Players According to Their Depth Chart Status for Each Game to Determine the Base Compensation

In football, the Duke Model calculates the base compensation for a player in any conference depending on how many games he started on offense or defense.<sup>152</sup> In football, teams typically use depth charts to determine who is the starter, the second team player, and the third team player.<sup>153</sup> The starters, in the author's experience, start the game and typically play more than the second team players (who may not play at all), who typically play more than the third-team players (who also may not play during any given game).

The base compensation for an individual in a Power Five conference school that started all twelve regular season games on offense or defense would be \$40,000 for the season. An individual that served as a second-team player in all twelve regular season games would earn a base compensation of \$20,000. A third-team player would receive \$10,000. And a scholarship player that does not fall within one of those three teams would receive \$5,000. If a player did not start every game, but started some, then the compensation would be prorated based on how many games the player served on the respective

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<sup>152</sup> Eleven players participate on every play for each team. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> [https://perma.cc/695Q-4JT7].

<sup>153</sup> See *2017 College Football Depth Charts and Rosters*, OURLADS, <http://www.ourlads.com/ncaa-football-depth-charts/> [https://perma.cc/GN6K-XT29] (listing depth charts for all college football programs). A depth chart is a common tool used to map out the placement of starting players, second-team players, third-team players, and the remainder of players. See e.g., *2016–2017 LSU Tigers Depth Chart*, OURLADS, <http://www.ourlads.com/ncaa-football-depth-charts/depth-chart/lsu/90981> [https://perma.cc/GE9C-N9ZA] (last updated Dec. 31, 2016, 10:18 AM).

teams. Thus, if player X started all twelve games, he would earn \$40,000 for the season. If player Y played on the second team the entire season, he would earn \$20,000, and so on.

The base salary divided by twelve equals the amount a player makes for each game. For example, if John Smith started half of the games, but was demoted halfway through the season to second team, then his compensation would be prorated as a starter and second-team player based on how many games he served in those roles. If Smith started half of the twelve games and served as a second-team player the other half, then his compensation for that year would be his starter compensation earned plus his second team compensation earned. This same approach would be applied to any scenario that might arise for any player, such as a player serving as a third-team player for three games, earning a second-team spot and playing in that capacity for three games, and then taking over for the last six regular season games as a starter because the starter at his position suffers injury. The below Figures illustrate how the Duke Model applies to these scenarios.

Fig. 1: Power Five Conference School Football Player Pro-Rated Base Compensation

Depth Chart Ranking	Compensation Per Game Equation (Assuming a 12 Game Schedule)	Compensation Per Game
First Team	$\$40,000 \div 12$	\$3,333.33
Second Team	$\$20,000 \div 12$	\$1,666.67
Third Team	$\$10,000 \div 12$	\$833.33
On Roster	$\$5,000 \div 12$	\$416.67

Fig. 2: Power Five Conference School Football Player Base Compensation Scenario A

Player	John Smith	Number of Games	Compensation Per Game Equation	Compensation Earned
First Team		6	$(\$40,000 \div 12) \times 6$	\$20,000
Second Team		6	$(\$20,000 \div 12) \times 6$	\$10,000
Third Team		0		
On Roster		0		
				Total Compensation \$30,000



Fig. 3: Power Five Conference School Football Player Base Compensation Scenario B

Player Smith	John	Number Games	of	Compensation Per Game Equation	Compensation Earned
First Team		6		$(\$40,000 \div 12) \times 6$	\$20,000
Second Team		3		$(\$20,000 \div 12) \times 3$	\$5,000
Third Team		3		$(\$10,000 \div 12) \times 3$	\$2,500
On Roster		0			
					Total Compensation \$27,500

If a team went to the postseason for either a conference playoff championship game, a bowl game, or the college football playoffs, then the base compensation would be calculated using a thirteen, fourteen or fifteen game schedule (for the national finalists), meaning the base compensation for each player would be divided by thirteen, fourteen or fifteen to determine how much each game would be worth. The compensation for reaching and winning a conference championship, bowl, or college football playoff game would be disseminated as an athletic bonus, discussed below.<sup>154</sup>

The special teams players<sup>155</sup> would also be eligible for a bonus based on athletic performance (discussed *infra*), but the base compensation for special teams players includes the following: the starting placekicker would receive \$20,000; and the kick-off specialist, punter, snapper, kick returner, and punt returner would receive \$10,000 each. The placekicker can sometimes play a crucial role in determining the outcome of the game through field goals and extra points, while the punter, kick-off specialist, snapper, kick returner, and punt returner each play a key role in dictating field position throughout the game.<sup>156</sup> The placekicker, given his potentially critical role, would receive more than these other special teams players. The placekicker does not, however, play as much as the offensive and defensive players and, therefore, would not warrant the same amount of base compensation as those players.

<sup>154</sup> See *infra* Section III.C.3.

<sup>155</sup> Special teams refer to plays in a football game where the ball is being kicked, which include a kickoff, field goal, and punt. *Beginner's Guide to Football*, *supra* note 152.

<sup>156</sup> Lisa Horne, *Just How Special are Special Teams in College Football?*, BLEACHER REPORT (Mar. 26, 2013), <http://bleacherreport.com/articles/1580902-just-how-special-are-special-teams-in-college-football> [<https://perma.cc/LZ4E-JG2S>] (statistically showing that "special teams . . . can and will impact the final score of [a] game").

The total compensation amount for starters would equal \$1,635,000.<sup>157</sup> After adding in the special teams players' \$70,000 base compensation, the total base compensation amount would equal \$1,705,000.

A non-Power Five conference school, whose revenues fall well short of a Power Five conference's revenue,<sup>158</sup> could still use the same basic structure, but use a certain percentage of the Power Five conference amounts. For example, a non-Power Five conference might agree to pay half of the amounts that the Power Five conferences would pay its members. The base compensation in this scenario, including the special teams' players and using half of the proposed Duke Model values, would equal \$852,500.

This system of performance-based compensation aligns with the interests of the players who want to start and play as much as possible. This system also aligns with the teams' interests, which include encouraging competition amongst the players, rewarding those players who earn starting spots on the roster, and those who make advancements on the depth chart.

Critics may argue that college athletes would oppose the idea of their teammates receiving more compensation than them, which could negatively affect team comradery.<sup>159</sup> This argument lacks merit and represents a fundamental misunderstanding of how athletes think. Jay Bilas, a former Duke University basketball player and assistant coach, who is also a lawyer and basketball analyst with ESPN, agrees, stating that "[i]t's patently absurd that there would be fights in the locker room if the best player made more money than the last player on the team or when the quarterback makes more than the person who snaps him the football, just as there aren't fights in the locker room among coaches when the head coach makes more money than the assistants."<sup>160</sup>

Athletes see sports as a meritocracy.<sup>161</sup> The better players

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<sup>157</sup> Football teams typically have eighty-five scholarship athletes. DIVISION 1 MANUAL, *supra* note 4, at § 15.5.6.1. Whereas men's basketball teams can have thirteen scholarship athletes. *Id.* at § 15.5.5.1. Only scholarship athletes would be automatically a part of the Duke Model. This total sum is calculated by multiplying the base salary by the number of players at each level of compensation. It is each base compensation level—\$10,000, \$20,000, and \$40,000—multiplied by twenty-two offensive and defensive players each for the first, second, and third teams, and \$5,000 multiplied by nineteen for players not on any of those teams but who are on the roster.

<sup>158</sup> Gould IV et al., *supra* note 4, at 21–22 (discussing how Power Five conferences' revenues are "five times greater than the revenues of . . . mid-major institutions").

<sup>159</sup> Schwarz, *supra* note 38, at 48–50 (debunking the myth that team comradery will, in fact, not be compromised with teammates receiving different compensation).

<sup>160</sup> Telephone Interview with Jay Bilas, *supra* note 26.

<sup>161</sup> Gerald Early et al., *Baseball, Boxing and the Charisma of Sport and Race*, in THE CHARISMA OF SPORT AND RACE, 8 DOREEN B. TOWNSEND CENTER OCCASIONAL

play more, the best players receive the awards, and, typically, the better team wins. As a former Division I athlete, the author of this article can attest that athletes will not resent a teammate who makes more money than them particularly because, under the Duke Model, compensation is based entirely on performance. Athletes understand and accept that performance drives rewards already.

## 2. The Base Compensation for Basketball Players is Determined by How Many Minutes Per Game Each Player Participates

In men's basketball, the base compensation under the Duke Model would depend on how many minutes each player averaged throughout the course of the season. Five players are in the game for each team, and, like football, coaches can substitute in other players throughout the game. Men's college basketball games currently consist of two twenty-minute halves for a total of forty minutes. In a Power Five conference, a player would receive a base compensation equating to the average of minutes played per game over the course of the season, assuming the player played in a sizeable number of games. For example, if a player averaged thirty-five minutes per game in a season, then the player's base compensation would be \$35,000.

Using the University of Kentucky (a Power Five conference team) men's basketball team as an example, the average number of minutes players played ranged from 1.3 to 32.1.<sup>162</sup> During the 2016–2017 season, under the Duke Model, the player with the most minutes averaged per game, Malik Monk, would have earned \$32,100, the next highest average per game would have earned \$30,400, and so forth.<sup>163</sup> The total base compensation for the University of Kentucky team in 2016-2017 would have totaled only \$215,800. Notably, all three of the University of Kentucky's men's basketball team's assistant coaches received salaries higher than \$215,800 for that season, with the lowest annual salary of those three assistant coaches at \$400,000, and the highest assistant coach salary for that year at \$750,000.<sup>164</sup> Moreover, non-Power Five conference schools could

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PAPERS 5 (Christina M. Gillis ed., 1996) ("Sport is about meritocracy. People are attracted to sport often because it is pure meritocracy.").

<sup>162</sup> *Kentucky Wildcats Stats 2016–2017*, ESPN, [http://www.espn.com/mens-college-basketball/team/stats/\\_id/96/kentucky-wildcats](http://www.espn.com/mens-college-basketball/team/stats/_id/96/kentucky-wildcats) [https://perma.cc/8GAP-R793].

<sup>163</sup> *Id.*

<sup>164</sup> Ben Roberts, *UK Basketball Coaches Receive Raises, Contract Extensions*, LEXINGTON HERALD LEADER (July 13, 2016, 3:20 PM), <http://www.kentucky.com/sports/college/kentucky-sports/uk-basketball-men/article89387672.html> [https://perma.cc/6EY3-DCWJ].

offer a lesser payment rate based on the school's overall budget since those conferences generate smaller revenues than the Power Five conference schools.<sup>165</sup>

This approach again aligns with the interests of the players and the teams as players want to play as many minutes as possible, and coaches want their best players on the floor as much as possible. Thus, minutes played in basketball represents the best measure to determine a base compensation for these athletes.<sup>166</sup>

It must be noted that a player in football will be much more likely to earn a full \$40,000 base compensation than a basketball player. Basketball players simply do not play all forty minutes of every game over the course of a season. Also, the base compensation totals for the teams are disparate between football and basketball, with football team base compensation totals much higher than basketball team base compensation totals. The disparate treatment in both of those instances (i.e., higher individual and team compensation in football than in basketball) makes sense financially and equitably because football programs tend to generate considerably more revenue than their basketball programs, and football teams typically include eighty-five scholarship athletes while basketball only includes thirteen scholarship athletes.<sup>167</sup>

### 3. Bonuses—Athletic

The conferences and player representatives may agree that base compensation is sufficient to compensate college athletes. They may, however, also agree to pay bonuses based on athletic performance. Employers, particularly professional sports teams, often employ bonuses in their employees' contracts to incentivize the employees to perform at their maximum levels.<sup>168</sup>

Under the Duke Model, statistical leaders for the football season on each team would receive a \$5,000 bonus. Those

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<sup>165</sup> See *supra* note 158 and accompanying text.

<sup>166</sup> In college football, there are four quarters that are fifteen minutes each. The number of plays on offense and defense will change each game depending on what happens in the game (i.e., if one team controls the ball and runs a lot more plays than the other team's offense which cannot make a first down). Thus, the number of plays is not a good measure for football, neither is minutes played as some plays take only a few seconds and others take much longer.

<sup>167</sup> See DIVISION 1 MANUAL, *supra* note 4, at §§ 15.5.6.1, 15.5.5.1 (restricting football teams to eighty-five total scholarships and basketball teams to thirteen); see also *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> [<http://perma.cc/JQJ4-U4F2>] (reporting that in 2015–2016 the Texas A&M football program had the highest revenue of any football or basketball program).

<sup>168</sup> See Corry, *supra* note 118 (showing examples of professional football players that earned bonuses by reaching performance thresholds).

statistical categories include yards passing, yards rushing, yards receiving, total touchdowns, total scoring, sacks, defensive tackles, tackles for losses, interceptions, pass break-ups, special teams tackles, kickoff return yardage, and punt return yardage. Each university would pay a total of \$65,000 for statistical bonuses. In basketball, statistical leaders for the season on each team would also earn \$5,000, and those categories would include points per game, rebounds, assists, blocked shots, and steals. The total statistical bonuses per team would amount to \$25,000. The flexibility of the Duke Model also allows the conferences and players to select for compensation only certain statistical bonuses, such as passing yards, rushing yards, total touchdowns, sacks, defensive tackles, pass break-ups, and interceptions.

Earning external honors aligns with the interests of the players, who want recognition for their efforts, and the schools because they benefit from the additional, positive exposure based on the athletic feats of their athletes. The Duke Model includes the following bonuses for external honors, meaning honors bestowed by organizations or entities outside of the university, as opposed to team awards given internally (such as Rice University's Most Valuable Player).<sup>169</sup>

The Duke Model would provide bonuses for Associated Press All-American Honors<sup>170</sup> and official All-Conference Honors,<sup>171</sup> with differing levels based on the team one made, such as first team, second team, or third team. The bonus amounts would range from \$10,000 to \$2,500 for All-American honors and \$5,000 to \$1,000 for All-Conference honors. Winning the Heisman Trophy, which is awarded annually to the most outstanding football player in college football,<sup>172</sup> would earn a player \$25,000. When Robert Griffin III won the Heisman Trophy while playing for Baylor University, "Baylor estimate[d] the Heisman win was worth \$250 million in extra donations, increased ticket sales, licensing

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<sup>169</sup> Chuck Pool, *Ellerbee Names 2016 MVP*, RICE OWLS (Feb. 19, 2017), <http://www.riceowls.com/sports/m-footbl/spec-rel/021917aac.html> [<https://perma.cc/M993-DC76>] (naming Emmanuel Ellerbee as the winner of Rice's Most Valuable Player for the 2016 season).

<sup>170</sup> *AP Preseason All-American Team*, USA TODAY (Aug. 22, 2017), <https://www.usatoday.com/story/sports/ncaaf/2017/08/22/ap-preseason-all-america-team/104847964/> [<https://perma.cc/X5GX-GUJD>].

<sup>171</sup> See e.g., *2016 All-Big 12 Football Awards Announced*, BIG 12 SPORTS (Dec. 7, 2016), <http://www.big12sports.com/ViewArticle.dbml?ATCLID=211345089> [<https://perma.cc/CTN8-M6Z6>] (announcing All-Conference titles and team for the Big 12); *Pac-12 Football Awards and All-Conference Team Announced*, PAC-12 NEWS (Nov. 26, 2016), <http://pac-12.com/article/2016/11/29/pac-12-football-awards-and-all-conference-team-announced> [<https://perma.cc/9F8L-J5KP>] (listing the winners of All-Conference Honors).

<sup>172</sup> *Heisman Trust Mission Statement*, Heisman, [http://heisman.com/sports/2014/9/15/GEN\\_0915145605.aspx](http://heisman.com/sports/2014/9/15/GEN_0915145605.aspx) [<https://perma.cc/FSC9-WALK>].

fees, sponsorship deals, an expanded deal with Fox Sports Southwest, and higher corn dog sales.”<sup>173</sup>

Athletes who earn these honors, which may traditionally be thought of as amateur honors, significantly help generate millions of dollars for their respective universities. Moreover, professional athletes sometimes receive bonuses based on awards and accolades they receive.<sup>174</sup> The following Figure illustrates the external honors bonuses for both football and basketball.<sup>175</sup>

Fig. 4: Individual External Honors Bonuses

Honor	Bonus
Heisman Trophy Winner	\$25,000
National Player of the Year	\$15,000
Conference Player of the Year	\$10,000
Conference Offensive Player of the Year	\$7,500
Conference Defensive Player of the Year	\$7,500
Conference Freshman/Newcomer of the Year	\$2,500
All-American First Team	\$10,000
All-American Second Team	\$7,500
All-American Third Team	\$6,000
All-Conference First Team	\$5,000
All-Conference Second Team	\$2,500
All-Conference Third Team/Honorable Mention	\$1,000

Just as coaches receive bonuses for postseason success, reaching a conference championship game, bowl game, or the playoffs would warrant an additional bonus payable to each member of the football or basketball team to reinforce the notion that success on the team level takes an entire roster.<sup>176</sup> For example, Gary Pinkel, the former head football coach of the University of Missouri, earned combined bonuses of \$900,000 for the 2014 season based, in part, on reaching the SEC title game and playing in the Citrus Bowl.

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<sup>173</sup> Howard Bloom, *How Much is Winning Heisman Worth?*, SPORTS BUS. NEWS (DEC. 7, 2012, 10:00 PM), <http://sportsbusinessnews.com/content/how-much-winning-heisman-worth> [https://perma.cc/5PK9-LC6Q].

<sup>174</sup> See Cory, *supra* note 118; Kurt Badenhausen, *The World's Highest-Paid Athletes 2015: Behind the Numbers*, FORBES (June 10, 2015, 8:55 AM), <https://www.forbes.com/sites/kurtbadenhausen/2015/06/10/the-worlds-highest-paid-athletes-2015-behind-the-numbers/#4743fbc034ce> [https://perma.cc/7B7X-ZDV2].

<sup>175</sup> Berkowitz & Schnnaars, *supra* note 15.

<sup>176</sup> Michael Aiello, *Compensating the Student-Athlete*, 23 SPORTS LAWS J. 157, 167–68 (2016) (stating that post season bonuses given to coaches “should be diverted to student-athletes” because “spectators attend sporting events to watch the players play, not to watch the coaches coach”).

Fig. 5: Football Bonuses Per Player Based on Team Success

Postseason Game	Bonus per Player
Conference Championship Game Participant	\$1,000
Conference Championship Game Winner	\$2,000
Bowl Game Participant	\$2,500
Bowl Game Winner	\$5,000
National Semifinalist	\$7,500
National Runner-Up	\$10,000
National Champion	\$20,000

Fig. 6: Men's Basketball Bonuses Per Player Based on Team Success

Postseason Game	Bonus per Player
Conference Championship Game Participant	\$1,000
Conference Championship Game Winner	\$2,000
NCAA Tournament 1st Round Participant	\$2,500
NCAA Tournament 2nd Round Participant	\$5,000
NCAA Tournament Sweet 16 Participant	\$7,500
NCAA Tournament Elite 8 Participant	\$10,000
NCAA Tournament National Semifinalist	\$20,000
NCAA Tournament National Runner-Up	\$25,000
NCAA Tournament National Champion	\$30,000
NIT Participant	\$2,000
NIT Champion	\$4,000

With the base compensation and athletic bonuses described, an examination of two cases might serve useful. The hypothetical involves players who play for the same Power Five conference school to determine if the results appear equitable.

In Case Study 1, the star running back starts every game, leads the team in rushing yards and total touchdowns. He earns Conference Offensive Player of the Year, First Team All-Conference and First Team All-American honors. His team reaches the National Semifinal game in the college football playoffs after winning its conference championship game. His total pay would be \$40,000 in base compensation, \$10,000 in bonuses for being a statistical leader in two categories, \$22,500 in individual athletics honors bonuses, and \$9,500 in team athletics honors bonuses. This equals \$82,000 and represents a modest amount given the likely publicity he has garnered for his team and university, the innumerable highlights of him on SportsCenter, and the use of his image by the university and networks to promote the games.

In Case Study 2, the second-team cornerback plays solidly, but his face is never used on any commercials, billboards, or media items like press releases or game day materials. He does not earn any All-American or All-Conference honors or lead the team in any statistical categories. After winning its conference championship game, his team reaches the National Semifinal game in the college football playoffs. Despite being a productive member of a team that generates considerable revenue, his total pay would be just his \$20,000 base compensation plus \$9,500 in team athletics honors bonuses for a total of \$29,500.

Given these outcomes—a star player earning a total of \$82,000 and a back-up player earning \$29,500—it is unlikely, and at best uncertain at this point before they are actually paid, that a reasonable consumer would be outraged by these numbers.<sup>177</sup> An average consumer may understand that a player who helps generate millions of dollars and considerable positive exposure for his school, while starring in games and appearing on television commercials that promote the games and highlights, could earn \$82,000. While \$82,000 may be more than that average consumer makes himself, that average consumer likely does not directly generate millions of dollars of revenue in whatever field the consumer works. A reasonable consumer might also accept a back-up player earning a lower-class salary despite serving as a solid contributor to a team that generates millions of dollars of revenue. Consumer demand for college athletics would likely not suffer.<sup>178</sup> As set forth in the Introduction, some coaches make millions of dollars. Fans overlook large salaries if their team is winning.

The total for a team that included one first team All-American, six all-conference players on the first team, six

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<sup>177</sup> See, e.g., McCormick & McCormick, *supra* note 4, at 497–98 (arguing for the compensation of college athletes above their scholarship amounts); Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAGAZINE (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> [<https://perma.cc/S64X-L9T3>] (supporting the payment of college athletes); Will Hobson & Emily Guskin, *Poll: Majority of Black Americans Favor Paying College Athletes; 6 in 10 Whites Disagree*, WASHINGTON POST (Sept. 14, 2017), [https://www.washingtonpost.com/sports/colleges/poll-majority-of-black-americans-favor-paying-college-athletes-6-in-10-whites-disagree/2017/09/14/27fa5fc2-98df-11e7-87fc-c3f7ee4035c9\\_story.html?utm\\_term=.d882759ca56d](https://www.washingtonpost.com/sports/colleges/poll-majority-of-black-americans-favor-paying-college-athletes-6-in-10-whites-disagree/2017/09/14/27fa5fc2-98df-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.d882759ca56d) [<https://perma.cc/N9GF-LLUL>] (“The idea of allowing players to earn money if their image or likeness is used through the sale of merchandise has more broad-based support than revenue-based pay, with 66 percent of Americans in favor.”).

<sup>178</sup> Today the consumer demand for college football is extremely high. ESPN even broadcasts a number of spring practice games. *FBS (I-A) Schedule–2017*, ESPN, <http://www.espn.com/college-football/schedule> [<https://perma.cc/NC76-QR9E>]. In the spring of 2016, Ohio State broke its own record for attendance at a spring practice game with 100,189 fans attending the game. Ward, *supra* note 32.



all-conference players on the second team, and a national semifinal finish, including all of the statistical athletic bonuses and base compensation, would be \$2,462,500.<sup>179</sup> This type of year would be phenomenal and would reap millions of dollars in revenue for the university, some of which should be allocated to pay the players for achieving those successes for the school.

#### 4. Compensating Athletes Under the Duke Model Could Easily Be Accomplished by Reallocating Resources or Allowing Alumni and Booster Donations

This article next briefly discusses potential sources to reallocate money to compensate college athletes. There are various sources of funding, such as revenue from the college football playoff system, coaches' salaries, and facility expenses, which could be reallocated to cover the expense of compensating players.<sup>180</sup>

For example, the revenues for the Power Five conferences related to the 2016-2017 season for the college football playoff system included the following: ACC, \$88.5 million; Big 10, \$132.5 million; Big 12, \$95 million; Pac-12, \$101 million; and SEC, \$101 million.<sup>181</sup> The number of teams vary by conference, with the ACC including the most at fifteen and the (now improperly named) Big-12 including the least at ten. Thus, if every single team enjoyed an outstanding year (e.g., requiring them to compensate players a total of \$2,462,500), which is highly unlikely and therefore grossly overestimates the following total, it would take almost \$37 million (fifteen teams multiplied by \$2,462,500 for each team) to compensate all of the football teams in the ACC under the Duke Model. The revenues from the college football playoff system alone, (e.g., \$88.5 million for the ACC), would easily compensate athletes and still leave over \$50 million for distribution according to each conference's rules. After compensating its athletes under the Duke Model, the Big 10, with its fourteen teams, would have over \$95 million remaining.

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<sup>179</sup> The figures break down to: All-American (\$10,000), six all-conference players on the first team (6 x \$5,000 equals \$30,000), six all-conference players on the second team (6 x \$2,500 equals \$15,000), and a national semifinal finish (85 players x \$7,500 equals \$637,500), including all of the statistical athletic bonuses (\$65,000) and base compensation (\$1,705,000).

<sup>180</sup> The University of Texas, for example, is projected to spend \$10 million to renovate the team's locker room and weight room. Brian Davis, *It's a Bargain: Texas' 126 New Football Lockers Will Cost \$8,700 Each, Not \$10,500*, AUSTIN AM.-STATESMAN: HOOK'EM PLUS (May 4, 2017), <http://www.hookem.com/story/bargain-texas-126-new-football-lockers-will-cost-8700-not-10500/> [<https://perma.cc/JZC2-26YC>].

<sup>181</sup> Dosh, *supra* note 133.

Even when looking at the traditionally less successful football teams in the Power Five conferences or non-Power Five schools, coaches' salaries could be reallocated to compensate college athletes. For instance, University of Kentucky's head football coach, Mark Stoops, received \$3.5 million as salary in 2016, and his football staff received an additional \$3.4 million, for a total salary for football coaches—a group that does not include the athletic director or athletic department staff—at the University of Kentucky of over \$6.9 million.<sup>182</sup> Schools in non-Power Five conferences, such as those in Conference USA, could also reallocate money to compensate college athletes, even if their compensation model included only a fraction of what Power Five conferences would pay. Frank Wilson, the head coach of Conference USA's University of Texas at San Antonio, received a salary of \$835,000 in 2016, with an additional \$1,055,000 of salary going to his staff, totaling \$1,890,000.<sup>183</sup> Rice University, another Conference USA university, invested over \$30 million in building a sports facility.<sup>184</sup> Universities and athletics departments can reallocate money in many instances from money spent on facilities or coaches' salaries to player compensation.<sup>185</sup> Recall that the total base compensation for a non-Power Five conference school that decided to compensate its players at half the rate under the Duke Model would only amount to \$852,500. The Group of Five conference schools could also use money received from the college football playoff system to compensate its players.<sup>186</sup>

As for basketball, if a team that paid its base salary and bonuses for statistical leaders, a conference championship win, advancement to the national semifinal game of the NCAA basketball tournament, saw its player win National Player of the Year, Conference Player of the Year (\$10,000), make First Team All-American (\$10,000), and have two players earn First

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<sup>182</sup> 2016 NCAAF Coaches Salaries, *supra* note 6. Further, reallocation would be simple as coaching salaries only represent “a fraction of the expenses” that university athletic departments spend. Aiello, *supra* note 176, at 165.

<sup>183</sup> 2016 NCAAF Assistant Coaches Salaries, *supra* note 11; 2016 NCAAF Coaches Salaries, *supra* note 6; 2016 NCAAF Strength Coaches Salaries, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/strength> [<http://perma.cc/P7GE-CWNM>].

<sup>184</sup> Rice Holds Ceremonial Groundbreaking for New Brian Patterson Sports Performance Center, RICE OWLS (Mar. 10, 2015), <http://www.riceowls.com/genrel/031015aab.html> [<https://perma.cc/TG4C-4X6F>].

<sup>185</sup> Money from NCAA executive salaries could also be reallocated to compensate college athletes. The President of the NCAA reportedly made \$1,900,000 in 2014, and a number of other NCAA executives made over \$500,000 each. See Berkowitz, *supra* note 18. Reallocation of coaching salaries only represent “a fraction of the expenses” that university athletic departments spend. Aiello, *supra* note 176, at 165.

<sup>186</sup> See *Revenue Distribution*, *supra* note 133.

Team All-Conference Honors, then the total compensation owed players would be \$571,800.<sup>187</sup> By all standards, this would be a wildly successful year for a basketball program. John Calipari, the head coach of the Kentucky men's basketball team, received a total salary of over \$7.4 million in 2017.<sup>188</sup> A reallocation of the head coach's salary by itself could have easily covered all of the players' compensation for the entire season. College coaches realize that their players generate billions of dollars in revenue and those coaches might support the payment of their players.<sup>189</sup>

Money received from the NCAA basketball tournament—which the NCAA doles out to conferences based on, among other things, how many games the conferences' teams win in the tournament—could also be used to compensate players. In 2016, the ACC reportedly received almost \$40 million.<sup>190</sup> If fifteen teams in the conference performed exceptionally well, which again is highly unlikely and thus grossly overestimates the following total, only \$8,577,000 would be needed to compensate the players under the Duke Model. The ACC would have over \$31 million remaining to distribute to its teams.<sup>191</sup>

Furthermore, boosters and alumni could contribute donations to compensate college athletes. For example, just as boosters paid off Nick Saban's \$3.1 million mansion to entice him to remain as the head coach of the University of Alabama football team, they might be willing to help fund players' salaries.<sup>192</sup> Thus, even if no reallocation of assets occurred, booster and alumni contributions alone could likely cover the costs to compensate college athletes.

<sup>187</sup> The figures, based on Kentucky University's basketball team, breakdown to: base salary (\$215,800), statistical leaders (\$25,000), conference championship win (\$2,000 x 13 players = \$26,000), advancement to the national semifinal game of the NCAA tournament (\$20,000 x 13 players = \$260,000), National Player of the Year (\$15,000), Conference Player of the Year (\$10,000), First Team All-American (\$10,000), and two players earning First Team All-Conference Honors (\$5,000 x 2 players = \$10,000).

<sup>188</sup> *2017 NCAA Basketball Tournament Coaches' Pay*, *supra* note 9.

<sup>189</sup> See Edward Aschoff, *Steve Spurrier Wants Players Paid*, ESPN (June 1, 2012, 2:08 PM), [http://www.espn.com/college-football/story/\\_/id/7990235/south-carolina-gamecocks-coach-steve-spurrier-wants-pay-football-players](http://www.espn.com/college-football/story/_/id/7990235/south-carolina-gamecocks-coach-steve-spurrier-wants-pay-football-players) [<https://perma.cc/PSG6-KCB7>] (stating that former University of South Carolina head football coach Steve Spurrier wanted to compensate the players with a stipend). This is akin to the full cost of attendance stipend later approved by the NCAA. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

<sup>190</sup> Rovell, *supra* note 129; see also Daniels, *supra* note 130 (listing the bonus, incentives, and other revenue the ACC has received over the last three NCAA tournaments totaling over \$100 million dollars).

<sup>191</sup> Rovell, *supra* note 129; see also Daniels, *supra* note 130.

<sup>192</sup> Scarborough, *supra* note 20.

## 5. Bonuses—Academic

Conferences and player representatives may also agree to bonuses based on academic performance. Bonuses based on academic performance would further encourage college athletes to perform well in the classroom, which is in accord with the universities' missions and the long-term success of college athletes.<sup>193</sup> The proposed bonuses that would be based on academic performance linked to athletics include academic All-Americans, All-District, and All-Conference teams.<sup>194</sup>

Schools could also award bonuses for academic awards not linked to athletics, such as making the Dean's List, graduating, and graduating with honors.<sup>195</sup> These academic bonuses might provide athletes with additional incentive to succeed in the classroom and graduate, though the average consumer might scoff at these particular academic bonuses because they do lack an immediate nexus to athletics and other students do not receive monetary bonuses for achieving these results, such as graduating or making the Dean's List. Nevertheless, the NCAA stresses the importance of "student" in its self-serving phrase student-athlete;<sup>196</sup> awarding academic bonuses to athletes under the Duke Model simply reinforces that notion.

<sup>193</sup> The Knight Commission on Intercollegiate Athletics formed "in October 1989 in response to highly-visible scandals in college sports . . . promotes reforms that support and strengthen the educational mission of college sports." Amy Perko, *Knight Commission Calls for NCAA to Transform its Guidelines for March Madness Revenues to Better Support College Athletes and Protect Financial Integrity*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (May 10, 2016), <http://knightcommission.org/resources/press-room/965-may-10-2016-knight-commission-calls-for-ncaa-to-transform-its-guidelines-for-march-madness-revenues-to-better-support-college-athletes-and-protect-financial-integrity> [https://perma.cc/6NWC-P8YU]. The Commission makes recommendations to the NCAA, some of which the NCAA has adopted. *Id.* The Commission consistently recommends that the NCAA use its basketball fund to reward academic success and positive academic outcomes of college athletes rather than just reward universities based on their success in the NCAA tournament. *Id.*

<sup>194</sup> Specifically: Academic All-American First Team (\$10,000), Academic All-American Second Team (\$7,500), Academic All-American Third Team (\$6,000), Academic All-District Team (\$5,000), and Academic All-Conference (\$4,000).

<sup>195</sup> Specifically, Dean's List (\$7,500), graduating (\$5,000), graduating cum laude (\$6,000), graduating magna cum laude (\$7,500), and graduating summa cum laude (\$10,000).

<sup>196</sup> Except in quotes by others, I purposefully refuse to refer to athletes in college as "student-athletes" based on the history of the phrase "student-athlete." Professors Robert and Amy McCormick traced the roots of the NCAA's phrase "student-athlete" to a Colorado Supreme Court holding in 1953, noting that:

[I]n *University of Denver v. Nemeth*, the Colorado Supreme Court upheld a determination by the state Industrial Commission that Ernest Nemeth, a football player at the University of Denver, was an "employee" within the meaning of the Colorado workers' compensation statute. Thus, the university was obligated to provide workers' compensation for his football injuries. Stunned by the *Nemeth* decision, the NCAA responded by coining the term

#### IV. ADDRESSING COUNTER-ARGUMENTS TO THE DUKE MODEL

In addition to the arguments against the Duke Model that are addressed above, this Part addresses three other major arguments against the Duke Model: (1) this compensation model further devalues education from the perspective of college athletes; (2) the model should account for the value of education that college athletes receive; and (3) Title IX prevents compensating only male athletes in two sports; and (4) college athletes are ill-equipped to manage a salary responsibly. Each of these counterarguments are addressed below.

##### A. *The Duke Model Further Devalues Education for College Athletes*

One might argue that the over-commercialization of major college sports devalues the education portion of college athletes.<sup>197</sup> One might also argue that if colleges and universities compensate college athletes for playing their respective sports, then education will be valued even less by college athletes.<sup>198</sup> As an initial matter, this argument fails if conferences choose to adopt the academic bonuses to compensate college athletes for their academic achievements. Second, whether education is valued or devalued for each college athlete depends on how each institution approaches academics with its players, as well as how each player values his education.

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“student-athlete” and requiring its exclusive use thereafter. By emphasizing the identity of athletes as “students,” the NCAA endeavored to diminish any tendency to characterize them as “employees.” . . . “[The NCAA] crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. [The NCAA] told college publicists to speak of ‘college teams,’ not football or basketball ‘clubs,’ a word common to the pros.” The NCAA adopted and mandated the term “student-athlete” purposely to buttress the notion that such individuals should be considered students rather than employees.

McCormick & McCormick, *supra* note 38, at 83–84 (footnotes omitted) (quoting WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995)) (citing Tom Farrey, *Pay-for-Play: Not Yet, But Soon?*, ESPN (Mar. 28, 2003), <http://espn.go.com/neb/ncaatoumeyOl/s/2001/0326/1162258.html>).

<sup>197</sup> See Nick Desai, *College Should be About Education First*, HUFFINGTON POST (Aug. 11, 2014, 6:30 PM), [http://www.huffingtonpost.com/nick-desai/colleges-should-be-about\\_b\\_5669998.html](http://www.huffingtonpost.com/nick-desai/colleges-should-be-about_b_5669998.html) [<https://perma.cc/9F8S-PDDA>] (stating that not only would paying athletes devalue the athlete’s education it would also create an “imbalance between a student athlete and just a student” and devalue every student’s education).

<sup>198</sup> See Rick Burton, *College Athletes Are Already Plaid with Their Education*, US NEWS (Apr. 2, 2013, 12:21 AM), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/college-athletes-are-already-paid-with-their-education> [<http://perma.cc/S264-3RVQ>] (“higher education is often (and falsely) assumed to have no value for athletes”).

As for the NCAA, it already appears to value money over education as a large amount of the NCAA's distributions are made based on athletic success.<sup>199</sup> Moreover, the NCAA allows the scheduling of football and basketball games on weekdays, including Monday through Thursday, which seems counterproductive if the NCAA truly wants college athletes to study during the week while staying fresh for class and practice.<sup>200</sup>

Reallocating the monies from college football and men's basketball<sup>201</sup> will not change the fact that people are receiving money from college athletics; it will simply redirect some of the money to those producing the product of major college sports, the athletes. Nevertheless, a reallocation of money does not dictate that a player, individual school, or conference value or stress academics less or more—athletes, schools, and conferences are free to prioritize academics as they want.

### B. *The Duke Model Should Account for the Value of Athletic Scholarships*

Some may argue that the Duke Model should compute in the value of the education that athletes receive because the education they receive possesses value.<sup>202</sup> This argument fails for several reasons. One, while it is true that the scholarship represents a value, the compensation that athletes receive should not be capped arbitrarily at the value of the scholarship. There is no cap on how much coaches can be paid,<sup>203</sup> how much schools can devote to improving facilities, NCAA executive pay, or athletic director salaries, and there should not be a cap based on the scholarship value for athletes.

<sup>199</sup> See NCAA, 2017 DIVISION I REVENUE DISTRIBUTION PLAN (2017), [https://www.ncaa.org/sites/default/files/2017NCAA\\_DivisionI\\_RevenueDistributionPlan\\_2017\\_0426.pdf](https://www.ncaa.org/sites/default/files/2017NCAA_DivisionI_RevenueDistributionPlan_2017_0426.pdf) [<https://perma.cc/6PHP-4ECF>].

<sup>200</sup> See 2017 College Football Schedule, FB SCHEDULES (2017), <http://www.fbschedules.com/college-football-schedule/> [<http://perma.cc/S264-3RVQ>]; 2015-2016 Men's College Basketball TV Schedule, USA TODAY (Oct. 29, 2015, 5:56 PM), <http://www.usatoday.com/story/sports/ncaab/2015/10/29/2015-16-mens-college-basketball-tv-schedule/74829074/> [<https://perma.cc/2KC7-KUVG>].

<sup>201</sup> College football and men's basketball have evolved into a multibillion-dollar business over the years through television contracts, increased ticket sales, and now the college football playoff system. Andy Staples, *The Future of College Sports Media Rights: How Will Deals Evolve With the Landscape? Punt, Pass & Pork*, SPORTS ILLUSTRATED (Mar. 28, 2016), <https://www.si.com/college-football/2016/03/28/how-are-college-sports-media-rights-deal-evolving> (recounting the evolution of the college sports business).

<sup>202</sup> See Ackerman & Scott, *supra* note 35; Chudacoff, *supra* note 35.

<sup>203</sup> See *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (1998) (striking down the NCAA rule capping compensation for assistant, entry-level college coaches' salaries).

Second, this argument ignores the fact that since the 1950s, well before college athletics became a multibillion-dollar industry, universities have provided scholarships to their athletes.<sup>204</sup> Thus, universities have been able to afford athletic scholarships for over half a century, and they continue to do so. Now that college athletics generates billions of dollars, though, the direct producers of that product—the athletes—should receive some of the revenue they generate. Finally, as discussed above, universities and colleges have the ability to pay college athletes by reallocating the money generated by college athletics that is currently given to others (e.g., coaches and athletic directors).

C. *Title IX Serves as an Impenetrable Barrier to Compensating College Athletes in Football and Men's Basketball*

Inevitably, when compensation for football and men's basketball is discussed, some will argue that Title IX forms the ultimate barrier to such compensation. Antitrust economist Andrew Schwarz argues that Title IX does not preclude compensation for college athletes playing football or men's basketball.<sup>205</sup> Schwarz asserts that Title IX "aims for gender equity in participation and the regulations offer three ways to comply, none of which speak directly to equal funding. One is meeting the needs of all of the under-represented gender, the second is a subjective concept of progress towards equity, and the third and most common is actual equity in participation."<sup>206</sup> First, female participation in sports need not change if football and men's basketball players received payment above their scholarship amounts. Second, Schwarz argues that even if an interpretation of Title IX required equal spending on women's sports and men's sports, then a system of payment "would function like a 100% payroll tax on the male college athlete's pay."<sup>207</sup> For example, "if a star quarterback is worth \$50,000 to a school . . . then the most they could afford to offer him would be \$25,000, knowing the other \$25,000 had to go to meet their (theoretical) Title IX pay-equity burden."<sup>208</sup> Thus, an interpretation of Title IX that required dollar-for-dollar equal spending would not prevent a payment system for football and men's basketball athletes, although the salaries

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<sup>204</sup> McCormick & McCormick, *supra* note 38, at 84 (stating that universities formally sanctioned full grant-in-aid athletic scholarships in 1956).

<sup>205</sup> Schwarz, *supra* note 38, at 59–62.

<sup>206</sup> *Id.* at 60.

<sup>207</sup> *Id.* at 62.

<sup>208</sup> *Id.*

received by these athletes would be lower than their market values, and such a system would actually further enhance spending on women's athletics.<sup>209</sup>

One more likely possibility exists, though, if Title IX is read to require dollar-for-dollar spending on men and women's sports(which is arguable), where a university pays its football players a total of \$2,462,500 via reallocated revenues or booster and alumni donations,<sup>210</sup> and the exact same amount is contributed to women's sports via those same avenues. Matching the payment of men's college basketball players would be even easier as payments would reach around \$571,800 on the high end under the Duke Model, when a team had an excellent season. In any event, compensating football and men's basketball players in college would not require the demise of women's sports or the need to cut men's sports, but it could lead to a significant increase in spending on women's college athletics, which would tend to improve women's athletics, not destroy them.

*D. College Athletes are Ill-Equipped to Manage Compensation Responsibly*

The payment of college athletes also raises issues of taxation and financial coverage for injuries suffered while playing in college. College athlete salaries would likely be subject to taxation as income. Lawyers or certified public accountants provided by the university could assist athletes with filling out their tax forms, just as Volunteer Income Tax Assistance (VITA) provides tax assistance to low-income individuals and families.<sup>211</sup> Universities already provide extensive academic support for athletes with tutors and study hall; assistance with filing taxes would simply be another form of support.<sup>212</sup>

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<sup>209</sup> *Id.*

<sup>210</sup> *See supra* Section III.C.iv4.

<sup>211</sup> *IRS VITA Grant Program*, IRS, <https://www.irs.gov/individuals/irs-vita-grant-program> [<http://perma.cc/P9EF-UDXR>] (last updated Oct. 5, 2016) (explaining that VITA is an initiative designed to help "low- to moderate-income individuals . . . file their taxes each year").

<sup>212</sup> *See e.g., Academics for Student Athletes*, OR. STATE U., <http://oregonstate.edu/studentathlete/> [<https://perma.cc/5KDC-WP89>] (offering, among other services, a "Bridge Summer Program" designed to "help[] student athletes transition to the academics . . . through learning skill development, academic course credit and University orientation programs"); *Academic Support Services*, U. OF SOUTHERN CAL., <http://saas.usc.edu/academic-support-services/> [<https://perma.cc/6949-3C2P>] (providing academic counseling services, priority scheduling, study hall, tutorial services, computer labs, travel laptops, excused absence letters, OASIS (Online Academic Student Information System and disability testing for all of their college athletes to make sure "they have a successful and delightful college career while engaging in their competitive sports"); *Longhorn PRIDE Program*, TEX. SPORTS, <http://texassports.com/sports/>



The NCAA already attempts to educate college athletes on being financially aware.<sup>213</sup> The NCAA and universities could expand this effort to include providing financial literacy tools for college athletes on responsibly managing a salary. Such efforts would help college athletes act as good stewards of their compensation by teaching them how to spend, invest, and save. It is quite possible that many college athletes, who live below the poverty line while in school,<sup>214</sup> would simply be sending their earned compensation back to their families to take care of rent, food, and utilities. If taxation does occur, college athletes would rather receive a salary reduced by taxes than no salary at all.

As far as providing financial coverage for injuries, which would be akin to workers' compensation, athletes in major college sports should be entitled to compensation for injuries sustained as a result of playing in college.<sup>215</sup> Although there is currently a program in place that helps pay for some injuries suffered by college athletes,<sup>216</sup> this program leaves cracks in the system that sometimes result in the players and their families paying medical bills;<sup>217</sup> extending financial coverage to college athletes could seal those leaks.

Earning compensation for playing would not change the universities' expectations that college athletes maintain

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2013/8/28/academics\_0828134433.aspx [https://perma.cc/7V89-NA6N] (discussing a college athlete academic program, called "[t]he Longhorn PRIDE Program (Personal Responsibility in Developing Excellence)... a comprehensive life skills program committed to the welfare of student-athletes" and one that "has been recognized as one of the best life skills program in the nation").

<sup>213</sup> Schwarz, *supra* note 38, at 71–72; *Financial Awareness Best Practices for Student-Athletes*, NCAA, <http://www.ncaa.org/about/resources/leadership-development/financial-awareness-best-practices-student-athletes> [https://perma.cc/E9ZB-MWG9].

<sup>214</sup> See McCormick & McCormick, *supra* note 4, at 507 (discussing many college athletes live below the poverty line).

<sup>215</sup> See Shaun Loughlin, *Workers' Compensation and Student-Athletes: Protecting the Unpaid Talent in Profit-Making Enterprise of Collegiate Athletes*, 48 CONN. L. REV. 1737, 1749–51 (2016); John Stahl, *Worker's Compensation Coverage for Student-Athletes?*, LEXISNEXIS (Sept. 23, 2011, 6:49 PM), <https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2011/09/23/workers-compensation-coverage-for-student-athletes.aspx> [https://perma.cc/U687-DXCL].

<sup>216</sup> The program is the NCAA Catastrophic Injury Insurance Program, which provides coverage to "student-athlete[s] who [are] catastrophically injured while participating in covered intercollegiate athletic activity," but it fails to cover athletes who are not totally disabled unless the costs of their injuries meet the policy deductible. *Student-Athlete Insurance Programs: Catastrophic Insurance Program*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> [https://perma.cc/PZL2-8LMR].

<sup>217</sup> See Loughlin, *supra* note 215, at 1742; Jon Solomon, *College Athletes' Rights: NCAA Requires Health Insurance, But Schools Decide What to Pay*, Alabama Media Group (Feb. 19, 2012, 7:55 AM), [http://www.al.com/sports/index.ssf/2012/02/college\\_athletes\\_rights\\_ncaa\\_r.html](http://www.al.com/sports/index.ssf/2012/02/college_athletes_rights_ncaa_r.html) [https://perma.cc/9SNN-5UK6].

academic eligibility to receive compensation.<sup>218</sup> Athletes would still need to conduct themselves in a manner that comports with the athletic program and university's standards.<sup>219</sup> College athletes, on the other hand, might seek "independent verification of [their] grades" to avoid being removed from the team for non-academic or athletic performance issues.<sup>220</sup>

Before any part of the Duke Model could be implemented, the prohibition on compensating college athletes would need to be extinguished, and the stakeholders would need to agree on a compensation model. The current infrastructure of the NCAA provides a general framework that would allow the stakeholders—the athletes, athletic and school administrators, and NCAA representatives—to accomplish those goals. The next Part discusses the current infrastructure of the NCAA, how it lends itself to changing the rule on compensation and adopting the Duke Model, and obstacles to those changes.

## V. HOW THE DUKE MODEL COULD BE IMPLEMENTED AND OBSTACLES THERETO

### A. *The NCAA Division I Governance Structure and SAACs Provide the General Framework for Initiating a Conversation About, and Implementing, the Duke Model*

The NCAA, which is an unincorporated non-profit organization, regulates and oversees college athletics on a national level.<sup>221</sup> It includes more than 1,200 member institutions spanning three divisions: Division I, Division II, and Division III.<sup>222</sup> Division I offers full scholarships to college athletes, and this division represents "the highest level of

<sup>218</sup> Academic eligibility under the NCAA requires athletes in their second year to have a minimum grade-point average "that equals at least 90 percent of the institution's overall cumulative grade-point average required for graduation." An athlete in their fourth or later year must have a "minimum grade-point average . . . that equals 100 percent of the institution's overall cumulative minimum grade-point average required for graduation." DIVISION I MANUAL, *supra* note 4, at § 14.4.3.3.

<sup>219</sup> Telephone Interview with Jay Bilas, *supra* note 26.

<sup>220</sup> *Id.*

<sup>221</sup> NCAA, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES 7 (2017), [http://www.ncaa.org/sites/default/files/2015-16NCAA\\_FinancialStatement\\_20170223.pdf](http://www.ncaa.org/sites/default/files/2015-16NCAA_FinancialStatement_20170223.pdf) [<https://perma.cc/7TGB-JME9>].

<sup>222</sup> *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> [<https://perma.cc/M4AH-44BK>]. Division II uses a partial scholarship model, and it competes at an intermediate level. Division II Partial Scholarship Model, NCAA, <http://www.ncaa.org/about/division-ii-partial-scholarship-model> [<https://perma.cc/N4SD-CXLK>]; *see also* MATTHEW MITTEN ET AL., SPORTS LAW AND REGULATION 99 (3d ed. 2013). Division III does not offer scholarships and represents the lowest level of competition for these divisions. *Id.*

competition in most sports.”<sup>223</sup> Division I schools generate the most attention because they “generally have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships.”<sup>224</sup>

The NCAA would need to abolish its rule prohibiting college athletes from earning compensation above their scholarships for playing their respective sport, and then it could adopt the Duke Model pay-for-play compensation system.<sup>225</sup> The current governing structure of the NCAA includes not only NCAA representatives and university officials (such as athletic directors, university presidents, faculty athletics representatives), but also college athletes, who participate in a minority role. The NCAA, in fact, recently reformed its governing structure in Division I to include college athletes in the process of decision and policy-making. Even though their numbers are limited, college athletes could initiate conversations that lead to the rule changes necessary to enable the conferences to adopt the Duke Model.

The NCAA’s “governance structure consists of legislative bodies—made up of volunteers from [its] member schools—that govern each division, as well as a group of committees that set association-wide policy. These committees manage topics affecting sports rules, championships, health and safety, matters impacting women in athletics, and opportunities for minorities.”<sup>226</sup>

The Division I structure has changed in the past few years. “Division I recently redesigned its governing system to create a structure that is more nimble and streamlined and to be more responsive to membership needs. Members adopt bylaws governing Division I through two legislative processes[,] . . . Autonomy and Council Governance.”<sup>227</sup> The new structure allows for collaborative efforts and, among other things, more college athlete participation.

Both processes[—Council Governance and Autonomy—which are discussed below], include[] input from presidents, chancellors, directors of athletics, athletics administrators, coaches, faculty representatives, conference personnel and [critical for purposes of

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<sup>223</sup> MATTHEW MITTEN ET AL., *supra* note 222, at 99.

<sup>224</sup> *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> [<https://perma.cc/76KY-MDXW>].

<sup>225</sup> *See generally Amateurism: Prize Money Based On Place Finish*, NCAA, <https://web3.ncaa.org/lstdbi/search/proposalView?id=597> [<https://perma.cc/J5BK-QBNK>] (providing that a college athlete becomes ineligible if one “[u]ses his or her athletics skill [directly or indirectly] for pay in any form in that sport”).

<sup>226</sup> *Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> [<https://perma.cc/DK5V-QJWW>].

<sup>227</sup> *Division I Governance*, NCAA, <http://www.ncaa.org/governance?division=d1> [<https://perma.cc/S9AM-3H5D>].

the Duke Model,] student-athletes . . . NCAA committees [are] populated by membership personnel [that] conduct the division's day-to-day business and establish strategic direction for the future. The membership receives assistance in this regard from staff at the NCAA national office.<sup>228</sup>

For example, the Division I Board of Directors includes liaisons from the NCAA's office, such as Kevin Lennon, the NCAA's Vice President for Division I governance.<sup>229</sup>

"Division I's committee structure oversees everything from championships administration and sport oversight to strategic planning and the overall health of Division I."<sup>230</sup> According to the NCAA, "[t]he student-athlete voice is an important component of the Division I governance structure."<sup>231</sup> The 2014 restructuring gave "more emphasis to student-athlete voice at every level of decision-making."<sup>232</sup>

The Council Governance includes the Division I Council, which is "responsible for day-to-day operations of the division" and constitutes the division's primary policy-making body.<sup>233</sup> The Division I Council is comprised of forty members who are "athletics administrators (e.g., athletics directors, senior woman administrators, conference administrators, compliance administrators and other senior level administrators), faculty athletics representatives and student-athletes."<sup>234</sup> "Two members of the Division I Student-Athlete Advisory Committee participate and vote in meetings of the Division I Council . . ."<sup>235</sup> The Student-Athlete Advisory Committee (SAAC) also has a voting college athlete on each of the eight standing committees of the Council.<sup>236</sup> The Division I Council committees create legislation on

<sup>228</sup> *Id.*; see also *Division I Board of Directors*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=BOARD](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=BOARD) [<https://perma.cc/TT6J-MADU>]; Michelle Brutlag Hosick, *Staffing Changes at National Office*, NCAA (Mar. 25, 2015 9:24 AM), <http://www.ncaa.org/about/resources/media-center/news/staffing-changes-national-office> [<https://perma.cc/F6JH-2P36>]. These processes are Council Governance and Autonomy. See discussion *infra* notes 258–77 and accompanying text.

<sup>229</sup> *Division I Board of Directors*, *supra* note 228; Hosick, *supra* note 228.

<sup>230</sup> *Division I Governance*, *supra* note 227.

<sup>231</sup> *Id.*

<sup>232</sup> *Division I Committees*, *supra* note 138. Potential new NCAA rules and changes to existing policies "develop within the committee governance structure throughout the year, while other legislative measures are submitted by member conferences." *Division I Governance*, *supra* note 227.

<sup>233</sup> *Division I Committees*, *supra* note 138. The NCAA governance structure is composed of a legislative body called the Council that volunteer from member schools that govern Division 1, as well as a group of committees that determine association-wide policy. *Id.*

<sup>234</sup> DIVISION 1 MANUAL, *supra* note 4, at § 4.3.1.

<sup>235</sup> *Division I Governance*, *supra* note 227.

<sup>236</sup> *Division I Council Substructure*, NCAA, <https://www.ncaa.org/sites/default/files/DI%20Council%20Substructure.pdf> [<https://perma.cc/4TCB-Z4JN>]. The following eight Standing Committees report to the Council: The Student-Athlete Experience

a variety of topics relating to the well-being of college athletes.<sup>237</sup> The other major governing process in Division I, Autonomy, also includes college athletes in the decision-making processes.<sup>238</sup>

In 2014, the new governance model also “grant[ed] flexibility to schools in the Atlantic Coast, Big 12, Big Ten, Pac-12 and Southeastern conferences to change [or pass] rules for themselves in a list of specific areas within Division I.”<sup>239</sup> The areas of autonomy for the Power Five conferences include, among others, financial aid and “awards, benefits and expenses for enrolled student-athletes and their families and friends.”<sup>240</sup> This structure is referred to as autonomy, and college athletes participate actively in the autonomy governance structure. “Conferences choose [fifteen] student-athletes to be part of the [eighty] votes cast on autonomy legislation.”<sup>241</sup> Non-Power Five conference schools may, but are not required to, follow any of the autonomy legislation passed by the Power Five conferences.<sup>242</sup>

The Division I Council reports to the Division I Board of Directors, which consists of “[t]wenty chief executive officers (CEOs), one director of athletics, one senior woman administrator, one faculty athletics representative and one student-athlete. All FBS conferences have a permanent seat. Five FCS and five Division I Subdivision conferences rotate

Committee, The Strategic Vision and Planning Committee, The Legislative Committee, The Competition Oversight Committee, The Men’s Basketball Oversight Committee, The Football Oversight Committee, The Women’s Basketball Oversight Committee, and The Division I Student Athlete Advisory Committee. *Id.*

<sup>237</sup> *Division I Council Substructure*, *supra* note 236 (noting Council committees provide suggestions over athlete awards, financial aid, benefits, and health and safety); see DIVISION 1 MANUAL, *supra* note 4, at § 4.3.2 (“The Council shall . . . [r]ecommend nonacademic policies to the Board of Directors. . .”).

<sup>238</sup> *Division I Governance*, *supra* note 227.

<sup>239</sup> *Division I Committees*, *supra* note 138; see DIVISION 1 MANUAL, *supra* note 4, at § 5.02.1.1.

<sup>240</sup> DIVISION 1 MANUAL, *supra* note 4, at § 5.3.2.1.2. Some of the other areas of autonomy include time demands, meals and nutrition, recruiting restrictions, health and wellness, insurance, career transition, and academic support. *Id.*

<sup>241</sup> *Division I Governance*, *supra* note 227. The other votes are institutional votes consisting of the members of the Power Five conferences. NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE, RECOMMENDED GOVERNANCE MODEL 32 (2014) [hereinafter DIVISION I STEERING COMMITTEE], <https://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf> [<https://perma.cc/33XM-W3LZ>] (reporting that out of the eighty votes, sixty-five will be institutional and fifteen college athletes).

<sup>242</sup> DIVISION 1 MANUAL, *supra* note 4, at § 5.3.2.1.2.2. See Hosick, *supra* note 143 (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences) [<https://perma.cc/3PHU-UXNP>] (stating “the full cost-of-attendance stipends . . . could be worth between \$2,000 and \$5,000 per player”).

seats.”<sup>243</sup> Finally, the Board of Governors, a NCAA-association wide committee, represents “the highest governing body” of the NCAA.<sup>244</sup> “The Board of Governors consist[s] of [twenty] members,” including “[t]he NCAA president and the chairs of the Division I Council and the Division II and Division III Management Councils,” and chancellors or presidents from Division I, II and III schools who serve on other NCAA committees.<sup>245</sup> The Division I Council and Autonomy enable college athletes to push for reform of the NCAA rules to allow college athletes to earn compensation for playing their respective sport in college under the Duke Model.<sup>246</sup> These other governing bodies, such as the Division I Board of Directors and the Board of Governors, could also seek these rule changes as well.<sup>247</sup>

One obstacle to the reform of NCAA rules through these governance structures involves the minority participation of college athletes, as there are only one or two of them on some of these major governing bodies. This means that the majority of the participants, comprised of NCAA representatives and university officials, would need to push for these changes, too. A second obstacle stems from the college athletes who do serve on these councils, boards, and committees. Not all of them are football or men’s basketball players. For example, Brady Bramlett, from the University of Mississippi, serves as the sole college athlete representative on the Division I Board of Directors.<sup>248</sup> He plays

<sup>243</sup> *Division I Board of Directors*, *supra* note 228.

<sup>244</sup> *NCAA Board of Governors*, NCAA, <http://www.ncaa.org/governance/committees/ncaa-board-governors> [https://perma.cc/P466-SGG5]; *see also Board of Governors*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=EXEC](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC) [https://perma.cc/9AER-V6JR].

<sup>245</sup> *NCAA Board of Governors*, *supra* note 244. The NCAA president and chairs of the Division I, II and III councils are the “ex officio nonvoting members, except that the NCAA president is permitted to vote in the case of a tie among the voting members present and voting.” *Id.* The other members include, specifically, “eight chancellors or presidents from the Division I Board of Directors from Football Bowl Subdivision institutions; . . . [t]wo chancellors or presidents from the Division I Board of Directors from Football Championship Subdivision institutions; . . . two chancellors or presidents from the Division I Board of Directors from Division I subdivision institutions; . . . two Division II chancellors or presidents from the Division II Presidents Council; and . . . two Division III chancellors or presidents from the Division III Presidents Council.” *Id.*

<sup>246</sup> DIVISION I MANUAL, *supra* note 4, at §§ 5.2, 5.3 (describing the legislative process that allows for changes to fundamental aspects of previously established rules and regulations).

<sup>247</sup> *Id.* (stating that any action that is “contrary to the basic purposes, fundamental policies and general principles set forth in the Association’s constitution may be overridden by the Association’s entire membership by a two-thirds majority vote of those institutions voting.”); *see also Division I Board of Directors Endorses Sweeping Changes to Enforcement Model*, NCAA (Aug. 2, 2012, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/news/division-i-board-directors-endorses-sweeping-changes-enforcement> [https://perma.cc/FB2C-UVMD] (commenting on the Board of Director’s ability to make a binding vote).

<sup>248</sup> *Division I Board of Directors*, *supra* note 228.

baseball.<sup>249</sup> Despite the merits of the argument based on the billions of dollars generated by college football and men's basketball, one might wonder how vigorously he would argue for compensation for fellow college athletes who do not play his own sport. Adding representatives to these legislative bodies from football and men's basketball, particularly from Power Five conference schools, might help further the reform suggested in this article as the laborers who do create the product on the field would likely argue more strenuously because they would be the direct beneficiaries of such rule changes.

The removal of the prohibition against compensating college athletes could be discussed and advocated by the Division I council and autonomy participants. But ultimately a two-thirds majority vote of all members of the NCAA would be needed to change this rule as it affects a dominant provision of the NCAA, namely amateurism.<sup>250</sup> And athletes would not have a vote in such a situation.<sup>251</sup> Therefore, opponents of the Duke Model might also question why the NCAA and its members would approve the rule change allowing college athletes to earn compensation via the adoption of such a model when the NCAA and its members have so vehemently opposed paying college athletes in the past. There are several responses to that question that relate to why the NCAA and its members benefit from the Duke Model. First, the NCAA and its member institutions avoid the negative press and

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<sup>249</sup> 21–Brady Bramlett, OLE MISS BASEBALL, [http://www.olemisssports.com/sports/m-basebl/mtt/brady\\_bramlett\\_825152.html](http://www.olemisssports.com/sports/m-basebl/mtt/brady_bramlett_825152.html) [<http://perma.cc/6Y9N-VM3Y>].

<sup>250</sup> See DIVISION 1 MANUAL, *supra* note 4, at § 5.02.1.2 (requiring “a two-thirds majority vote of all delegates present and voting in joint session at an annual or special Convention” for “a regulation that applies to all members of the Association”); *id.* at 5.3.9.4 (stating that “[t]he action of any specific division challenged by the Board of Governors as being contrary to the basic purposes, fundamental policies and general principles . . . may be overridden by the Association’s entire membership by a two-thirds majority vote of those institutions voting”); *id.* at § 2.9 (setting forth the NCAA’s general principle of amateurism that requires all “student-athletes” to be “amateurs in an intercollegiate sport”). Ironically, Rule 2.9, which discusses amateurism, provides that “student-athletes should be protected from exploitation by professional and commercial enterprises”, which is precisely what the NCAA and its members are doing to college athletes. See generally Acain, *supra* note 113; Robert A. McCormick & Amy Christian McCormick *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639 (2010) (discussing the “various forms of exploitation of college athletes” and how managers of college athletes, including the NCAA, benefit from such athletes while athletes are devoid of legal protections).

<sup>251</sup> See DIVISION 1 MANUAL, *supra* note 4, at § 5.1.3.1.1 (stating “[e]ach active member and each member conference with voting privileges . . . shall be entitled to one vote”); *id.* at § 5.1.3.4 (stating a voting “delegate shall not represent any active member or member conference unless the delegate actually is identified with such member, and an institution’s student may not serve as its voting or alternate voting delegate”).

the costs of continuing antitrust litigation brought on behalf of college athletes against the NCAA and conferences.<sup>252</sup>

Second, if college athletes prevailed in any of those antitrust cases, then the amount of money that could change hands in a free market might be much more than in a controlled Duke Model. This approach also forestalls any efforts by the NLRB to rule officially that college athletes are employees, and it would likely prevent Division I FBS scholarship athletes at private colleges and universities from bringing a labor complaint.

If the NCAA and its members decided to implement the Duke Model, this would not be the first time they made such drastic changes to enhance the benefits of college athletes in the face of external threats such as litigation or government pressure.<sup>253</sup> For instance, the Board of Directors adopted the autonomy legislation a day before the *O'Bannon* ruling.<sup>254</sup> Notably, the autonomy legislation passed after some Power Five conference commissioners and others from the Power Five conferences threatened to “split[] off into a separate division if autonomy failed.”<sup>255</sup> Thus, the Duke Model would also help the NCAA avoid any type of secession by the Power Five conferences from the NCAA system.

If the rules are changed to allow for compensation through the Duke Model, each conference could use a structure similar to SAACs where the NCAA would have a representative, each school in the conference would have a representative, and the players for each sport (football and basketball) would have their own representative, preferably a lawyer or agent who would negotiate on behalf of the players, as well as players. SAACs could easily morph into a structure that includes the foregoing stakeholders.

Currently, a SAAC consists of college athletes, among others, who “provide insight on the student-athlete experience” and the “rules, regulations and policies that affect student-athletes’ lives.”<sup>256</sup> The NCAA requires all member institutions and conferences to have SAACs.<sup>257</sup> A conference

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<sup>252</sup> See, e.g., *Jenkins v. NCAA Complaint*, *supra* note 76, at 1–3, 40 (involving football and men’s basketball players seeking a free and open market system of payment for college athletes beyond their scholarship amounts).

<sup>253</sup> Bennett, *supra* note 242.

<sup>254</sup> *Id.* (noting that on Thursday, August 7, 2014, the Division I board voted “to allow the schools in the top five conferences to write many of their own rules”); see also *O'Bannon*, 7 F. Supp. 3d at 955 (signing the judgment on August 8, 2014).

<sup>255</sup> Bennett, *supra* note 242.

<sup>256</sup> *NCAA Student-Athlete Advisory Committees (SAACs)*, *supra* note 142.

<sup>257</sup> *Id.* (defining National and Campus SAACs, along with student representative number requirements for Division I, II, and III); NCAA, DIVISION 1 SAAC MISSION STATEMENT, <http://www.ncaa.org/sites/default/files/SAAC%20Web%20Information.pdf> [<https://perma.cc/5KUG-QGCS>] (listing some of SAAC’s duties as reviewing



SAAC “serve[s] as a medium of communication through which student-athletes, conference administrators, institutional representatives, NCAA representatives and coaches discuss and take action on issues relating to rules and regulations; student-athlete welfare; and community service.”<sup>258</sup> Conference SAACs have the power to do the following: vote on new rules or changes to existing rules; recommend potential legislation in their respective conference; and “recommend potential NCAA legislation.”<sup>259</sup> They also “[r]eview, react, and comment to the governance structure on legislation, activities, and subjects of interest.”<sup>260</sup> Some recent subjects of interest have been the time demands of Division I college athletes, the NCAA Division I shared governance, and financial literacy (i.e., talking to athletes about financial issues, including ways to best “manage funds provided through cost of attendance”).<sup>261</sup>

Each conference typically allows for each academic institution to send two representatives to the conference SAAC, which includes male and female athletes.<sup>262</sup> Additionally, each conference SAAC includes a chair and vice chair, who are elected by their peers.<sup>263</sup> The SAAC from each Division I Conference selects one representative to represent the college athletes’ interests, from their conference, on the NCAA SAAC.<sup>264</sup>

“[s]tudy issues [and] mak[ing] policy [and] legislative recommendations regarding amateurism, recruiting, financial aid, awards [and] benefits”).

<sup>258</sup> *Student-Athlete Advisory Committee (SAAC)*, ACC, <http://www.theacc.com/page/SAAC> [<https://perma.cc/XMG2-LC5W>].

<sup>259</sup> *NCAA Student-Athlete Advisory Committees (SAACs)*, *supra* note 142.

<sup>260</sup> *Birmingham-Southern Student-Athlete Advisory Committee*, BIRMINGHAM-S. C., <http://www.bsports.net/information/saac> [<https://perma.cc/VUJ9-8RRV>].

<sup>261</sup> NCAA, REPORT OF THE NCAA DIVISION I STUDENT-ATHLETE ADVISORY COMMITTEE: OCTOBER 3–4, 2015 MEETING (2015).

<sup>262</sup> *See, e.g., Big 12 Conference Student-Athlete Advisory Committee*, BIG 12 SPORTS, <http://www.big12sports.com/ViewArticle.dbml?ATCLID=1523127> [<https://perma.cc/PW4J-6K84>] (listing the members of the Big 12 SAAC and their representative schools); *Student-Athlete Advisory Committee (SAAC)*, *supra* note 258 (providing a short history of the ACC’s SAAC); Chris Taylor, *Taylor Serves as ACC SAAC Representative*, GO DUKE (July 18, 2015), <http://www.goduke.com/ViewArticle.dbml?ATCLID=210224587> [<https://perma.cc/79VB-6TGN>] (describing his experience as the SAAC representative for Duke University).

<sup>263</sup> *See SAAC Members Meet at Conference Office*, Big 12 Sports (July 26, 2017), [http://www.big12sports.com/ViewArticle.dbml?DB\\_OEM\\_ID=10410&ATCLID=211657600](http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=211657600) [<https://perma.cc/ZT4W-6Q3E>] (stating the Big 12 Conference SAAC selects the chair and vice chair during their meetings); *see also Big 12 Conference Student-Athlete Advisory Committee*, BIG 12 SPORTS, <http://www.big12sports.com/ViewArticle.dbml?ATCLID=1523127> [<https://perma.cc/53PD-Q237>] *SAAC Members Meet at Conference Office*, Big 12 Sports (July 26, 2017), [http://www.big12sports.com/ViewArticle.dbml?DB\\_OEM\\_ID=10410&ATCLID=211657600](http://www.big12sports.com/ViewArticle.dbml?DB_OEM_ID=10410&ATCLID=211657600) [<https://perma.cc/ZT4W-6Q3E>] (stating the Big 12 Conference SAAC selects the chair and vice chair during their meetings).

<sup>264</sup> *Student-Athlete Advisory Committee (SAAC)*, *supra* note 258 (“There will be one student-athlete from the SAAC who will represent the ACC on the NCAA SAAC.”). SAACs also elect members onto the Division I Board of Directors, Council, and various

SAACs have demonstrated they can be effective. For example, the Division I Council adopted a measure to enhance the information provided to college athletes participating in Division I sports, including expected time commitments.<sup>265</sup> The Division I SAAC, comprised of thirty-two athletes from various sports and each from different conferences<sup>266</sup> (currently there are only two football players and two men's basketball players on the Division I SAAC),<sup>267</sup> first introduced the need for this information and pushed to pass the legislation.<sup>268</sup> SAACs also successfully advocated for the adoption of legislation that lessens the time demands on Division I athletes.<sup>269</sup>

SAACs provide a general framework that could facilitate the implementation of the Duke Model in each conference. Representatives of the athletes would need to be added to represent the football and men's basketball interests fully.

committees (competition oversight committee, football oversight committee, men and women's basketball oversight committee, etc.). *See, e.g.*, DIVISION I STEERING COMMITTEE, *supra* note 241, at 18, 21, 24 (2014). In addition, they vote members onto their own committees to fill void spots. *See* BIG 12 CONFERENCE, STUDENT-ATHLETE ADVISORY COMMITTEE (June 4, 2012) (Meeting minutes), [http://www.big12sports.com/pdf8/848268.pdf?DB\\_OEM\\_ID=10410](http://www.big12sports.com/pdf8/848268.pdf?DB_OEM_ID=10410) [<https://perma.cc/DH9T-UWD7>].

<sup>265</sup> Michelle Brutlag Hosick, *DI Council Approves Time Commitment Legislation*, NCAA (Jan. 18, 2017, 16:21 EST) <http://www.ncaa.com/news/football/article/2017-01-18/di-council-approves-time-commitment-legislation> [<https://perma.cc/VGT4-ZNMD>] (“In addition to drug testing and graduation rates information, recruits would receive information about the time commitments involved in participating in Division I sports.”).

<sup>266</sup> *See, e.g.*, *Division I Student-Athlete Advisory Committee*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=1SAAC](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=1SAAC) [<https://perma.cc/L6EC-JEBN>] (listing Division I SAAC members, the sport they play, and the institution they attend).

<sup>267</sup> *See id.*; *see also* *Division II Student-Athlete Advisory Committee*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=2SAAC](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=2SAAC) [<https://perma.cc/2QKR-C67J>] (listing twenty-eight Division II SAAC members who compete in sports including, soccer, tennis, volleyball, skiing, baseball, basketball, track and field, cross country, mixed rifle, golf, and softball); *Division III Student-Athlete Advisory Committee*, NCAA, [http://web1.ncaa.org/committees/committees\\_roster.jsp?CommitteeName=3SAAC](http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=3SAAC) [<https://perma.cc/36MF-GFBD>] (listing twenty-two members competing in sports including, volleyball, basketball, soccer, football, softball, lacrosse, tennis, and baseball).

<sup>268</sup> Hosick, *supra* note 265 (noting that Division I “SAAC members advocated for the proposal and helped create informational material schools can use to fulfill the new requirement”).

<sup>269</sup> Jake New, *Trying Again on Time Demands*, INSIDE HIGHER ED (Jan. 18, 2017), <https://www.insidehighered.com/news/2017/01/18/time-demands-concussion-policies-be-focus-ncaa-meeting-week> [<http://perma.cc/56NM-8CM8>] (discussing a push to lessen time demands); *accord* Hosick, *supra* note 265 (“Student-athletes in Division I will be able to more easily pursue internships and study abroad opportunities after the Division I Council on Wednesday adopted new legislation providing additional flexibility in eligibility rules.”); *see also* Amy Wimmer Schwarb, *SAAC Reveals Time Demands Survey Results at Division I Issues Forum*, NCAA (Jan. 15, 2016, 11:54 PM) <http://www.ncaa.org/about/resources/media-center/news/saac-reveals-time-demands-survey-results-division-i-issues-forum> [<https://perma.cc/5Y29-7PY7>] (reporting on the SAACs survey depicting student sentiment to decrease the amount of time they spend playing sports).

These conference-wide structures could determine which aspects of the Duke Model to implement (i.e., base salary, athletic bonuses, academic bonuses or a combination of all three) at the particular amounts to ensure that all universities have the ability to pay and the athletes receive compensation for their efforts in generating massive revenues for their schools and conferences. Representatives from each school in a conference, as well as an NCAA representative, could work together with the players and their representatives to implement the aspects of the Duke Model they want. Therefore, the Duke Model could be implemented using slight variations of the existing infrastructure of the NCAA and SAACs.

#### CONCLUSION

College athletes should reap what they sow. They create a product in a multibillion dollar business that relies on their skill, dedication, and performance to thrive. The Duke Model provides a system for compensating college athletes in a fair and reasonable manner. The existing infrastructures in the NCAA provide the general framework to implement a compensation model, and that compensation model should be the Duke Model.