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Amateurism and Professionalism in the National Collegiate Athletic Association

Vlad A. Bursuc

2013 Politics Honors Thesis

Introduction

March Madness sweeps the country every year, with over eighty million enthusiastic fans gathering around their office, school, or online to discuss, argue, gamble, and, of course, watch the exciting sixty-eight-team basketball tournament. This is after eagerly keeping up with games, statistics, and injury reports of the regular season games, which fill stadiums often seating over twenty thousand eager fans even before the exiting football Bowl Championship Series (BCS) has come to an end in early January. Americans will listen to the games on the radio, pay to get access to them online, or watch them on television programs exclusively dedicated to these two sports. This is in addition to buying tickets to worship their teams alongside 107,500 fans in stadiums such as the newly renovated \$280 million Big House in Ann Arbor. Rivalries pit family members and neighbors against each other, and team pride is displayed through flashy merchandise.

An uninformed observer would assume that these leagues are highly popular examples of professional sports in the twenty-first century. They could not be more wrong, however, as the league in question is Division IA of the National Collegiate Athletic Association (NCAA). The Association, “the voice and conscience of college sports” (Brand, 1) holds the task of governing intercollegiate athletics, ensuring that the safety of its players and the sanctity of amateurism and education are maintained within its competition. This organization generated a modest \$871 million in revenue from television contracts and other sources last year, while its top ten institutions alone generated over \$1 billion from athletics through donations, ticket sales, sponsors, and various other endorsers (ncaa.org). The

amateurism that the NCAA protects is supposed to represent the precedence of academic success over athletic prowess by having students participating in athletics also be scholars engaged in a non-professional extracurricular activity. It seems, however, that the NCAA has evolved into a professional league comprised of teams representing their universities on the main stage in a media-driven, hyper-popular phenomenon that has captivated the American public.

The American legal system is set up based on values that our founders and past justices have deemed to be universal and necessary for ensuring happiness to all citizens. Our complex network of legislation has the purpose of ensuring fairness and equality of opportunity, in addition to regulating part of the structure and operation of the economy. Although operating a well-established *laissez faire* system, parameters are set by various government branches to protect the market from uncompetitive practices that hinder market permeability and growth. Politicians and judges often preach the importance of operating under common rules that govern all of our actions so that the playing field is level. In this painfully ironic example, sports can serve as a microcosm of our socio-political ideology, with players working together to achieve common goals and competing against other actors with some individuals being more successful than others, all while operating under common rules.

Unfortunately, the NCAA has abused its unique existence in the world of academia and athletics and manipulated our constantly revised system to meet its financial goals. This type of flagrant behavior is what our country's system prides itself on avoiding. There is no other category of people in American society that does

not receive compensation for labor in the free-market economy or is denied contractual negotiation rights due to a permitted monopsony that prevents choice for sellers of a desired skill.

It is in the interest of legal and political academics to revisit the legislation surrounding the NCAA, given the changes that have occurred in the last two centuries to the legal term “amateur” so that they may be able to create effective change that would reintegrate intercollegiate athletics into the greater goals of our economy and society by aligning them with the rest of the system. Throughout its history, the NCAA has continually stripped its participants of their rights, while promoting its commercial popularity and manipulating its members into following a corrupt system that hides behind a noble concept in a hypocritical manner. Continuing in this manner will only lead to further unfair exploitation through careful crafting of regulations that hold universities in a colonialist system, while baiting their leaders with irresistible revenue. Although reform to this capitalist system is necessary to restore fairness and equity to a duplicitous system, it is unlikely that change will emerge from within the biased organization or its members, and must instead come from federal court orders. Finally, an appropriate alternative exists and can be implemented in a fashion consistent with the current presentation for the invested fans and without interfering with the free-market requirements of such an enterprise.

1. A History of Amateurism

The New Oxford American Dictionary defines the term amateur as “a person who engages in pursuit, especially a sport, on an unpaid basis.” This is also the definition that most viewers of intercollegiate athletics use when they spend \$30 or more on a ticket to see two state universities match up in a regular season game. Avid basketball fans are also happy to pay a minimum of \$450 to attend the Final Four, the last three matches of the NCAA Tournament (www.ncaa.org). Nevertheless, many fans will insist that it is the nature of amateurism that makes these athletic outings as exciting as they are (Branch, 2). Most fans turn a blind eye to the multi-million dollar salaries of top coaches, as well as the monstrous cost of building new arenas and stadiums. They seem to be willing to pay every large organization around the sport, but remain unmoved on the issue of amateurism, aligning their preconceived notions of the value of concept of “student-athletes”.

In order to better understand how this term came about, we should look to the history of intercollegiate sports. This, of course, begins in the first major western universities, at Oxford and Cambridge in the late eighteenth century.

Industrialization led to a number of changes in social dynamics during this period, allowing aristocrats to earn larger profits than ever before. This allowed more free time, which led to the development of sports at large and the increased occurrence of sports in boarding schools and even universities’ Elite anglophiles insisted that these sports not become the focus of one’s education (Sack and Staurowski, 9-13).

This is not because of notions we hold today such as top high school recruits being students before they are athletes, but rather because aristocrats were not expected to put all of their effort in *any* one direction. Ideals reminiscent of the Renaissance dictated this idea of diversifying one's knowledge horizontally, that is, across a variety of disciplines, rather than specializing vertically in a single area of study (Kaburakis, 297). Highly trained professionals were akin to lower class individuals such as butchers or shoemakers. Professional athletes would be viewed as overdeveloped in one area and atrophied in all others, unfit for the aristocracy that the University was breeding. The key to the relevance of amateurism in this period, however, lies in spectators: "To the undergraduate, sport is not an exhibition to be watched; it is a recreation to be indulged in actively" (Savage, 78). Although this is still true of Division III programs in the NCAA, clearly, undergraduate athletes today are no longer just playing for themselves, but are also performing for huge numbers of people.

As professional sports began gaining international relevance, it became too strenuous to be an amateur and also remain competitive. Athletes from lower-class backgrounds needed some form of compensation in order to survive. Because sports governing bodies were comprised of elites who did not wish to share their profits, their response continued to be that elite athletic levels could be attained in one's own spare time (Sack and Staurowski, 14). Thus no change was made in international athletics, as there was not enough money coming in from spectators to justify paying these athletes after the organizing bodies got their share. The

standard of amateurism was continued, not for ideological reasons of molding a certain type of, but because of monetary convenience (Duderstadt, 63).

As universities in the United States developed along these same lines, Harvard alumnus and president Charles Eliot declared in 1858 while reminiscing about his collegiate rowing career “I’d rather win than not, but it’s mighty little matter—rowing is not my profession... It is only recreation, fun, and health” (Eliot, 80). However, as urban migration occurred between 1860 and 1920, it became difficult to continue holding such views. As the population was shifting toward cities, mass entertainment was becoming a necessity, which led to the creation of professional leagues as popular culture shifted toward spectator sports. Of course, professional sports in the post-Civil War era were quickly expanding given the nature of supply and demand in the United States. During the Second Industrial Revolution, the booming economy led to much interest in investing in such promising enterprises as popular sports. Since professional sports were still in their infancy and the hunger for profits being exceptionally high, it was natural that interest in expanding collegiate sports would be equally high (Sack and Staurowski, 17).

In this business-driven era, it was the wealthy industrialists that controlled the universities and sat on their boards of trustees, having replaced the clergymen that had previously run these positions. Many of them believed that intelligence is a preferred quality over intellect for the graduates and “many were not entirely convinced college was even necessary” (Sack and Staurowski, 20). The quick no-nonsense problem-solving techniques that are developed by playing sports are

exactly the types of qualities that the business class preferred over the ideals that emerge from a liberal arts education (Branch, 7). A shift in the ideology behind the functionality of an education that has occurred since the early days of British universities encouraging an amateur status. Instead, the anti-elitist and anti-intellectual ideologies of the industrialist became geared toward anti-amateurism (Zimbalist, 192).

Furthermore, these profit-driven individuals saw an opportunity to promote their colleges, which were often located in states that could barely survive in their low-population Midwest and West. This meant that aggressive campaigning for students was to begin by advertising their paid teams of student-athletes. Not only would this bring in needed students, it would also allow for huge amounts of revenue from ticket sales. University of Chicago, employing a particularly aggressive view, bred its football team for the sole purpose of traveling around the country and beating other teams to prove its prowess as an institution of higher learning. “Between 1896 and 1909, the university’s enrollment increased from 1,815 to 5,500 students” (Sack and Staurowski, 32). An \$80,000 trust fund had been set up for needy students, but instead, Amos Stagg, the football coach at the time, used it to subsidize athletes (Duderstadt, 64). This was happening all over the country by the beginning of the 20th century as coaches, administrators, team captains, and managers were campaigning actively for funds to pay for the players’ expenses, tuition, hotel rooms, or just spending money (Sack and Staurowski, 34). All the while, however, the ideal of amateurism was still being celebrated, not because of

the academic goals of the universities anymore, but because schools could gain money and attention from a self-sustaining department.

Ivy League schools became the first to begin outright action against compensating amateurs in 1898 as all members except Yale sent faculty, students, and alumni to Brown University to speak about the issue. Their Report on Intercollegiate Sports concluded, “the practice of assisting men through college so that they may strengthen their athletic programs is insulting to college reputations and degrading to amateur sport”(9). This is significant not only because these major institutions of higher learning took a stand against a practice that had gone rampant, but because the idea of amateurism was first questioned here. The representatives believed that colleges “are not engaged in making athletes” (5), much like the British model that influenced this ideal. In a sense, they believed that capitalism should not be a part of academics, and neither should professional sports. They drafted a number of regulations that they hoped would be adopted by many programs. They included banning paid athletes and summer participation in paid leagues, as well as eligibility restrictions that would be voted on yearly (Sack and Staurowski, 18-21). This report, ahead of its time, closely resembles the philosophy of Division III athletics. No schools adopted the full regulations, and only a few adopted any of the restrictions, indicating that amateurism did not matter to those in executive positions at American universities. Since there was no governing power behind the Brown Conference’s report to force action, business continued as usual. In fact, at the turn of the century, “many athletes were not only paid, but not even

students”(Duderstadt, 70). The concept of amateurism, as envisioned by British schools and early American colleges, was already long dead.

In 1905 Alexander Meiklejohn, dean of Brown University, spoke out against the “outright hiring of players,”(Sack and Staurowski, 24) noting that college athletes should be students, not professionals impersonating college students. Once again, no one listened and nothing was done for the ideological argument for amateurism. However, when concerns mounted about the violence and injuries that occurred in football due to the intense competitiveness that comes from high stakes games that involve compensation and prestige, Teddy Roosevelt responded by creating the Intercollegiate Athletic Association of the United States in 1906. This organization, which became the NCAA in 1912, aimed to return college athletics to the students and banned recruiting, financial aid, and professionals (Kaburakis, 299). Article VI (b) defined the college amateur as “one who participates in sport solely for the physical, mental or social benefits he derives therefrom, and to whom the sport is nothing more than an avocation”(Proceedings of the First Annual Convention, 33). The key flaw in this, however, was the fact that universities were in charge of governing their own actions and ensuring compliance with NCAA regulation, which meant, as one would expect, that no change in practice occurred, especially since revenue continued to increase, which allowed money to be reinvested into the infrastructure of athletics, as exemplified by Yale building the biggest football stadium in the country in 1914, which had a capacity of 75,000 fans (Sack and Saurowski 33-35). The ideology behind amateurism was once again a

farce that allowed universities to attract attention though hosting professional sports.

As public awareness of these practices grew, so did media interest. In the age of famous muckraking newspapers, scandals of NCAA violations appeared in newspapers across the country (Duderstadt, 56). This prompted the Carnegie Foundation for the Advancement of Teaching to fund a study of college sports conducted by Howard Savage in 1929, which consisted of interviews and surveys with university faculty, athletic directors, coaches, admissions staff, and financial aid offices. In addition, newspapers, university documentation, and press statements were compiled in this large study of 112 institutions. The Carnegie Study concluded that 81 of those universities were paying athletes through reserved jobs, scholarships, loans, and money, sometimes vying for athletes with outright scholarship offers (Sack and Staurowski, 36-7). To be sure, the study included schools that are today members of Division III, which comprises over 40 percent of the members of the NCAA, the only division which preserves the ideals of amateurism in its intended fashion (www.ncaa.org). This means that almost all of those schools which today make up Division I and II, where scholarships are now allowed, were likely to engage in some form illegal compensation. In many instances, donors would give money to financial aid offices that was specifically reserved for athletes. "College sports have become theatrical in the business sense and the public has a vested right to a team that will win" (Savage, 215). It was becoming increasingly clear that the benefits of college athletics greater than the

moral weight of preserving amateurism. The fact that the NCAA's rules were being almost unanimously ignored sounded a significant alarm about the general dodging of regulation within highly competitive college sports.

Scandals became rampant during the 1930s and conferences, wishing to avoid poor publicity, began taking action, sometimes even ejecting members (Sarkes and Staurowski, 38). Since the NCAA did not have any sanctioning power, conference boards, which were often comprised of athletic directors at that time, were the only real form of governance and, thus, the only avenue for reform. Frank Graham, president of the Southern Conference, presented drafted regulations to curb the type of violations presented in the Carnegie study. He asked the conference members in 1935 to approve rules including that “no athlete shall use his name for commercial advertising, sell game tickets, hold a sinecure job, receive more for a job than the regular rate, or accept counterfeit bets” (as qtd in Duderstadt, 59). History, however, was to repeat itself as the Graham plan fell through, since it received no backing from the other members of the board. This plan, however, was not entirely unsuccessful as it opened the door for the Big Ten and Ivy League to agree not to withhold scholarship funds for athletes in 1942, which the NCAA commended. These actions are some of the only deeds toward preserving amateurism; the key, however, is that they were once again not interested in protecting amateurism for the sake of the ideology behind it, but, as always, for protecting public image. The scandals were attracting negative attention to college sports and hurt their growth,

especially as compared to professional sports, which had fewer regulations and, consequently, an easier path to successful expansion (Sarkes and Staurowski, 43).

In 1943, at its annual conference, the NCAA decided that the only way to restore balance (read: good publicity) in intercollegiate athletics was by abandoning a 42-year commitment to amateurism and allowing athletic scholarships provided that the athletes qualify for need. This was to stop disagreement among conferences about appropriate regulation implementation and was called the Sanity Code. The 1948 conference also created the first NCAA enforcement body, the Constitutional Compliance Committee, which was created to make rulings regarding interpretations of regulation language and determine whether certain practices are forbidden by the NCAA constitution (Duderstadt, 71). This committee was given the power to terminate membership if deemed appropriate by a two-thirds majority vote. This was the opportunity for the NCAA to become an effective governing body over intercollegiate athletics and gain true power of implementation over its member institutions (Sarkes and Saurowski, 45).

In 1950, at the NCAA convention, the Compliance Committee put 7 schools up for a dismissal vote because of continued violations of the Sanity Code, one year after being ordered to reform their programs. Although a simple majority vote was reached, it was not enough to actually expel the schools from the Association (Duderstadt, 73). Even after the compromise reached by the Sanity Code, most school administrators were still unhappy with the production of their athletes without scholarships. Since the Committee failed to perform its duties and actually

sanction schools in violation of NCAA policy, the individual universities took over the task of governing themselves. In fact, the University of Michigan, among other schools, reinstated their old aid policies because their teams had started losing. By 1957 Walter Byers, the first executive director of the NCAA, had passed legislation that allows schools to pay room, board, tuition, and fees for their athletes while they would still be called amateurs, although this was previously condemned as professionalism. The fifty-year transformation was complete (Sarkes and Staurowski, 48). In order to maintain a non-employer status, at this time, the term “student-athlete” was created along with “college team” so that the grant-in-aid gifts could not be legally defined as contracts for hire. “The label ‘student-athlete’ is mere window dressing for individuals who, in substance, are employees” (McCormick, 137). Byers described this after his retirement as “the beginning of a nationwide money-laundering scheme” (Byers, 73. McCormick, 83). Although this option was made available for all schools, some of the schools chose to maintain the original ideal of unpaid amateurs and joined Division III in 1973 (ncaa.org).

Under Walter Byers, the NCAA increased its governing power over its members as it took over the promotional aspect of the games. In 1967 the NCAA passed legislation stating that being absent at practice or failing to participate in athletics fully was fraudulent and contrary to admissions applications letters of intent and constituted ground for termination of financial aid, athletic or not. The moral argument behind this ruling seems justifiable under the ideals that should be set for appropriate conduct of college students (Sarkes and Staurowski, 82).

However, given the timing of the implementation of this rule, it seems that the NCAA was effectively trying to maintain a status as a non-profit organization, while continuing to recruit top-notch players that would bring them attention given emerging television contracts (Byers, 80). “The NCAA had given member institutions far greater control over the college athlete workforce,” which is what allowed it to gain power of implementation over its member institutions (Sarkes and Stuaurovski, 84). Further details of the legal implications of this transformation will be discussed the legal section of this thesis. The NCAA’s newfound popularity with the universities allowed it to have more control, while its protective blanket allowed further opportunities for growth for institutions interested in competing at the highest level (Branch, 20). The Association had effectively gained monopoly over the scheduling of intercollegiate games because of its assumed role as television contract negotiator by the early 1970s.

Trying to control attendance at football games, the NCAA instituted the Football Game of the Week, allowing only one college game to be broadcasted each week on national television. When several colleges rebelled and formed the College Football Association (CFA), the NCAA responded by revoking those schools’ membership and banning them from competing with any member schools in any competition. While the Supreme Court ruled this a restriction of trade and gave the conferences control of television scheduling in 1984, they allowed the NCAA to have a monopoly over the scheduling of games among members by dissolving the CFA. This meant that the NCAA kept immunity from anti-trust legislation because of

compliance with the court's order on the matter of television contracts (Epstein, 367). It is important to note, however, that the NCAA must govern post-season play as it occurs in an inter-conference format. This allowed the Association to remain immune from the Sherman Anti-trust Act, while still acting as a cartel.

In addition, while it is commendable that colleges are paying for the expenses of college athletes because they bring a valuable skill to the university setting, maintaining the amateur status is contradictory. The status allows the university and the NCAA to put limitations on the amount that is paid to these athletes so that they can continue to exploit them (Branch, 15). If they can maintain a cap on the amount of compensation for tuition, then they can spend more of their profit on getting and paying professional-caliber star coaches and reap more money for themselves from advertisement, merchandise, and broadcasting. Moreover, since the payers are not able to receive compensation during the off-season and summer, they are being denied another right that most students engaged in skill-based extracurricular activities, such as musicians, enjoy. This is yet another effective dialectic that fueled the NCAA's expansion as a moneymaking organization toward the end of the previous century (Duderstadt, 74).

The same year as the Supreme Court ruling, the NCAA signed a contract with CBS for the exclusive rights to broadcast the basketball tournament, which Byers had expanded from 8 teams to 32 and later to 65. The contract was worth a whopping \$1 billion dollars, none of which was intended for the players that would be broadcasted (Byers, 70). Of course, since they were amateurs, they also had no

rights to any sought-after highlight footage that may be worth hundreds of thousands of dollars in advertising, even decades after they had graduated from college. Furthermore, since they are cogs in the college sports machine, they could be asked to play games at whatever times allowed television coverage of the most games for each conference, resulting in players traveling across states twice a week and playing games as early as 9 AM and as late as 1 AM, while allegedly being enrolled to get a quality higher-level education. The amateur status had been abused even further after 75 years by the organization that was created to protect it and the students bearing it (Duderstadt, 114).

All of this reform and increased implementation power by the NCAA did not make the organization operate under a more appropriate moral framework. As famous basketball coach, Bobby Knight stated, “collegiate amateurism is not a moral issue. It is an economic camouflage for monopoly practice” (as qtd in Zimbalist, 19). More revenue generated from advertisers and television in the 1980s meant that more scandals of illegal player compensation went on. A survey of football players conducted by Walter Byers in 1989 revealed that 48 percent of them received illegal payments for their services. Two years later, the University of Kentucky was caught delivering payment when an unmarked package addressed to a potential recruit fell out of the delivery truck and \$1000 dollars spilled out of it (Byers, 92). The level of competitiveness in the increasingly popular college athletic leagues also led to an increase in the number of scandals, which meant that as more money came in, it became increasingly important to keep enforcing rules against illegal activities so

that the media attention would not shift too far toward the scandalous side and reduce advertisement revenues. However, between 1991 and 1992 the NCAA spent \$1.9 million dollars on enforcement, \$2.5 million on legal and government affairs, \$2.5 million on public relations, and \$1.9 million on committee entertainment (Brown, 27-34). When contrasting this budgeting to the initial purpose of the NCAA to protect assure compliance to regulations that are intended for the players' well-being, it is clear that the true mission of the Association had shifted drastically. The NCAA had become more interested in maintaining their revenue streams, rather than ensuring that amateurism is enforced for the sake of its importance to higher education, which had allegedly been a 100-year commitment.

With CBS paying the NCAA \$6 billion dollars over eleven years in 1999 for the broadcasting rights to the basketball tournament and the Final Four brand receiving \$550 million in 2000 from merchandise alone, it is understandable that the NCAA continues to strive for even more publicity and money. The NCAA has increased its revenue from television, licensing, and scholarship funds by more than 8000 percent in the period between 1980 and 2000, which of course is free of taxes because of the non-profit status of the institution (Duderstadt, 118-9). In 2010, the new contract with CBS was worth \$11 billion over 14 years (Branch, 5). This means that in the last few decades, the NCAA has become one of the most prosperous leagues anywhere in sports. However, this league does not use any of its money to pay the individuals who make all of this possible, the individuals that spark the interest of so many fans who are willing to spend significant portions of their

income to support this growing system. Organizational reform toward compensating the athletes, therefore, will never begin at the level of the NCAA because their profit margin would suffer greatly, as a significant portion of their budget would have to be shifted toward player contracts.

Schools receive sizeable amounts of money from the NCAA in years when they are not paying it back in large quantities due to violations of its bylaws, making it difficult for them to take a stand against the commercialized nature of the NCAA. The media has played an interesting role in college athletics, on one hand promoting them and paying billions to the NCAA and its conferences, while on the other feeding the public all of the exciting scandals. This only means that they have the ability to manipulate all of the NCAA governing bodies, conference boards, athletic directors, and college presidents because of the appeal that college sports bring to these universities. It had become increasingly apparent that the expectations of behavior for student-athletes increased in the media age with press conferences being fed players for interviews after every game (Duderstadt, 77). Internet coverage, combined with big sponsors paying universities directly has provided too many incentives for universities to remain involved in the show business of big-time collegiate athletics. In addition to incentives for publicity, when schools perform well in during their seasons, tournaments, or championship bowl games, they can receive between tens of thousands and millions of dollars in bonuses, all of which stays within the department and does not actually benefit the school in the way that revenue from a modestly paid professor's research would (Brown, 150). Much of

this money actually goes to their celebrity football and basketball coaches in Division I-A, which have enjoyed an average increase in annual base salary of 80% in the 5-year period between 1998 and 2003 to a figure of \$388,000. In 2009 football coaches earned an average of \$1.36 million in yearly salary (Porto, 3). In basketball, the situation is far more inflated with coach Rick Pitino of the recent national champion Louisville basketball team bringing in an astounding \$4.2 million dollars per year. These pay-stubs also show that athletic programs are absolutely dependent on their coaches, which is why they devote their facilities so that they may hold clinics and camps to earn more profits on top of their multi-million dollar salary contracts (Duderstadt, 154). Successful schools can also diversify their revenue streams by selling merchandise or rights to commercial space for sponsors. McDonalds paid Georgia Tech \$5.5 million in 1995 just to display its arches on the inside and outside of their basketball arena. The University of Kentucky made \$5 million per year between 1996 and 2000 off of merchandise alone after winning the national basketball tournament (Sarkes and Staurowski, 91-2). After winning again in 2012, Kentucky has already accrued \$8 million from merchandise royalties (businessweek.com).

Although much of this profit is allegedly used to fund other, non revenue-producing sports and various campus improvements, that is not entirely true. The universities' investment in big-time sports can lead them to re-invest their money into the two big sports, as in the case of Michigan University's \$226 million dollar renovation of its football stadium in 2010 (Branch, 19). These astronomical prices combined with sponsorship income and the misappropriation of these revenues

makes it difficult to see how the universities are interested in the well being or educational goals of its student-athletes over its investment to stay at the top of big-time sports.

All of the factors in commercial college sports make it difficult to be opposed to taking a stand against the misuse of amateurism or to the unfair lack of compensation to the athletes that generate billions. During the history of this nation's universities, the atmosphere around the fields of athletic competition has warped significantly. The role of the athletes in the eyes of the universities, the NCAA, the media, and the fans of the sport has changed drastically. Yet through all of this, the amateur status has been preserved. To be sure, this is only in name, as the changes that had occurred in its working definition make it difficult to compare it to the origins of the word. There is great moral value to preserving college athletics in the manner that they were intended initially, before commercialism and capitalism took over, as Division III preserves it. However, continually insisting on this status so that profits can pour in without compensation to those that attract fans is an insult to the ideology behind amateurism. Ultimately, the educational goals of the universities, and the financial goals of athletic departments and the Association have become separated; yet amateurism continues to exist as the common bridge because of its functionality. Without giving these athletes a choice, the NCAA and universities at the Division I level have tossed aside their commitment to education for the prospect of publicity and revenue. In football and basketball at the Division I level, over a century after the creation of the NCAA, amateurism is dead. In such an

environment, it is impossible to see how universities can see past the financial bottom line, visibility, and athletic competitiveness and find the integrity to insist on the primacy of academic objectives and values.

2. The Legal Path to Today's Amateurism and Its Chains

Amateurism's history presents its ideals as being disconnected from the current stated goals of the NCAA. The existing system promotes the idea of cheating because of the hypocritical practices of the Association, which allow the athletic programs to interact in a manner similar to professional sports, while insisting that they are amateur. A number of court cases have contributed to creating and maintaining this status, partly through the help of carefully orchestrated rhetoric and the manipulation of legal concepts by the Association's lawyers. The key to reform, however, still lies in the courts, despite their previous conservative approach that has defined the NCAA as a revenue-generating non-profit that is fueled by volunteer athletes.

In 1960 Edward Van Horn, a scholarship football player at California State Polytechnic College was killed in a plane crash while returning from a game in Ohio. His scholarship came from a booster club, which paid athletes per the coach's recommendation, which was legitimized by the NCAA in 1956 (Sarkes and Staurowski, 80). The scholarships had minimum GPA requirements and covered tuition, books, and some apartment rental fees. Van Horn had a family and needed the money from his football scholarship (Duderstadt, 73). When his family sued for death benefits from the athlete's employer, the university argued before the

California District Court of Appeals that the yearlong scholarship had been a gift, not dependent upon participation, which did not make it an employment contract. The court ruled, however, that because some degree of athletic prowess was necessary for the scholarship to be awarded, it constituted an employment contract. The court also noted previous jurisprudence that said that college students may have the dual capacity of an employee and student. Based on these facts, the court ordered that death benefits be paid to Van Horn's family (*Van Horn v. Industrial Accident Commission*).

This case prompted Walter Byers to contact Marcus Plant, a notable tort expert from the University of Michigan Law School to draft a plan to guide the NCAA through worker's compensation torts over the following twenty years. The language of the grants-in-aid had to be evaluated by attorneys. The grants needed to refer to the NCAA Constitution, which also mandated that they be described as gifts after the *Van Horn* (Sarkes and Staurowski, 80-2). In 1967 the NCAA also eliminated four-year scholarships so that athletes would not begin slacking in school or on the field, knowing that they are getting a full ride (Byers, 83). In fact, these efforts were made so that coaches would have more control over who got compensated. "This way the NCAA could have it both ways" (Sarkes and Staurowski 83): schools would not lose money to athletes who got injured early on or failed to develop as expected. It is clear that the format by which the scholarships were awarded did not change in the least following the *Van Horn* decision, but what did change was the language describing them. This effort to avoid legal action and responsibility without question goes against the NCAA's stated goals of protecting the interests of the

student-athlete and takes away their rights to compensation for injury so that the universities and the Association can keep more of their money. Theodore Roosevelt's effort to curb injury in intercollegiate athletics in 1905 by creating the NCAA was clearly of little concern to the governing board of the Association in the 1960s. More importantly, the actions that were deemed to be employment by the California District Court did not change, which means that effectively, student-athletes receiving scholarships today are actually being compensated in a way that violates amateurism, whereby the hypocrisy of the NCAA is once again visible.

At that time, college football received considerable national attention, while basketball was not yet part of the main stage in college sports. Walter Byers, the first NCAA President, presiding for the decades between the 1960s and 1980s, tried to stop the commercial aspect of intercollegiate sports, while still improving the infrastructure and providing the best arena for expanding competition for all sports.

As he began to understand the commercial promise of collegiate football, Byers attempted to do away with amateurism and allow professionalism to take the stage. His proposal was voted down by the NCAA committee because of the difficulty of removing the sport that drove the expansion of intercollegiate sports without changing the public idea of what motivates schools to maintain amateurism. If one intercollegiate sport made up of student-athletes were to be removed, then it would make it impossible to continue making legal claims for the moral importance of preserving amateurism in a revenue-generating sport. The rising price of television contracts along with the popularity of the sport also made it difficult for the members to allow the sport to become professional and pay the athletes. As a well-

crafted network of regulations at the NCAA and university level safely began insulating the status of student-athlete, courts began to render similar decisions regarding their employment status. Since the courts were supporting this new brand of amateurism, it further allowed the other members of the NCAA to oppose Byers' proposal and continue expanding.

In 1983, three cases confirmed the fixed jurisprudence of United States courts. In the case of *Rensing v. Indiana State University*, a football player became paralyzed as a result of a football injury and sued for compensation as part of his alleged employment, given the fact that he was a scholarship-earning athlete. The Indiana Supreme Court decided that there was no employment relationship due to the language surrounding the grant he received, therefore no workman's compensation was in order. The court argued that financial aid is not "pay" since the award was legal under the NCAA's rules, and those rules also strictly prohibited taking pay for sports. The circular logic employed by the courts is quite apparent in this case since it gives the NCAA the power to define financial aid and pay, regardless of any other existing definitions, giving the NCAA full immunity from any legal action. Rensing's claim that this should be considered income was also denied because he did not report this on his income tax return (*Rensing v. Indiana State University*). The Michigan Court of Appeals rejected the assertion that intercollegiate athletics is integral to the university's primary business of education and research in *Coleman vs. Western Michigan University*, thereby disallowing workman's compensation. To complete the trifecta, the Federal District Court of Arizona denied student-athletes eligibility to participate in a sport if the athletes

received compensation for that sport in the past. After football players at the University of Arizona were found to receive non-scholarship pay for participating in collegiate athletics, the NCAA fined them and prohibited post-season play, an action that became standard practice for such violations. Although the federal court stated that amateur rules have a “substantial effect on interstate commerce,” they also believed that the sanctions were “reasonably related to the NCAA’s goals of preserving amateurism” (*Justice v. NCAA*).

While *Rensing* and *Coleman* solidified the student-athlete as a non-employee participator in an activity that is non-essential to university goals, *Justice v. NCAA* delivered the final punch by limiting athletes’ earning potential even further than the abolition of four-year scholarships. These athletes now became subject to a contract to which they have no negotiation rights. Since *Justice* also determined that the NCAA had power of sanctioning members that fail to abide by their bylaws, its governing status had reached a level that would allow it to truly control the business aspect of college sports.

This was true until 1984, when the NCAA sued The University of Oklahoma and The University of Georgia one year later because they violated the NCAA’s wishes to control television broadcasting of football games. The Association wished to limit broadcasting to 28 per year in an effort to level the playing field by restricting appearances of big-time schools. The Supreme Court ruled that the practice of “limiting television contracts to two networks was a violation of anti-trust laws” and was an “unreasonable restraint of competition” (*NCAA v. Regents*). Writing for the majority, Justice John Paul Stevens argued that any restraint on

economic competition “that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of anti-trust legislation” (*NCAA v. Regents*). While the decision was a loss for the NCAA on paper, it allowed unlimited broadcast of football games on television, with the scrutiny being in the hands of conferences, which meant significant increase in its commercialization and revenue opportunities.

Once again, the NCAA had taken advantage of its legal knowledge to have it both ways. Justice Byron White, writing in dissent said that it is unfortunate that the Supreme Court chose to view the NCAA as “a purely commercial venture in which colleges and universities participate solely, or even primarily, in the pursuit of profits,” and remained uninterested in “the NCAA’s fundamental policy of preserving amateurism and integrating athletics and education” (*NCAA v. Regents*). He went on to say that unlimited television appearance for a few colleges “would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements” (*NCAA v. Regents*). As Justice White predicted, the bigger-profile conferences took advantage of the opportunity to promote themselves, thus increasing the awareness of a few big-time teams that began traveling across the country given newfound interest in the sport. With the status of student-athletes sealed in the courts and the ability to expand unrestricted in an atmosphere of growing popularity and a rapidly expanding television business, the Association’s path to commercial expansion without athlete compensation was laid.

The effects of this court decision were unbelievable. In the 1970s the twin cities of Minneapolis and St. Paul, Minnesota could enjoy up to two football games per week, one on NBC and one on CBS. In 2004, viewers from this area could gorge themselves on thirteen football games on a given Saturday during the season. In addition, many schools in Division 1A had to increase athletic spending significantly in the early 2000s just to remain competitive in this hyper publicized atmosphere. Between 2000 and 2005, college athletic expenses in Division I rose by 8 percent per year, while general college expenses rose by an average of 3 to 4 percent in the same time period (Porto, 81). Although the revenue also increased in the aftermath of the Regents decision, the costs are becoming increasingly burdensome, sometimes coming from students' athletic fees, but more often coming from institutional subsidies. A 2010 Study showed that subsidies for athletics rose 20 percent for those teams in Division I-A after adjusting for inflation (Porto, 7). All of this indicates that the aftermath of the *Regents* decision has brought forth more pressure for big time college sports to expand into a professional league as it is today; a league where money is absolutely key to staying afloat. At this point, it is difficult to say that much of the hype about college sports is even about attracting students as they were initially marketed. Most of that has been lost to the ever-growing commercial greed of many other companies that pay the universities to display their logos in front of the hundreds of millions that watch their sports on television.

In the 1986 case of *Graczyk v. Workers' Comp. Appeals Bd.*, the Court of Appeals of California upheld the decisions made three years prior and denied

compensation for injury based on the NCAA's framing of amateurism and athletic scholarships as fulfilling a non-employment status. The courts used a four-factor approach to determining this status. First, they were concerned with whether or not the alleged employer controls the details of the alleged employee's work. Because the coaches, a college employee, dictate a rigorous workout and dietary schedule for their athletes, the university exercises extensive control over the details of athletes' work and this will be discussed in greater detail in the following section. Second, the court looked at whether or not the alleged employer has the ability to fire alleged employees and determined that the university has no right to dismiss, which they held to mean expel, the student-athlete for poor performance on the athletic field. Thirdly, the court analyzed the way in which the alleged employee is paid and determined that a free education, room, and board was a gift not dissimilar from academic or other talent-based scholarships, thus not constituting payment, a concept that will also be revisited later in this thesis. Lastly, the court looked at whether or not the alleged employer furnishes the equipment for the job, which the universities do with the exception of the talent and labor, which is provided by the athletes (Schott, 4-5). Based on these criteria, the court continued to allow the NCAA to function as it had previously, allowing further growth without compensation for the athletes.

This type of dual operation by the NCAA, both controlling all the "companies" that are crafting individual student-athletes and managing the "production details, promotion, and sale" of this product, has been called cartel behavior (Epstein, 373). The NCAA members have agreed to limit the amount of compensation to its student

athletes to the cost of attending each respective university. By controlling inputs and lowering costs through the promotion of amateurism, limiting recruiting and numbers of athletes, the NCAA is controlling an entire business. When combined with the courts' willingness to permit the Association to make its own rules, this allows it to operate in a zone that is legally defined by them and governed by the philosophy amateurism (Mitten et al., 213-4). That philosophy, which was created a century before the Sherman Anti-Trust Act banned cartels, is actually nonexistent in the current practice of this cartel organization. Only in the case of promotion was the NCAA convicted of violating Anti-Trust legislation, and that was in a case when it restricted itself. In 1988 the United States 5th Circuit Court of Appeals finalized the status of grants-in-aid and other compensation in *McCormack v. NCAA*. Cheerleaders and football players from Southern Methodist University brought forth this class-action lawsuit following the NCAA suspending their football program for compensating their athletes beyond the cost of room and board. The court referred to *NCAA v. Regents* when stating, "most of the regulatory controls of the NCAA are a justifiable means of fostering competition among amateur athletic competition and therefore are procompetitive because they enhance interest in intercollegiate athletics" (*McCormack v. NCAA*). The court went on to acknowledge that although true amateurism is not achieved in collegiate sports, the attempts that the Association is making toward creating a practical mixture justify compensating the athletes for their education cost. The final decision rejected the claim that restrictive payments in the NCAA constitute price fixing. Once again, courts have ruled that the NCAA's goals of preserving an imperfect model of amateurism justify its violation of

established legislature governing both employment and cartel behavior (Schott, 6). The NCAA was allowed to continue operating a cartel that was effectively sold to an eager public and allowed to grow to astronomic proportions, while leaning on humble beginnings.

In 1990, the United States District Court in Nashville, Tennessee revoked Brad Gaines's eligibility to participate in football at Vanderbilt University following his unsuccessful attempt to be drafted into the National Football League (NFL). The eligibility rules of the NCAA made its type of amateurism acceptable under the Sherman Anti-Trust Act. Two years later, the 7th Circuit Court also upheld this line of reasoning in *Banks v. NCAA* by removing Braxton Banks' eligibility to participate in intercollegiate football following his payment to an agent and entrance in the NFL draft. Had the court relied only on the typical rule-of-reason analysis for determining Sherman Anti-trust Act violations, it would have determined NCAA's bylaws prohibiting agents and outside compensation would be illegal. This is demonstrated by its statement, "the NCAA and its member institutions have near total control of the market of college players; such control might be deemed more than adequate market share to constitute market power" (*Banks v. NCAA*). Since there is no substitution for college sports, the NCAA has monopsony power of the market, as they are the only buyer of high school graduate talent facing many sellers wishing to showcase their maturing talent for professional leagues. Rules about compensation directly regulate the price of student-athlete services, restraining ability for them to market their services the way other athletes do. Without a procompetitive justification, these rules are illegal under rule of reason test (Schott,

7). Instead, the NCAA's rules were upheld because of the intention to separate amateur and professional sports (Epstein, 360). Amateurism has been increasingly imposing restrictions on student-athletes rather than protecting their rights. Both the NCAA and the court system supported their role as a restricting and coordinating body rather than a protector of student-athletes. Ironically, by insisting on protecting what they called the ideals of amateurism and student-athletes, the NCAA was able to suppress the very freedom of the student-athletes.

As costs, revenues, and salaries grew, however, the concern of the NCAA for the well being of its athletes remained dwarfed by the wish for profits. In 2000 the Texas Court of Appeals upheld the jurisprudence of the 1980s decisions when they deemed that Kent Waldrep, a football player permanently paralyzed as a result of an injury incurred in a 1974 game against Alabama, was not entitled to worker's compensation, as there was no employment relationship determined in the case of his football scholarship (Epstein, 133). Once again, the NCAA's commitment to protecting student-athletes from extraordinary injury was nowhere to be found, even on the verge of the new millennium. Because athletes are mandated by the alleged moral code of student conduct to fulfill their duty of participation at the risk of losing their scholarship, in addition to being restricted by the NCAA's embargo on outside compensation for their talent, they continue to be bound by the status of amateurism, without gaining any security from it.

The Supreme Court delivered another blow to the rights of the student-athletes in 1988 in the case of *NCAA v. Tarkanian*. Jerry Tarkanian was a coach at the University of Nevada Las Vegas (UNLV) who had been suspended from his position

based on accusations of violating NCAA regulations. The coach sued, claiming that the NCAA did not offer him due process as a state actor and got reinstated based on an injunction issued by the Clark County District Court in Nevada. The Supreme Court, on a decision by the same Justice John Paul Stevens, reversed the lower court's decision based on the claim that the issue in the case was "whether UNLV's actions in compliance with the NCAA rules and recommendations turned the NCAA's actions into state action" (*NCAA v. Tarkanian*). He argued that the actions of the NCAA could not be attributed to the state of Nevada and that although UNLV had followed the NCAA's rules and adopted its recommendation, only UNLV was authorized to suspend Tarkanian. Of course, given the level of publicity around college athletics, it would have been ludicrous for UNLV to reject the NCAA's recommendation and risk both bad press and a large penalty from the Association. Once again Justice White dissented, noting "it was the NCAA's finding that Tarkanian had violated NCAA rules, made at NCAA-conducted hearings, all of which were agreed to by UNLV in its membership agreement with the NCAA, that resulted in Trakanina's suspension" (*NCAA v. Tarkanian*). He is claiming that private organizations like the NCAA can be considered state actors if they engage jointly with state officials in the challenged action. Justice White excelled at football at both the collegiate and professional level as he used his talents in order to pay for his schooling, seeking a career in law, not in athletics. He also has an extreme dislike of the media and the commercialism surrounding college athletics as well as a mission to eliminate professionalism from college sports (Porto, 54). Unfortunately, he did not have the backing of the other Justices. Since this decision deemed the NCAA's

rule-enforcement procedures exempt from due process requirements, it meant that there was no incentive for the organization to increase protections to its staff members or, more importantly, its athletes. *Tarkanian* is another case in which courts afforded more rights to the NCAA at the cost of protections for the student-athletes as the NCAA governs both the Committee on Infractions and investigative staff that assists the committee. This decision proclaimed the NCAA to be the “prosecutor, judge, and jury all the same in those proceedings” (Porto, 13).

Furthermore, these proceedings are isolated because only NCAA staff members are allowed to take part in investigative actions against accused coaches and athletes. To exemplify the potential damage that this could have on the integrity of these proceedings we can take the case of Dr. Ridpath, who was hired at Marshall University as the assistant athletic director with the specific instruction to rid the program of suspected infractions. An investigation was launched after he reported to both the Mid-American Conference and the NCAA that there was a previously unknown employment scheme within the football and basketball programs. This involved various sinecure jobs being held by players within the athletic department, as they were receiving a paycheck every two weeks without doing any labor. In order to better focus on these issues and for various personal reasons, Dr. Ridpath changed his position to Director of Judicial Programs at Marshall during this time, a position outside of the payroll of the athletic department. The President of the University, however, made the claim that this was a demotion based on his recent involvement in this scheme, which actually predated his time at the university by 7 years according to the separate investigation done by Ridpath’s lawyers. It would

have been absurd for the new athletic director to incite an NCAA investigation into a matter in which he was involved. The Committee of Investigation found Dr. Ridpath to be responsible for the violations and recommended his termination in 2009. For convenience, and in order to avoid fines, the University cleverly maneuvered the internal investigation, which had to exclude all persons outside of the athletic department, to frame Dr. Ridpath as a scapegoat, ruining his career and reputation, while the real culprits were still holding jobs within intercollegiate athletics (Porto, 163-5). Thus, in the aftermath of *Regents, Tarkanian* and all of the lower court decision, the NCAA as well as individual colleges and universities have learned to take advantage of the court's willingness to disregard individuals within college sports in favor of its commercial prowess, ensuring that collegiate sports take further strides toward an outright monopoly on state-subsidized, tax-exempt professional sports that do not have to pay their athletes because of its monopsony power on the market of young athletes fresh out of high school. The most successful outright cartel has built an intricate web of bylaws and careful provisions in order to gain the legal cover to profit greatly from the unfortunate young athletes who are being manipulated and held with no choice and no protection under the false pretenses of higher education and the absurd premise of protection from injury.

3. A Labor Approach to Redemption of Rights

With all of the court decisions upholding the NCAA's "commitment to amateurism" as being enough for the Association to impose restrictions on student-athletes' rights, it seems almost impossible for athletes to gain any form of sympathy

that would lead to real compensation for their athletic services. However, a number of scholars seem to lean toward an avenue of argument that has not been readily utilized by student-athletes: The National Labor Relations Act (NLRA). Many of the lawsuits described in the legal section of this paper as leading to institutional restrictions on student-athletes deal with the Sherman Anti-Trust, which suggests that the courts have generally looked at the NCAA in relation to its member universities or as a body governing the relations among member universities. Courts have not looked at the relationship that athletes have with their universities and how the NCAA often governs that relationship without reference to the greater interstate commerce implications of intercollegiate sports. The NLRA's purpose is to regulate the inherent conflict between capital and labor in the United States. In the case of the NCAA and its members, this conflict is manifested by the contradictory notion of commercialized amateur college sports, which generate revenue from labor without compensation for those providing the latter. Although the Act only governs private enterprises and would not directly apply to public universities, at least 32 states have statutes governing employment relationships among public entities that are modeled directly after the NLRA, thus making this Act the starting and ending point of inquiry about the student-athlete's status as an employee-athlete (McCormick, 88).

In order to determine the relationship between independent contractors and employees, The National Labor Relations Board adopted the common law approach or right-of-control test to decide between the two statuses. Under this test, the governing factor for determining employee status is the degree of control that an

employer has over the alleged employee, as far as both the end result and the manner of achieving it. This means that an employer controls the daily lives and the manner in which its employees carry out their work. A number of cases, however have used an additional criterion for determining an employee's status—the alleged employee's economic dependence upon the employer. Several of the cases looking at the employment status of college students brought before the Board have been decided using both the right of control test and this statutory test.

Under the Board's two methods of interpretation of the NLRA, grant-in-aid athletes in the revenue generating sports of Division I are legal employees. Under the common law interpretation, these athletes are providing a service to their universities under a contract that sets forth responsibilities and compensates them, are subject to daily pervasive control by their coaches, and are economically dependent upon their schools. The degree of control that universities have over their "employee-athletes," as they are described by McCormick, has been assessed by numerous studies and interviews, often concluding that they are subject to more control than any other employee group, as no other employee is required to lift weights or a similar strenuous physical activity at 5:30 AM or seek permission to leave campus during the summer off hours at risk of termination. An average football player will, in fact, spend fourteen weeks in season participating in a "conservative estimate of approximately fifty-three hours" of mandatory football activities including practice, film sessions, and meetings (McCormick, 99). Clearly that is more than a full-time position for university employment. In most cases this means that football players are not allowed to take afternoon classes so that they do

not conflict with practice schedules, yet are required by the NCAA to “be enrolled in at least a minimum full-time program of studies leading to a baccalaureate or equivalent degree, which shall not be less than 12 semester hours” (Ncaa.org, Div. I Manual, art 14.1.8.2). Not only does this show a high degree of control by the employer, but also points to the fact that the relationship that the University has with these students is primarily economic and not educational, especially since they are sometimes foreclosed from certain classes and even majors. Furthermore, the degree of control is so great that these athletes are required by risk of termination to attend every class and sit as close as possible to the front of the classroom, while being monitored by persons that report to the athletic department.

During the off-season, players undergo rigorous conditioning including weightlifting three to four days per week for at least one or two hours, hour-long team meetings every weekday in addition to practice, their lives being essentially regulated from 5:30 AM to 10:00 PM. During the summer, these players must make up any required classes they had to miss due to in-season requirements, but they cannot do so in the second term of the summer because of pre-season training, which begins in the first week of August (McCormick, 101-2). The level of accountability that is expected of these athletes is indicative of employee status, as attendance to all scheduled events is mandatory and recorded, much like other employees are required to clock their hours. Given these facts, in addition to the point that universities dictate mandatory demands of their players for 240 days of the year during a season in which the team does not qualify for a post-season bowl championship and 262 days during bowl championship years, it seems that the time

commitment approximates or exceeds the 250 days per year that the average American spends on the clock. These athletes are additionally prohibited from using tobacco or alcohol at many of these institutions' football programs, something that is not prohibited by any other employer (Moore, 63). It is clear that football programs at the Division I level put a level of control that exceeds the national average, not minimum, numbers for time demanded of employees by their employers, exhibiting a level of control that must fulfill the first criterion for defining employment under the NLRA.

Universities have the same pervasive control over their basketball athletes. Unlike amateur athletes, these players spend four to five hours per day, six days per week practicing or watching film in addition to playing one or two games each week, sometimes going on road trips that can be as long as 10 hours each way, often in the middle of the week. One of the students McCormick interviewed stated that "it is impossible not to miss class," while another estimated that he missed fifteen to twenty percent of his classes (107). Since television stations are in charge of scheduling, games can happen at any time between 10 a.m. and midnight, something that makes it impossible for players to adequately follow a study plan (Duderstadt, 65). Even during the off-season, players must devote a minimum of three hours each day of the week to practice in addition to mandatory study halls in an attempt to offset the academic time they lost during the season. Basketball coaches also have the same restrictions on the social lives of players as their football counterparts. "No other university employee is even remotely subject to the degree of control, day by day, hour by hour, minute by minute, as the employee-athlete" (McCormick, 108).

This confirms the fact that grant-in-aid Division I basketball players are employees under the NLRA's first criterion.

Although many courts in the United States have deemed grant-in-aid scholarships to be framed in such a way as to not be considered compensation for athletic participation, their true purpose has been adequately outlined above. These scholarships constitute a payment for the athletic services rendered, fulfilling the second criterion of the NLRA. Article 15.1 of the Division I NCAA manual states that scholarships may be awarded based solely on athletic ability, irrespective of academic promise or financial need, and the NCAA maintains the right to veto how many each school can afford, how much they can cover, and who can receive them. Many of the Division I athletes could not afford to pay for school without these scholarships. Because of the time and energy demands of these athletes, it is almost impossible for them to hold a side job while maintaining their full academic load. Athletes were even prohibited by the Association from holding such jobs until 1998 (Freedman, 680). When adding the fact that these scholarships pay for food and shelter, the final criterion for the common law test is confirmed, as these athletes are financially dependent on their universities. Thus, grant-in-aid football and basketball players at the Division IA level are employees under the NLRA's common law test.

In cases where the National Labor Relations Board has determined the status of students, they have employed the statutory test in addition to the common law test. In its 1974 *Leland Stanford Junior University* decision, the Board looked at four criteria to determine that graduate research assistants were not employees under

the NLRA. The Board decided that because (1) these persons were graduate students enrolled in pursuit of a PhD in physics at Stanford, (2) they were required to perform research to acquire a degree, (3) they received academic credit for their research, and (4) their stipend from the university was not dependent upon the nature or value of their services (*Leland Stanford Junior University*). The Board determined that because these persons were primarily students, they were not employees. Three years later, the board upheld its decision in a similar case, *St. Clair's Hospital*, regarding student-like employees, arguing that “the mutual interest of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature” (*St. Claire Hospital*). By 1999, however, the Board had changed its interpretation in the case of *New York University*, arguing that the common law approach deems these student research assistants to be employees because of the inherent master-servant relationship expressed by the employer’s right to control the actions of its employees in return for payment. This decision was overturned by the *Brown University* case finding which was based on facts fitting into four categories “[1] the status of graduate student assistants as students, [(2)] the role of graduate student assistantships in graduate education, [(3)] the graduate student assistants’ relationship with the faculty, and [(4)] the financial support they receive to attend Brown” (*Brown University*). The non-employee relationship under the NLRA was determined based on whether the relationship was primarily educational and not economic in nature. However, this allows a student to be considered an employee under the Act if he or she fulfills the common law test and performs services for its university in a manner

that is not academic in nature, while his or her relationship to the university with respect to those services is economic in nature (McCormick, 96).

It is important to note that the Board did not decide in *Brown* that graduate assistants are not employees because of their status as students. Otherwise there would have been no need for a second, third, and fourth criterion. Rather, the board ruled that the graduate assistants were “primarily students,” something that the NCAA claims about their athletes (*Brown University*). The student-status is, nonetheless, only a formality necessary for the NCAA to continue claiming its dedication to amateurism. The athletic services rendered by these individuals are not related to their educational programs and are, in fact, a hindrance to their academic development. In *Brown*, the graduates were spending only a few hours each week working as lab assistants and “it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, [on] being a student” (*Brown University*). Student-athletes spend up to fifty-three hours each week on their athletic participation, likely sleep a minimum of eight hours a day in order to allow their bodies to recover from their strenuous training, and another 2 hours per day eating, leaving forty-five hours to do anything else. Even if they had no social life, no media attention, and no hobbies, they would be devoting less time to studying than to athletics. The commercial aspect of the league also indicates the true intentions that the universities and the Association have for these young men: labor. Furthermore, if their main purpose were pursuing a degree, their graduation rates would be higher. University of Central Florida published a study showing “nearly half of the college [football] teams that participated in bowl games at the end

of the 2005 season had failed to graduate at least 50 percent of their players during the past 6 years” (Porto, 8). That same year, of the 65 teams that made the NCAA basketball tournament, 35 did reach the 50 percent mark. It is important to note that because professional leagues often recruit these athletes before they graduate from college, their graduation rates would naturally be slightly lower. However, only around three basketball undergraduates and ten football undergraduates are selected to join professional leagues each year, meaning that the graduation rates presented are virtually unaffected by these few individuals. The fact that professionals recruit them in the first place further indicates that their commitment is primarily economic, not academic (Mitten et al., 223). The sad truth about college amateurism is that these are professionals enrolled at their universities primarily as athletes, something that the National Labor Relations Board could not deny under its previous jurisprudence.

The second condition in the *Brown* statutory test looked at the degree to which the work performed by the students furthered their education and found that their services in teaching and research were directly linked to their coursework. Contrarily, the work performed by the students is utterly unrelated to their education or degrees. Participation in sports is not required for any course or for the completion of any degree and, as demonstrated by the revenue these sports generate, they are entirely economic in nature. Additionally, the university’s clear commercial nature indicates that they have a powerful incentive to focus on athletic rather than academic success in the case of these individuals. This fact, combined with the academic standards put in place simply to maintain appearances, serves to

further highlight the economic relationship and the intention to maintain good public relations, revealing the “fundamentally commercial nature” of college sports (McCormick, 135). The third criterion was the nature of the relationship that the students had with their faculty as they were supervised and instructed during their jobs by the same people that taught their classes, which meant that in the mind of the Board, they were still being instructed as students. Since coaches, who are not faculty, supervise athletes during their practice, their work as athletes is not educational in nature and their time at practice does not help in any way with their academic work (McCormick, 125). Under the second and third criteria, student-athletes qualify as employees because of the fundamental differences between their job and that of the graduate research assistants in terms of their relevance to the education they gain from the university.

The final criterion for determining employment is whether athletic scholarships are compensation for athletic services and not merely financial aid. In *Brown*, the Board decided that the graduate students’ scholarship was mere financial aid that allowed them to attend Brown and were unrelated to the quality or value of the services they provided in the lab. The key to determining whether or not these payments constitute compensation is whether or not they would be withheld if these services were terminated. In the case of graduate assistants, their scholarships would remain so long as they maintained good academic standing even if they stopped performing the lab assistant services. The situation in Division IA is quite different since athletic grants-in-aid are never given without athletic services being rendered. As mentioned earlier, these scholarships are limited to one year and

can be removed if the player's contribution to athletics is not deemed to be appropriate, making the scholarships effectively dependent on proper athletic participation. When comparing merit- or need-based scholarships to athletic grants-in-aid it becomes clear that the latter is only awarded based on services rendered and often covers all costs, while the former rarely waives all costs is given simply to enable students to attend the university and pursue a degree irrespective of their extra-curricular activities. Since the NCAA engages in cartel behavior, McCormick argues, "this anti-competitive and illegal arrangement can hardly serve as justification that athletes are not employees any more than a wage-fixing arrangement among employers in a industry would render their workers as non-employees" (129). All of this evidence unilaterally points to the fact that all criteria under the common law and statutory tests for determining employment relationships under the NLRA is fulfilled by the nature of relationship between universities and their athletes.

Division I football and basketball players, although often not entirely students, are denied a number of rights by their current legal definition, while hurting the academic reputation of their colleges and universities. Under the NLRA the employee has a number of exclusive rights: "To self-organization, to form, join, or assist labor organizations, to bargain collectively through a representative of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 USC § 157). The additional rights that these students are entitled to under the NLRA would greatly improve their financial situations, allowing them to receive more money that they

ever could from grants-in-aid. Collective bargaining from these talented individuals would enable them to better provide for their families for an additional four years instead of risking permanent injury while pretending to be a student ready to fail at achieving a degree. As the proportion of students holding a “special admit” status is dramatically higher among revenue-generating athletes as compared to the rest of the student body, it is unclear that many of these employees actually deserve to have a spot at many universities, contradicting the universities’ mission of education. In fact, this is significant enough that schools can recruit from high schools that are magnet schools specifically for athletes and have even changed their graduation requirements for athletes. They have instituted a sliding scale of grade point average (GPA) and scores on The Scholastic Aptitude Test (SAT), so that a student who only writes his name correctly on the SAT and answers no questions can get admitted to college if he has a GPA of 3.55 (Should NCAA Rules..., 69). Additionally, many schools even allow fictitious classes, unlisted in any catalogs and available only to athletes, to allow teams to travel for extended road trips, like professionals, while still receiving as many as six hours of credit (Kaburakis, 299).

The power of myth is exceptionally apparent, as it has served the economic interest of universities and the NCAA. The power of law, however, should be greater in a society that prides itself on looking beyond propaganda to facts and truth. The truth is that it would be beneficial for both athletes and universities’ academic missions to restructure the definition of student-athletes toward the direction of employees and end the farce of amateurism.

4. Avenues of Reform

With collegiate football and basketball players being worth on average \$121,048 and \$265,027 respectively per year, it is clear that the justification for reform exists (Staurowski, 576). Luckily, another legal path to creating effective change within intercollegiate sports also exists. This path can be found by looking to a significant victory for the NCAA. Under the rule-of-reason analysis employed in the case of *Banks vs. NCAA*, it was determined that the NCAA has monopsony power over its market, which would be illegal without a procompetitive justification, which was fulfilled by the NCAA's alleged commitment to amateurism, according to the 7th Circuit Court. In order for the NCAA to be forced to abandon its price-fixing practices, a group of athletes, preferably from a variety of schools and conferences, must prove three factors in court. All of these factors are true at this time and can be proven by the facts, which have been presented here, as well as further overwhelming evidence. This court decision can be a real catalyst for change, which can be manifested in various forms.

The first item they must prove is that the ideal of amateurism is no longer prevalent in college sports at the Division IA level, which have become entirely commercial, a factor that has been extensively established in this thesis, and has even been admitted by the president of the NCAA when he stated that it is the university's "obligation to generate significant amounts of revenue to their [athletic] department's mission." The second item they must prove is that the NCAA's goals of promoting education are, in fact, not furthered by amateurism rules. While this second contention can be proven by the gross failure rates of recruited student-

athletes at the Division IA level, it also important to note that the NCAA's utter ineffectiveness at stopping recurrent scandals of athletes cheating at various universities shows that the level of competition at this level has become too great. In fact, competitiveness is so great that their push for whatever degree of amateurism no longer prevents professional-caliber athletes who are inadequate students from being sought by colleges for their athletic programs. The final criterion for establishing a court decision to end the NCAA's cartel behavior of denying student-athletes appropriate compensation lies in proving the existence of a less restrictive alternative for promoting the same competitive balance. Options for this alternative are abundant, although often have shortcomings.

The first and simplest alternative solution is the intercollegiate free-market league. In this system the universities compete for the services of their prospective student-athletes, leading to a fair price for each individual (Johnson). This system would reduce the cheating and hypocrisy of amateurism and commercialism within college sports. Additionally, it would finally align these athletes with the rest of the United States population engaged in a socially sanctioned activity without being denied participation in free-market capitalism (Yasser, 133-4). The drawbacks of this seemingly simple solution, however, include many of the academic shortcomings of the current system. If an eighteen-year old athlete fails to perform under the current system of amateurism, he loses his scholarship; but under the free-market system, he can be fired from the university, meaning that he would lose his student position as well, leading to a large decrease in revenue for the NCAA due to a further decrease in academic commitment, while a free-market system of

athletics completely divorced from academics would lead to the same funding issue for the NCAA. Therefore, this alternative is not entirely viable as a solution to the third item in the rule-of-reason test.

Many opponents of paying Division 1 men's football and basketball athletes will also point to Title IX as a hindrance. This educational provision passed in 1972 aims to protect women's rights, ensuring that they have the same opportunities as their male counterparts in education. Through this amendment, women now make up fifty percent or more of graduating classes at institutions of higher education. Title IX states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Courts have interpreted that in the case of athletics this means that scholarship numbers must be proportional to the number of participants in sports of each gender. Compliance exists only in programs that are equal or equal in effect, with any disparity being related to non-discriminatory factors. This jurisprudence is flawed for a number of reasons. First, the men's sports in question have lost all educational purpose as discussed in previous sections and are now purely commercial professional leagues fueled by the demands of fans (Staurowski, 577). Second, the demand for men's basketball and football is far greater than the demand for men's track and field, men's baseball, or men's lacrosse, much in the same way as it is far greater than women's sports, which indicates that the disparity is a result of discrimination that comes from sport, not from gender differences. Furthermore,

the discrimination comes from the fans of the sport and not from the educational institutions or the NCAA, proving that Title IX has little control over this issue.

The way in which athletic scholarships are distributed to male athletes in college indicates that their purpose is not educational in nature. Instead, they recognize an athlete's capacity to produce on the athletic field, court, or arena and only serve to meet whatever minimum threshold for academic participation is necessary at each institution. These scholarships, along with the term "student-athlete" are also part of the NCAA's toolkit to prevent athletes from holding worker status (Staurowski, 590). The revenue from men's sports primarily funds the equivalent scholarships for women, which do not serve the purpose of attracting athletes that are likely to bring more fan and sponsor revenue. The only possible exception to this is women's basketball, which still does not produce enough revenue to generate a profit for its athletic department. In this environment of mass-media commercialism, which is driven by revenue, it is hard to see a place for the educational purposes of Title IX.

The best solution for reform is the A-League. Under this model, which is inspired by a proposition by Rick Talender of *Sports Illustrated*, those teams who are currently members of Division 1A along with any others interested in maintaining big-profile college sports would join this new league. Players in this league are compensated under a free-market system similar to the one described above, with negotiable contracts similar to professional ones in the National Football League (NFL) and the National Basketball League (NBA). They would not be required to be enrolled as students at the university in question, but would receive one of year free

tuition for each year they participate in the League in addition to their salary. This tuition credit could be redeemable at any time, ensuring that these athletes could focus on their sport fully without an academic load, as well as giving them the ability to focus on their academic work exclusively after they retire from their sport.

Universities retain control over their teams, as they will continue to represent their respective institutions. In addition, the institutions can sell shares of their teams to investors, allowing higher revenue that can be used for various expenses of the athletic department for both revenue-generating and non-revenue-generating sports. Universities that are mainly interested in education and are disinterested in this model such as Division 2 and 3 institutions can remain separate and continue to operate their college sports as they do today. The fans who clam strong allegiances to current big-time teams can continue to watch their favorite sports, enjoy the same rivalries, and even participate in March Madness in the same way. The effective change from an altered form of amateurism to professionalism due to a court order explaining the unfair nature of the current situation is likely to persuade avid fans to support the change toward a more fair system of compensation and is unlikely to lead them to reject the A-League and stop watching the sports to which they are so dedicated today.

Many officials currently holding positions of power such as athletic director, coach, or college president would undoubtedly oppose the A-League because of loss of jobs and authority. Furthermore, the NFL and NBA are not likely to be happy about subsidizing this minor league in order to receive the talent they have previously been reaping at no cost. While the NCAA would have to change its stance

on amateurism, something they are not likely to enjoy being forced to do; their past actions prove that they are not opposed to change the definition of the term. The Association's inclination, as well as the position of the regents of universities clearly points toward maintaining the status quo of college sports, which places most of the money in their pockets, meaning that they will automatically oppose policy change. This is why a court order or a decision by the National Board of Labor Relations is the only effective way to reform college sports.

Possible problems with the A-League include the prospect of students who sustain an injury early in their career and are unable to continue performing. Such students would lose their salary and be forced to retire from the sport with only one year of free tuition available to them. However, this is not unlike the problems that any given grant-in-aid scholar would have under the current system. He would be forced to leave school if he could not afford the remaining tuition since all athletic scholarships are only good for one year. Unfortunately, promising young prospects that fail to perform and are dropped from the A-League would not be able to transfer to a member-school of the amateur divisions because they would have already been professionals. Although this would be a disadvantage to college athletes, the spirit of amateurism would be better preserved, as these individuals chose to focus on athletics over academics by joining the A-League, possibly without even matriculating. Their athletic careers would have come to an end regardless since the NFL or the NBA would no longer consider them if they were deemed inappropriate in the A-League. But their involvement in amateur athletics could continue at the intramural or club level at any university. The non-revenue

generating sports would suffer because of losing the minimal funding they used to receive from football and basketball. However, if these sports are to remain part of the educational mission of the school as prescribed by the NCAA, the student fees and tuition, as well as ticket sales could be used to easily offset the cost of operating these sports. Using this platform for reform, student-athletes could bring forth a successful petition to overturn the previous court decision in *Banks* using the rule-of-reason test for the Sherman Anti-trust Act and bring balance to college athletics.

Conclusion

The perverse actions of the NCAA have systematically served to maximize the profits of its governing boards and the athletic departments of the universities. Simultaneously, the ever-growing level of competition and the massive responsibilities that take precedence over and distract them from their academic duties have dwarfed the benefits that athletes derive from this extra-curricular activity. Through its various legal maneuverings, the Association has acquired a variety of imposing powers over its member institutions and athletes. Having been allowed a dictatorial mandate, The NCAA's president claimed "amateurism' describes the participants not the enterprise" (Brand, 5). Its unreasonable bylaws have stretched as far as being able to supersede the order of a court of law as it can sanction schools for obeying a court order benefitting a college athlete if that order were ever to be modified or removed (2012-2013 NCAA..., Bylaw 19.7). They have drawn a veil of amateurism before the American public in an attempt to cover the capitalist growth of commercialized college athletics. Unfortunately for them, it is

becoming clear that their veil is shrinking and is no longer able to hide their growing revenue.

Their staunch opposition to paying athletes exists only on paper as exemplified their own bylaw: “a professional athlete is one who receives payment for athletic participation *except* as permitted by the governing legislation of the Association”(2012-2013 NCAA..., Bylaw 12.02.3), indicating that they are only opposed to paying athletes in a manner inconsistent with their own provisions. Reform will not come from the group of greedy leaders at the top of athletic departments and the NCAA, but from collective action from the wronged athletes instead. Either through a careful presentation of their employment status under the NLRA or an appeal to a federal court’s rule-of-reason test for the Sherman Anti-Trust Act, reform to Division 1A is entirely possible through the alterative of the A-League. This minor league will divorce students from athletes, while better preserving the academic goals of post-secondary education and solving the issues of hypocrisy within intercollegiate athletics. Despite inevitable opposition from the leaders of the NCAA and college sports, the A-League will lead to a better system that separates amateurism from commercialism and promotes a healthy learning environment.

The initial conceptions of amateurism can flourish today in a system that ends the injustice brought to the young men who work long hours, putting their body at risk of permanent injury for the enjoyment of a nation that is so impressed by their talent that they are willing to spend their hard-earned money to see them perform. The American free-market system demands compensation for all labor

that produces value to the consumer. Established laws against monopsony and cartel behavior exist to protect the American consumers and workers in every commercial enterprise other than the one in which we entrust our youngest and most promising athletes as they leave the comfort and security of their home. Our economic system is governed by such principles as these through our laws in order to ensure that the persons that fuel the machine are not forgotten in the haze of profit. This is simply what is just under our political and economic definition. Justice in the intercollegiate athletics arena is long overdue. It is time for the victims of the hypocritical system set up by the NCAA to take their grievances to a higher court and demand the minimum fruit for their toil, a just salary.

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I affirm that I have adhered to the Honor Code on this assignment.

-Vlad Bursuc