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An Essay on the NCAA, Amateurism, and the Student-Athlete: Protecting Their Greatest Asset

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Abstract

Since its incorporation in March of 1906, the NCAA has ostensibly been dedicated to assisting student-athletes to excel in the classroom, on the field, and throughout life. This paper will argue that instead, the NCAA has been transformed into a multi-billion dollar "big business" dedicated to its self-preservation and to maintaining control over collegiate athletics and college athletes. As the economic landscape of collegiate athletics has drastically changed, many universities today pay their coaches salaries in the range of $3-$7 million per year (or even more) and individual schools and athletic conferences have successfully negotiated massive television, cable, and merchandizing deals. Arguably the NCAA's greatest asset— its student athletes— have been denied the benefits generated by their participation in college athletics.

The United States Supreme Court has decided to take on appeal *NCAA v. Alston* (2021). When decided, *Alston* may help to clarify several important questions: Will the relations between the student athlete and their colleges and universities fundamentally change? Will additional compensation be awarded to the student athlete beyond the "full cost of attendance"? And will the student-athlete be allowed to profit from the use of their name, image and likeness? Finally, the paper discusses how a revenue sharing model utilized by all major professional sport leagues should be implemented into the structural relationship between the NCAA and student athletes. The paper argues that the current amateurism model is simply outdated. Future research will explore the effect of *Alston* on these questions.

Key Words: NCAA, amateurism, full cost of attendance, antitrust, "name, image and likeness"

1. Introduction and Context

Mannion (2017) wrote that "A cornerstone of NCAA athletics has been the staunch enforcement of the amateurism of its athletes. The NCAA's Division I handbook dedicates almost 30 pages to the concept, defining the ins and outs of where athletes can and cannot be paid before and during their collegiate careers." Wolohan (2014) states the position of the NCAA: "… restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product."

Since its inception, the NCAA has relied on the concept of amateurism to avoid granting to athletes benefits and compensation beyond their basic athletic scholarships, as well as the ability to control their own name, image and likeness (Murphy, 2021). Zola (2013) adds that "For decades the NCAA has created the illusion that their sole purpose was to defend the concept of amateurism within higher education. This trick has been sanctioned by none other than the Supreme Court when, in 1984, they recognized the NCAA as the "guardian of an important tradition… amateurism in intercollegiate athletics."

In assessing various rules employed by the NCAA, courts until now have uniformly sided with the NCAA, having been persuaded that if the athlete was granted the right to make money from the use of his or her name, image and likeness, the aspects that make college sports unique would be compromised. Until now, U.S. courts have limited their inquiry to whether the rules of the NCAA are necessary to affect their core purpose of preserving a competitive balance among its member schools and to maintaining the unique character of college athletics—and not to whether the NCAA uses amateurism as a trope to "exploit "student-athletes (Kargl, 2017; Adams, 2021).

Yet, as Mitchell (2020) reported:

"The term 'student athlete' was invented by the National Collegiate Athletic Association to avoid labor laws. In 1955, a Fort Lewis A&M football player named Ray Dennison suffered a fatal injury during a game. When his widow filed for workers' compensation benefits for Dennison, a scholarship athlete, then NCAA executive director Walter Byers concocted a legal strategy to ensure college athletes would not be seen as employees in the eyes of the law. The term 'student-athlete' was born. Invoking amateurism as a way to avoid both payment and liability, and it stuck. And Ray Dennison's wife lost her lawsuit."

Many argue that the time for change has come. Student athletes who compete in sanctioned NCAA sports have been deprived of their fair share of the "athletic pie" for too long. The most memorable moments in the history of collegiate athletics involve athletes who cannot benefit monetarily from their own success. Moments like Vince Young's touchdown run to beat USC; Kemba Walker's step back jumper at Madison Garden to advance in the Big East Tournament; and Desmond Howard's famous punt return ending in a Heisman pose, are but a few of the moments that have made collegiate athletics so riveting.

The rules of the NCAA relating to its self-defined principle of amateurism, however, may place the NCAA in direct conflict with U.S. antitrust laws (see generally Federal Trade Commission, 2017) by creating restrictive anticompetitive effects on the marketplace for the services of student-athlete. Tatos (2017), in fact, found the following:

(1) "The procompetitive justifications that the NCAA has offered for its restraint on athlete payments have little, if any, economic merit and do not justify the consumer injury resulting from the restraint;
(2) Absent the restraint, the minimum amount public P2 [Power conference] schools alone could have paid athletes is approximately $5.2 billion between 2003-2004 and 2014-2015, approximately two-thirds of which would have been used to compensate football and men's basketball players, indicating that the consumer injury resulting from the NCAA's restraint on trade has caused significant antitrust damages;
(3) Contrary to the NCAA's claims, empirical and documentary evidence demonstrates that directly compensating FBS/DI athletes would not result in decreased consumer demand;
(4) 'Competitive balance,' when analyzed in an antitrust setting, does not support the NCAA's claims; and
(5) Evidence, including the over one million documents released from the academic/athletic fraud investigation at the University of North Carolina at Chapel Hill, demonstrates significant consumer injury associated with the integration of academics and amateur revenue sport athletics."

O'Bannon v. NCAA (2009) highlighted issues relating to the exploitation by athletic departments and the NCAA of the "name, image and likeness" of college athletes. The Covid-19 global pandemic has brought to the forefront the argument that the student athlete is not an ordinary student, but rather an athletic department's greatest asset.

In this context, is it fair to ask whether the actions of the NCAA, in not allowing college athletes to profit off their name, image and likeness and reap at least some of the benefits of large television and cable contracts, amounts to a limitation on competition to the improper end of preserving its control over collegiate athletics and maximizing its revenue and not in protecting the student-athlete?

2. The Debate Over Name, Image and Likeness: Or, Is it a Debate About Much More?

The debate about who should profit from the use of an athlete's name, image and likeness is directly related to the popularity of an athlete and the athlete's overall public appeal. Professional athletes, music stars, actors/actresses, and social media "influencers" all profit from their names, images and likenesses. Issues relating to name, image and likeness, also referred to by the acronym "NIL," have recently been hotly debated in the context of *college* athletics and revolve around an individual athlete's right to control their "right of publicity" (Afshar, 2015; Stark-Mason, 2021) versus the NCAA's prohibition on doing so.

For many, it is clear that the NCAA's prohibition on an athlete receiving income from the use of his or her name, image and likeness has the effect of maintaining control over the student athlete and of preserving an essential piece of their business model. Currently, the college athlete is prohibited from accepting payment for the use of their name, image and likeness under most circumstances beyond the receipt of an athletic scholarship or grant-in-aid, payments for room and board, and since 2015, an additional amount representing a "full cost of attendance" (see e.g., Prisbell, 2014; Bradbury & Pitts, 2018). Receipt of any additional compensation would amount to the acceptance of an improper benefit, resulting in a violation of its rules and a loss of future athletic eligibility.

It is interesting to note that while the public may believe that only "star" football players from schools like Clemson, Alabama, Michigan, Oklahoma, USC, and Notre Dame could realistically garner sponsorship dollars in return for their NIL, that is actually not the case. The ability of athletes to utilize social media and endorse various brands will potentially create a large revenue stream. Social media has created a platform for athletes from smaller schools from non-revenue generating sports potentially to grow their own brand. What, however, is missing is the ability of the athlete to profit off his or her NIL. A recent study conducted by Temple University's School of Sport, Tourism and Hospitality Management (reported in Hale, 2021) also shows that the potential profits from NIL endorsement deals are actually more favorable for a women athlete than a male. Interestingly, Olivia Dunne, a gymnast at LSU who has 3.7 million TikTok followers and over 1 million Instagram followers, has a large audience with which brands would love to partner (Hale, 2021). But the rules remained in force.

2.1. State and Federal Legislative Fixes

In recent years, several states have enacted legislation relating to the issue of name, image and likeness. Six states (Florida, California, Colorado, Nebraska, New Jersey, and Michigan) have introduced a specific NIL bill that will become operative on July 1, 2021 (Dellenger, 2021). Mississippi is close to joining the states which have officially passed new NIL legislation. [The Drake Group (2021b) reports that 8 additional states have passed bills into law: Alabama, Arizona, Arkansas, Georgia, Montana, New Mexico, South Carolina, and Tennessee. An additional 17 states have introduced bills. "The trend among the states reveals that not only are many more states introducing bills that are swiftly moving through committee, but also indicate a willingness among states to enact earlier effective dates."] While each state's NIL legislation will slightly differ, all bills that have passed have incorporated common provisions which include: an athlete's NIL rights cannot be restricted by any member school; an athlete should have the ability to hire an agent; endorsement deals must be disclosed to the school; agents must be "registered" or at least be subject to some reasonable regulation in order to protect the interests of athletes; and no prospective athlete can strike a deal relating to recruitment purposes (Dellenger, 2021).

On the federal level, Representatives Anthony Gonzalez (R-OH) and Emanuel Cleaver (D-MO) are the lead sponsors of a NIL/college athletes bipartisan bill in the 117th Congress, termed the *Student Athlete Level Playing Field Act*, that will permit college athletes to enter into endorsement contracts and to hire agents. The legislation also contains language that maintains the "student" relationship between the educational institution and the student-athlete. The bill prohibits the NCAA and other national or conference governance organizations or their member institutions from declaring college athletes ineligible for participation because the athlete has entered into an endorsement contract or has retained an agent in order to obtain such contracts.

The bill is virtually the same as the version introduced in the 116th Congress, but contains several substantive changes. First, the bill contains a "parity clause" such that if a college athlete has been prohibited from entering into an endorsement deals due to objections related to third parties, then the NCAA, covered athletic organizations and institutions will likewise be prohibited from having sponsorships or endorsement contracts with such entities. The legislation contains the following language:

"EXCEPTIONS FOR ENDORSEMENT CONTRACTS.—A covered athletic organization or institution of higher education may prohibit a student athlete from entering into an endorsement contract with the following categories of brands, companies, or types of contracts:

(A) A tobacco company or brand, including any vaping device or e-cigarette or related product.
(B) Any alcohol company or brand.
(C) Any seller or dispensary of a controlled substance, including marijuana.
(D) Any adult entertainment business.

(E) Any casino or entities that sponsor or promote gambling activities."

Second, the legislation specifies that Congress should prioritize the selection of "independent" members of a Commission that will be charged with making recommendations to Congress on NIL rules. Third, the new version permits institutions to prohibit athletes from *wearing any gear* with the insignia of any entity during any athletic competition or "athletic-related university-sponsored event."

However, the Drake Group (2021b), whose stated mission is "to defend academic integrity in higher education from the corrosive aspects of commercialized college sports," while commending the sponsors for their reintroduction of the bill, nevertheless expressed its criticisms regarding certain aspects of the proposed legislation because of:

"lack of clarity regarding the permissiveness of athlete self-employment, establishment of a powerless temporary Commission instead of a permanent NIL Commission to determine and monitor the implementation of NIL standards, the broadness of the provision permitting schools to restrict athletes from the wearing of clothing with certain insignia, the softness of the requirement to comply with Title IX, the ambiguity in the antitrust protection, the lack of a mandate for transparency of NIL agreements, and the dearth of any educational requirements, including that athletes be educated on financial literacy, among others."

Further, the Drake Group expressed its belief that any federal legislation relating to the issue of NIL should be enacted within a comprehensive bill that would "condition receipt of Higher Education Act funding on institutions providing students participating in intercollegiate athletic programs with health and medical protection, improved educational benefits that lead to better graduation rates, greater freedom of college athletes to attend institutions of their choice, and a stronger athlete voice in the governance organizations that control their athletics experience."

Additional legislative solutions have been introduced by Sen. Marco Rubio (R-FL) [*The Fairness in Collegiate Athletics Act*]; Sen. Roger Wicker (R-MS) [*The Collegiate Athletic Compensation Act*]; Sens. Cory Booker (D-NJ) and Richard Blumenthal (D-CT) [*College Athlete Bill of Rights*]; Sen. Chris Murphy (D-CT) and Rep. Lori Trahan (D-MA) [*College Athlete Economic Freedom Act*]; and by Sen. Jerry Moran (R-KA) [*Amateur Athletes Protection and Compensation Act of 2011*]. Interestingly, Sen. Booker played tight end as a recipient of an athletic scholarship at Stanford University; Sen. Blumenthal was a former swimmer at Harvard; and Rep. Trahan was a volleyball player at Georgetown (Keller, 2021). "Across each of the proposals, there are a handful of select topics by which each takes a significant stance, namely the involvement of agents, disclosure requirements, governing entities for NIL transactions, payments, and third party involvement" (Keller, 2021).

At the same time, Hale (2021) reports that the NCAA is working to adopt their own policy that would *bar* member schools from following their individual state laws. Some commentators have posited that states actually may prefer that the NCAA reevaluate its current policies or, in the alternative, for the federal government to preempt state action in favor of enacting a national policy (Staley, 2021). In some cases, however, the motivation behind these laws may not only be the protection of their athlete's rights. A far less altruistic purpose may be present. The Drake Group (2021a) is quite direct: "Many of the bills' provisions indicate a willingness to provide additional benefits and funds seemingly to achieve a recruiting advantage whereby states are saying to athletes: 'come here and you can have NIL rights now' in addition to other benefits."

Many of the states that have proposed legislation have highly competitive football and basketball programs. Ironically, some may have realized that passing NIL legislation will give the universities in their state a "leg up" in recruiting by providing athletes with an attractive source of income while representing a university. The NCAA seems to have recognized this fact as well and sees this as a core reason to maintain its current policy. The NCAA argues that if athletes can earn money and additional benefits from monetizing their NILs, the benefits will produce unfair advantages and may be used to lure athletes to certain member schools.

3. *O'Bannon v. NCAA*: A Reprise of the Seminal Challenge to NCAA Rules on Amateurism

NCAA rules prohibiting payments to athletes for the use of their name, image and likeness were challenged in *O'Bannon v. NCAA* (2009) (see Edelman, 2014). Ed O'Bannon was a star basketball player for UCLA in the mid 1990's.

In 2009, he challenged the NCAA by filing a class action lawsuit against the NCAA and the Collegiate Licensing Company, alleging a violation of the Sherman Antitrust Act (1890) as a "contract, combination, or conspiracy in restraint of trade" and for enacting policies that required him to sign a waiver to forego compensation for the use of his name, image and likeness in return for maintaining his collegiate eligibility, depriving him of his "right of publicity" (see generally Moore-Willis, 2018). [The Collegiate Licensing Company (CLC) is a collegiate trademark licensing and marketing company, founded in 1981 by Bill Battle in Selma, Alabama. CLC is the largest and oldest collegiate licensing company in the United States, providing services to more than 200 colleges and universities, athletic conferences, bowl games, the Heisman Trophy, and the NCAA.]

Specifically, O'Bannon cited the sale of individual game videos and videos commemorating UCLA's National Championship; photographs and stock footage; the rebroadcast of games on the ESPN Classic network; and the use of his likeness by Electronic Arts [EA], a video game developer, in a popular video game. The class consisted of former FBS [Football Bowl Subdivision] football and Division I men's basketball student-athletes whose images were either sold or licensed without their consent. EA was also alleged to have conspired with the NCAA based on licensing agreements between the NCAA and EA relating to the use of student-athlete likenesses (Marcus, 2013). About the same time, Sam Keller, the former starting quarterback for the Arizona State University and University of Nebraska football teams, separately brought suit against the NCAA, CLC, and EA, alleging that EA had impermissibly used the NILs of student-athletes in its video games. The cases were consolidated into one action.

The consolidated case was first heard by Judge Claudia Wilken in the U.S District Court for the Northern District of California. On August 8, 2014, Judge Wilken issued a decision in the case. In sum, Judge Wilken found that the rules of the NCAA prohibiting payment of compensation to student-athletes violated Section 1 of the Sherman Act as an "unreasonable restraint on competition in the college education market." Judge Wilken noted that were it not for those rules, schools would compete with each other by offering recruits compensation exceeding the cost of attendance, which would "effectively lower the price that the recruits must pay for the combination of educational and athletic opportunities that the schools provide" (p. 972.) Judge Wilken held that NCAA rules prohibiting compensation for the use of student-athletes' NILs are thus price-fixing where NCAA and its members collectively "agree to value [NILs] at zero" (p. 973). As a result, colleges and universities behave as a cartel — a group of sellers who have colluded to fix the price of their product" (see Blair & Wang, 2017).

As such, the District Court permanently enjoined the NCAA from enforcing certain of its rules as they applied to the Football Bowl Subdivision and Division I men's basketball student-athletes. The decision permitted schools to offer student-athletes an athletic scholarship representing the "full cost of attendance" at their respective schools and up to $5,000 per year in deferred compensation, the amount to be held in trust for student-athletes until after they leave college. The NCAA appealed this decision to the Ninth Circuit Court of Appeals.

The appellate panel first held that it had jurisdiction in the matter and that it was not precluded from reaching the merits of plaintiffs' Sherman Act claim because: (1) the Supreme Court did *not* hold in *NCAA v. Board of Regents of the University of Oklahoma* (1984) that the NCAA's amateurism rules are valid as a matter of law under *all* circumstances; (2) the rules are subject to the Sherman Act because they regulate commercial activity; and (3) the plaintiffs established that they suffered injury in fact, and therefore had standing, by showing that, absent the NCAA's rules, video game makers would likely pay them for the right to use their names, images and likenesses in college sports video games. The panel conceded that even though many of the NCAA's rules were likely to be found to be pro-competitive, they were *not* exempt from antitrust scrutiny and must be analyzed under the Rule of Reason. Indeed, as Professor Edelman (2014) wrote:

"Furthermore, the district court's ruling in O'Bannon accurately interpreted the 1984 Supreme Court decision NCAA v. Board of Regents of the University of Oklahoma in light of both its underlying context, and the factual realities about the college sports marketplace. Despite the NCAA's longstanding contentions to the contrary, the Board of Regents decision stands foremost for the proposition that collective action by NCAA member schools is subject to antitrust scrutiny under section 1 of the Sherman Act."

The Court of Appeals agreed that the record supported the District Court's finding that the rules served the pro-competitive purposes of integrating academics with athletics and preserving the popularity of the NCAA's product by promoting the principle of amateurism.

However, applying the Rule of Reason, and not the more stringent *per se* rule, the panel held that the NCAA's rules had significant anticompetitive effects within the college education market, in that they fixed an aspect of the "price" that recruits pay to attend college. The Ninth Circuit agreed that the District Court had properly identified a "less restrictive alternative" to the current NCAA rules: allowing NCAA members to offer athletic scholarships up to the "full cost of attendance." However, the District Court's other remedy—allowing students to be paid cash compensation of up to $5,000 per year—was erroneous. The panel thus vacated the District Court's judgment relating to the $5,000 payment.

In sum, the Ninth Circuit stated:

"By way of summation, we wish to emphasize the limited scope of the decision we have reached and the remedy we have approved. Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. When those regulations truly serve pro-competitive purposes, courts should not hesitate to uphold them. But the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules. In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market. The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."

"We vacate the district court's judgment and permanent injunction insofar as they require the NCAA to allow its member schools to pay student-athletes up to $5,000 per year in deferred compensation. We otherwise affirm. The parties shall bear their own costs on appeal."

The basis for the decision of the Ninth Circuit was that Judge Wilken had provided no rationale why the figure of $5,000 was chosen. The Appellate Court reasoned that the number could be more or may be less (McCann, 2016). In March of 2016, lawyers for O'Bannon's appealed the decision to the Supreme Court of the United States. However, the Supreme Court denied certiorari on October 3, 2016. The matter was thus never finally resolved and the controversy has continued.

As a result of *O'Bannon*, a number of class-action lawsuits have been filed by student- athletes against the NCAA and their universities, challenging these and other restrictions, including a lawsuit originally filed in 2014 by former West Virginia running back Shawne Alston, as well as other Division I basketball and football players. These suits were combined into a single suit, also heard by Judge Wilken, who once again ruled against the NCAA in March 2019. Judge Wilken required the NCAA to permit students to receive other non-cash scholarships, payment for internships, and other support beyond the full cost-of-attendance for academic purposes (see Smith 2015). The Ninth Circuit upheld the ruling on appeal, and the Supreme Court certified the case in 2021 as *National Collegiate Athletic Association v. Alston* after the NCAA filed a notice of appeal.

4. *Alston v. The NCAA:* Might There Finally Be a Resolution?

While the *Alston* case is broader in scope than the singular issue relating to of name, image and likeness, a decision by the United States Supreme Court may shape the future, determining how the NCAA will be allowed to define amateurism and how the organization will move forward in treating their greatest assets- the student-athletes (see Crabb, 2017).

The NCAA has continued to maintain that the preservation of amateurism is key to preserving the uniqueness of college athletics and its differentiation from professional sports (Nachmany, 2021). The NCAA has argued that granting compensation to athletes in the form of paying the cost of post-graduate degrees and paid internships will be exploited by member schools as a recruiting tool, creating an unfair and fundamentally unequal marketplace (Maese, 2021).

The NCAA in its 62-page brief to the Supreme Court cited the 40-year old case of the *NCAA v. Board of Regents of the University of Oklahoma* in its defense of its amateurism model. Even though the NCAA was ultimately unsuccessful in maintaining its control over broadcasts of collegiate football games (Scully, 1984), and individual schools and conferences were granted the right to negotiate their own television contracts, the organization had also gained something in the process. In *Board of Regents*, the Justices found that the NCAA was indeed unique and should be afforded reasonable latitude to preserve the pro-competitive aspects of its amateurism model.

Commentators Heckman, Loughlin and Curtner (2021) essentially agree with the NCAA's position and argue that ending amateurism—essentially adopting a "pay for play" model" (Kniss, 2017)—will be "disastrous for student-athletes" and will have "wide-ranging policy implications for higher education, shifting incentives, raising costs, reallocating resources, threatening college sports offerings of all kinds and taking a toll on a valuable tool for social mobility."

Considering the changes to the economic landscape of college athletics that have been brought about by the infusion of billions of dollars in revenues a result of television and cable contracts, the merchandizing efforts undertaken by most universities, and the sustained popularity of college athletics—most especially college basketball and football—is it time to reexamine the "model of amateurism" *from the perspective of the college athlete* and not from the that of the NCAA (Maese, 2021)?

5. The Landscape *Has* Changed

The economic landscape of college athletics has indeed drastically changed in the last thirty-seven since the 1984 opinion of the United States Supreme Court in *NCAA v. the Board of Regents,* a decision which essentially reinforced the NCAA's position on amateurism (see Steinberg, 2017). College sports have evolved into big business, but the treatment of student athletes has not reflected this reality. Coaches, schools, and conferences have reaped the benefits of the drastic evolution in the economic landscape of college athletics. "March Madness" alone brings in roughly $800-$900 million per year which equates to seventy percent of the NCAA's total annual revenue. The NCAA sells television contracts and group licensing rights to cable companies. At major universities such as Texas A&M, Nebraska, and Florida State, athletics—more specifically football—drives revenue, and thus athletic department and often university policies. University sports programs are now being compared to professional sport franchises that are worth upwards of $4 billion.

The deals have only continued to grow over the last decade (see Berr, 2015). The NCAA garnered roughly $666 million in 2012 which is expected to increase to $990 million by the year 2025 (Gough, 2021). Looking at specific conferences, the Big Ten brings in an average of $440 million per year through their media agreement with FOX, ESPN, and CBS (Draper & Blinder, 2020). The South Eastern Athletic Conference (SEC) recently brokered a deal with Disney to make ESPN and ABC the official television partner of the conference. This deal will include all sports, not just football. The 10-year deal which commences in 2024 will generate $300 million annually for the conference (Rabalais, 2020). Notre Dame's contract with ABC, as well as other broadcast arrangements as an "affiliated" member of the ACC, is worth in the range of $25.2 million $29 million per year (Bucholtz, 2020).

Even with the drastic changes, the NCAA has continued to resist granting cash payments to student athletes beyond those representing the "full cost of attendance," contending that the current system is both fair and equitable. "NCAA Divisions I and II schools provide more than $3.6 billion in athletics scholarships annually to more than 180,000 student-athletes" (NCAA, 2021). The NCAA (2015) stated: "Division I college athletes now can receive athletics scholarships that provide funds to help pay the full costs of attending college, such as travel and other expenses. The 65 schools in the Atlantic Coast, Big Ten, Big 12, Pac-12 and Southeastern Conferences approved the rule in January (of 2015), and since then it has been adopted by other Division I schools and conferences." [Table I contains information on the amount of such payments, as reported in the Chronicle of Higher Education.] At the same time, the NCAA has made it clear that they do not want to look like they support "pay for play" as it will irreparably damage the image of college athletics (Maese, 2021) for both athletes and fans.

A second area where the economic landscape has evolved is through the exponential growth in coach's salaries [See Appendix II], while the benefits the athlete receives have been stagnant. Nocera (2011) reported that Leigh Steinberg, a prominent sports agent, believes that the more college athletic programs ignore amateurism and act like professional sport franchises, that coaching salaries will continue to grow. This prediction has proven true. The growth in coach's salaries shows how the amateurism model is outdated. In 2017, Nebraska reached an agreement with Scott Frost to become the university's new head football coach. He currently makes an average of $5 million per year; his salary compares to many NFL head coaches. In 2017, Jimbo Fisher signed a 10-year contract to become the head football coach at Texas A&M. His average salary is set to be $7.5 million. Looking at Fisher's coaching history, he was earning $72,000 as an assistant at Auburn University in 1998. He then became the head coach at Florida State in 2010, where his deal garnered him $1.6 million per year.

6. Student-Athlete As Essential Worker

The Covid-19 global pandemic has raised questions whether a student-athlete is more than just an "ordinary" student and should be treated as such. Is the student athlete in reality an essential worker (Roberts, 2020), who generates millions of dollars in revenue for their universities—in essence, the athletic programs greatest asset? Laurence Deitch, who has spent twenty-four years as a member of the Board of Regents of the University of Michigan, shed light on the decision of the Big Ten Conference to resume football after the conference originally had decided that it was too risky to play in the fall of 2020. The Big Ten claimed that their decision to return to play was made for the benefit of their athletes who love the game and want to compete. Many fans of college football will agree with this statement, but Deitch provides a different interpretation of the decision. Deitch asserts, "Major college football is a multibillion-dollar money machine for Universities, their highly paid coaches and the television and apparel industries. The universities' decision was an economic choice, plain and simple" (reported in Nocera, 2020). Deitch himself, who is technically a neutral advocate for the best interests of the University of Michigan, is now an advocate for compensating student athlete.

The pandemic has highlighted an important difference between an "ordinary" university student and the student-athlete. While the ordinary student is at home or confined to their dorm room learning in a "virtual environment," the student athlete is ordered to campus for daily Covid-19 testing and to participate in team activities at a time where it was arguably unsafe to practice or play. As more and more teams returned to competition during the fall of 2020, the pandemic has demonstrated that student-athletes are essential pieces to the academic and athletic puzzles at their universities and should be compensated as such. Simply put, the student-athlete's participation in sports during the pandemic is one of risks for which they are not adequately compensated.

7. Basic Revenue Sharing Model

The college athlete is arguably the most important asset in a university's athletic program, but they have been largely denied the benefits attenuated with that status. This situation may change after a decision in *Alston v. NCAA* is rendered by the United States Supreme Court. At that point, attention may shift to creating a revenue sharing model (Stocz, Schlereth, Crum, Maestas, & Barnes, 2019) which would recognize that there is no essential difference between the NFL or the NBA and the NCAA. College athletic programs are certainly "big businesses" that feed off of lucrative television and cable contracts, with coaching and administrative salaries that reach into the millions of dollars. [NCAA president Mark Emmert earned between $2.7 and $3.9 million in the period 2017-2018. Berkowitz (2020) reported that "For the 2018 calendar year, one other NCAA executive was credited with more than $1 million in total compensation… Eight others were credited with more than $500,000. That group includes former executive vice president Oliver Luck, who was credited with just over $650,00 for work he did before leaving a little more than halfway through the year to become the commissioner of the XFL."]

The NCAA and professional sports leagues secure television contracts in essentially the same way. Both exploit the name, image and likeness, as well as the reputations (on and off the field), of their athletes. What is missing in college athletics is revenue sharing. The creation of a simple "defined revenue sharing model" may be the solution to the problem.

A study performed in 2017 (reported by Gaines, 2017) took the revenue garnered by each of the top 20 revenue generating football programs and split the revenue based on the current NFL player's share of the defined revenue. At the time, the players' share was 47% of the defined revenue, but has since been increased to 48.5% under the new 2020 NFL Collective Bargaining Agreement. What this shows is that if a basic revenue sharing model was in place, the 85 football scholarship athletes would be paid a certain amount for their play. The research indicates how valuable these football programs are, even after the universities would pay 47% of the defined revenue to scholarship players. After distributing 47% of the revenue, a scholarship football player at the University of Texas would *potentially* receive $666,029 per year, and a scholarship athlete at the University of Alabama would be *potentially* entitled to $545,347 per year. Football-based revenue of Football Bowl Subdivision schools would net scholarship football player an average of $163,087 per year based on revenues of approximately $29.5 million (Gaines, 2017). Huddleston (2020) notes that "College football stars could be earning as much as $2.4 million per year, based on NCAA revenues."

Of course, these large payments based on a projected revenue sharing model are unrealistic and would result in a wholesale abandonment of any trace of the NCAA's amateurism model. In addition, the revenue sharing model may only be possible in the case where there is a union representing the interests of these "essential workers" as there is in all professional sports. However, because the professional model is neither realistic nor probable, that does not mean that there might be a middle ground. As was noted previously, individual states are enacting their own name, image and likeness legislation. Each state approach is slightly different. Included in New York State's NIL bill is a provision requiring that universities must set aside 15% of the athletic department's yearly revenue to be divided among its scholarship athletes. South Carolina is proposing that athletic departments place $5,000 per year in a trust fund for each athlete that can be accessed once the athlete graduates, mirroring the decision by Judge Wilken. Alabama follows a different approach and gives the athlete the option to seek profits from their name, image and likeness, or accept a $10,000 stipend from the school per year of their athletic participation. If the athlete accepts the $10,000 stipend, the athlete would forgo their opportunity to seek revenue-generating opportunities involving their NIL.

Under a bill recently enacted in Georgia, schools can "require athletes to pool up to 74.99% of their money earned in an escrow account that would then be shared with other athletes. However, it would not be able to be withdrawn until a year after they graduate/leave school" (Coleman, 2021). In addition, the Georgia legislation requires athletes to take five hours of "financial literacy and life skills workshop to prepare for receiving the compensation."

These and other state legislative solutions await the Supreme Court's decision in in *Alston v. NCAA* (see Totenberg, 2021).

8. An Alternative Solution Based on a Collective Bargaining Model

Might the issue of compensation be resolved through the adoption of a collective bargaining model based on the fact that student-athletes are "employees" of their universities? In fact, student athletes have attempted to form unions in the past, most recently at Northwestern University (Novy-Williams & Soshnick, 2014; Strauss & Nocera, 2015). However, in 2015, the National Labors Relations Board (NLRB) rejected a petition by scholarship athletes in the Northwestern University football program (Hunter & Shannon, 2016) to establish a bargaining unit which would then collectively bargain with the university over a broad array of issues relating to "wages, hours, and working conditions." The petitioners cited the demands placed on the student athletes, "the strict rules set by coaches, and the financial aid they received as compensation"—not to mention the profits they generated for Northwestern (see Strauss, 2015). Wasser (2015) wrote:

"The scholarships that Northwestern University offered its football players were for playing football, not for earning a degree. Players were required to meet on-field performance expectations in order to continue receiving (what were at the time) one-year scholarships. Successfully meeting those expectations meant 60-hour workweeks during the season, and 50-hour workweeks in the offseason. Players scheduled their courses around practice time and other team obligations, just as employees going to school fit their classes around work requirements."

However, in a unanimous decision, the NLRB declined to assert jurisdiction (see McInnis, 2018). Interestingly, the Board did *not* determine if the players were in fact statutory employees under the National Labor Relations Act (1935). In its decision, the Board held that asserting jurisdiction would not "promote labor stability due to the nature and structure of NCAA Division I Football Bowl Subdivision (FBS)." The Board also noted that by statute, it does not have jurisdiction over state-run (public) colleges and universities, which constitute 108 of the roughly 125 FBS teams. In addition, every school in the Big Ten conference, with the exception of Northwestern University, is a state-run institution. "As the NCAA and conferences maintain substantial control over individual teams," the Board held that asserting jurisdiction over a single team would not "promote stability" in labor relations across the league in general (see McCann, 2015), and to Northwestern University in particular, which might be the only university in the Big Ten whose athletes had been granted the right to unionize. Strauss (2015) added that "Chief among the board's reasons for declining to consider the case were the complexities of an NCAA in which one team might be unionized while others were not, and whether a union would negotiate terms that conflicted with the association rules."

There was one other concern raised. If the NLRB granted collective bargaining rights to the student-athletes, the fear was such an action might actually halt the progress made by the NCAA on the student athletes' behalf in such areas as increasing the value of a scholarship, guaranteeing the athletic scholarship for four years, increasing athletic stipends and meal allowances, and the possibility of providing better medical coverage in the future (Strauss, 2015).

For some commentators, the "non-decision decision" was a disappointment. As McInnis (2018, p. 189) wrote: "The players may come and go through the years, but the exploitation remains the same. Unfortunately, the National Labor Relations Board missed its chance to make a lasting mark on this oppressive industry." The decision of the NLRB, however, contained one important caveat: "Whether we might assert jurisdiction in another case involving grant-in-aid scholarship football players (or other types of scholarship athletes) is a question we need not and do not address at this time" (see Ford, 2015). Will *NCAA v. Alston* impact this issue as well?

9. Conclusions and Commentary

The landscape of college athletics has drastically changed. The NCAA must realize that unlike professional sports there are actually three pieces to the collegiate puzzle: the players, universities, and the NCAA. The interplay between these parties creates the uniqueness of college athletics and contributes to their tremendous success and sustained popularity. College athletics has evolved since the first ever collegiate football contest dating back to 1869. In 1869, Rutgers faced Princeton on the American football pitch, where Rutgers was victorious winning 6-4. During the formative years of college athletics, money was not at the center of decision making. Originally, college sports were utilized for physical fitness and developing school comradry. Athletics were not always well organized, but more on the lines of your typical "backyard football game." Times have definitely changed and the NCAA's greatest asset—its athletes—have contributed to the change. The athlete's rights should not be restricted and compensation for their services relative to the overall profits generated through their talent and effort should be recognized. The decision in *NCAA v. Alston* may have a significant impact on this scenario and will be explored in Part II of this article.

TABLE I – PAYMENTS FOR THE "FULL COST OF ATTENDANCE"

Institution	Old Scholarship	New Scholarship	Difference
Tennessee	$23,710	$29,376	$5,666
Auburn	$23,578	$29,164	$5,586
Louisville	$19,142	$24,344	$5,202
Mississippi State	$17,294	$22,420	$5,126
Texas Tech	$18,944	$24,044	$5,100
Penn State	$29,810	$34,598	$4,788
TCU	$50,940	$55,640	$4,700
Oklahoma	$19,341	$23,955	$4,614
Oklahoma State	$18,180	$22,740	$4,560
Ole Miss	$18,204	$22,704	$4,500
Wisconsin	$20,678	$24,994	$4,316
Texas	$21,552	$25,862	$4,310
South Carolina	$21,414	$25,565	$4,151
Kansas State	$18,194	$22,306	$4,112
Arkansas	$19,064	$23,066	$4,002
Florida State	$17,800	$21,684	$3,884
Baylor	$50,278	$54,160	$3,882
Nebraska	$19,762	$23,448	$3,726
Missouri	$21,040	$24,704	$3,664
Clemson	$23,304	$26,912	$3,608
Utah	$19,448	$23,022	$3,574
Cal	$28,616	$32,168	$3,552
Washington State	$24,634	$28,176	$3,542
Arizona State	$21,851	$25,209	$3,358
Florida	$17,230	$20,550	$3,320
Arizona	$21,900	$25,200	$3,300

Institution	Old Scholarship	New Scholarship	Difference
Pitt	$29,024	$32,324	$3,300
Maryland	$21,342	$24,504	$3,162
LSU	$24,192	$27,288	$3,096
Kansas	$17,288	$20,364	$3,076
Indiana	$21,382	$24,418	$3,036
Rutgers	$27,012	$29,933	$2,921
Alabama	$24,542	$27,434	$2,892
Miami	$59,162	$61,942	$2,780
Vanderbilt	$61,470	$64,250	$2,780
Virginia Tech	$20,960	$23,739	$2,770
Texas A&M	$19,764	$22,470	$2,706
Washington	$24,433	$27,112	$2,679
Stanford	$62,540	$65,165	$2,625
Ohio State	$22,198	$24,800	$2,602
Georgia	$20,082	$22,680	$2,598
UCLA	$32,157	$34,752	$2,595
Virginia	$24,528	$27,092	$2,564
Illinois	$27,650	$30,150	$2,500
Northwestern	$65,603	$68,095	$2,492
Oregon State	$23,832	$26,316	$2,484
Iowa State	$16,600	$19,030	$2,430
N.C. State	$19,938	$22,368	$2,430
Wake Forest	$62,140	$64,540	$2,400
Oregon	$22,440	$24,780	$2,340
Colorado	$26,268	$28,562	$2,294
Kentucky	$21,464	$23,748	$2,284
North Carolina	$21,884	$24,120	$2,236
Duke	$61,793	$63,999	$2,206
Michigan	$24,780	$26,984	$2,204
Minnesota	$23,180	$25,374	$2,194
West Virginia	$17,642	$19,613	$1,971
Notre Dame	$62,825	$64,775	$1,950
Iowa	$19,072	$21,010	$1,938
Michigan State	$24,254	$26,126	$1,872
Purdue	$21,242	$23,002	$1,760
Georgia Tech	$23,028	$24,748	$1,720
Syracuse	$59,610	$61,242	$1,632
USC	$65,982	$67,562	$1,580
Boston College	$61,622	$63,022	$1,400

TABLE II SALARIES OF THE TOP TEN FOOTBALL AND BASKETBALL COACHES RANK SCHOOL CONFERENCE COACH SALARY SCHOOL BUYOUT

"Top 10" NCAA FOOTBALL COACHES SALARIES- UPDATED AS OF NOVEMBER 17 2020

1.	Alabama	SEC	Nick Saban	$9,100,000	$36, 800,000
2.	LSU	SEC	Ed Orgeron	$8,687,500	$23,850,000
3.	Clemson	ACC	Dabo Swinney	$8,258,575	$50,000,000
4.	Michigan	Big Ten	Jim Harbaugh	$8,054,000(a)	$6,367,929
5.	Texas A&M	SEC	Jimbo Fisher	$7,500,000	$53,125,000
6.	Auburn	SEC	Gus Malzahn	$6,900,000	$21,450,000
7.	Georgia	SEC	Kirby Smart	$6,803,600	$19,835,834
8.	Oklahoma	Big 12	Lincoln Riley	$6,507,143(b)	$30,974,666
9.	Texas Christian	Big 12	Gary Patterson	$6,130,937 (c)	No information
10.	Florida	SEC	Dan Mullen	$6,070,000	$12,000,000

(a) Pandemic reduction $268,721
(b) Pandemic reduction $300,417
(c) Estimated

"Top 10" NCAA BASKETBALL COACHES PAY- UPDATED AS OF MARCH 9, 2021

1.	Kentucky	SEC	John Calipari	$8,000,000	$54,000,000
2.	Duke	ACC	Mike Krzyzewski	$7,044,221(a)	No information
3.	Villanova	Big East	Jay Wright	$6,144,180(b)	No information
4.	Texas Tech	Big 12	Chris Beard	$5,050,000(c)	$15,267,641
5.	Tennessee	SEC	Rick Barnes	$4,950,000(d)	$16,625,000
6.	North Carolina	ACC	Roy Williams(e)	$2,475,000(f)	$7,612,500
7.	Michigan St.	Big 10	Tom Izzo	$3,922,266(g)	$6,629,911
8.	Auburn	SEC	Bruce Pearl	$3,931,300	$8,638,542
9.	Texas A&M	SEC	Buzz Williams	$3,900,000	$16,925,000
10.	Nebraska	Big Ten	Fred Hoiberg(h)	$4,000,000	$22,000,000

(a) Estimated
(b) Estimated
(c) Pandemic reduction $328,708
(d) Pandemic reduction $242,500
(e) Retired Spring 2021
(f) Pandemic reduction $93,750
(g) Pandemic reduction $362,560
(h) Pandemic reduction $100,000

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