The Professional Labor Market for Teenage Basketball Players: Disruptive Competition to the NCAA's Amateur Model

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Legal history and financial evidence of disruptive baseball leagues from 1882 through 1915 show that a dominant league— the National League, specifically— survived by absorbing its strongest competitor, eliminating inferior ones, and raising player compensation. This experience offers insights to the recent formation of three professional basketball leagues for teenagers. The NBA's G League Ignite team, Overtime Elite League, and the Professional Collegiate League threaten the NCAA's amateur athlete model: They employ 16- to 19-year-olds with salaries and bonuses from $100,000 to $1 million a year; NIL (name, image, and likeness) rights; and educational and healthcare benefits, including college tuition for later.

This labor market competition coincides with state NIL laws, NCAA v. Alston— a Supreme Court antitrust case in 2021 that the NCAA lost in a 9-0 vote— and legislative proposals in Congress. Together, these formidable forces threaten the NCAA's monopsony control of its amateur labor force.

In addition, this study compares the finances of debt-strapped athletic programs at the University of California,

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Berkeley (Cal) and University of Illinois at Urbana-Champaign (Illinois) to robust athletic budgets at Kansas, North Carolina, and Kentucky to simulate the impact of the new leagues' employment costs for Power Five schools. Using public information about the highest paid players in teenage leagues, this study estimates that salary, employment taxes, worker's compensation, and health insurance benefits would cost these programs $4,985,540 to employ a roster of seven elite players out of high school for the 2021-2022 season.

The empirical labor market focus in this study is captured in Justice Kavanaugh's concurring opinion in Alston, where he states: "The NCAA's business model would be flatly illegal in almost any other industry in America…. Price-fixing labor is price-fixing labor." My study suggests that the market will provide a remedy for elite players before courts grind their way to Justice Kavanaugh's realistic assessment. Pay-for-play is breaking the NCAA's monopsony power over the high-end of its talent pool for basketball. These evolutionary forces are likely to realign Power Five basketball into a professional league of a few well-financed professional teams while sidelining debt-strapped programs.

I. INTRODUCTION

"This appears to be a clear monopsony case, since the NCAA is the only

purchaser of student *athletic labor*."[1] This statement from the court's opinion in *Agnew v. Nat'l Collegiate Athletic Ass'n*—remarkable in 2012 for acknowledging that NCAA athletes perform labor—echoed an exposé published by Walter Byers, former executive director of the NCAA.[2] Byers wrote that the NCAA and its schools run "a nationwide money-laundering scheme."[3] Until recently, the NCAA imposed an amateur model on college athletes that exploited the labor of these players for the benefit of universities and colleges. In 2021, the Supreme Court eviscerated this model,[4] opening a path for these players to become employees of their schools while earning pay for their athletic services.

This article examines the legal history of baseball from 1882 through 1915,[5] court opinions involving the NCAA,[6] new state laws,[7] congressional proposals,[8] and financial analysis of Power Five athletic programs[9] to show that the NCAA's amateur model for all sports, especially, basketball faces unprecedented external pressures for fundamental change. Emerging basketball leagues offer elite teenage players a lucrative alternative to the NCAA.[10] This article concludes that these evolutionary forces will likely realign a few well-financed Power Five basketball teams into a professional league while sidelining debt-strapped programs.[11]

This study is organized around four research questions:

1. How did disruptive baseball leagues force the dominant National League to alter its complete control over the sport's most talented players—a type of buyer's monopoly called a monopsony[12]— that limited player pay far below what a competitive labor market would offer? In Part II,[13] I use legal history of disruptive rival leagues in professional baseball from 1882 through 1915 to show that the National League survived by absorbing successful competitors,[14] buying

1. Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 337 n.3 (7th Cir. 2012) (emphasis added), (affirming the district court's denial of a student antitrust complaint over a football scholarship limit of 85 for NCAA schools.) A monopsony is buyer's– not a seller's– control in setting market prices. For more, *see* Comment, *infra* note 39.

2. *See generally* Walter Byers, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995).

3. *Id.* at 73.

4. *See* Alston, *infra* note 146.

5. *Infra* notes 48-49, 58, 75-77.

6. *Infra* notes 113-116, 118-24, 132-51, 155-60.

7. *Infra* notes 161, 201-07.

8. *Infra* notes 211-13.

9. *Infra* notes 222-37.

10. *Infra* notes 171-95.

11. *See infra* note 218 (assessment of Navigate's Jeff Nelson). This view differs from the status quo reported in Dan Wolken, *These Two New Leagues Aim to Challenge College Basketball for Top High School Players*, USA TODAY (May 19, 2021) ("The attitude of the college basketball establishment for a long time has been to ignore potential competitors, most of which never materialized beyond the idea stage, ran out of money or failed to catch on as a compelling product.")

12. *Infra* notes 40-42.

13. *Infra* notes 36-80.

14. *Infra* note 64.

out or excluding inferior competitors,[15] and raising player compensation to end recurring cycles of disruptive leagues poaching players.[16] Part II concludes with Table 1, a depiction of top-pay for baseball players each year from 1874-1917, after the end of the baseball wars. The data show that highest salaries for players increased tenfold during the time that disruptive leagues were raiding the NL's best players.

2. How did the NCAA and its predecessor, the Intercollegiate Athletic Association, remain a sole monopsony purchaser of athletic labor from 1906 to the present? Part III explores the origins of the amateur athletics model for colleges and universities.[17] Court opinions show that college football attracted over-capacity crowds as early as 1908 that led to personal injury lawsuits.[18] Schools successfully defended these lawsuits with the disingenuous argument that their athletic associations were not under their control.[19] In the 1920s and 1930s, NCAA schools skirted liability in disputes over a contract[20] and tax collection,[21] arguing that they were not responsible for liabilities arising from athletic contests. I show that the NCAA's win streak in court continued without significant losses into the current era with antitrust lawsuits from players.[22] This pattern was not reversed until *O'Bannon v. NCAA* ruled in favor of players in 2014.[23]

3. How do the emerging pro basketball leagues, organized for premier 16- to 19-year-old players, compare to disruptive baseball leagues from more than a century ago? Part IV[24] shows that employment-based models of the NBA's G League Ignite team,[25] Overtime Elite League (OTE),[26] and the Professional Collegiate League (PCL)[27] are segmenting this athletic labor market by pay, age, media platforms, and proximity to the NBA. They pose formidable threats to the NCAA's amateurs-only monopsony on teenage athletic labor by paying players up to $1 million while offering NIL marketing opportunities with educational and healthcare benefits. Table 2 estimates a college payroll for seven elite players in the 2021-2022 season based on public reporting of top salaries in teenage leagues.[28] Increases in pay over the past three years for teenage basketball players are comparable to pay increases for baseball players that resulted from rival

15. *Infra* note 78 (the National League bought out Federal League teams in Pittsburgh, Newark, Buffalo, and Brooklyn).
16. *Infra* note 53 and Table 1 *infra* at 12.
17. *Infra* notes 81-170.
18. *Infra* notes 113-15.
19. *Infra* notes 114-16.
20. *Infra* note 119.
21. *Infra* notes 119-24.
22. *Infra* notes 132-39 & 142-45.
23. *Infra* notes 158-59.
24. *Infra* notes 171-99.
25. *Infra* notes 171-82.
26. *Infra* notes 183-93.
27. *Infra* notes 194-95.
28. *Infra* note 195 and Table 2 *infra* at 39.

leagues outbidding the National League for elite talent.[29] Just like the National League more than a century ago, successful college programs will feel pressure to adopt an employment model that competes with emerging leagues that are raiding their talent pool.

4. Do Power Five schools have budgets that allow them to match the current salaries and related employment costs paid by G League Ignite, Overtime Elite, and the Professional Collegiate League? In Part V,[30] this study uses the Knight Commission on Intercollegiate Athletics' public access website to analyze schools from each of the Power Five conferences. Its features reveal annual revenue, long-term debt, and annual debt service for three financially stable athletic departments (Kansas,[31] North Carolina,[32] and Kentucky[33]), and two heavily indebted schools (Illinois[34] and Cal[35]). Kansas, North Carolina, and Kentucky are better positioned than Illinois and Cal to transition to a professional basketball model.

Part VI concludes that disruptive leagues are successful when well-financed competition, a savvy business model, and court rulings converge to support a competitive labor market that allows for the mobility of elite players. Just as the baseball wars created winners and drop-outs among teams and leagues, turbulence facing the NCAA—particularly Power Five schools—will likely realign basketball programs with strong finances and winning traditions into a professional league, leaving behind programs with poor finances and weak brands.

II. MAJOR LEAGUE BASEBALL: HOW DISRUPTIVE LEAGUES ALTERED MONOPSONY CONDITIONS FOR ATHLETIC LABOR

Beginning with a game at Cooperstown, New York in 1839, baseball exhibitions were played by amateurs.[36] Thirty years later, the Cincinnati Red Stockings toured the nation with professionals, going 57-0 against amateur clubs.[37] The first league of professional baseball teams—the National Association of Professional Base Ball Players (called the NA)—was formed in 1871 but lasted only five years.[38] The league was destabilized by player movement from one team to another without limits.[39]

This laid the groundwork for baseball's adoption of a "buyer's

29. *Infra* note 51 and Table 1 *infra* at 12.
30. *Infra* notes 200-39.
31. *Infra* notes 225-27.
32. *Infra* notes 228-30.
33. *Infra* notes 231-33.
34. *Infra* notes 234-36.
35. *Infra* notes 237-39.
36. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 3 (2010).
37. E. Woodrow Eckard, *The Origin of the Reserve Clause: Owner Collusion Versus "Public Interest,"* 2 J. OF SPORTS ECON. 113, 114 (2001).
38. *Id*. at 115.
39. *Id*.

monopoly"—also called monopsony[40]—a form of collusion that can support an antitrust claim.[41] Athletes are especially vulnerable to teams who collude to fix prices for their labor at artificially low rates because the labor market for these athletes is so limited.[42]

This practice took shape in 1876, when the National League of Professional Baseball Clubs (also called National League, or NL) absorbed the strongest teams from the National Association.[43] The NL stabilized team rosters by restricting players from moving to a new team during the season and prohibiting teams from tampering with player contracts during the season.[44] However, players enjoyed free agency during the off-season.[45]

The league increased team control over players at the end of the 1879 season. Club owners agreed that teams would reserve five players, extend these contracts for the next season, and collude not to hire another team's reserved players.[46] Known as the reserve clause, this contract ended off-season bidding for players and made each team a monopsony as to its best five. Within its first year, the reserve clause caused player compensation to fall sharply.[47]

An NL team's right to renew a player's contract following every season

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40. *See* Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE. L. J. 576, 639 n.3 (1953) (stating that monopsony is "the reverse situation" of a monopoly, where "a single buyer or a number of buyers acting in unison control the entire demand for a service or commodity, or enough of it to augment profits by restricting the amount purchased or by reducing the price paid (citation omitted)." More generally, *see* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 106 (2010) (stating that '"cooperative buying' may be nothing more than a euphemism for collusive monopsony that drives prices below competitive levels and has negative economic effects on social welfare similar to those caused by price fixing sellers").

41. *See* I*n re* Beef Industry Antitrust Litigation, 600 F.2d 1148, 1158 (5th Cir. 1979) (recognizing that "[i]n the monopsony or oligopsony price fixing case . . . the seller faces a Hobson's choice: he can sell into the rigged market and take the depressed price, or he can refuse to sell at all").

42. Brown v. Pro Football, Inc., 50 F.3d 1041, 1061-62 (D.C. 1995) (Wald, dissenting): With a few notable exceptions, athletes typically excel in a single sport, and their labor has greater market value in that sport than in any other profession. If team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch profitably to other lines of work. Thus, the labor market for professional athletes' services is one of a very few areas where there is real potential for anticompetitive monopsonistic practices.

43. DAVID QUENTIN VOIGT, AMERICAN BASEBALL (VOL. 1): FROM THE GENTLEMAN'S SPORT TO THE COMMISSIONER SYSTEM 64-67 (1983).

44. *Id*. at 66 ("The ease with which players were herded under the new regime furnishes further proof of the successful power play.")

45. *Id*.

46. Edmund P. Edmonds, *Arthur Soden's Legacy: The Origins and Early History of Baseball's Reserve System*, 5 ALB. GOV'T L. REV. 38, 39-40 (2012) Arthur Soden led National League owners in implementing a uniform player contract that allowed each team to protect five players from the market.

47. STUART BANNER, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION 5 (2013). Tommy Bond's pay fell from $2,200 in 1879 to $1,500 in 1880. *Id*. Jack Burdock and Ezra Sutton, Boston's highest paid players in 1879 at $1,800 and $1,500, respectively, were paid $1,200 in 1880. *Id*. The reserve clause led to the first year that teams made money. Eventually, the league allowed teams to impose reserve clauses on an entire roster by 1887. *Id*.

reserved his services indefinitely and allowed the team to impose its terms.[48] National League teams had no compunction, however, regarding signing players from other leagues.[49] The Allegheny Base-Ball Club, a member of the American Association, believed it had a contract with a skilled player, Charles Bennett, to play exclusively for them in 1883.[50] However, after he joined Detroit's National League team that same year, Allegheny lost its lawsuit to compel him to play in Pittsburgh .[51]

Bennett's case arose a year after the start of five "wars" between the National League and rival leagues. National League teams began targeting the American Association for player raiding in 1882. The war extended to "the Union Association in 1884, the Players League in 1890, the American League in 1901-02, and the Federal League in 1914-15."[52]

At various points from 1882 through the end of the 1889 season, the competition between the NL and rival leagues waxed and waned. However, salary data for the highest-paid players over these years show that expanded labor market competition from disruptive leagues eroded the NL's monopsony price-setting power. Top-end pay doubled for players in this time.[53]

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48. Harold N. Enten, *Baseball and the Reserve Clause*, 1 N.Y.L. SCH. STUDENT L. REV. 159, 159 (1952).

49. Allegheny Baseball Club v. Bennett, 14 F. 257, 257 (1882). The Allegheny contract stated:

> It is hereby agreed, this third day of August, 1882, between the Allegheny Base-ball Club and Charles W. Bennett, that said Charles W. Bennett hereby promises and binds himself that between the fifteenth and thirty-first days of October, 1882, he will sign a regular contract of the Allegheny Base-ball Club, a chartered company belonging to the American Association of Base-ball Clubs, which contract shall bind him to give his services as a base-ball player to said club for the season of 1883, and shall bind said Allegheny Club to pay him the sum of $1,700 for an during such season of 1883; and in consideration of his agreement to sign such a contract in October, the sum of $100 is now paid to said C. W. Bennett, the receipt of which is hereby acknowledged.

50. Allegheny Baseball Club v. Bennett, 14 F. 257, 257 (1882). The Allegheny contract stated:

> It is hereby agreed, this third day of August, 1882, between the Allegheny Base-ball Club and Charles W. Bennett, that said Charles W. Bennett hereby promises and binds himself that between the fifteenth and thirty-first days of October, 1882, he will sign a regular contract of the Allegheny Base-ball Club, a chartered company belonging to the American Association of Base-ball Clubs, which contract shall bind him to give his services as a base-ball player to said club for the season of 1883, and shall bind said Allegheny Club to pay him the sum of $1,700 for an during such season of 1883; and in consideration of his agreement to sign such a contract in October, the sum of $100 is now paid to said C. W. Bennett, the receipt of which is hereby acknowledged.

51. *Id*. at 259 (The court said that a contract such as this "will not be enforced when it is doubtful whether an agreement has been concluded").

52. Richard Hershberger, *The First Baseball War: The American Association and the National League*, 49 BASEBALL RES. J. 115, 115 (2020). Hershberger also noted that smaller skirmishes occurred between the American Association and the National League in 1891. *Id*. Hershberger added this important insight:

> But the five great wars stand out. The American Association (AA) war was modest compared with its later counterparts. It should not be discounted because of this. The AA war of 1882 set the pattern for future wars, and the settlement bringing it to a conclusion set the pattern for how major league baseball would be organized in the twentieth century.

53. *See* Michael Haupert, *MLB's Annual Salary Leaders Since 1874*, Society for American Baseball Research, https://sabr.org/research/article/mlbs-annual-salary-leaders-since-1874/.

Friction between the leagues peaked in 1889 when a player named John Montgomery Ward formed the Brotherhood of Professional Baseball Players and offered players unique advantages.[54] Ward induced fellow players to join his league by allowing them to earn income from gate receipts.[55] He also gave players some say in management decisions and even allowed them to acquire part ownership in teams.[56] Ward pragmatically conceded, however, that "a majority of ball-players regard the reserve rule as a necessary institution," though they may consider that some abuses have arisen under it."[57] The short-term success of Ward's Players League registered in a spurt of litigation based on players' failure to honor the reserved clauses in their contracts with established teams.[58]

Litigation over players jumping to a rival league occurred a decade later in another phase of the early baseball wars.[59] The American League, formed out of

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Haupert reports salaries from 1874-2019. The following figures correspond to the years spanning the five baseball wars, including two additional years— 1916 and 1917— to show that elimination of the Federal League ended the upward trend of player compensation.

1874: $2,800 [Fergus Malone (Chi. NA)]; 1875: $2,200 [Rich Higham (Chi. NL)]; 1876: $4,000 [Al Spalding (Chi. NL); 1877: $2,900 [Al Spalding (Chi. NL)]; 1878: $3,700 [Bob Ferguson (Chi. NL)]; 1879: $1,800 [Frank Flint (Chi. NL)]; 1880: $1,800 [Adrian Anson (Chi. NL)]; 1881: $2,000 [Jim O'Rourke (Buf. NL)]; *1882: $2,400 [Monte Ward (Prov. NL)]*; 1883: $3,100 [Buck Ewing (NY. NL)]; 1884: $3,100 [Buck Ewing (NY. NL); 1885: $4,500 [Jim O'Rourke (NY. NL)]; 1886: $4,500 [Fred Dunlap (StL./Det. NL)]; 1887: $4,500 [Fred Dunlap (Det. NL), Charles Radbourne (Bos. NL)]; 1888: $5,000 [Fred Dunlap (Pit. NL) and Buck Ewing (NY. NL)]; *1889: $5,000 [Fred Dunlap (Pit. NL) and Buck Ewing (NY. NL)*]; 1890: $4,000 [Hardy Richardson (Bos. PL)]; 1891: $2,000 [Paul Cook (Lou./StL. AA)]; 1892: $2,800 [Joe Gunson (Balt. NL)]; 1893 [no data]; 1894 [no data]; 1895: $2,400 [Jack Glasscock (Lou./Was. NL)]; 1896 [no data]; 1897 [no data]; 1898 [no data]; 1899: $1,800 [Victor Willis (Bos. NL)]; 1900 [no data]; 1901 [no data]; 1902 [no data]; 1903 [no data]; 1904: $5,000 [Joe McGinnity (N.Y. NL)]; 1905 [no data]; 1906: $8,500 [Nap Lajoie (Cle. AL)]; 1907: $8,500 [Nap Lajoie (Cle. AL)]; 1908: $8,500 [Nap Lajoie (Cle. AL)]; 1909: $9,000 [Nap Lajoie (Cle. AL)]; 1910: $9,000 [Ty Cobb (Det. AL) and Nap Lajoie (Cle. AL)]; 1911: $9,000 [Ty Cobb (Det. AL) and Nap Lajoie (Cle. AL)]; 1912: $10,000 [Roger Bresnahan (StL. NL), Jimmy Callahan (Chi. AL), Hugh Jennings (Det. AL), and Honus Wagner (Pit. NL)]; 1913: $15,000 [Fred Clarke (Pit. NL)]; 1914: $15,000 [Ty Cobb (Det. AL) and Tris Speaker (Bos. AL)]; 1915: $15,050 [(Fred Clarke (Pit. NL)]; 1916: $20,000 [Ty Cobb (Det. AL)]; and 1917: $20,000 [Ty Cobb (Det. AL)].

Italics highlight the growth in top-end salaries between 1882 and 1889.

54. Henry Clay Palmer, et al., ATHLETIC SPORTS IN AMERICA, ENGLAND AND AUSTRALIA 144-147 (1889) (referring to John Montgomery Ward as John M. Ward).

55. *Id*. at 149.

56. *Id*. ("half of the capital stock may be owned by players").

57. *Id*. at 145.

58. The third war, between the NL and the Brotherhood of Professional Baseball Players, resulted in several notable cases: Columbus Baseball Club v. Reiley, 11 Ohio Dec. Repr. 272 (1891); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (1890); American Ass'n Club of Kansas City v. Pickett, 8 Pa. C. C. 232 (1890); Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198 (C. C. S. D. N. Y. 1890); Metropolitan Exhibition Co. v. Ewing, 42 F. Supp. 198 (S.D.N.Y. 1890); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. C. C. 57 (1890); Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. C. C. 337 (1890); and American Ass'n Club of Kansas City v. Pickett, 8 Pa. C. C. 232 (1890).

In the first war between the American Association and National League of Professional Base-Ball Clubs, the only reported legal decision is Bennett, *supra* note 48. No cases are reported for the second war that pitted the National League against the Union Association in 1884.

59. The fourth war, between the American League (formerly known as the Western League)

a minor league in 1901, posed the next competitive threat to the NL by establishing franchises in National League cities, declaring itself a major league, and poaching the NL's best players.[60] Nap Lajoie, a coveted player for the NL's Philadelphia Phillies, was at the center of this brief but pivotal skirmish for players when he joined a crosstown rival, the Philadelphia Athletics.[61] Lajoie enjoyed success with the Athletics, winning the triple crown while batting .426.[62] The NL team sued Lajoie and prevailed before the state supreme court.[63] However, the American League avoided the judgment by transferring Lajoie and two other contract-jumping teammates to Cleveland where the three played, except in games in Pennsylvania.[64]

As upstart teams raided players from dominant teams, this expanded labor market competition and increased player pay. The National League's economic war with the American League took a toll: while the AL's gate grew by 30% in 1902, the NL's gate fell 15% and it lost most of its lawsuits to enforce the reserve clause against defecting players.[65]

On January 9, 1903, this battle between the leagues was settled on terms that were favorable to the American League. It was elevated to a major league, with its teams included in the agreement, and each league was fixed at eight teams. Teams now could not move without consent from a majority of other teams and all player contracts were treated as binding, eliminating contract jumping. The reserve clause was also included in every player's contract, granting teams a perpetual option to renew these contracts.[66]

The Federal League mounted the last significant challenge to the dominant National League and American League in 1913.[67] After the Federal League's

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and National League in 1901-02, resulted in Philadelphia Ball Club, Ltd. v. Lajoie, 51 Ad. 973 (1902); and Brooklyn Baseball Club v. McGuire, 116 Fed. 782 (E. D. Pa. 1902).

The fifth war, involving the Federal League and National League, resulted in Weeghman v. Killifer, 215 Fed. 163 (D. Mich. 1914), *aff'd*, 215 Fed. 259 (C. C. A. 6th, 1914); Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914); American League Club of Chicago v. Chase, 149 N. Y. Supp. 6 (Sup. Ct. 1914); and Cincinnati Exhibition Co. v. Marsans, 216 Fed. 269 (E. D. Mo. 1914).

60. C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325, 326-27 (2002).

61. Stephen Constantelos & David Jones, *Nap Lajoie*, Society for American Baseball Research (last visited Mar. 7 2022), available in https://sabr.org/bioproj/person/nap-lajoie/.

62. *Id*.

63. Philadelphia Ball Club, *supra* note 57 or 58.

64. *1902: Enemies Within the Gate*, THIS GREAT GAME: THE ONLINE BOOK OF BASEBALL, (last visited Mar. 7, 2022, 4:15 PM),https://thisgreatgame.com/1902-baseball-history/.

65. *Id*.

66. Rogers III, *supra* note 59.

67. National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, 269 F. 681, 682 (D.C. Cir. 1920),, explaining that the Federal League of Professional Baseball Clubs was incorporated in March, 1913, and originally had franchises in Brooklyn, Pittsburgh, Buffalo, Baltimore, St. Louis, Kansas City, Indianapolis, and Chicago, and then expanded to Baltimore. The league disbanded in December, 1915, after entering into a "Peace Agreement." *Id*. There is a factual discrepancy in reporting the start of the Federal League in Comments, *Organized Baseball and the Law*, 46 YALE L. J. 1386, 1389-90 (1936) (stating the league formed in 1912, not 1913).

franchises stumbled, better capitalized owners and a new commissioner positioned these teams to compete with the dominant leagues.[68] This strategy built upon informal agreements with the Fraternity of Professional Baseball Players of America.[69] Under these unwritten terms, the Federal League restricted free agency by imposing a reserve clause on a team's best players, but agreed with the Fraternity to raise salaries on renewed contracts.[70] As a result, the National League and American League met the Fraternity's demands, which included increasing salaries for players who had offers from a Federal League club.[71] For example, Ty Cobb's salary from the AL's Detroit Tigers rose from less than $12,000 in 1913 to $20,000 in 1915.[72] The Federal League was such a "disturbing factor" to the baseball establishment that most of its clubs were paid to disband.[73]

Table 1 shows the dramatic rise in top-end player salaries that resulted from the competition between the NL and its disruptive rivals. The five years with partially-filled columns represent turning points in these monopsony-driven demand ceilings for athletic labor: (1) the NL artificially depressed salaries in 1879 by imposing a reserve clause on the best players; (2) the period from 1882 through 1889 was marked by salary pressure from rival leagues; (3) players experienced a decline in top-end pay in 1890, the first year in nearly a decade where players had no external market for their labor; (4) the Western League in 1902-1903 rekindled labor market competition and broke the dominant league's monopsony, leading to higher top-end pay in 1904; and (5) while player pay leveled off from 1907-1911, it rose in 1912, and exploded in response to the Federal League from 1913-1915, before leveling off again after this rivalry

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For three reasons, my analysis does not include Negro leagues, even though there is strong evidence that these several leagues employed major league talent: (1) The league was not formed until 1920, after the baseball wars ended and stabilized the dominant NL and AL; (2) these dominant leagues boycotted Black players because of their exclusion of Blacks; and (3) this Jim Crow practice negated any raiding of players from the Negro League. *See Negro Leagues History*, Negro League Baseball Museum (last visited Mar. 7, 2022), https://nlbm.com/negro-leagues-history/.

68. Adam Dorhauer, *The Unionization of Baseball*, THE HARDBALL TIMES (Dec. 3, 2015),https://tht.fangraphs.com/the-unionization-of-baseball/.

69. *Id*.

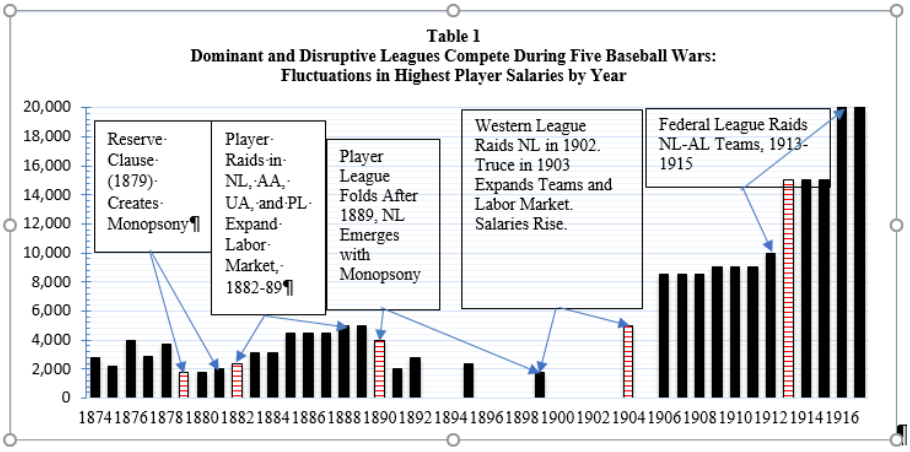
70. *Id*.

71. *Id*.

72. *Id*.

73. Hindman v. Pittsburgh Trust Co., 109 A. 876, 876 (1920). The National and American leagues entered into a peace agreement with Federal League franchises that included payment of $50,000 to the Pittsburgh club, $400,000 to the Brooklyn club, and $20,000 to the Newark club. *Id*. The Baltimore club refused to abide by the agreement and sued the major leagues for $900,000 in damages. *Id*.

ended.



The short history of the Federal League shows that a rival league can spur a sharp rise in player pay.[74] Upstart teams in the new league spent lavishly to attract the dominant league's players,[75] prompting these players to break contracts that reserved their services.[76] By 1915, however, the major leagues had bought out the owners of Federal League franchises in Pittsburgh, Newark, Buffalo, and Brooklyn. The major leagues also allowed Phil Ball, the owner of the St. Louis Terriers, to buy the St. Louis Browns of the AL, allowed Charles Weeghman, owner of the Chicago Whales, to buy the Chicago Cubs of the NL, took over the bankrupt Kansas City club, and refused to meet the conditions set

74. Compare the pay for a valuable player who broke his contract with an established Philadelphia club to join a rival upstart team in Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393 (1890) ($2,000 salary for the 1889 season) and pay for the "foremost" first baseman in American League Baseball Club of Chicago v. Chase, 86 Misc. 441 (N.Y. 1914), at 447 ($4,500 salary in 1914, with a club option to reserve the player for next season for $6,000).

75. Samuel J. Alito, Jr., *The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 34 J. SUP. CT. HIST. 183, 188 (2009):

> As a result, the Federal League was forced to pay steep salaries to secure mostly aging talent. Coupled with the league's heavy capital expenditures (in only a couple of years, it erected eight new stadiums), the salary wars put the Federal League in the hole. By the end of the 1915 season, the Baltimore Terrapins had lost $65,000, while the Brooklyn TipTops had accumulated losses of $800,000, and the Buffalo and Kansas City franchises were insolvent.

76. *American League Club of Chicago v. Chase*, 86 Misc. 441, 442 (1914). (Buffalo club of Federal League induced Harold (Hal) Chase to break his contract with the Chicago club in the American League in June 1914). Refusing to enforce the Chicago club's contract, the court said that "the baseball player is made a chattel; the title of the club to the player, if he be a player of a major league, is made absolute." *Id.* at 451. The court added:

> "The system created by 'organized baseball' in recent years presents the question of the establishment of a scheme by which the personal freedom, the right to contract for their labor wherever they will, of 10,000 skilled laborers, is placed under the dominion of a benevolent despotism through the operation of the monopoly established by the National Agreement. This case does not present the simple question of a laborer who has entered into a fair contract for his personal services." *Id.* at 466.

for the Federal League team in Baltimore.[77]

In summary, the major leagues survived competition from five disruptive leagues. However, two competitors forced the league to make lasting changes. Although the Federal League only lasted three years, it raised players' pay substantially and disrupted the lineup of major league teams.[78] The Western League expanded professional baseball from one to two major leagues which made it the most transformational rival. Important to note, however, the surviving leagues maintained strict control over their best players from 1879 through 1915, the period of the five baseball wars. They used reserve clauses in player contracts and threatened to punish teams that interfered with these exclusive agreements. The dominant NL lost most of its individual lawsuits but did not lose the ability to include the reserve clause in its contracts. In fact, the reserve clause continued to be a major irritant for baseball players.[79]

III. INTERCOLLEGIATE ATHLETICS: HOW AMATEUR COMPETITION PRESERVED MONOPSONY CONDITIONS FOR ATHLETIC LABOR.

A. Overview

Intercollegiate athletics emerged a few years after the first baseball game in Cooperstown.[80] The five baseball wars, from 1882-1915, would not have occurred without growing fan interest in seeing the sport played in more markets. During this period, colleges also drew large crowds to athletic events.[81] Some athletes simultaneously played as professionals and as amateurs on college teams, which suggests[82] that the labor markets for amateurs in college athletics

77. As explained by Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), where the Baltimore franchise sued the National League under the Sherman Act after it was left without a league to conduct its business. *Id*. at 207. The team won treble damages. *Id*. at 208. In a landmark antitrust ruling that affirmed the appellate court's reversal, the Supreme Court ruled that baseball is exempt from antitrust law because the business is confined to a baseball field. Thus, the game is never in interstate commerce. *Id*. at 208-209.

78. David Mandell, *Did the Federal League Have a Reserve Clause?*, Society for American Baseball Research (last visited Mar. 7, 2022), https://sabr.org/journal/article/did-the-federal-league-have-a-reserve-clause/ (Federal League defined the reserve clause by "[o]utbidding owners of the National and the American League for some of the best baseball talent of the era, … that included such stars as Mordecai Brown, Joe Tinker, Edd Roush, and Eddie Plank, who jumped from the two established major leagues.").

79. *E.g*., *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) ("With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly.")

80. *Infra* note 95, JOSEPH N. CROWLEY.

81. *Infra* note 106, PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, Luther H. Gulick, *Amateurism*, available in https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=52&q1=amateurism , reporting on 40,000 spectators for college football. *See also* Scott, *infra* note 113; and George, *infra* note 115.

82. *Infra* note 106, PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, which published Capt. Palmer E. Pierce, *International Athletic Association of the United States: Its Origin, Growth and Function* at 27 (at PDF 39), available in

and professional baseball players overlapped.

These overlapping player markets did not disappear despite the NCAA's efforts. The NCAA created rules to prevent college athletes from competing in a professional sports league. However, this led to cheating.[83] From their inception, the NCAA's amateur rules ignored the fact that some gifted college-aged athletes competed at a professional level. These athletes were subjected to amateur rules solely based on NCAA rules and their status as college students. For example, John Montgomery Ward was a skilled professional player who formed the first player's union in 1885 and organized the Player's League in 1889 while studying law at Columbia during off-seasons– a time before collegiate sports had a national association.[84]

This background offers context for Part III, which analyzes how the NCAA envisioned and implemented its amateur model.[85] Colleges and universities in the early 1900s never faced the labor market disruptions that professional baseball experienced from 1882-1915. This does not mean that university administrators were naïve about college athletes playing professionally.[86] Some campus administrators were shrewd businesspeople who used academia as a camouflage for running a money-making operation.[87] The mythology built around the amateur college athlete trapped college players in a rule-driven amateur system that denied players pay,[88] and penalized them for transferring to a new school.[89] NCAA rules continue to define amateurism in great breadth. However, emerging antitrust and NIL litigation have threatened the NCAA's monopsony.[90]

Part III is guided by Walter Byers' characterization of the NCAA as an

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https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=39&q1=professional, stating:

> The use of athletic prowess for personal gain was said to be a widespread practice and it was hinted, if not directly stated, that the college authorities were cognizant of these violations of the principles of amateur sports.

Also see infra note 110 (E.J. Bartlett's discourse on professional athletes).

83. *See* Alston, *infra* note 151, slip op., at3:

> Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company (citation omitted).

Alston cited many other examples, including the use of "tramp athletes" who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." *Id*.

Today, that concern is addressed, in part, in NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21, NCAA DIV. I MANUAL, art. 1, 1.3.1 (Basic Purpose), stating: "A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."

84. Bill Lamb, *John Montgomery Ward*, SOCIETY FOR AMERICAN BASEBALL RESEARCH.
85. *Infra* notes 101-110.
86. *Infra* note 106, PROCEEDINGS OF THE SECOND ANNUAL CONVENTION (*see* Rule 3).
87. Credit Alliance Corp., *infra* note 118 (Dr. Sexton's testimony).
88. Banks, *infra* note 132.
89. Tanaka, *infra* note 142.
90. *Infra* note 161.

"economic camouflage for monopoly practice . . . that operat[es] an air-tight racket of supplying cheap athletic labor."[91] Byers, the executive director of the NCAA from 1951-1988, deeply understood intercollegiate athletics in the modern era. He used "monopoly" similarly to the Seventh Circuit's more precise description in *Agnew v. Nat'l Collegiate Athletic Ass'n*: "This appears to be a clear *monopsony* case, since the NCAA is the only purchaser of student athletic labor (emphasis added)."[92] Byers' terminology reflects the Supreme Court's observation that there is a strong "kinship between monopoly and monopsony."[93] Part III uses Byers's camouflage metaphor to demonstrate how the NCAA's strict amateurism model has led to monopsony control of its athletic labor markets.

B. The NCAA's Origins

Intercollegiate sports in the U.S. began with a boat race between Harvard and Yale in 1852,[94] just thirteen years after the first amateur baseball game.[95] By 1899, New York Gov. Theodore Roosevelt, a Harvard graduate who was delivering a speech at Yale, lauded the Yale football team as a spirit "to purify the civil life of the Nation."[96] However, as president he believed that football needed to institute rules to protect the lives of players.[97] He intervened in college sports and called for institutional reforms after at least eighteen football players

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91. *See* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (1995), at 73. Byers, the Executive Director of the NCAA from 1951 to 1988, turned against the association, stating that it was "a nationwide money-laundering scheme." *Id.*

92. Agnew, *supra* note 1, at 337 n.3. Other courts have taken a similar view, though some use euphemisms for labor. *See* Rock, 2013 WL 4479815, at *11 (players had identified a cognizable market in which "buyers of *labor* (the schools) are all members of NCAA Division I football and are competing for the *labor* of the sellers (the prospective student-athletes who seek to play Division I") (emphasis added); in re NCAA I–A Walk–On Football Players Litig., 398 F.Supp.2d 1144, 1150 (W.D. Wash. 2005) ("Plaintiffs have alleged a sufficient 'input' market in which NCAA member schools compete for *skilled* amateur football players (emphasis added)."); and O'Bannon v. NCAA, 7 F.Supp.3d 955, 991-992 (N.D. Cal. 2014)

> (T)he sellers in this market are the recruits; the buyers are FBS football and Division I basketball schools; the product is the combination of the recruits' *athletic services* and licensing rights; and the restraint is the agreement among schools not to offer any recruit more than the value of a full grant-in-aid. In the absence of this restraint, schools would compete against one another by offering to pay more for the best recruits' *athletic services* and licensing rights—that is, they would engage in price competition (emphasis added).

93. Weyerhaeuser Co. v. Ross–Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 322 (2007), citing Roger G. Noll, *'Buyer Power' and Economic Policy*, 72 ANTITRUST L.J. 589, 591 (2005).

94. Joseph N. Crowley, *The NCAA's First Century in the Arena* (2006), at 3,https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.119.6843&rep=rep1&type=pdf. The first intercollegiate baseball game, played in 1859, resulted in Amherst's 73-32 win over Williams. *Id*. Track and field debuted in 1876, followed by a violent form of football in the 1800s that led to many serious injuries. *Id*.

95. *Supra* note 35.

96. *Yale Cheers for Roosevelt*, THE N.Y. TIMES (Nov. 21, 1899), https://timesmachine.nytimes.com/timesmachine/1899/11/21/118941070.html?pageNumber=6.

97. Katie Zezima, *How Teddy Roosevelt Saved Football*, The Wash. Post (May 29, 2014).

died that season.[9899]

The early bylaws of this intercollegiate athletic association proposed rules that are similar to the NCAA bylaws.[100] For example, players were required to enroll as on-campus students.[101] Also, players were not allowed to be paid for athletic competition or play for more than one school otherwise they would be ineligible to compete in intercollegiate athletics.[102]

University presidents formed an intercollegiate athletic association.[103] Their first group— the Intercollegiate Athletic Association of the United States, a forerunner to the NCAA— said it "discourages commercialism and encourages true amateurism."[104] Its third convention set seven rules for player eligibility, anchoring them in a player's standing as an amateur and student.[105]

~~In~~ Some academic leaders were skeptics of the athletic association,[106]

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98. *See* Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487,489 (1995) n 1905 there were more than eighteen deaths in intercollegiate football.

99. *Id*.

100. *Compare* PROCEEDINGS OF THE SECOND ANNUAL CONVENTION, *infra* note 106 (rules promulgated by Intercollegiate Athletic Association), and Nat'l Collegiate Athletic Ass'n, 2020-21 Div. I Manual, *infra* note 168.

101. *President's Football Reform Plan Started*, N.Y. TIMES (Nov. 27, 1905).

102. *Id*.

103. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

104. Capt. Palmer E. Pierce, *The International Athletic Association of the United States*, 14 AM. PHYSICAL EDUC. REV. 76, 77-78 (1909)

> In brief, then, this National Association was formed to organize and perpetuate the work of sane control of collegiate sports, and incidentally to support representative rules committees. It encourages local governing bodies, which shall receive their ideals from the National Association. It studies the question of amateurism and endeavors to spread the knowledge of this important athletic subject. It strives to elevate, to educate. It hopes to make sport for sport's sake the controlling spirit at all institutions of learning. It discourages commercialism and encourages true amateurism. It believes the use of intercollegiate athletics for advertising purposes should be frowned upon. It strives to coordinate, in their proper relations, athletic and academic work.

105. *See* PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES 78-79 (Jan. 2, 1909), available in https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=144&q1=shall%20represent. Rule 1 required a student to take a full schedule of courses. Rule 2 required a student who serves as a trainer or instructor had never been paid for athletic competition. Rule 3 required a student who played in an athletic contest had never been paid for this activity. Rule 4 prohibited a student from competing if he had participated the four previous years. Rule 5 required a student to complete a year of instruction at his school before competing in athletics (only for a student who has been registered for other college or university). Rule 6 required a football player to complete two out of three terms in the prior year. Rule 7 required students to complete a card with information about his previous athletic competitions.

106. PROCEEDINGS OF THE THIRD ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES (Jan. 2, 1909), available in https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=96&q1=agitation, publishing the address Cap't. Palmer E. Pierce, at 30 (PDF #96). As president of the body, he appealed for more schools to join but also enumerated their concerns:

> (a) 'Your Association is accomplishing little or nothing. It has no particular influence.'
> (b) 'Your eligibility rules are not as advanced as our own. No good, then, could come to us by joining.'

including those who thought that sports would detract from a scholarly atmosphere on campus.[107] Similarly, others believed that amateurism was the only way to deter students from pursuing the "despicable" path of professional sports.[108] Some college leaders viewed the professional athlete as natural prey to dishonorable people and activities.[109] College athletics, in contrast, could fuse athletic prowess with moral virtue.[110] Christian virtue, character development, and physical prowess fertilized the amateurism seedbed.[111]

As collegiate athletics became popular, academic ingenuity camouflaged the business side of athletics. Legal disputes provided occasional glimpses of this façade. A spectator at a University of Michigan football game, seated among 5,000 others on a stand built for only 3,000, was injured when the structure collapsed.[112] After his negligence lawsuit against the Michigan athletic association was dismissed, an appellate court reversed due to the fact that the university's board of regents built, owned, and controlled the stands.[113] In a

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(c) 'We prefer to keep independent and believe we can do more good as an independent leader than by joining in a national movement.'
(d) 'You require the faculties to take control of athletics, while at our institution the faculties have little power.'
(e) 'There is too much talk about college athletics. Don't see the need of this agitation.'
(f) 'There are members in your organization so impure athletically we do not care to associate with them.'

107. W. Burlette Carter, *Responding to the Perversion of* In Loco Parentis: *Using a Non-Profit Organization to Support Student-Athletes*, 35. IND. L. REV. 851, 860 (2002), quoting ROBERT STEBBINS, AMATEURS: ON THE MARGIN BETWEEN WORK AND LEISURE 20-21 (1979) ("Some viewed [sports as] downright frivolous, even a socially dangerous activity to be discouraged.").

108. *Id*.

109. PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, *supra* note 107 at 59-60, publishing *Debate, Should Any Student in Good Collegiate Standing Be Permitted to Play in Intercollegiate Baseball Contests*, II. Negative, Prof. E.J. Bartlett 59 (PDF # 125):

> The professional athlete is the admiration of the sensual woman, the coveted prize of the false sport who wants to buy him, the very implement and object of enormous gambling operations, a golden sandwich man to the cigarette maker, a sojourner in strange places where his warmest welcome is in the bar and pool rooms. Naturally, he is always looking for his price. He must win to maintain his popularity. His livelihood is at stake and his temptation is a little greater than others to forget to be generous in sport….

110. Karen L. Hartman, THE RHETORICAL MYTH OF THE ATHLETE AS A MORAL HERO: THE IMPLICATIONS OF STEROIDS IN SPORT AND THE THREATENED MYTH–(2008) available here https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=3014&context=gradschool_dissertations, stating:

> In the mid-1800s to the early 1900s, sport became increasingly popular in America. As technology and manufacturing developed, more and more Americans turned toward sport as a way to fill their newfound leisure time. During this time, there were several national organizations and important figures that served to frame sport as a moral endeavor. Specifically, the Young Men's Christian Association (YMCA), the Muscular Christianity Movement, Bernarr Macfadden and the Physical Culture magazine, Theodore Roosevelt, and the creation of the National Collegiate Athletics Association worked together to create an enduring myth of the athlete as a moral hero.

111. *Id*., stating:

> People were exposed to this message if they went to church, listened to a Presidential speech, or read a magazine; these five factors infiltrated sport and morality into numerous aspects of society. Modern sport, therefore, was incubated by practitioners of the social gospel during Protestant Christianity's time of optimistic missionary revival.

112. Scott v. Univ. of Mich. Athletic Ass'n, 116 N.W. 624, 624 (1908).

113. *Id*. at 625.

similar case, the University of Minnesota avoided legal responsibility for a fan's injury at a football game.[114] This avoidance of liability continues in the contemporary era.[115]

Some university presidents expressed misgivings about the direction of NCAA athletics. By the end of World War I, with college-age men returning to campuses, Brown University President William H.P. Faunce called upon schools to return intercollegiate athletics to its amateur roots: "It would indeed be a happy result of the war if some sports now called minor could come to the front because of their educational value, and some sports called major, because of their gate receipts, could be sent to the side lines until they bring forth fruits meet for repentance."[116]

Faunce's message appears to have fallen on deaf ears. University presidents navigated commercial transactions involving athletics with legal slipperiness. Centenary College, owner of a scoreboard installed in 1924 that had space advertising, left a bankruptcy receiver without recourse against the school because the academic administration claimed that it had no control over its athletic association.[117]

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114. George v. Univ. of Minn. Athletic Ass'n, 120 N.W. 750, 752 (1909). The court's reasoning noted that the "defendant was a branch or department of the University of Minnesota, and this action, therefore, does not lie." *Id*. at 751.

115. Howell v. Calvert, 268 Kan. 698 (2000). A track athlete was killed, and another was hurt when a truck struck them during a pre-dawn mandatory training session on a route that their coach selected. *Id*. at 700. The team asked the coach a week earlier to modify their route after an athlete hurt her ankle in a pothole, but the coach denied this request. *Id*. The plaintiffs argued that a college owes its student athletes a special duty of care, but the court rejected this argument. *Id*. at 700. *Also see* Orr v. Brigham Young University, 108 F.3d 1388 (10th Cir. 1997). Orr lost his negligence lawsuit in which he claimed that BYU owed a special duty to protect his physical well-being by not playing him while his back was injured. In Illinois, Northwestern University settled a tort claim for $16 million in a matter growing out of the death of Rashidi Wheeler during a football practice, though detailed facts of the case are not a matter of public record. *See* Molly McDonough, *Forced Settlement Can't Relieve a Mother's Grief*, 4 No. 35 ABA J. E-REPORT 1 (Aug. 2005).

116. William H.P. Faunce, *Athletics for the Service of the Nation*, 79 ADVOCATE OF PEACE 76, 77 (1918), available in https://books.google.com/books?id=YVU2AQAAMAAJ&pg=RA1-PA76&lpg=RA1-PA76&dq=William+H.+P.+Faunce,+Athletics+for+the+Service+of+the+Nation&source=bl&ots=F4NX_ifUIo&sig=ACfU3U1RwHlrI3Q5xkI1SIY0ql-v6ag45Q&hl=en&sa=X&ved=2ahUKEwja-4vbnujwAhV7B50JHVgqB9IQ6AEwB3oECAQQAw#v=onepage&q&f=false.

117. Credit Alliance Corp. v. Centenary College of Louisiana, 136 So. 130 (La. App. 2d Cir. 1931). The bursar of the college entered into a contract for a football scoreboard, with a capability for advertising. *Id*. at 130. The contract called for annual installments from 1924-1926, but the college sought to exercise its option to return the scoreboard after a year and redeem its notes pledging future payment. *Id*. However, the scoreboard company fell into bankruptcy, and the equipment was never returned. *Id*. at 131. A receiver, who sued to collect on the contract, lost its case when the state appeals court reasoned:

> Dr. Sexton, president of defendant college, as a witness, stated that the first time he saw the notes sued on was when presented to him while testifying; that he only knew the notes had been issued when the bank in January, 1926, notified him that it held the note of $500 for collection; that the scoreboard was not used by the college but by the students and other people interested.…
>
> It is not shown that Dr. Sexton, in his capacity as president, had authority to issue binding notes in the name of the college, and in the absence of proof to that effect it cannot be

A tax case adjudicated before the Supreme Court demonstrated how college football hid behind the fig leaf that it promotes higher education. In *Page v. Regents of University System of Georgia*, the Internal Revenue Service attempted to collect federal taxes from the sale of football tickets for two universities operated by the University System of Georgia.[118] Regents sued the IRS to enjoin the collection,[119] contending that intercollegiate athletics fell outside the tax code because football games were an extension of required physical education curricula at a state-supported school.[120] The Fifth Circuit Court of Appeals agreed with the regents, with obsequious praise for the amateur athletics model.[121] An acerbic dissent exposed college football's ruse:

> My associates, apparently to their own satisfaction, have rationalized themselves into the frame of mind to believe and to say that these modern gladiatorial spectacles, conducted in vast and costly amphitheaters, for the excitement and amusement of the American public, all present being keyed to a pitch and under a tension wholly foreign to that ordinarily associated with academic and educational pursuits, are an essential part of higher education in Georgia, and, as such, a governmental function of that State. They have not rationalized me into that frame of mind; I cannot rationalize myself into it. It seems to me that the mental processes by which the din and delight, the struggle and stress, the flying arms and legs, the alternate angles and extrications, and all the heady actions of an intercollegiate football game, are envisioned as higher education, are a 'reductio ad absurdum' of even modern higher educational theory. They seem to me in the slangy but expressive vernacular common in the stadiums, to 'take higher education for a ride.'[122]

Seeing through this academic hypocrisy, the Supreme Court reversed the appellate ruling, remarking that "however essential a system of public education to the existence of the State, the conduct of exhibitions for admissions paid by

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> assumed that such authority was reposed in him. If he was not vested with such power by the trustees, then it follows as a consequence that he could not ratify the unauthorized acts of the bursar and thereby obligate the college for any amount.

Id. at 132-133.

118. Page v. Regents of University System of Georgia, 93 F.2d 887, 890 (5th Cir. 1937). Federal law levied a 14 cents tax on each ticket that cost over 41 cents, with the seller designated as the agent to collect the tax. The University of Georgia and Georgia Tech sold football tickets to the public for $1.50 apiece, while students received free tickets because they paid an athletic fee.

119. *Id*. at 889.

120. *Id*. at 891-892.

121. *Id*. at 892, stating:

Public contests are not an abuse of physical education. It is true they employ but a few of the students, but they give stimulus and life to the whole athletic enterprise. 'To make the team' in any athletic sport is a supreme incentive to careful and systematic effort; and to star upon it is like an Olympic crown. Great judgment is necessary to prevent the stimulus of publicity from becoming too great, lest the athletic tail be found wagging the dog of mental culture in the schools, but in principle the public exhibition of the best in athletics is not different from the school exhibitions of our boyhood or from the honors and speakerships at commencements of most colleges.

122. *Id*. at 895 (Hutcheson, dissenting).

the public is not such a function of state government as to be free from the burden of a nondiscriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged."[123]

C. The NCAA in the Modern Era

In the modern era, college athletes have litigated the NCAA's amateur model on three fronts: (1) antitrust claims alleging that the NCAA rules unreasonably restrain their compensation and mobility in an athletic labor market[124]; (2) antitrust claims that schools strictly prohibit players from being paid for their name, image, and likeness while schools exclusively exploit these personal attributes for their commercial gain[125]; and (3) claims that athletes are misclassified under the Fair Labor Standards Act, and should be paid to play. [126]

1. Sherman Act Antitrust Litigation

Like any sports league, the NCAA makes its contests interesting by having competitors collude to equalize their access to talented players.[127] The NCAA's scholarship limits in men's basketball,[128] for example, spreads talent among competitors like baseball's initial reserve clause allowed teams to sign their best five players and prohibit them from playing for another team.[129] In 1984, the Supreme Court ruled that the NCAA violated the Sherman Act; however, the plaintiff was not a player but university with a powerhouse football program that challenged the NCAA's limits on a team's TV exposure.[130]

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123. After the IRS substituted a new officer to collect the tax, the Supreme Court reversed the appellate court's ruling in Allen v. Regents of University System of Georgia, 304 U.S. 439, 452 (1938).

124. *Infra* notes 132 & 137.

125. *Infra* notes 152-160.

126. *Infra* notes 165-166.

127. *See* ROBERT BORK, THE ANTITRUST PARADOX278 (1978), remarking that "some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams."

128. NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-21, NCAA DIV. I MANUAL, *supra* note 84, art. 15.5.5.1, providing that: "There shall be a limit of 13 on the total number of counters in men's basketball at each institution." *Also see* art. 15.01.7, stating: "Sport-by-Sport Financial Aid Limitations. Division I may establish limitations on the number of financial aid awards a member institution may provide to countable student-athletes (counters)."

129. *See* Edmonds, *supra* note 46 (referencing the National League's adoption of a rule that allowed teams to designate five players who could not be on the open market).

130. *E.g*., Richard G. Sheehan, *An Empirical Analysis of the NCAA's Competitive Behavior*, 62 THE ANTITRUST BULLETIN 112, 128 (2017), observing: "In the name of competitive balance, the NCAA has made concerted efforts to restrict expenses, including efforts to limit … the number of grants-in-aid, restrict the length of grants-in-aid, and limit what is covered by a grant-in-aid." He concluded by noting: "If the goal is to limit expenses with the goal of improving competitive balance, the results presented here suggest that placing restrictions on coaches' salaries would be the most effective means of achieving that." *Also see* Brian M. Mills & Steven Salaga, *Historical Time Series Perspectives on Competitive Balance in NCAA Division I Basketball*, J. SPORTS ECON. 614 (2015); and Daniel Sutter & Stephen Winkler, *NCAA Scholarship Limits and Competitive Balance in College Football*, 4 J. SPORTS ECON. 3 (2003).

Until recently, courts dismissed lawsuits from players who sued under the Sherman Act to challenge NCAA restrictions on compensation. By upholding amateurism as an inviolable precondition for player eligibility, courts put NCAA players in a situation analogous to baseball players a century ago who were forced to accept a team's terms and conditions if they wanted to play their sport.[131]

Initially, courts were unpersuaded by players' arguments that the NCAA's regulations were market transactions.[132] The NCAA's legal camouflage succeeded in depicting plaintiffs as student athletes, not players.[133] In other litigation, the NCAA claimed that college sports are an "avocation."[134] The NCAA also contended that its educational mission transcends commercialism.[135]

Courts also dismissed player antitrust challenges to mobility restrictions.[136] They failed to see college football as a futures market for professional football players.[137] In *Banks v. Nat'l Collegiate Athletics Ass'n* the Seventh Circuit

131. The NCAA's mobility restrictions and penalties were upheld in Smith v.Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 185-186 (3d Cir. 1998) (rule prevented participation by graduate student who had been an undergraduate at a different institution); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1089–90 (7th Cir. 1992) (rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) (rules revoked athlete's eligibility to participate in an intercollegiate sport in the event that the athlete chose to enter a professional draft or engage an agent to help secure a position with a professional team); and Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 382 (D. Ariz. 1983) (rule denied athlete eligibility to participate in an intercollegiate sport if the athlete accepted pay for participation in the sport).

132. The district court in Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975) held that the Sherman Act does not apply to NCAA eligibility standards. The Fifth Circuit assumed without deciding that the Sherman Act applies to the NCAA's student eligibility rules in McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F. 2d 1338, 1343-44 (5th Cir. 1988).

133. *Jones*, 392 F. Supp. at303, stating that "plaintiff is currently a student, not a businessman in the traditional sense, and certainly not a 'competitor' within the contemplation of the antitrust laws." In *Gaines*, 746 F. Supp. 738, 743-744the district court distinguished between the NCAA's commercial rules and noncommercial rules, ruling that eligibility standards were not commercial. The court in *Smith*, 139 F.3d 180, 185-186, ruled that the NCAA's eligibility rules are not related to the NCAA's commercial interests, and therefore, the Sherman Act did not apply to these student regulations.

134. *See* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 626 (Colo. 2004), stating: "*Student participation in intercollegiate athletics is an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises (emphasis added)," quoting NCAA regulations from that time. Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197, 1198 (9th Cir. 1976), ruled that a student crosses the amateur boundary by signing a contract to play a professional sport.

135. *See* Banks v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (NCAA organizes amateur intercollegiate athletics "as an integral part of the educational program and . . . retain[s] a clear line of demarcation between intercollegiate athletics and professional sports.").

136. Nat'l Collegiate Athletics Ass'n v. Yeo, 171 S.W.3d 863 (Tex. 2005); *Banks*, 977 F.2d 1081; and Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1065 (9th Cir. 2001).

137. *E.g.*, Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 373 (D. Ariz. 1983) ("case law flatly rejects the notion that student-athletes' expectations of future athletic careers are constitutionally protected."), and *Yeo*, *id*., at 870 ("student-athletes remain amateurs").

rejected a Notre Dame player's antitrust claim because the court did not believe that NCAA rules related to a labor market.[138] Impervious to Notre Dame's reputation as an NFL feeder,[139] the majority said that elimination of the NCAA's restrictions on entering the draft and signing with an agent would shift college football from "educating the student-athlete" to a "'minor-league' farm system … for professional football in the NFL."[140]

However, courts gradually shifted their thinking. In *Tanaka v. Univ. of S. Cal*., the Ninth Circuit said that NCAA rules relate to a cognizable market in college football.[141] The Seventh Circuit, in *Agnew v. Nat'l Collegiate Athletic Ass'n*, acknowledged that NCAA football is a "competitive market to attract student-athletes whose *athletic labor* can result in many benefits for a college, including economic gain."[142]

These players did not sue for pay as employees: they simply characterized scholarships as compensation in this labor market.[143] This litigation strategy was not a direct challenge to the NCAA's camouflage model but argued that collegiate athletics restrained players' access to college education by penalizing

138. *Banks*, 977 F.2d at1084, involved a Notre Dame football player who was undrafted after declaring for the NFL draft following his junior year, but was blocked by NCAA eligibility rules from returning to school for a senior year of competition. The Seventh Circuit rejected the player's Sherman Act claim because the player failed "to explain how the no-draft rule restrains trade in the college football labor market." *Id*. at 1089.

139. Statistics for the year that Banks entered the draft could not be found, however, Notre Dame was tied for ninth among schools that had active players in the NFL in 2020. Spencer Parlier, *NFL Players by College on 2020 Rosters*, NCAA.COM (September 8, 2020).

140. *Banks*, 977 F.2d at 1091.

141. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1064–65 (9th Cir. 2001) (citing Mackey v. Nat'l Football League, 543 F.2d 606 (8th Cir. 1976)). However, the court did not find a close connection between the athletic conference's transfer rules and the free agency restrictions, because the PAC-10 imposed a one-year penalty, while the NFL's "Rozelle Rule" was unlimited in duration. *Id.*

142. 683 F.3d 328, 347 (7th Cir. 2012) (emphasis added). Agnew lost his scholarship when Rice University did not renew it following his injury, and as a result, he had to pay to complete his degree. *Id.* at 332. Although the court was receptive to the concept of "athletic labor," it upheld the district court's dismissal of Agnew's complaint because he failed to state a conspiracy or combination to restrain a labor market. *Id.* at 347–48. The NCAA has since revoked its one-year limit on scholarships and allowed schools to make multi-year scholarship commitments to players. *Id.* at 332 n.1.

The court conceded, however, that "a market of some sort is at play in this case. A transaction clearly occurs between a student-athlete and a university: the student-athlete uses his athletic abilities on behalf of the university in exchange for an athletic and academic education, room, and board." *Id.* at 338. Citing the economic realities of major college football programs today, Agnew ambiguously concluded in a double-negative phrase that "full scholarships in exchange for athletic services . . . are not noncommercial." *Id.* at 340.

143. *See Tanaka*, 252 F.3d. Tanaka, a soccer player for USC, sought to transfer to nearby UCLA without incurring a one-year penalty that required her to sit out during the next season. *Id.* at 1064. She claimed that she participated in an investigation into academic fraud, and that USC retaliated against her by invoking the PAC-10's ineligibility rule that would deter transferring. *Id.* Tanaka alleged that this conference rule had anticompetitive effects under the Sherman Act, but the appeals court rejected this argument, noting that the PAC-10's restrictions would not apply to her if she transferred outside the conference. *Id.*

them for transferring to another school.[144]

Alston v. NCAA— a separate class action lawsuit that was consolidated with *O'Bannon* and other cases in *in re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* (*Alston II*)[145]— followed this player strategy of gradually exposing the NCAA's amateurism camouflage. After the *O'Bannon* lawsuit forced the NCAA to offer players the full benefit of educational cost-of-attendance—payments for incidental expenses in addition to tuition, fees, and room and board—, players sued for additional education-related compensation that their non-player student peers receive from colleges.[146]

The district court ruled in *Alston II* that the NCAA's cap on education-related expenses violated the Sherman Act because schools could not justify limits related to "computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies."[147] The court said that restrictions on "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships"[148] were unreasonable restraints of trade. On appeal before the Supreme Court, Justices poked holes in the NCAA's amateurism model during oral argument,[149] and by a unanimous vote, ruled that the NCAA's education-

144. More recently, *see* Rock v. National Collegiate Athletic Ass'n, 2016 WL 1270087 (S.D. Ind. 2016) (denying motion for class certification in a case that challenged the NCAA's rules prohibiting granting players multi-year, Division I football scholarships from 1973 to 2012, thereby eliminating competition among schools for their labor).

145. 375 F. Supp. 3d 1058, 1247 (N.D. Cal. 2019). Later, the Ninth Circuit summarized how the Alston lawsuit became part of the O'Bannon case:

> In March 2014, while the NCAA was litigating *O'Bannon I*, FBS football and D1 men's and women's basketball players filed several antitrust actions against the NCAA and eleven D1 conferences that were transferred to and, with one exception, consolidated before the same district court presiding over *O'Bannon I*. Rather than confining their challenge to rules prohibiting NIL compensation, Student-Athletes sought to dismantle the NCAA's entire compensation framework.
>
> In December 2015, the district court certified three injunctive relief classes comprised of (i) FBS football players, (ii) D1 men's basketball players, and (iii) D1 women's basketball players. Each subclass consists of student-athletes who have received or will receive a full grant-in-aid during the pendency of this litigation.

In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation (*Alston III*), 958 F.3d 1239, 1247 (9th Cir. 2020).

146. In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation (*Alston I*), 2018 WL 1524005, at *6 (N.D. Cal. 2018).

147. 375 F. Supp. 3d at 1088.

148. *Id.* at 1088.

149. *See* Transcript of Oral Argument, Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (No. 2021-512). Justice Thomas referred to "players," not student athletes, when he marveled at the "balloon[ing]" pay for coaches in this amateur arena, Tr. 10. Justice Kavanaugh referred to NCAA players as "workers who are making the schools billions of dollars on the theory that consumers want the schools to pay their workers nothing," Tr. 33. Justice Barrett openly doubted "that consumers love watching unpaid — unpaid people play sports," again, phrasing that avoided the NCAA's preferred usage of "student-athletes," Tr. 38.

benefits restrictions violated the Sherman Act.[150]

2. Name, Image, and Likeness

While NCAA schools have largely succeeded in exploiting the educational camouflage model, large conferences have started their own cable TV networks to broadcast contests and grow their revenues.[151] In *O'Bannon v. National Collegiate Athletic Ass'n*,[152] a former star basketball player at the University of California, Los Angeles (UCLA) led a landmark antitrust lawsuit that successfully challenged the NCAA's sweeping prohibition on compensating players with licensing revenue.[153] His trial testimony exposed the NCAA's educational camouflage by showing that college basketball is a full-time job,[154] causes players to miss many classes,[155] and sells rights to a player's name, image,

150. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

151. *See* Dan McGrath, *Commissioner's Big Ten, Rich and Tarnished*, N.Y. TIMES, (Sept. 2, 2011, at ASection ANaN). Conferences have derived large revenues from their own TV networks for more than a decade. *Id.* In its fifth year, the Big Ten's network rivaled "pro-driven regional cable channels as a profit center after generating more than $220 million in revenue last year." *Id*. Revenue for conferences has exploded over this time. *See* Kevin Draper & Alan Blinder, *College Football Season Is Nearly Over. Then the Big TV Negotiations Begin*, N.Y. TIMES, Dec. 18, 2020, at B11. TheBig Ten network generated revenue of more than $781 million in its 2019 fiscal year, distributing more money to conference schools than others in college athletics. *Id.*
In the 2018-2019 academic year, the PAC-12 distributed $32 million to all conference schools, behind the SEC's $45 million per school and Big Ten's $55 million per school. Kyle Bonagura & Heather Dinich, *State of the PAC-12: What Hiring George Kliavkoff Means for TV Rights, CFP Expansion, NIL and More*, ESPN, (May 17, 2021), https://www.espn.com/college-football/story/_/id/31449912/state-pac-12-hiring-george-kliavkoff-means-tv-rights-cfp-expansion-nil-more.

Reflecting the financial realities of NCAA athletics, the PAC-12 hired George Kliavkoff in 2021 to augment its media footprint and further its brand as an entertainment outlet. *See* Ralph D. Russo, *PAC-12 Picks MGM Executive Kliavkoff As Next Commissioner*, AP NEWS, (May 13, 2021) https://apnews.com/article/sports-e864185b604b3da8d6119bfbe0be8095 (Kliavkoff worked with Major League Baseball Advanced Media, Hearst Entertainment & Syndication, and with NBC Universal Cable as its chief digital officer).
NCAA players have started to use their social media platforms at key moments, such as the March Madness tournament, to highlight the exploitation of their name, image, and likeness for schools and conferences rather than themselves. *See* Barry Svrluga, *Bad News for the NCAA and its March Madness Scam: The 'Amateurs' Are Onto Them*, WASH. POST (March 20, 2021), https://www.washingtonpost.com/sports/2021/03/20/bad-news-ncaa-its-march-madness-scam-amateurs-are-onto-them/ ("The NCAA Owns my name image [sic] and likeness. Someone on music scholarship can profit from an album. Someone on academic scholarship can have a tutor service. For [people] who say 'an athletic scholarship is enough.' Anything less than equal rights is never enough. I am #NotNCAAProperty.").

152. O'Bannon I, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

153. *Id.* at 963.

154. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 2014 WL 6907623 16 (N.D. Cal.) (June 9, 2014, Trial Transcript), Testimony of Plaintiff Edward J. O'Bannon, Jr.

> Q. And during the season, approximately how much time a week did you spend on basketball and basketball-related activities?
> A. A week, I'm thinking anywhere from 40 to 45 hours.

155. *Id.* at 21.

> Q. And you said when you were traveling you missed classes?
> A. Correct.
> Q. Approximately how many classes in a season would you miss because of travel

and likeness without allowing players any benefit from this commercial exploitation.[156] The district court ruled in favor of O'Bannon, concluding that the NCAA's blanket rules against compensation unlawfully restrained trade.[157] The court also rejected the NCAA's camouflage argument that schools embrace amateurism out of philosophical commitment.[158] However, the Ninth Circuit Court vacated the district court's remedy that schools be allowed to put up to $5,000 per year in deferred compensation in trust for players until they exhaust their eligibility.[159] This part of the ruling, which nullified the district court's efforts to compel schools to put some compensation in a lockbox until players exhausted their amateur eligibility, left these athletes with a hollow victory.

Currently, states are swiftly enacting NIL laws. In general, they prohibit state schools from imposing penalties on NCAA players who are compensated for their name, image, and likeness.[160] While these laws do not create an

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commitments for basketball?
A. I believe anywhere from 30, 35, I mean just kind of off the top of my head.

156. *Id.* at 26-27, 29.
Q. When did you first learn that your image was used in a college game for — for video?
…
A. Oh, the time. '08? 2008.
Q. How did it come about that you learned your image was used?
A. I was at a friend's house . . . And his son, who was also out there in the garage, reminded his dad about the video game that he had been playing the night before.
…
Q. Did anyone ask for your permission to feature you in a video game?
A. No.
Q. Were you ever paid for appearing in a college video game?
A. No.
Q. Sitting here today, Ed, would you be willing to sell your image to someone who wanted to put it in a college video game with your team?
A. Yes.

157. O'Bannon I, 7 F. Supp. 3d at 991–92, *aff'd in part and vacated in part*, O'Bannon v. National Collegiate Athletic Association, 802 F.3d 1049 (*O'Bannon II*) (9th Cir. 2015).

158. O'Bannon II, 802 F.3d 1049 at 1079. The court also marked the first time that a ruling undermined the NCAA's amateurism rules:

> What's more, there is no evidence to suggest that any schools joined Division I originally because of its amateurism rules. These schools had numerous other options to participate in collegiate sports associations that restrict compensation for student-athletes, including the NCAA's lower divisions and the NAIA. Indeed, schools in FCS, Division II, and Division III are bound by the same amateurism provisions of the NCAA's constitution as the schools in Division I. The real difference between schools in Division I and schools in other divisions and athletics associations, as explained above, is the amount of resources that Division I schools commit to athletics. Thus, while there may be tangible differences between Division I schools and other schools that participate in intercollegiate sports, these differences are financial, not philosophical.

O'Bannon I, 7 F. Supp. 3d at 981.

159. O'Bannon II,802 F.3d 1049 at 1079.

160. Martin D. Edel & Julius Halstead, *The Latest on NIL: Updates to State and Federal Laws*, THE NAT'L L. REV., (April 15, 2021), https://www.natlawreview.com/article/latest-nil-updates-to-state-and-federal-laws (reporting that Michigan enacted House Bill No. 5217). The Michigan law was similar to others in California, Colorado, Florida, Idaho, Nebraska, and New Jersey that allow NCAA players to be compensated for publicity rights, regulate agent licensing standards, and prohibit a school from penalizing a player for earning NIL compensation, as each law defines that term. *Id.* The list of states passing NIL laws grew to include Georgia, Alabama, New Mexico and Mississippi. *See* Gregg E. Clifton & John G. Long, *State Name, Image, and Likeness Laws With July 1st Effective Dates Continue To Grow*, NAT'L LAW REV. (May 7, 2021),

employment relationship, they erode the NCAA's amateurism precept by allowing players compensation rights related to endorsements and other forms of personal marketing.[161] At the beginning of 2022, the NCAA proposed a new constitution for its members.[162] Meanwhile, since *Alston* was decided in June 2021, the void of NCAA regulations has allowed some states to draft NIL laws that offer their universities a recruiting advantage over other states.[163]

3. Fair Labor Standards Act

NCAA athletes have sued under the FLSA, seeking a ruling that they are employees. Until recently, their efforts have failed. Two federal appeals courts ruled that the amateur student-athlete model precludes a court from ruling that NCAA athletes are employees under the Fair Labor Standards Act.[164] A district

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https://www.natlawreview.com/article/state-name-image-and-likeness-laws-july-1st-effective-dates-continue-to-grow (reporting that these state laws would be effective July 1, 2021). Georgia H.B. 617 allows schools to enact a rule that requires players to share up to 75% of NIL compensation in order to create a pool to share "for the benefit of individuals previously enrolled as student-athletes in the same school." *Id.* New Mexico's S.B. 94, enacting the Student Athlete Endorsement Act, allows players to be compensated for using their names, images, and likenesses, to hire representatives, and to be protected from adverse actions that compel them to forfeit their NIL rights. *Id.* Alabama's H.B. 404 is similar to New Mexico's law, but also states that a player may earn only fair market compensation for the use of their name, image, or likeness. *Id.* Mississippi's Senate Bill 2313, called the "Mississippi Intercollegiate Athletics Compensation Act," is structured along similar lines but requires players to use Mississippi-licensed representatives. *Id.* More recently, *see* Klein Moynihan, *NCAA Braces for New-Age "Madness" Amidst NIL Law Enactment*, LEXOLOGY (June 17, 2021), https://www.lexology.com/library/detail.aspx?g=f2f22998-f8f5-4cec-af08-9ea8c74d1d37 (summarizing the lineup of states with NIL laws and NIL bills being actively legislated: "Arizona (late-July 2021); Arkansas (Jan. 2022); California (Jan. 2023); Colorado (Jan. 2023); Maryland (July 2023); Michigan (late-Dec. 2022); Montana (June 2023); Nebraska (no later than July 2023); Nevada (Jan. 2022); New Jersey (Sept. 2025) . . . Oklahoma (July 2023); South Carolina (July 2022); Tennessee (Jan. 2022) . . . Also of note, similar bills are progressing through their respective legislative processes in Connecticut, Illinois, Louisiana, Massachusetts, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, and Rhode Island.")

161. H.B. 5217, 100th Leg., Reg. Sess. (Mich. 2020). Section 5(a)(2) provides a college athlete broad protection from penalties for being compensated for that player's name, image, or likeness, in these terms:

> An athletic association, conference, or other group or organization with authority over intercollegiate athletics, including, but not limited to, the National Collegiate Athletic Association, shall not prevent a postsecondary educational institution from fully participating in intercollegiate athletics without penalty as a result of a student obtaining professional representation in relation to contracts or legal matters regarding the student's opportunities to earn compensation for the student's use of his or her name, image, or likeness rights, including, but not limited to, representation provided by an athlete agent or financial advisor, or legal representation by an attorney.

162. *NCAA Draft Constitution*, NCAA (Dec. 6, 2021), https://ncaaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_DraftConstitutionDec6.pdf.

163. *See* Dennis Dodd, *NCAA Council Unlikely to Recommend Name, Image, Likeness Rules as States' Laws Set To Go Into Effect*, CBSSPORTS (May 17, 2021),https://www.cbssports.com/college-football/news/ncaa-council-unlikely-to-recommend-name-image-likeness-rules-as-states-laws-set-to-go-into-effect/ (reporting that NIL laws in Alabama, Florida, Georgia, Mississippi, New Mexico, and Tennessee are "similar to each other but far more lenient than anything the NCAA is considering").

164. *See* Dawson v. Nat'l Collegiate Athletic Ass'n, 932 F.3d 905 (9th Cir. 2019); Berger v.

court in 2018 dismissed another FLSA lawsuit.[165] However, a different FLSA lawsuit in the same Pennsylvania district court has survived a motion to dismiss and is now before the Third Circuit on an interlocutory appeal.[166]

Notwithstanding this long stream of litigation, the NCAA rules in 2020-2021 promulgated the amateurism model in great breadth and detail, as enumerated here:

> 2.9 The Principle of Amateurism. Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises
>
> 2.12 The Principle Governing Eligibility. Eligibility requirements shall be designed to ensure proper emphasis on educational objectives, to promote competitive equity among institutions and to prevent exploitation of student athletes.
>
> 2.13 The Principle Governing Financial Aid. A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution. Any other financial assistance, except that received from one upon whom the student-athlete is naturally or legally dependent, shall be prohibited unless specifically authorized by the Association.
>
> 12.02.10 Pay. Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.
>
> 12.02.11 Professional Athlete. A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.
>
> 12.1.2 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: … (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any

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Nat'l Collegiate Athletic Ass'n, 843 F.3d 285 (7th Cir. 2016).

165. Livers v. Nat'l Collegiate Athletic Ass'n, 2018 WL 10669663 (E.D. Pa. June 20, 2018) (denying plaintiff's motion for reconsideration); Johnson v. NCAA on Sept. 22. Last month the District Court denied a motion to dismiss filed by those players' five schools (Villanova, Fordham, Sacred Heart, Cornell and Lafayette).

166. Johnson v. National Collegiate Athletic Association, 2021 WL 6125453 (E.D.Pa 2021).

> consideration received, except as permitted in Bylaw 12.2.5.1; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received….
>
> 12.2.3.2 Competition With Professionals. An individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team (per Bylaw 12.02.12) in that sport….
>
> 16.01 General Principles. 16.01.1 Eligibility Effect of Violation. A student-athlete shall not receive any extra benefit…. If the student-athlete receives an extra benefit not authorized by NCAA legislation, the individual is ineligible in all sports.[167]

In sum, for more than a century the NCAA has enjoyed its suffocating imposition of amateur status on players. Only recently has the NCAA allowed players in revenue sports to transfer without incurring a penalty.[168] Baseball also enjoyed this type of long-running status quo of its reserve clause. No court overruled it. An arbitrator's ruling in 1975, nearly a century after the National League implemented the reserve clause, held that a team could not perpetually prohibit a player from free agency.[169] Both Major League Baseball and NCAA sports have enforced their monopsony cartels despite numerous challenges by players. Fortunately for players, rival leagues have occasionally disrupted this status quo.

IV. THE LABOR MARKET FOR TEENAGE BASKETBALL PLAYERS: DISRUPTIVE COMPETITION TO THE NCAA'S AMATEUR ATHLETE MODEL

Part III concluded by referring to rival leagues that are disrupting the NCAA's status quo. Part IV elaborates on these developments by explaining how three recently formed basketball leagues for teenage players offer a lucrative professional alternative to NCAA basketball. Part IV culminates with Table 2, an estimated payroll of employment costs for a professional basketball team at a Power Five school. The table shows data from reporting in 2021 of top-end pay on the G League Ignite team and Overtime Elite league. This analysis leads to Part V, where the finances of athletic programs at five schools are examined for

167. *2020-21 NCAA Division I Manual*, NAT'L COLLEGIATE ATHLETIC ASS'N (last visited Mar. 8, 2022) https://www.ncaapublications.com/productdownloads/D121.pdf.

168. *See NCAA Division I One-Time Transfer FAQs*, NAT'L COLLEGIATE ATHLETIC ASS'N, Apr. 21, 2021. (explaining the conditions for a one-time transfer without incurring a one-year penalty).

169. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 409 F. Supp. 233 (W.D. Mo. 1976). Arbitrator Seitz ruled on December 23, 1975 that two baseball clubs did not have a right to reserve the services of two players, and ordered the major leagues to alter their rules to allow other clubs to negotiate with these players. *Id*. at 237.

their revenues relative to total debts and annual interest payments. Taken together, Part IV and Part V provide an empirical picture of college basketball's rapidly changing labor market for premier talent. Ultimately, this analysis provides financial information that can be used for preliminary comparisons to the baseball wars.

A. Professional Basketball Leagues for Teenagers: Reprise of Baseball Wars?

NBA G League Ignite: The G League is an NBA minor league with 29 teams.[170] It includes Ignite, a team comprised of NBA draft prospects who play for only one season.[171] Ignite grew out of the NBA's practice in the 1990s through 2005 of occasionally drafting outstanding high school players.[172] The NBA ended this practice with an age minimum and a mandatory one year gap following high school graduation before a player could turn pro.[173] In December 2018 the G League revamped its management with an eye toward offering NBA-bound players a one year path to pro basketball.[174]

While bypassing college, elite players were initially paid $125,000 a year.[175] A year later, in the 2020-2021 season, Ignite offered to pay up to $500,000 a season.[176] Ignite's most prominent player in 2021, Jalen Green, was eligible to earn bonuses to bring his pay to $700,000, plus NIL deals that increased his pay to $1 million.[177] Five-star recruits Jonathan Kuminga, Daishen Nix, Isaiah Todd, and Kai Sotto joined him.[178] Ignite built on that model for the 2021-2022 season, signing Scoot Henderson as its first player for over $1 million.[179] Star recruits Jaden Hardy, Michael Foster, and Fanbo Zeng joined Henderson.[180] In signing players, Ignite competed successfully against Kentucky, UCLA and other major college programs that offered these players

170. *Frequently Asked Questions: NBA G League*, NBAGLEAGUE,(last visited Mar. 8, 2022), available in https://gleague.nba.com/faq/.

171. *Id.*/.

172. Michael Lee, *An NBA Experiment Lets Draft Prospects Skip College, Stay Home and Get Paid to Play*, WASH. POST, Feb. 11, 2021.

173. Ray Glier, *Georgia Tech Great Jarrett Jack Helping G League Draft Prospects*, ATLANTA JOURNAL-CONSTITUTION, Feb. 7, 2021 (detailing that 40 players joined NBA teams out of high school from 1995-2005, but only 10 made an NBA All-Star teams).

174. Lee, *supra* note 173.

175. *Id*.

176. *Id*.

177. Jabari Young, *A Top High School Basketball Player Could Net Up to $1 Million by Skipping College and Playing for the NBA's G League*, CNBC, Apr. 17, 2021.

178. Edward Sutelan, *Why Top Basketball Recruits Are Skipping College to Sign with NBA G League, Overtime Elite*, SPORTING NEWS, May 21, 2021.

179. The Athletic Staff, *Scoot Henderson Becomes Youngest Pro U.S. Hoops Player After $1M G League Deal*, THE ATHLETIC, May 21, 2021 (explaining how Matt and Ryan Bewley, five-star juniors, each signed two-year deals at $500,000 per year with OTE, and declined offers from Alabama, Auburn, Florida and other schools).

180. Sutelan, *supra* note 179.

scholarships.[181]

Overtime Elite (OTE): This basketball league is part of a business built around premiere young athletes whose contests are viewed online 14 billion times a year by 45 million people.[182] Like the Ignite team, OTE creates a labor market for teenage players.[183] OTE recruits the best high school juniors and seniors globally, with the aim of hiring 30 players for a minimum guaranteed salary of $100,000, NIL rights, health insurance, and academic instruction.[184] In May 2020, the league started to sign players to contracts.[185]

OTE is modeled after European soccer academies, combining athletic competition with academic instruction.[186] OTE players forfeit eligibility to play in high school and college due to amateur restrictions.[187] However, in addition to their pay, OTE players have access to at least $100,000 for college tuition if they decide not to pursue professional basketball.[188]

Late in 2021, the league plans to house and train players and families and play games in Atlanta, followed by an international tour.[189] OTE has raised $140 million from investors, including Jeff Bezos.[190] Four players signed contracts by May 2021.[191] The league signed two players each to two-year contracts that pay $500,000 per season.[192]

Professional Collegiate League: PCL, a third professional path for teenage basketball players, explicitly states it is "disrupting the amateurism model."[193]

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181. David Cobb, *Five-Star Prospect Jaden Hardy Announces He'll Sign with NBA G League Ignite over College Basketball Offers*, CBSSports, May 15, 2021.

182. OTE, available in https://www.overtimeelite.com/our-story .

183. Kevin Draper, *A New League's Shot at the N.C.A.A.: $100,000 Salaries for High School Players*, N.Y. TIMES, Mar. 8, 2021.

184. OTE, available in https://www.overtimeelite.com/facts.

185. Bruce Schoenfeld, *The Teenagers Getting Six Figures to Leave Their High Schools for Basketball*, N.Y. Times, Nov. 30, 2021.

186. Draper, *supra* note 184.

187. *Id*.

188. Kendall Baker, *Overtime Targets NCAA with New League Offering $100,000 Salary to High School Players*, AXIOS, Mar. 10, 2021, at https://www.axios.com/overtime-basketball-ncaa-high-school-nba-930b8d29-f85c-494c-8111-aa3f588c783d.html.

189. *Id*.

190. Jabari Young, *Overtime Selects Atlanta for Its Basketball League That Pay 16- to 18-Year-Olds $100,000*, CNBC, May 19, 2021. *Also see* Goldsmith, *infra* note 210.

191. Adam Zagoria, *Overtime Elite League Strikes Again By Signing Another Set Of Twins Who Will Turn Pro Out Of High School*, FORBES, May 25, 2021. (explaining signings included Amen Thompson, ranked as the No. 22 overall ranked player by ESPN).

192. *Scoot Henderson Becomes Youngest Pro U.S. Hoops Player After $1M G League Deal*, *supra* note 180.

193. *See* Professional Collegiate League, at https://thepcleague.com/ ("The PCL aims to reimagine the landscape of collegiate athletics by disrupting the amateurism model and offering a legitimately superior alternative. We aim to improve the economic outlook of our athletes, the majority of whom will likely be minorities and/or come from a low socioeconomic background."). PCL's disruptive potential is noted in Wolken, *supra* note 11, USA TODAY, May 19, 2021. "But with Overtime Elite and the Professional Collegiate League, both of which plan on fielding teams and playing games this fall, there's finally real disruptor potential in the talent pipeline that has directed the vast majority of top players from high school to college to the pros." *Id.*

PCL's development is neither as specific nor as advanced as the Ignite team and OTE. PCL promises to pay players $50,000-$150,000, play in eight cities, require enrollment and attendance in area technical schools or colleges, and provide unspecified scholarship support.[194]

Based on publicly reported information about pay for Ignite and OTE players,[195] Table 2 estimates the cost in 2021-2022 of employing seven players at comparable salaries. This roster size was set in reference to the two leagues. In 2021, Ignite employed five teenage players, and a 20-year-old player from India, plus seven older players.[196] OTE employed 27 players in its first year.[197] Employment costs were computed for each salary line. Employer taxes for Social Security, Medicare, and FUTA unemployment insurance were used, as were worker's compensation costs for professional athletes.[198]

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194. *See* Professional Collegiate League https://thepcleague.com/athletes (inaugural cities include Atlanta, Baltimore, Charlotte, Norfolk, Philadelphia, Raleigh, Richmond, and Washington, D.C.).

195. *Scoot Henderson Becomes Youngest Pro U.S. Hoops Player After $1M G League Deal*, *supra* note 180 THE ATHLETIC (May 21, 2021) (detailing Scoot Henderson's signing with the G League for $1 million for 2021-2022; detailing Matt and Ryan Bewley, five-star juniors, each signing two year deals at $500,000 per year with OTE, and declining offers from Alabama, Auburn, Florida and other schools); Young, *supra* note 178 (detailing that Jalen Green played 2020-2021 season for $700,000); *Top Prospect for 2021 NBA Draft, To Earn $500K in NBA Minor League*, NBCSPORTS, July 15, 2020 (detailing Jonathan Kuminga signing with the minor league for about $500,000); Dan Feldman, *Report: No. 13-Ranked Basketball Prospect Isaiah Todd Signs with G League*, ESPN, April 17, 2020 (detailing that Isaiah Todd was to earn $500,000, with salary at $250,000, and bonuses of $250,000 for attending the league's yearlong developmental program which includes community events and life-skills programs); Chris Bumbaca, *5-Star Prospect Daishen Nix Decommits from UCLA, Will Join NBA G League*, USA TODAY, Feb. 20, 2020 (detailing Daishen Nix signing with the NBA G League for $300,000); Dakota Schmidt, *State of the NBA G League In 2020*, RIDICULOUS UPSIDE, July 25, 2020 (detailing Kai Soto signing with the NBA G League for $200,000).

196. Yash Matange, *NBA G League Ignite 2021: Full Roster, Season Schedule, Coaching Staff and More,* THE SPORTING NEWS, Feb. 10, 2021, at https://ca.nba.com/news/nba-g-league-ignite-2021-full-roster-season-schedule-coaching-staff-and-more/1d2nuia3mvfbaz7z05lfp5nei.

197. Bruce Schoenfeld, *The Teenagers Getting Six Figures to Leave Their High Schools for Basketball*, NYT (Nov. 30, 2021).

198. *See* IRS, *Topic No. 751 Social Security and Medicare Withholding Rates* (earnings in 2021 use a tax base of $142,800 with an employer tax rate of 6.2%, while the employer Medicare tax is 1.45% of all income paid to an employee),U.S. Dep't of Labor, *Unemployment Insurance Tax Topic, Federal Tax Rate* (an employer's FUTA taxes are 6.0% of taxable wages, up to $7,000, to each employee during a calendar year). The worker's compensation computation relies on *Workers Comp for "Student Athletes"?*, RENAISSANCE ALLIANCE, available in https://www.renaissanceins.com/blog/workers-comp-for-student-athletes, estimating a "low-rate" of (Pro AthleteClassification 9179 of $25.37/$100 Pay in a "Low State"), and *How to Calculate Workers' Comp Premiums*, PROPELHR, available in https://www.propelhr.com/blog/how-to-calculate-workers-comp-premiums (the formula is "Employee Classification Rate x Employer Payroll (Per $100) x Experience Mod Rate (Mod) [assume Mod = 1.0]). Health Insurance was used for the average employer contribution for public employees in 2020 U.S. Dep't of Labor, Bureau of Labor Statistics, *National Compensation Survey-Benefits* (Series Id: NBU31500000000000030182; Series Title: Monthly premium dollar amount (Average - mean) health care benefits: medical care single coverage for all employee contribution requirements; state and local government workers; provision: Avg. flat monthly Employer premium for single coverage medical care benefits.

	Table 2 Estimated Payroll Costs for Professional Basketball Team at a Power Five School (Using G League Ignite and Overtime Elite Roster and Pay)				
	2021-2022 Season Pay	Employment Taxes (FICA & FUTA)	Worker's Compensation	Health Insurance	Player Employment Cost
Player 1	**$1,000,000**	$8,854 + $14,500 + $4,200 = **$27,554**	**$253,700**	**$6,916**	**$1,288,170**
Player 2	**$700,000**	$8,854 + $10,150 + $4,200 = **$23,204**	**$177,590**	**$6,916**	**$907,710**
Player 3	**$500,000**	$8,854 + $7,250 + $4,200 = **$20,304**	**$126,850**	**$6,916**	**$654,070**
Player 4	**$500,000**	$8,854 + $7,250 + $4,200 = **$20,304**	**$126,850**	**$6,916**	**$654,070**
Player 5	**$500,000**	$8,854 + $7,250 + $4,200 = **$20,304**	**$126,850**	**$6,916**	**$654,070**
Player 6	**$300,000**	$8,854 + $4,350 + $4,200 = **$17,404**	**$76,110**	**$6,916**	**$400,430**
Player 7	**$250,000**	$8,854 + $3,625 + $4,200 = **$16,679**	**$63,425**	**$6,916**	**$337,020**
Total	**$3,750,000**	**$145,753**	**$1,041,375**	**$48,412**	**$4,985,540**

B. Preliminary Conclusions

It is premature to conclude that these new professional basketball leagues pose the same threat to the NCAA's amateurism model as disruptive baseball leagues posed to the NL's reserve clause from 1882-1915. However, there are similarities. To begin with, the NL's reserve clause and the NCAA's amateurism rules each created monopsony conditions that artificially constrained pay for elite athletic labor. Second, investors in both baseball and teenage basketball leagues concluded that the labor market was so artificially restricted, relative to the supply of elite athletic labor, that they could form rival leagues and attract the best players with much better pay. Third, both baseball and basketball players faced the penalty of being permanently boycotted due to the NL's and NCAA's eligibility rules. Nevertheless, the pay premium was enough for baseball players, and a small but growing number of teenage basketball players, to pose a threat to the dominant leagues' monopsony rules. Fourth, the labor markets for baseball a century ago and basketball today overlapped with the labor market for college athletics. Fifth, disruptive leagues positioned themselves to compete directly with the main league. The Western League, a minor league in the late 1800s, played in markets with NL teams to invite favorable comparisons by fans. Today, teenage professional basketball leagues are built to compete with the NCAA for top-level talent and for fans on the Internet. These similarities suggest that the NCAA is being pressured to abandon its amateurism model in order to hold its market for basketball games that employ elite players.

V. COLLEGE BASKETBALL'S RESPONSE TO DISRUPTIVE COMPETITION: CAN SCHOOLS AFFORD TO EMPLOY PLAYERS?

The NCAA and its Division I basketball programs may respond to the emerging professional competition for teenage players by doing nothing. The NCAA had no particular response when the NBA drafted elite players directly

from high school.[199] However, in the lengthy preps-to-pro period, college basketball lost only 40 elite high school players to the NBA.[200] The current climate in college sports differs, however, in posing unprecedented change. The NCAA's amateur model is rapidly crumbling from state NIL laws and antitrust litigation.

Even if no employment model emerges for NCAA players, schools face proxy labor market competition that pits states with player-friendly NIL rights against those with stingy publicity rights.[201] In Illinois, for example, player has no NIL rights until after enrolling.[202] These rights end with the close of a person's college career.[203] Thus, a player cannot make money for a sponsored event that live-streams his signing of a National Letter of Intent.[204] After a player's college eligibility ends, he or she has no right to income from the name on his team's jersey.[205] Nor does the player have a right to group licensing—for example, to his or her likeness in a video game for college sports.[206] Michigan has a narrower prohibition on player publicity rights, only limiting a player from entering into a

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199. Len Elmore, *Prodigy Players Bypassing College Basketball for NBA G League, Pro Opportunities Will Not Damage Sport*, CBSSPORTS, May 8, 2020. Elmore, an All-American basketball player who graduated from Maryland in 1974, contended that the status quo will not change in college basketball:

> For most fans, the draw to the games is about the name on the front of the jersey, not the one on the back. College stars come and must go, based on options or eligibility. The game's fans remained steadfast and the numbers grew from the early 1970s, when I played, through the high-school-to-pros period that produced Kobe Bryant, Kevin Garnet and LeBron James, to name a few. Back then, we heard the same 'sky is falling' chorus.

200. Glier, *supra* note 173.

201. *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLLEGE SPORTS, available in https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/, tracks state NIL legislation.

202. State of Illinois, Enrolled Amendment to Senate Bill 2338, Section 10(1), "The Student-Athlete Endorsement Rights Act," passed and sent to the Governor on June 11, 2021, stating: "A student-athlete may earn compensation, commensurate with market value, for the use of the name, image, likeness, or voice of the student-athlete *while enrolled at a postsecondary educational institution* (emphasis added)…."

203. *Id*., Section 25, stating: "A contract for the use of the student-athlete's name, image, likeness, or voice that is entered into while the student-athlete is participating in an intercollegiate sport at a postsecondary educational institution *may not extend beyond the student-athlete's participation in the sport at the institution* (emphasis added)."

204. *Id*.

205. The law does not address group licensing but states: '"Third party licensee' shall not include *any national association* for the promotion or regulation of collegiate athletics, athletics conference, or postsecondary educational institution (emphasis added)."

206. Illinois restricts player compensation more broadly in State of Illinois, *supra* note 202, Section 15, stating:

> A student-athlete may not receive or enter into a contract for compensation for the use of the student-athlete's name, image, likeness, or voice in a way that also uses any registered or licensed marks, logos, verbiage, name, or designs of a postsecondary educational institution, unless the postsecondary educational institution has provided the student-athlete with written permission to do so prior to execution of the contract or receipt of compensation. If permission is granted to the student-athlete, the postsecondary educational institution, by an agreement of all of the parties, may be compensated for the use in a manner consistent with market rates.

Compare infra note 212, H.R.850 (Section 3(4) that provides legal protection to group licensing rights for "a group of college athletes").

contract that conflicts with their team's apparel contract.[207] Due to state NIL laws, Michigan and Michigan State can offer more opportunities for publicity earnings compared to Illinois and Northwestern.

The new basketball leagues present other business-model challenges to NCAA schools. To begin with, OTE markets itself heavily to younger fans who are attracted to internet streaming platforms.[208] The league uses a more youthful advertising model that is common to social media platforms.[209] These approaches suggest that as the supply of professional teen basketball games grows, Power Five schools could be in more direct competition for advertising dollars with the new leagues. This could explain, for example, why the PAC-12 is rethinking its revenue model by hiring a commissioner with extensive experience in digital media but no athletic administration.[210]

Against this backdrop of labor market and advertising market pressures, political pressure is growing for college athletics to adopt an employment model. Thus, the emergence of NIL economic rights for NCAA players in 2021 may be an intermediate step toward a business model that more broadly shares the wealth that these athletes generate for schools. Congress is considering various bills to legislate economic rights for college athletes in addition to state NIL laws,[211]

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207. State of Michigan, *supra* note 162, Section 6, stating:

> A student shall not enter into an apparel contract providing compensation to the student for use of his or her name, image, or likeness rights that requires the student to display a sponsor's apparel, or otherwise advertise for a sponsor, during official team activities if the provision is in conflict with a provision of the student's postsecondary educational institution's team contract.

This provision appears to be narrower than the Illinois NIL law, *supra* note 206, that broadly regulates a player's use of "any registered or licensed marks, logos, verbiage, name, or designs of a postsecondary educational institution."

208. Ed Dixon, *Overtime Launching New High School Basketball League for NBA Hopefuls*, SPORTSPRO, Mar, 5, 2021. ("Overtime has become one of the biggest US sports media brands amongst younger generations. The company has an audience of more than 40 million fans and followers, with nearly 90 per cent of those aged under 35.").

209. Jill Goldsmith, *Overtime Sports Startup Raises Fresh Funds From Jeff Bezos, Drake, Dozens Of NBA Players*, DEADLINE, April 21, 2021., reporting that Overtime had grown to "50 million social media followers and crosses verticals from content to e-commerce, its sports app, and live events." The league is using investments from a broad array of former NBA stars and venture capital firms to develop NFTs (non-fungible tokens), trading cards that enable users to place bets on a social media app.

210. Bonagura & Dinich, *supra* note 152 (detailing how PAC-12 hires media executive to be its new commissioner).

211. H.R.850 — 117th Congress (2021-2022), College Athlete Economic Freedom Act, introduced by Rep. Trahan, Lori [D-MA-3] on Feb. 4, 2021, at https://www.congress.gov/bill/117th-congress/house-bill/850/all-info#latestSummary-content. The bill's summary states that he legislation "establishes a federal right for college athletes to market the use of their NIL or athletic reputation"; limits how athletic associations and conferences can regulate player NIL activities; authorizes the Federal Trade Commission to enforce player NIL rights; and "preempts more restrictive state laws relating to college athletes' NIL and athletic reputation rights." Sen. Christopher Murphy [D-CT] introduced a companion bill on the same day in S.238— College Athlete Economic Freedom Act. *See also* H.R.9033 — 116th Congress (2019-2020), College Athletes Bill of Rights, introduced by Rep. Janice Schakowsky [D-IL-9] on Dec. 18, 2020. The bill would prohibit an institution of higher education from interfering with NIL rights for college players; establish a Commission on College Athletics to protect interests of college athletes;

including a right to form a union.[212] Legislation proposes that major athletic programs share their revenue with smaller schools, for example, by having the major programs subsidize health insurance benefits and post-collegiate medical coverage for all NCAA players.[213]

As the disparity in resources between NCAA schools grows,[214] some Power Five basketball programs could consider the adoption of a professional employment model. College sports analysts have begun to contemplate a new conference with super-power teams.[215] Recently, Texas, and Oklahoma announced plans to leave the Big 12 and join the SEC, pressuring the Big Ten, ACC, and PAC-12 to form a vaguely defined alliance to counter the SEC's superior position for future media rights contracts.[216]

One college sports consultant estimates that a 32-team college football super league could make between two to five times more money compared to

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and create a medical trust fund to cover the cost of out-of-pocket expenses relating to any sports-related injury. Sen. Cory Booker [D.N.J.] introduced a companion bill in S.5062, College Athletes Bill of Rights, 116th Congress (2019-2020) on Dec. 17, 2020.

212. S.1929 — 117th Congress (2021-2022), sponsored by Sen. Christopher Murphy [D-CT], is a bill to establish collective bargaining rights for college athletes. *Also see* Dan Murphy, *Congressional Bill Introduced Would Allow College Athletes to Form Unions, Become Employees*, ESPN, May 27, 2021.

213. *See* Ross Dellenger, *NCAA Senate Hearing Brings Potential Solution for NIL's Biggest Obstacle Into Focus*, SI, June 9, 2021., reporting on Sen. Maria Cantwell's questioning of NCAA president Mark Emmert around the issue of legislation to require schools with high-revenue athletic programs to share their money with smaller schools. Emmert replied:

> There's a way to determine within D-I resources of how to cover those costs. There's a variety of different vehicles. The challenge everyone has to recognize is there's no NCAA money—it's all the schools' money. If the member schools want to, and I'd be willing to put this question to them, say 'How can we find a mechanism for funding out of pocket expenses at low-resource schools?'

*See also*H.R.2672— 116th Congress (2019-2020), NCAA Act, introduced by Rep. John Katko [R-NY-24]. The bill would require schools with intercollegiate athletic programs to (1) conduct annual baseline concussion testing for athletes, (2) implement due process procedures for students, and (3) guarantee athletically related student aid for up to five years, without revocation due to athletic skill or injury.

214. Alan Blinder, *Exiting Pac-12 Chief Urges a Bigger Playoff and a More Responsive N.C.A.A.*, N.Y. TIMES, June 7, 2021., reporting an interview with Larry Scott, the departing PAC-12 commissioners:

> I think it's become increasingly difficult for the N.C.A.A. to govern universities with disparities in resources, priorities and goals. The conferences with the largest resources have wanted to do more and more for student-athletes over the years, but because not everyone can afford it, it's been hard for the N.C.A.A. to be nimble and progress, and that's why we have some of the challenges that we have now.

215. *What Could a College Football Super League Look Like?*, ESPN, Apr. 21, 2021., stating: "If all the best teams play in the same league, that league would generate more money for those teams than they would earn in their current leagues…. With billions of dollars at stake, however, and plenty of conference realignment shenanigans in the not-so-distant past, no one can say with complete certainty that a college football Super League will never be hatched."

216. College Athletics Financial Information (CAFI) Database, available in http://cafidatabase.knightcommission.org/reports (see bottom of page, "About the Data"), explaining that "athletic financial data are based on revenue and expense reports from more than 230 public schools in NCAA's Division I that have a legal obligation to release the data (the NCAA does not release the data publicly)."

their revenue shares in their current conferences.[217] If the best college teams joined to create their own super-league, this would compare to the baseball wars at the turn of the Twentieth Century, when the Western League rose from a minor league rival to the National League to become the current American League.

In the following analysis, I explore the possibility that this will incentivize schools with national basketball brands and strong finances to match the competition from teenage professional leagues by adopting an employment model. My analysis relies on financial data that NCAA schools report annually to the NCAA, a private association, which are available on a free, public access website administered by the Knight Commission on Intercollegiate Athletics.[218] The data demonstrate the wide disparity in the financial soundness of schools from Power Five conferences. Kansas (Big 12), North Carolina (ACC), and Kentucky (SEC) have powerhouse basketball programs that reside in financially sound athletic departments. Cal (PAC-12) and Illinois (Big Ten) have weaker basketball brands within distressed athletic departments. In this analysis, I conclude that Kansas, North Carolina, and Kentucky have more financial resources to adopt an employment model for their basketball program than Cal and Illinois.

NCAA schools are required to report these finances by the Equity in Athletics Disclosure Act and the Integrated Postsecondary Education Data System.[219] The Knight Commission on Intercollegiate Athletics, along with *USA Today*, publishes the schools' financial reports.[220] Its website can be filtered for specific schools and their metrics for revenues and expenses. Charts 1.A through 1.C depict three financially strong athletic departments, while Charts 1.D and 1.E show financially strained athletic programs. I chose to present one school from each of the Power Five conferences based on annual revenue,[221] long term

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217. Dan Wolken, *Opinion: A College Football Super League Would Be Very Lucrative . . . For the Very Few*, USA TODAY, Apr. 21, 2021., reporting on an analysis from Jeff Nelson, president of Navigate, a consulting firm to four power conferences. Nelson notes that the Ohio State-Michigan football game generates between $10 to $15 million in value to the Big Ten television contract, while other games are worth between $1 to $2 million. *Id*. This assessment is generally confirmed in Andrew Zimbalist, *Rutgers' Athletics Deficit Reveals The Hidden Caste In The College Sports Hierarchy*, Forbes, Aug. 16, 2020.:

> It turns out there is also a sharp distinction between the top half and the bottom half among the 64 Power Five schools. Whereas the top 32 athletic programs have median generated revenues of $144.5 million and report a median operating surplus of $3.2 million in fiscal year 2018, the bottom 32 programs have median generated revenues of $98.1 million and a median operating deficit of $10.6 million.

218. Alan Blinder, *A.C.C., Big Ten and Pac-12 Form Coalition to Counter SEC's Might*, N.Y. TIMES, Aug. 24, 2021.

219. *Id*.

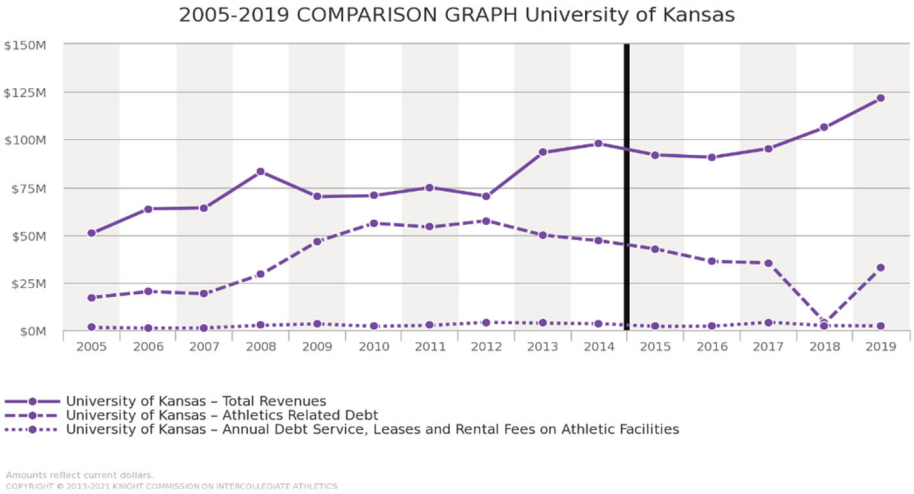
220. College Athletics Financial Information (CAFI) Database, *supra* note 217.

221. Revenue includes:

> Total Revenues (total revenues for the athletics program minus less transfers to the institution); Other Revenue (compensation and benefits provided by a third party; game program, novelty, parking and concession sales; sports camps and clinics; athletics restricted endowment and investments income; and, other operating revenue); Corporate Sponsorship, Advertising, and Licensing (revenue generated by the institution from royalties, licensing, advertisements and sponsorships); donor contributions (funds

debt,[222] and annual debt service.[223]

Chart 1.A



University of Kansas: From 2005 through 2019, the Kansas athletic program recorded annual revenues far in excess of total debt and annual debt service. Annual revenues were $91,860,673 in 2015; $90,658,829 in 2016; $95,251,461 in 2017; $106,307,326 in 2018; and $121,553,307 in 2019.[224] Total debt for those years ranged widely yet remained low compared to annual revenue: in 2015, $42,581,106; in 2016, $36,094,238; in 2017, $35,284,196; in

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contributed from individuals, corporations, associations, foundations, clubs or other organizations external to the athletics program above the face value for tickets); Competition Guarantees (revenue received from participation in away or neutral-site games); NCAA/Conference Distributions, Media Rights, and Post-Season Football (revenue received from the NCAA [including championships] and athletics conferences, media rights, and post-season football bowl games); Ticket Sales (revenue received from ticket sales for all NCAA-sponsored sports at an institution); Institutional/Government Support (revenue received from governments, direct funds from the institution for athletics operations, and costs covered and services provided by the institution to athletics (and for athletics debt) but not charged to athletics); Student Fees (fees paid by student and allocated for the restricted use of the athletics department); and Total Institutional/Government Support and Student Fees (combination of institutional/government support and student fees). *Id*., at Custom Reporting, *Where the Money Comes From (Athletics Revenue)*, at http://cafidatabase.knightcommission.org/reports (click on "Data Custom" and see the left-hand column of all sources of revenues, and click on each footnote for a revenue source to verify the information *supra*).

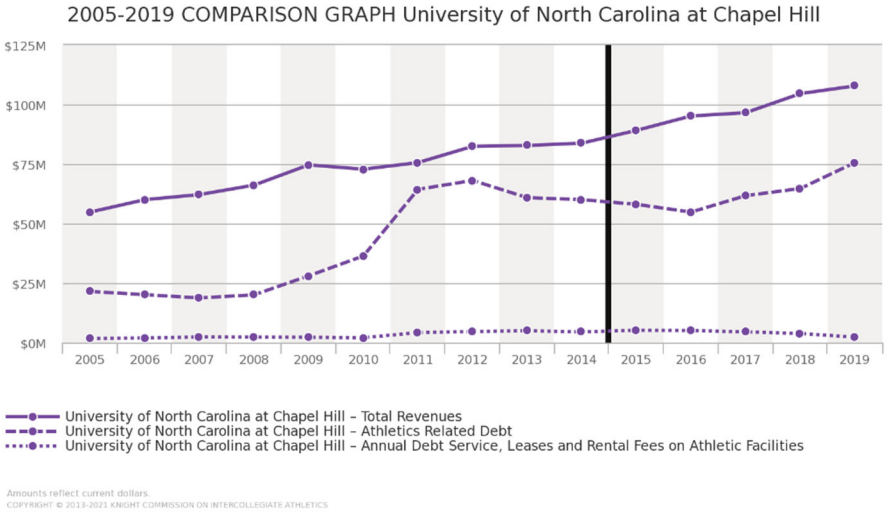
222. *Id*., Athletics Related Debt (use the same process for revenue but see the right-hand column, and scroll down to "Athletic Related Debt," then click on the footnote to verify that this source provides data on "total athletic debt balances owed by the athletic department").

223. *Id*., Annual Debt Service (use the same process for revenue but see the right-hand column, and scroll down to "Athletic Debt Service, Leases, and Rental Fees on Athletic Facilities," then click on the footnote to verify that this source provides data on "payment of principal and interest on athletic facilities debt, leases and rental fees in the reporting year").

224. College Athletics Financial Information (CAFI) Database, *supra* note 217 athttp://cafidatabase.knightcommission.org/reports/dce7c982 (results also available from the author).

2018, $3,953,422; and in 2019, a very large increase to $32,836,602.[225] Annual debt service (including lease and rental fees) was low and steady relative to revenue: $2,048,194 in 2015; $2,113,944 in 2016; $4,210,479 in 2017; $2,412,442 in 2018; and $2,252,544 in 2019.[226] In general, Kansas was in a sound financial condition for 2015-2019, and over the longer period dating to 2005.

Chart 1.B



University of North Carolina: North Carolina reported sound finances from 2005 through 2019. Annual revenues were consistently greater than total debt and annual debt service. Recently, revenues rose steadily: In 2015, they totaled $89,128,256; in 2016, $95,175,985; in 2017, $96,551,626; in 2018, $104,571,404; and in 2019, $107,812,619.[227] Total debt was significantly below annual revenues: in 2015, $58,058,409; in 2016, $54,824,409; in 2017, $61,719,291; in 2018, $64,718,474; and in 2019, $75,629,285.[228] North Carolina's annual debt service (including lease and rental fees) was low and steady relative to revenue: in 2015, $5,190,674; in 2016, $5,077,407; in 2017, $4,525,467; in 2018, $3,837,320; and in 2019, $2,305,346.[229] Like Kansas, North

225. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/cacdd673 (results also available from the author).

226. College Athletics Financial Information (CAFI) Database, *supra* note 217 athttp://cafidatabase.knightcommission.org/reports/10a47f0a, (results also available from the author).

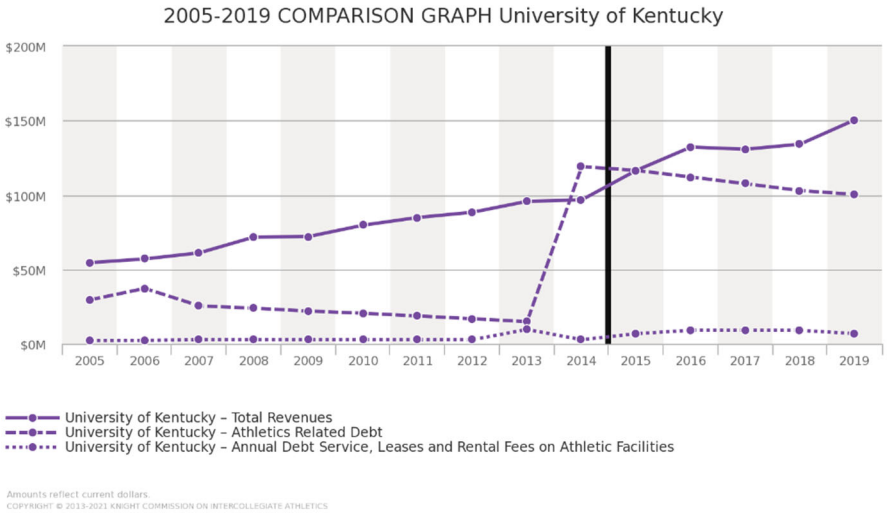
227. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/f6876758 (results also available from the author).

228. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/487134ca http://cafidatabase.knightcommission.org/reports/f6876758 (results also available from the author).

229. College Athletics Financial Information (CAFI) Database, *supra* note 217 at, http://cafidatabase.knightcommission.org/reports/f6876758 (results also available from the author).

Carolina athletic finances were in good condition for 2015-2019, and over the period dating to 2005.

Chart 1.C



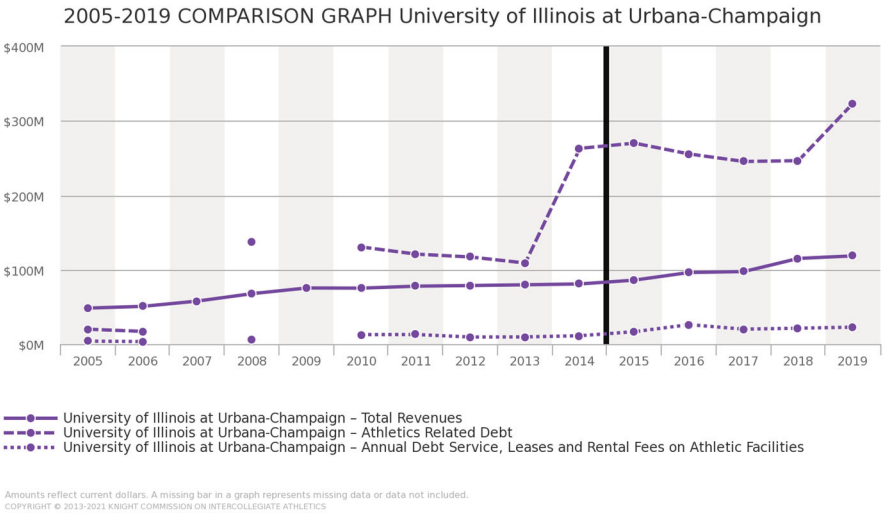
University of Kentucky: With the exception of 2014, when its overall debt exceeded annual revenues, Kentucky's finances were in good condition from 2005-2019. Kentucky's revenues rose sharply from 2015-2019. In 2015, they totaled $116,494,690; in 2016, $132,180,246; in 2017, $130,706,744; in 2018, $134,154,614; and in 2019, $150,435,842.[230] Kentucky's total debt was significantly below annual revenues from 2005 through 2013, then rose sharply in 2014. However, from 2015 through 2019, Kentucky's total debt dropped steadily. In 2015, this figure was $116,493,061; in 2016, $112,058,061; in 2017, $107,560,307; in 2018, $102,930,445; and in 2019, $100,373,240.[231] While Kentucky's annual debt service including lease and rental fees was higher compared to Kansas and North Carolina, it was low from 2005-2019. In 2015, annual debt payments totaled $6,798,859; in 2016, $9,103,938; in 2017, $9,051,450; in 2018, $9,047,967; and in 2019, $6,840,023.[232] Like Kansas and North Carolina, Kentucky athletic finances were in good condition for 2015-2019, and over the period dating back to 2005.

230. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/e6e0de3a (results also available from the author).

231. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/f0cac1cb (results also available from the author).

232. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/2aa368b2 (results also available from the author).

Chart 1.D



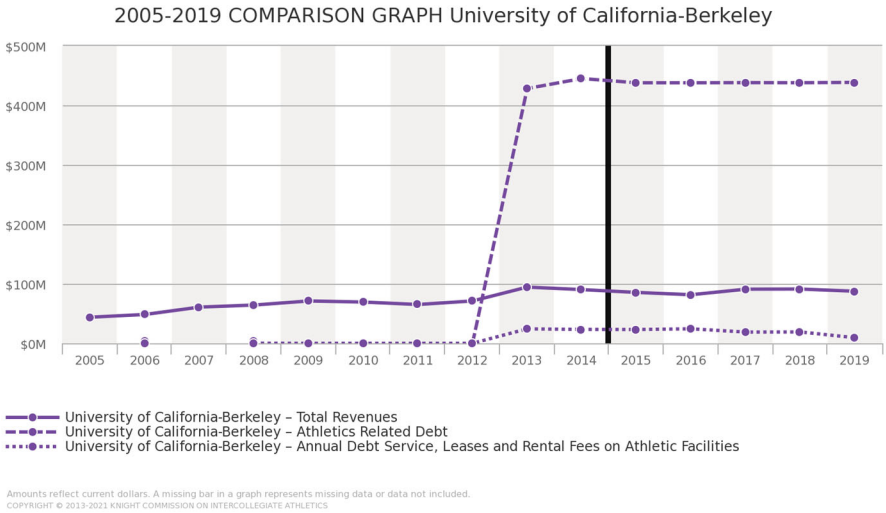
University of Illinois at Urbana-Champaign: Unlike Kansas, North Carolina, and Kentucky, Illinois's total debt trended consistently above annual revenues, with a growing gap. Beginning with revenue, Illinois recorded strong gains starting at $85,998,659 in 2015, rising to $96,249,500 in 2016 and to $97,447,731 in 2017, before rising sharply again in 2018 to $115,132,186 and to $118,565,501 in 2019.[233] However, total debt for Illinois was far above the annual revenue line: in 2015, this debt totaled $270,037,697; in 2016, $255,501,079; in 2017, $245,441,944; in 2018, $246,518,481; and in 2019, $323,509,449.[234] Illinois' annual debt payments including lease and rental fees were much larger compared to Kansas, North Carolina, and Kentucky, and were large relative to its revenues. In 2015, annual debt payments totaled $16,722,890; in 2016, $26,174,229; in 2017, $20,085,545; in 2018, $21,384,837; and in 2019, $22,777,734.[235]

Chart 1.E

233. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/e53c5fb0 (results also available from the author).

234. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/f3164041 (results also available from the author).

235. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/2aa368b2 (results also available from the author).



University of California, Berkeley: In contrast to Kansas, North Carolina, and Kentucky, Cal's total debt far exceeded annual revenues from 2012-2019. On the revenue side, Cal registered anemic growth from 2015-2019: In 2015, revenue totaled $85,539,904; in 2016, $81,653,024; in 2017, $90,976,576; in 2018, $91,247,489; and in 2019, $87,500,758.[236] Cal's total debt, which spiked in 2012, remained high in 2015-2019: this debt totaled $437,940,000 in 2015; $437,940,000 in 2016; $438,161,849 in 2017; $438,018,196 in 2018; and $438,564,941 in 2019.[237] In contrast to Illinois' annual debt payments, Cal's costs declined sharply over 2015-2019, though they remained high compared to Kansas, North Carolina, and Kentucky. In 2015, annual debt payments (including lease and rental fees) totaled $23,211,000; in 2016, $24,362,301; in 2017, $18,881,198; in 2018, $19,071,191; and in 2019, $9,431,659.[238]

Table 3 summarizes Charts 1.A through 1.E by depicting the ratio of each school's annual revenues to total debt, and annual revenue to yearly debt service, for 2015-2019. Debt obligations were used for this analysis because principal and interest payments on bonds and loans are non-discretionary expenses that can only be lowered by paying off, or refinancing, the underlying debt. Table 3 offers a comparison of each school's financial capacity to take on the expenses of employing seven basketball players at current rates for G League Ignite and OTE players—a cost in the 2021-2022 season that Table 2 shows is almost $5 million.

236. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/4f4bbbe9 (results also available from the author).

237. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/f8100188 (results also available from the author).

238. College Athletics Financial Information (CAFI) Database, *supra* note 217 at http://cafidatabase.knightcommission.org/reports/2279a8f1 (results also available from the author).

Table 3
Ratio of Power Five School Annual Revenues to Total Debt and Annual Debt Payments (2015-2019)

	Ratio of Annual Revenue to Total Debt	Ratio of Annual Revenue to Annual Debt Costs
Kansas		
2015	2.16	44.74
2016	2.51	42.88
2017	2.70	22.69
2018	26.89	44.07
2019	3.75	55.96
Kentucky		
2015	1.00	17.16
2016	1.18	14.52
2017	1.22	14.44
2018	1.30	14.83
2019	1.50	21.99
North Carolina		
2015	1.40	17.17
2016	1.77	18.75
2017	1.56	21.33
2018	1.62	27.25
2019	1.43	46.77
Illinois		
2015	0.32	5.14
2016	0.38	3.68
2017	0.40	4.85
2018	0.48	5.38
2019	0.37	5.21
Cal		
2015	0.19	3.69
2016	0.19	3.35
2017	0.21	4.82
2018	0.21	4.78
2019	0.20	9.28

Table 3 shows that Kansas, North Carolina, and Kentucky kept their borrowing costs within proportion to revenues. From 2015-2019, their annual revenues ranged from 1.00 to 2.70, with one small exception involving a very favorable 26.89 ratio for Kansas in 2018. These basketball powers kept their annual borrowing costs low relative to revenues. Kansas had the least budget impairment due to borrowing costs, with revenue to debt service payment ratios ranging from 22.69 to 55.96. Kentucky's revenue to debt service payment ratios ranged from 14.44 to 21.99, while North Carolina's revenue to debt service payment ratios ranged from 17.17 to 46.77.

In contrast, Table 3 shows the magnitude of debt burden carried by Illinois and Cal. Illinois' ratio of annual revenues to total debt ranged from 0.32 to 0.48, meaning that long-term debt ranged from 2 to 3 times the money that flowed each year to the program. Cal's ratio of annual revenues to total debt was worse, ranging from 0.19 to 0.22, meaning that long-term debt ran about 5 times more than the incoming money. Notably for Illinois and Cal, their revenues did not

grow enough to justify optimism that either program could pay off these debts without a bailout or huge gift. Illinois' revenue to debt service payment ratios ranged from 3.68 to 5.38, while Cal's revenue to debt service ratios ranged from 3.35 to 9.28. For both schools, their athletic programs usually spent approximately 15% to 20% of their annual budgets on debt costs.

VI. CONCLUSIONS

Table 3 shows that Power Five schools have widely divergent abilities to respond to the emerging threats to the NCAA amateur model. Multiple financial threats confront all Power Five schools. New competition from teenage professional basketball leagues is siphoning their talent pool. State NIL laws advantage and disadvantage schools to varying degrees in recruiting players.[239] These laws also portend some degree of financial competition for publicity between schools and their most marketable players. Antitrust litigation threatens to undermine the NCAA's core rules relating to amateurism. Proposed federal legislation threatens to saddle athletic departments with large financial obligations, including revenue sharing with smaller schools; responsibilities to pay athletes for injuries years after their eligibility is exhausted; and a requirement to engage in collective bargaining.

The current era for Power Five schools is reminiscent of the baseball wars from 1882-1915. The similarities include investor-driven leagues that were designed to compete with the sports establishment; monopsony control of players that tied them to their teams and threatened them with league boycotts if they accepted employment with a rival; legal skirmishes between players and the dominant leagues to establish the cartel's reach to enforce its labor market rules; and the Supreme Court's eventual involvement near the end of these protracted battles between players and the dominant leagues.

Then and now, legal regulation of athletic labor markets was at the heart of the baseball wars and are at the heart of NCAA's attempts to fend-off player efforts to make money during their collegiate years. Most courts ruled that baseball players were free to sign with new teams after they played out their contractual season with NL teams. Today, college players are not asking courts to declare the amateur model as a *per se* antitrust violation, but the *O'Bannon* decision set into motion current NIL laws that erode the NCAA's amateurism

239. My working paper, "Do Student Athletes Get NIL? The Sherman Act and University Restraints on Player Access to Sports Branding Markets," analyzes pay restrictions for players that are embedded in 25 state NIL laws. Pay restrictions in NIL laws range from 4 points (New Mexico) to 45 points (Illinois), indicating great variance in the regulation of NIL pay rights for athletes. There is no practical way to estimate in early 2022 how much effect– if at all– these laws will have on recruitment of players. Considering these pay restrictions and the debt data in this study, perhaps the most certain conclusion is that the University of Illinois at Urbana-Champaign faces dual headwinds of high debt and a potentially disadvantageous NIL law for recruiting players. California has a player-friendly NIL law, with only eight pay-restriction points. This might enable Cal Berkeley to attract better athletes, which in turn could brighten the financial outlook for the athletic program.

model. The *Alston* case signifies a further erosion of the NCAA's amateurism model. Legal regulation of athletic labor is rapidly spilling over into state legislatures and Congress.

Then and now, the economics of professional sports eventually exerted pressure on the dominant leagues to change. The National League outlasted weak competitors, bought-out and idled successful competitors, and absorbed strong competitors who pirated their best players. Top pay for top baseball players soared ten-fold from the start to the end of the baseball wars. Currently, pay for top teenage basketball players has grown eight-fold in three seasons.

Disruptive leagues succeed when they are well-financed, deploy savvy business models, and receive favorable court rulings. The confluence of these factors enables elite athletes to earn pay through competition by employers for their unique talents. Just as the baseball wars created winners and drop-outs among teams and leagues, the NCAA's current turbulence—particularly as this affects Power Five schools— may realign 65 athletic programs into one super-league that offers market-based pay to their basketball players. Poorly financed programs may be left behind with the amateur status that they have fiercely defended.

In 1909, the Intercollegiate Athletic Association's annual proceedings featured a lively disagreement, formally titled: "Debate, Should Any Student in Good Collegiate Standing Be Permitted to Play in Intercollegiate Baseball Contests?" Prof. J.P. Welsh argued in the affirmative:

What constitutes a professional baseball player? Does a college student who, during a portion of the college year, when it does not interfere with his college duties, accepts pay for playing baseball, thereby become a professional? I contend most emphatically that he does not. He is still a college student. His skill as a player is the result of his practice in college sports. Nobody thinks of calling a student who earns money by singing or by playing some musical instrument, a professional musician. Is the college student who, during vacation or any other time, by writing something of merit or by going on the stage, thereby made a professional, or excluded from the college debating club, or from the staff of the college paper, or miscellany, or the college theatricals?[240]

This study chronicles the long history of college athletics exploiting its amateur model, and the glacial pace of court rulings that expose this camouflage for the benefit of colleges and universities. The recent emergence of disruptive basketball leagues for teenagers offers the best hope for vindicating Prof. Welsh's view that college athletes can receive pay for their play and still be students in good standing.[241]

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240. PROCEEDINGS OF THE THIRD ANNUAL CONVENTION, supra note 107, publishing, at 53-54 (PDF # 119-120), available in https://babel.hathitrust.org/cgi/pt?id=mdp.39015039707107&view=1up&seq=119&q1=welsh.

241. In this vein, *see* Alston, *supra* note 151, Justice Kavanaugh's dissenting opinion), at 3: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on

the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor.