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### Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon

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# ATHLETIC COMPENSATION FOR WOMEN TOO? TITLE IX IMPLICATIONS OF *NORTHWESTERN* AND *O'BANNON*

ERIN E. BUZUVIS\*

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This Article examines the role that Title IX has played in the debate over college athlete compensation, including the litigation that seeks to challenge the National Collegiate Athletic Association's longstanding policies that prohibit members from compensating athletes or sharing with them the revenue produced by the licensing of their names and likenesses.<sup>1</sup>

Title IX, a federal statute passed in 1972, prohibits sex discrimination in educational institutions that receive federal funds.<sup>2</sup> In Title IX's early days, the NCAA was not a great fan of the law. In fact, the association backed political and litigation efforts in the 1970s and 80s aimed at foreclosing the statute's application to athletics.<sup>3</sup> Today, however, as the NCAA faces public criticism and legal action over its policies that prohibit compensation for college athletes, it has taken to using Title IX as a defensive shield. In response to the argument that withholding compensation from athletes whose labor generates millions of dollars of revenue is tantamount to exploitation, the NCAA argues that paying athletes in revenue sports, coupled with the commensurate obligation under Title IX to pay female athletes, would be prohibitively expensive for college athletics as we know it.<sup>4</sup> Ergo, no pay for play.

1. Northwestern Univ. & Coll. Athletes Players Ass'n., N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), *available at* <http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f>; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

2. 20 U.S.C. §§ 1681–1688 (2012).

3. RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETICS REFORM* 147 (2011); Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 11 (2001).

4. *See, e.g.*, NCAA's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, In re NCAA Student-Athlete Name and Likeness Licensing Litigation, No. 09-CV-1967-CW, 2013 WL 6818041, at \*22–24 (N.D. Cal. Dec. 12, 2013) (arguing that amateurism policy helps ensure member institutions' financial ability to offer women's sports and less prominent men's sports); Declaration of James E. Delany in Support of the NCAA's Class Certification Opposition Brief, In re NCAA Student-Athlete Name and Likeness Licensing Litigation, No. 09-CV-1967-CW, 2013 WL 1100330, at ¶ 10 (N.D. Cal. Mar. 14, 2013) (Big Ten Commissioner argues that pay-for-play would "seriously undermine the objectives of Title IX and reduce other athletic opportunities for students, regardless of gender."); *see also* Editorial Board, *Pay for Play and Title IX*, N.Y. TIMES, Mar. 22, 2014, [http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html?\\_r=0](http://www.nytimes.com/2014/03/23/opinion/sunday/pay-for-play-and-title-ix.html?_r=0); Kevin Trahan, *Why the NCAA's Title IX Excuse No Longer Works*, SB

This position has made Title IX the enemy of those who support the reform of college athletics to eliminate the exploitation of college athlete labor.<sup>5</sup> If Title IX does not require schools that pay male athletes in revenue sports to also pay female athletes in nonrevenue sports, then the NCAA cannot sustain its positioning of Title IX as an obstacle to athlete compensation. The debate about what Title IX would or would not require is therefore operating as a proxy for whether college athletics should or should not reform in a way that addresses the exploitation of uncompensated labor.

This Article seeks to advance two positions. First, that the NCAA is right: In a world where male athletes in revenue sports are paid, Title IX would require payment of female athletes using some measure of equality. Second, that NCAA's critics are right: athletes are being exploited by the present system. But, the reformers needn't fear the NCAA's use of Title IX as a shield. Used properly, Title IX presents the reformers with a sword. If, as the NCAA has suggested, Title IX implications render the application of labor and antitrust law to college athletics prohibitively expensive, the NCAA's only choice will be to reform college athletics to restore the primacy of educational over commercial values, or alternatively, to separate the commercial interests from higher education entirely. Either approach would simultaneously address concerns about the exploitation of uncompensated labor, gender equity, and cost containment. For this reason, it is important that college athletics confront the Title IX implications of decisions that result in compensation for athletes.

This Article will proceed in three parts. First, it will describe the controversy over athlete compensation, including the NCAA's amateurism position over time and the challenges to that position that have been mounted in courts of public opinion as well as in the courts of law. One such case is that of Northwestern University's football players, who won a momentous decision in the spring of 2014, when a regional-level opinion of the National Labor Relations Board agreed that they were being treated like employees and thus had the right to engage in collective bargaining with their institution. Another is the class-action lawsuit lead by former UCLA basketball player Ed O'Bannon against the NCAA. This summer, a

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NATION (Apr. 14, 2014), <http://www.sbnation.com/college-football/2014/4/14/5613112/ncaa-title-9-ed-obannon>; Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), [http://espn.go.com/college-sports/story/\\_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics](http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics).

5. See, e.g., Marc Edelman, *When It Comes to Paying College Athletes Title IX Is More of a Red Herring than a Pink Elephant*, FORBES (Feb. 4, 2014), <http://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/>; Ellen J. Staurowsky, "A Radical Proposal": *Title IX Has No Place in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575 (2012).

federal district court agreed with the plaintiffs that the NCAA violated federal antitrust law by prohibiting institutions from allowing athletes to share in the revenue institutions derive from licensing their athletes' names and likenesses.

Second, this Article will examine the consequences for college athletics under Title IX should athletes prevail in any of the litigation challenging their exploitation in revenue sports. It concludes that college athletic departments would have a legal obligation under Title IX to provide commensurate compensation for female athletes. Though such an outcome conflicts with principles of capitalism, which would otherwise operate to limit compensation to those athletes whose labor has value on the open market, it is nevertheless the right result. That is because an institution's obligation to pay female athletes arises from application of a civil rights law, which in the context of Title IX and other such laws, reflects democratic consensus of the priority equality over the freedom of private entities to make unconstrained market choices in such fundamental contexts as education.

In its third Part, this Article will reframe the application of Title IX to athlete compensation as a tool, rather than an obstacle, to achieving college athletics reform. It takes the NCAA at its word that complying with a requirement under *Northwestern* or *O'Bannon* to allow some degree of athlete compensation, in combination with Title IX, is prohibitively expensive, at least for most institutions. This reality could therefore motivate college athletics to reform its way out of having to comply with labor and antitrust law by curtailing the ways in which college athletics has become overly commercialized, since such reform would operate to neutralize the application of both decisions. Alternatively, college athletics departments could reform themselves by abandoning their connection to education and the subsidy that comes with it. Purely commercialized programs would embrace the obligation to comply with antitrust and labor law, but would insulate themselves from Title IX. By helping to push hybrid programs into the paradigm of one or the other, educational or commercial, the Title IX implications of *Northwestern* and *O'Bannon* can help to leverage meaningful athletics reform that minimizes athlete exploitation, promotes gender equity, and contains cost.

### I. THE CONTROVERSY OVER COLLEGE ATHLETE AMATEURISM

Intercollegiate athletics began in August 1852, when the rowing teams from Harvard and Yale met at Lake Winnepesaukee, New Hampshire, for an exhibition race.<sup>6</sup> This athletic contest did not occur because students were passionate about rowing and eager to test their skills against like-minded

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6. SMITH, *supra* note 3, at 1.

competitors. It was not the brainchild of university officials seeking to foster school spirit through friendly athletic rivalry. Nor was it suggested by the faculty seeking to enhance students' character education by immersion in such concepts as discipline and endurance. Rather, the first intercollegiate athletic competition was a commercial proposition. It was sponsored by the Boston, Concord, and Montreal Railroad as a way to promote travel and tourism to the New Hampshire lakes' region. The nascent railroad paid for the competitors' vacations in exchange for the athletes' participation in the exhibition race before a thousand spectators.<sup>7</sup>

Notably, the origin of intercollegiate athletes occurred under pretenses that are prohibited today. The NCAA, the association of colleges and universities that regulates intercollegiate athletics, promotes the view that students who participate in intercollegiate athletics embody the ideals of amateurism. They play for the love of the game, not for perks or compensation. It uses the phrase "student-athlete" to drive home the distinction between college players and their professional counterparts,<sup>8</sup> and its slogan describes them as mostly "going pro in something other than sport."<sup>9</sup> Unlike their early predecessors, today's "student-athletes" are prohibited from selling their services to the likes of the BCM Railroad in exchange for compensation in the form of free vacations.<sup>10</sup>

The NCAA's position on amateurism has evolved over the years. It has also been controversial long before litigation came to a head this year. That history, as well as the present-day controversy—including the litigation—is the subject of this Part.

#### A. Background on the NCAA's Amateurism Policy

The NCAA's amateurism policy has been controversial throughout the organization's history. At the turn of the last century, college and

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7. *Id.*; STEVEN A. RIESS, *SPORT IN INDUSTRIAL AMERICA 1850–1920* (2012).

8. Ellen J. Staurowsky & Allen J. Sack, *Reconsidering the Term Student-Athlete in Academic Research*, 19 J. OF SPORT MANAGEMENT 103, 105 (2005).

9. Press Release, *NCAA Launches Latest Public Service Announcements, Introduces New Student-Focused Website*, NCAA (Mar. 13, 2007), <http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/NCAA%2BLaunches%2BLatest%2BPublic%2BService%2BAnnouncements%2BIntroduces%2BNew%2BStudent-Focused%2BWebsite.html>.

10. See generally NCAA BYLAWS, art. 12, *reprinted in* Nat'l Collegiate Athletics Ass'n, 2014–2015 NCAA DIVISION I MANUAL OCTOBER VERSION [hereinafter NCAA MANUAL], at 57, *available at* <http://www.ncaapublications.com/p-4380-2014-2015-ncaa-division-i-manual-october-version.aspx>; NCAA BYLAWS, art. 12.1.2(a), *reprinted in* NCAA MANUAL, at 59 (declaring a student-athlete ineligible for competition if he or she "uses his skills for any form of pay in that sport," where "pay" is defined to include "salary, gratuity, or any form of competition"); NCAA BYLAWS, art. 12.1.2.1.4.3, *reprinted in* NCAA MANUAL, at 60 (limiting what a student-athlete can accept from an outside sponsor to include only "actual and necessary expenses.").

university leaders created the NCAA under political pressure to standardize the rules of football in the hopes of lowering the game's mortality rate.<sup>11</sup> At the NCAA's first convention in 1906, however, the topic of amateurism was also on the table, as some delegates argued for rules that would have prohibited athletic departments from accepting any funding other than direct support from the college or university.<sup>12</sup> But instead, the prevailing model of amateurism that emerged from that convention focused on keeping the students, not the institutions, free of influence and pressure that comes from money. Universities and their alumni could not offer compensation for a student's athletic services, and students were deemed ineligible if they had ever accepted payment for competing in a sporting event.<sup>13</sup>

At the same time, however, colleges and universities were realizing that athletic programs could generate some revenue and, perhaps of even greater value, institutional publicity.<sup>14</sup> These commercial pressures made it difficult to resist the temptation to field competitive teams, especially in football. And since the NCAA at the time relied on the honor system method of compliance, member institutions found it easy to skirt the rules: coaches paid athletes from funds designated for "needy students" or found fake jobs for them on campus.<sup>15</sup> Alumni contributions subsidized tuition and living expenses for players, and financial aid offices subsidized tuition for athletes who had no academic interest or ability.<sup>16</sup> A report published by the Carnegie Foundation for the Advancement of Teaching in 1929 found that 81 out of 112 colleges studied subsidized athletes' tuition by means such as jobs, loans, athletic scholarships, and outright compensation and other perks.<sup>17</sup> Such evidence of the failure of NCAA's amateurism code has caused some scholars to liken it to Prohibition: similarly difficult to enforce, and serving only to drive the targeted conduct underground.<sup>18</sup> Eventually, institutions didn't even try to keep these practices hidden. When conferences began adopting conflicting positions on amateurism, as happened, for example, when the Southeastern Conference became first to

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11. W. Burette Carter, *The Age of Innocence: The First 25 Years of The National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215 (2006).

12. *Id.* at 222-23; RANDY R. GRANT *ET AL.*, THE ECONOMICS OF INTERCOLLEGIATE SPORT 24-25 (2008). The initial bylaws also banned recruiting and participation by freshmen. *Id.*

13. GRANT, *supra* note 12, at 22-23.

14. ALLEN L. SACK & ELLEN J. STAUROWKSY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 20 (1998).

15. *Id.*

16. *Id.* at 23.

17. *Id.* at 36.

18. *Id.*

openly allow athletic scholarships in 1936, the NCAA was powerless to object.<sup>19</sup>

Intolerance for these abuses eventually led the NCAA to undertake a massive reform effort in 1948. Later dubbed the "Sanity Code," this reform attempted to recommit the membership to a purer model of athlete amateurism in which athletic scholarships, along with other vestiges of professionalism, would be prohibited. The Sanity Code also created new mechanisms for enforcement that, for the first time, created the possibility that violators would be expelled from the NCAA.<sup>20</sup> Quickly, however, the NCAA caved to the preferences of its more powerful members, and in 1950 changed course on the issue of athletic scholarships. That year, the NCAA membership voted to allow them so long as they were administered by the institution's financial aid office rather than the athletics department.<sup>21</sup> Still, even after they were permitted, some colleges and universities declined to offer athletic scholarships. The Ivy League voted in 1954 to prohibit athletic scholarships and enforce other measures designed to ensure athletics remained secondary to academic mission of its member institutions.<sup>22</sup> Other schools that shunned scholarships out of commitment to an educational model of athletics eventually became Division III when the NCAA adopted its three-division structure in 1973.<sup>23</sup>

Meanwhile, athletes and others began taking the view that athletic scholarships operated as compensation and rendered athletes employees of the college or university—in particular, for purposes of workers' compensation law.<sup>24</sup> In 1963, a California court ruled that a Cal Poly football player killed in a plane crash returning from a game in 1960 was an employee for purposes of California's workers compensation law.<sup>25</sup> This ruling, which allowed the players' family to recover financial compensation for his death, "sent shock waves through the NCAA."<sup>26</sup> Leadership counseled member institutions "to avoid the impression that athletes had to participate in sports in order to retain their athletic scholarships."<sup>27</sup> The NCAA coined the phrase "student-athlete" to distance collegiate athletes from their professional counterparts, and advised its members to include disclaimers stating scholarships did not constitute payment for participation.<sup>28</sup> As a result of this veneer, NCAA members

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19. SMITH, *supra* note 3, at 85, 89; GRANT, *supra* note 12, at 31.

20. GRANT, *supra* note 12, at 31.

21. *Id.* at 32.

22. SACK & STAUROWSKY, *supra* note 14, at 49.

23. *Id.*

24. *Id.* at 80–81.

25. Van Horn v. Indus. Accident Comm'n, 219 Cal. App. 2d 457, 460 (1963).

26. SACK & STAUROWSKY, *supra* note 14, at 81.

27. *Id.* at 82.

28. *Id.* at 83; *see also* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING



prevailed in the next wave of workers compensation decisions. The Indiana Supreme Court ruled in 1983 that a player paralyzed during basketball practice could not recover under workers compensation law as an employee of Indiana State because he did not consider the scholarship to be compensation, as evidenced by his failure to report it on his tax returns.<sup>29</sup> That same year, the Michigan Court of Appeals held that an injured student-athlete was nevertheless not an employee under workers compensation law.<sup>30</sup> Though the court considered an athletic scholarship to be compensation,<sup>31</sup> that factor was outweighed by other findings that weighed against the athlete's employee status, such as the lack of the university's control over the athlete and the status of football as a non-integral aspect of the university's business.<sup>32</sup> Remarkably, these victories came notwithstanding changes to the NCAA bylaws—one (1967) allowing universities to cancel scholarships during the award period for misconduct and insubordinate and another (1973) that prohibited multi-year scholarships<sup>33</sup>—that had rendered the continuation and renewal of athletic scholarships to be conditioned on performance, a hallmark of employment-based compensation.

#### B. The NCAA's Amateurism Policy Today

The NCAA's present policy on amateurism permits member institutions in Division I and II to offer scholarships tied to a student's participation in athletics. Bylaws limit athletics grant-in-aid to the cost of tuition, room and board, and books.<sup>34</sup> They also prohibit member institutions from offering any additional payments beyond grant-in-aid that would in any way compensate students for their athletic participation,<sup>35</sup> and prohibit athletes themselves from accepting such compensation from third parties.<sup>36</sup>

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COLLEGE ATHLETES 72 (1995) (on the coining of "student-athlete.").

29. *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983).

30. *Coleman v. Western Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983).

31. *Id.* at 226.

32. *Id.* at 226–27. The court also found it relevant that the university could not cancel the scholarship based on performance, though this was not true. SACK & STAUROWSKY, *supra* note 14, at 87–88.

33. GRANT, *supra* note 12, at 35; SACK & STAUROWSKY, *supra* note 14, at 83–84.

34. NCAA BYLAWS, art. 15.02.5, *reprinted in* NCAA MANUAL, *supra* note 10, at 189. For athletes who are otherwise eligible for other institutional financial aid (i.e., that is not based on athletics), the bylaws cap their awards at the cost of attendance. NCAA BYLAWS, art. 15.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 190.

35. Otherwise, the only other payment an athlete may receive from his or her institution is going-rate compensation for services actually rendered in the context of a work-study job. NCAA BYLAWS, art. 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 59; NCAA BYLAWS, art. 12.4.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 67.

36. The bylaws prohibit student-athletes from accepting direct or indirect

The restriction on compensation from third-parties operates to prevent athletes from licensing their names, images, and likeness, to those, like broadcasters, video game producers, and merchandise manufacturers, who would otherwise pay the athlete for that right. Relatedly, as a condition for eligibility, athletes sign a form that authorizes the NCAA and third parties acting on its behalf to use their names and likeness to promote the association's events.<sup>37</sup> The form apparently operates to relinquish athletes' rights in perpetuity to the commercial use of their names, images, and likenesses, including after they graduate.<sup>38</sup>

While athletes themselves are restricted to amateur status, there is nothing amateur about the big time collegiate athletic programs for which they play. Institutions that compete in the NCAA's Division I—particularly, the Football Bowl Subdivision—invest millions of dollars in facilities, operating and recruiting costs, and coaches' salaries,<sup>39</sup> and they expect a positive return, whether that be from the distribution of bowl game television contracts, NCAA basketball tournament proceeds, season ticket sales, or other sources.<sup>40</sup> Motivated by business objectives rather than educational ones, college athletic departments drive the competitive market for well-compensated head coaches (who are sometimes the highest paid public employee in their state) and spend lavishly on amenities and facilities designed to attract the top recruits.<sup>41</sup> Some institutions do manage to profit handsomely on the investments they make in their football and men's basketball programs.<sup>42</sup> However, it is these profits that open up big-

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compensation or gifts in any way connected to their participation as college athletes, including sponsorships in excess of "actual and necessary expenses" to participate in non-collegiate competitions. NCAA BYLAWS, art. 12.1.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 59.

37. NCAA BYLAWS, art. 12.5.1.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 68; NCAA BYLAWS, art. 12.5.2, *reprinted in* NCAA MANUAL, *supra* note 10, at 71; NCAA Form 08-3a.

38. *O'Bannon v. NCAA*, Nos. C-09-1967-CW, C-09-3329-CW, C-09-4882-CW, 2010 WL 445190 at \*1 (N.D. Cal. Feb. 8, 2010).

39. In the Football Bowl Subdivision, institutions' median expenditures on athletics in fiscal year 2013 was \$62,227,000, while the highest reported was \$146,808,000. NCAA REVENUES & EXPENSES DIVISION I REPORT 24, tbl. 3.1 (2014), *available at* <http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf>. Football programs are the most expensive; the median expenditure for football programs was \$15,279,000 and the highest reported was \$41,550,000. *Id.* at 25, tbl. 3.4.

40. *See id.* at 30, tbl. 3.7 (breaking down revenue by source).

41. *See id.* at 32–33, tbl. 3.9 (providing a breakdown of expenses by type); KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, COLLEGE SPORTS 101: A PRIMER ON MONEY, ATHLETICS, AND HIGHER EDUCATION IN THE 21ST CENTURY 11–12, 16–17 (2009), *available at* <http://www.knightcommission.org/images/pdfs/cs101.pdf> (describing arms race in expenditures for facilities and coaches' salaries).

42. The reported median figure for revenue generated by Division I FBS athletics programs was \$41,897,000 in 2013; the highest reported was \$165,691,000. NCAA

time athletic programs to the criticism that they are exploiting the free labor of athletes who make those profits possible.<sup>43</sup>

Defenders of amateurism refute arguments that athletes are exploited by pointing out that athletes often receive scholarship assistance to attend college.<sup>44</sup> They argue that some athletes receive federal Pell Grants (need-based financial aid) in addition to their athletic scholarships, which may exceed the cost of attendance of for some athletes.<sup>45</sup> Yet, proponents of athlete compensation argue that for many athletes, scholarship and other support is insufficient to cover the true cost of attending college.<sup>46</sup> Moreover, the time commitment required of athletes in these big-time programs precludes many of them from holding down the kind of part-time job that other college students have to make ends meet. In addition, it is not always clear that athletes receive a meaningful education in exchange for their athletic participation. Athletes are routinely clustered into easy and potentially useless majors, denied opportunities for academic enrichment such as internships, and assigned to “tutors” complicit in academic fraud.<sup>47</sup>

REVENUES & EXPENSES DIVISION I REPORT, *supra* note 39, at 22, tbl. 3.1. Football programs were the most lucrative. The median reported figure for football revenue was \$20,278,000 and the highest was \$109,400,000. *Id.* at 25, tbl. 3.4.

In terms of *net* revenue, only 20 of the 123 institutions in Division I FBS reported a profitable athletic department, a median figure of \$8,449,000. *Id.* at 28, tbl. 3.5. The other 103 reported losses with median figure of \$14,904,000. *Id.* Looking at football programs, 69 reported net earnings from their football programs, with a median reported figure of \$12,926,000. *Id.* at 27, tbl. 3.6. The other 54 institutions lost money on football with a median reported figure of \$3,818,000. *Id.*

43. *E.g.*, Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why A Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1032 (2014) (“Thus, at a time when the NCAA executives, college presidents, athletic directors, and coaches have all become exceedingly wealthy, many student-athletes remain poor.”); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 75–77 (2006); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011), [http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true).

44. *E.g.*, Darren Rovell, *NCAA holds firm: No pay for play*, ESPN (Dec. 11, 2013), [http://espn.go.com/college-sports/story/\\_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming](http://espn.go.com/college-sports/story/_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming).

45. *See, e.g.*, Ron Morris, *No Need to Pay College Athletes*, THE STATE, (Jan. 25, 2014) (article no longer available online); Jon Solomon, *Pell Grants for Players: Division I Athletes in Alabama got \$4.8 Million in need-based aid*, AL.COM (Apr. 10, 2014), [http://www.al.com/sports/index.ssf/2014/04/pell\\_grants\\_for\\_players\\_divisi.html](http://www.al.com/sports/index.ssf/2014/04/pell_grants_for_players_divisi.html).

46. *See* Christopher Davis, Jr. & Dylan Oliver Malagrino, *The Myth of the “Full Ride”: Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform*, 65 OKLA. L. REV. 605 (2013).

47. Ramogi Huma & Ellen J. Staurowsky, *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, NAT’L COLL. PLAYERS ASS’N (2012), available at <http://www.ncpanow.org/news/articles/body/6-Billion-Heist>

Many athletes fail to graduate.<sup>48</sup> These arguments take on a race and class dimension as well, since the NCAA's amateurism policy is particularly harmful to athletes who are recruited out of poverty and who, owing to systemic discrimination, have lacked access to educational resources prior to attending college.<sup>49</sup>

Despite increasing public criticism,<sup>50</sup> the NCAA has been unwilling to undertake significant reform as a voluntary matter.<sup>51</sup> Its policies continue

Study Full.pdf; Sarah Ganim, *CNN Analysis: Some college athletes play like adults, read like fifth-graders*, CNN (Jan. 8, 2014), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/>.

48. *Report: Football Players Graduate at Rates Lower Than Non-Athletes*, INSIDE HIGHER ED (Sept. 27, 2013), <http://www.insidehighered.com/quicktakes/2013/09/27/report-football-players-graduate-rates-lower-non-athletes#sthash.NB4NxgwW.t9xFbsBn.dpbs>; see also BILLY HAWKINS, *THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS* 18 (2010) (questioning whether universities' multi-million dollar investments in academic support centers are actually investments in "academic evasion centers."); *id.* at 71–73 (discussing exploitation through miseducation, including the clustering of black athletes in watered-down majors that aim not to educate athletes but simply to keep them eligible under the NCAA's academic standards).

49. Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J. L. & POL'Y 17, 24–25 (2012) ("In this way, the NCAA amateurism regime—in which free market principles determine compensation for coaches and all other economic beneficiaries of college sports, but not for athletes—replicates the apartheid-like systems that have existed throughout history and under which members of the racial majority have exploited the labor of minorities for entertainment and profit."); see also Erin Buzuvis, *Title IX Feminism, Social Justice, and NCAA Reform*, 5 FREEDOM CENTER J. 101, 112–114 (2014); Branch, *supra* note 43 (ascribing to the NCAA's amateurism rules, "an unmistakable whiff of a plantation"); HAWKINS, *supra* note 48, at 14–15.

50. See, e.g., Doug Bandow, *End College Sports Indentured Servitude: Pay "Student Athletes"*, FORBES, Feb. 21, 2012, available at <http://www.cato.org/publications/commentary/end-college-sports-indentured-servitude-pay-student-athletes>; Branch, *supra* note 43; Frank Deford, *Bust the Amateurism Myth*, CHRON. OF HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article/NCAA-Frank-Deford/130058/>; Boyce Watkins, *Is the NCAA Racist or Just Getting Rich?* BLACK VOICES (Aug. 4, 2009) (article no longer available online); Michael Wilbon, *College athletes deserve to be paid*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid); see also Staurowsky, *supra* note 5, at 578–80 (noting and documenting public attention to the pay-for-play debate). While noting the recent flurry of commentary calling for student athlete compensation, it is important to note that scholars and commentators have been calling for such reform for many years. Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 DENV. U. L. REV. 213, 225–227 (1990) (presenting arguments for rejecting continued adherence to amateurism value in college athletics); see also Seth Davis, *Should College Athletes Be Paid? Why They Already Are*, SPORTS ILLUSTRATED, (Sept. 21, 2011), <http://www.si.com/more-sports/2011/09/21/branch-rebuttal> (citing commentator's criticism of amateurism from 1905).

51. To be sure, there have been some examples and attempts at reform. In 2011, the NCAA briefly allowed Division I members to offer a \$2000 cost of living stipend to athletes on full scholarship, to better reflect the true cost of attendance. NCAA

to hold athletes to an amateur ideal, yet permit member institutions to run athletic departments as commercial enterprises that put revenue generation ahead of athletes' personal and academic welfare.

### C. Legal Challenges to NCAA Amateurism Policy

In light of the NCAA's reluctance to change its position on athletes' amateur status, present and former student athletes are seeking to leverage the law in ways that would compel the NCAA to abandon the status quo in favor of some manner of freedom for athletes to capitalize on their market value. Both labor law and antitrust law have been the subject of such efforts, as described below.

#### 1. Labor Law Challenge: Are College Athletes "Employees" Under the NLRA?

In January 2014, present and former college athletes created the College Athletes Players Association, a labor organization seeking to advocate for the rights and safety of college athletes through the means of collective bargaining. Though CAPA is a new organization, it is an outgrowth of a well-established advocacy organization, the National College Player Association, which was founded in 2001 and is lead by former UCLA football player, now activist, Ramogi Huma.<sup>52</sup> Additionally, CAPA is receiving financial support from the United Steelworkers, the largest labor union in the United States.<sup>53</sup>

Soon after creating CAPA, Huma and Kain Colter, a quarterback from Northwestern University (since graduated), petitioned the National Labor Relations Board for the right to hold an election to authorize CAPA as the representative of Northwestern University football players in collective bargaining with the university.<sup>54</sup> CAPA's expressed objective is to negotiate on players' behalves for health insurance that would cover medical expenses for injuries sustained during competition.<sup>55</sup> The petition,

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members voted to rescind the plan, with many citing concerns that stipends were prohibitively expensive to administer in a gender equitable manner. *NCAA Shelves \$2000 Athlete Stipend*, ESPN (Dec. 16, 2011), [http://espn.go.com/college-sports/story/\\_/id/7357868/ncaa-puts-2000-stipend-athletes-hold](http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold).

52. See *Who We Are*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/about> (last visited Mar. 13, 2015); *About NCPA*, NAT'L COLLEGE PLAYERS ASS'N, <http://www.ncpanow.org/about> (last visited Feb. 4, 2015).

53. See *What We're Doing*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/what> (last visited Feb. 04, 2015).

54. Tom Farrey, *Kain Colter Starts Union Movement*, ESPN (Jan. 28, 2104), [http://espn.go.com/espn/otl/story/\\_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union](http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union).

55. CAPA's website, for example, lists "[g]uaranteed coverage for sports-related

filed with the Board's regional office in Chicago, was accompanied by a stack of union authorization cards signed by Colter's teammates.<sup>56</sup> Northwestern, the petitioners' putative employer, challenged the petition, arguing that college football players are not employees within the meaning of the National Labor Relations Act, and thus do not have rights under the statute to engage in collective bargaining.<sup>57</sup> In February of 2014, the Board held a hearing at which players and coaches provided testimony on the question of whether the athletes constitute employees under the law.<sup>58</sup>

In March, the Board's Regional Director concluded that the Northwestern players were statutory employees and granted their petition for a representation election<sup>59</sup> (that election has since taken place, though the result remains impounded pending the outcome of Northwestern's appeal to the full NLRB). In reaching this conclusion, the Director focused his analysis on the common law definition of employee, which courts have recognized as being incorporated into the NLRA. Under this definition, an employee is a person who performs services for another while subject to the other's control, and in return for payment.<sup>60</sup> The Director thus organized his analysis around the fundamental elements of compensation for services and control.

As to compensation for services, the Director found evidence of a quid pro quo exchange between the football players' labor and the scholarships they receive. Scholarships, of course, have economic value—which the Director found to exceed \$76,000 per year taking into account tuition, fees,

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medical expenses for current and former players" first on its list of goals. See *What We're Doing*, COLL. ATHLETES PLAYERS ASS'N, <http://www.collegeathletespa.org/what> (last visited Feb. 04, 2015).

56. The law requires union authorization cards from 30% of members of the proposed bargaining unit, so presumably the petition was accompanied by at least 26 petitions (30% of 85). Gregg E. Clifton & Shawn N. Butte, *College Athletes: Students or Employees?*, COLLEGE & PROFESSIONAL SPORTS LAW, (Feb. 8, 2014), <http://www.collegeandprosportslaw.com/collegiate-sports/college-athletes-students-or-employees/>.

57. 29 U.S.C. § 157 (2014) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .").

58. *Kain Colter Testifies at NLRB Hearing*, ESPN (Feb. 18, 2014), [http://espn.go.com/chicago/college-football/story/\\_/id/10476031/northwestern-qb-kain-colter-testifies-bid-form-college-athlete-union](http://espn.go.com/chicago/college-football/story/_/id/10476031/northwestern-qb-kain-colter-testifies-bid-form-college-athlete-union).

59. Northwestern Univ. & Coll. Athlete Players Ass'n, N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>.

60. See *N.L.R.B. v. Town & Country Electric*, 516 U.S. 85, 94 (1995); *Brown Univ. & Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW AFL-CIO*, 342 N.L.R.B. 483, 490 n.27 (2004).

room, board and books.<sup>61</sup> Northwestern requires its players to sign a tender agreement, which to the Director's mind operated as an employment contract because it details the conditions under which the player would not continue to receive his scholarship,<sup>62</sup> such as engaging in misconduct or violating an eligibility requirement imposed by the NCAA.<sup>63</sup> Scholarships can also be canceled if the player decides to withdraw from the team or fail to satisfy obligations to attend practices and games. These conditions convinced the Director that scholarships amounted to compensation in exchange for performance.<sup>64</sup>

The Director next described how scholarship football players at Northwestern were subject to the university's control in ways that distinguished them from other students. Most obviously, such control takes the form of intense demands on the players' time. Pre-season and in-season itineraries established that players were required to commit as much as 60 hours per week to team-related duties.<sup>65</sup> Control also takes the form of discipline, which coaches impose on players who violate team rules. Many of these rules restrict players' private lives that other students do not face, including rules that require a coach's permission to make living arrangements, apply for outside employment, drive their own cars, travel off campus, post items on the Internet, speak to the media, use alcohol and drugs, or engage in gambling.<sup>66</sup> Finally, the university exhibited control over the players' academic engagements, by mandating study hours and tutoring and requiring their participation in a professional development program. The fact that players may benefit from these requirements does not detract from the fact that, as mandatory conditions for staying on the team—and thus remaining eligible for scholarship—they demonstrate high and unique levels of control.

The Director made one additional conclusion regarding the petitioners' employment status, which was to distinguish them from the graduate student assistants who the NLRB determined in 2004 were not statutory employees, even though they received financial assistance to attend the university in exchange for teaching and research services.<sup>67</sup> In the case of the graduate student assistants, both the services they performed and the

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61. Northwestern Univ. & Coll. Athlete Players Ass'n, N.L.R.B. No. 13-RC-121359 (Reg. 13 Mar. 26, 2013), available at <http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f>.

62. *Id.*

63. *Id.* at 4.

64. *Id.* at 15.

65. *Id.* The Director cited players' testimony establishing a time commitment of 40 to 50 hours in season and 50 to 60 hours during pre-season. *Id.*

66. *Id.*

67. *Northwestern Univ.*, No. 13-RC-121359 at 18 (citing *Brown Univ.*, 342 N.L.R.B. 483 (2004)).

compensation they received were related to the academic purpose of the institution, such that the overall relationship between the graduate students and the university was “primarily and educational one”<sup>68</sup> rather than an employment one. In contrast, Northwestern football players are not “primarily” students; the services they provide to the university for as much as 60 hours a week are not academic in nature, being neither credit-bearing nor supervised by the university faculty.<sup>69</sup>

While the Regional Director’s analysis may have supported his conclusion that the Northwestern football players were employees under the NLRA, the Director’s conclusion is hardly the final word. As of this writing, Northwestern is appealing the decision to the full National Labor Relations Board in Washington, D.C., which typically applies a *de novo* standard of review rather deferring to the findings of lower-level agency decision makers. It is expected that the outcome either way will thereafter be appealed to federal court.

If the Northwestern plaintiffs prevail on appeal and the Director’s decision is upheld by the full NLRB and the federal courts, the direct impact will be that scholarship football players at Northwestern University may elect to be represented by CAPA and engage in collective bargaining with the university.<sup>70</sup> But practically speaking, the ramifications will be even more widespread, as a victory for the Northwestern plaintiffs will inspire athletes at other institutions to similarly petition for the right to unionize. These petitioners would prevail as long the programs they represent are factually similar to that of Northwestern in the degree to which players are compensated and subject to their university’s control. Public institutions are not covered by the NLRA, so the NLRB cannot authorize collective bargaining there. However, the precedent of its Northwestern decision could influence the courts who interpret state labor laws that do govern public sector unions. Additionally, given that public and private schools compete against each other on the field and in the market for athletic talent, public institutions would likely feel pressure to match whatever benefits the private sector unions successfully bargain for.

CAPA has stated that the benefit it is seeking to obtain through

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68. *Id.*

69. *Id.* at 18–20.

70. These petitions would also force the NLRB to sort of questions pertaining to the scope of the appropriate bargaining unit, which are as-yet unaddressed. It also appears that the Director’s decision may have renewed focus on the question of whether athletes are employees under other laws as well. For example, a class-action lawsuit filed in October of 2014 alleges that the NCAA and its Division I member institutions are violating the Fair Labor Standards Act in failing to pay athletes the federal minimum wage. Steve Berkowitz, *New Lawsuit Targets NCAA and Every Division I School*, USA TODAY, Oct. 23, 2014, <http://www.usatoday.com/story/sports/college/2014/10/23/ncaa-class-action-lawsuit-obannon-case/17790847/>.



collective bargaining is comprehensive health insurance for its members, so that players injured during their college participation will not have to endure out-of-pocket expenses after they graduate.<sup>71</sup> CAPA also advocates for multi-year scholarships which, while already the norm at Northwestern, are not necessarily standard at other institutions despite being permitted by NCAA rules. CAPA could even seek to bargain for benefits presently prohibited by the NCAA's amateurism rules, since the NLRA contains no exemption for an employer's refusal to bargain on the grounds of restrictions on the employer resulting from their voluntary membership in an association such as the NCAA. To this end, CAPA could attempt to bargain for cost of living stipends, an educational trust fund to help players who graduate on time defray the cost of education, or even (though CAPA has not publically supported for this) market-driven compensation, i.e., salary.<sup>72</sup> If demand for CAPA-represented players is strong enough, CAPA could leverage its collective bargaining power to pressure the NCAA to change the rules to allow its member institutions to meet the union's demands. It is also possible that CAPA might find the newly-autonomous Power Five conferences willing to implement many of their demands regardless of whether the union is able to exert collective bargaining pressure.<sup>73</sup>

## 2. Antitrust Challenges: Are NCAA Bans on Player Competition Unlawful Restraints on Trade?

In 2009, former UCLA basketball star Ed O'Bannon filed a lawsuit against the NCAA on behalf of a class of former athletes whose names, images, and likenesses appeared in television broadcasts and in video games to the financial benefit of their universities as well as the NCAA.<sup>74</sup> The lawsuit challenged various NCAA policies that prohibit athletes from receiving compensation for the use of their names, images, and likenesses. These included policies that limit what universities can provide to athletes

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71. Jeremy Fowler, *Players as Employees? High Cost of College Football Unions Is in Millions*, CBS SPORTS (Apr. 21, 2014), <http://www.cbssports.com/collegefootball/eye-on-college-football/24534813/players-as-employees-high-costs-of-college-football-union-is-in-millions>.

72. *Id.*

73. Steve Eder, *How New N.C.A.A. Rules Will Work*, N.Y. TIMES, Aug. 8, 2014, [http://www.nytimes.com/2014/08/08/sports/ncaaf/football/how-new-ncaa-rules-will-work-or-not.html?\\_r=0](http://www.nytimes.com/2014/08/08/sports/ncaaf/football/how-new-ncaa-rules-will-work-or-not.html?_r=0) (predicting that the Power Five conferences will improve medical coverage and offer more robust and multi-year scholarships).

74. Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College Athlete Rights and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014). For more details generally on the procedural history of the O'Bannon lawsuit, see generally *id.* at Part I.

as part of their athletic grant-in-aid, as well as those that required athletes to relinquish “in perpetuity” the right to license for commercial purposes the use of their names, images and likenesses as associated with their participation in college athletics.<sup>75</sup> The plaintiffs argue that these restrictions on athletes’ compensation amount to an unreasonable restraint on trade that, as such, violates the Sherman Antitrust Act.<sup>76</sup>

O’Bannon’s case<sup>77</sup> was assigned to Judge Claudia Wilken of the U.S. District Court for the Northern District of California, who eventually<sup>78</sup> held a bench trial in June of 2014. Her ruling of August 8 concluded that the NCAA’s denial of players’ rights to capitalize on their own names, images and likenesses violated antitrust law. In reaching this conclusion, Judge Wilken employed the established burden-shifting approach for unreasonable restraint cases.<sup>79</sup> First, a plaintiff must demonstrate that the defendant’s conduct amounts to a significant restraint on trade in a particular market. When a plaintiff satisfies that burden, the defendant must then prove that the restraint is justified by a pro-competitive purpose. If the defendant succeeds, the plaintiff can still prevail by establishing that the defendant could accomplish that purpose by employing a means that are less restrictive.

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75. NCAA Form 08-3a; NCAA BYLAWS, art. 12.5.1.1, *reprinted in* NCAA MANUAL, *supra* note 10, at 68; O’Bannon v. NCAA, Nos. C09-1967 CW, C09-3329 CW, C09-4882 CW, 2010 WL 445190 at \*1 (N.D. Cal. Feb. 8, 2010).

76. 15 U.S.C. § 1 (2014) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

77. O’Bannon’s case was consolidated with other similar cases, which resulted in the addition a second group of plaintiffs that used a different theory of liability, namely violation of their right of publicity, to challenge the NCAA and other defendants’ licensing practices. However, the NCAA settled with the right of publicity plaintiffs in June of 2014. Other original and later-added defendants, namely, Electronic Arts and the Collegiate Licensing Corporation have also settled all claims. Michael McCann, *NCAA Reaches Settlement with Keller Plaintiffs: What Does It Mean?* SPORTS ILLUSTRATED (JUNE 9, 2014), <http://www.si.com/college-football/2014/06/09/ncaa-keller-lawsuit-settlement>.

78. In the run-up to the trial, the judge denied the NCAA’s motions to dismiss and for summary judgment. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2014 WL 1410451, at \*17–18 (N.D. Cal. Apr. 11, 2014) (as well as other various pre-trial motions).

79. Antitrust plaintiffs have two avenues for satisfying the unreasonableness requirement. Some types of agreements, like price fixing agreements among competitors, are deemed “per se” unreasonable, and thus automatically constitute illegal restraints on trade. For other agreements not governed by the “per se” rule, the courts will use a “rule of reason” test, which asks whether the restraints’ harm to competition is outweighed by procompetitive effects. Judge Wilken ruled that the plaintiffs in this litigation will have to satisfy the rule of reason, because the per se rule does not apply to agreements between and among the NCAA, CLC, and licensees, who were not horizontal competitors engaging in price fixing. O’Bannon v. NCAA, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

In *O'Bannon*, the plaintiffs satisfied their initial burden by proving that the NCAA's suppression of athletes' and former athletes' rights to license their own names, images and likenesses restrains trade in two discrete markets: the market for college education and the market for group licenses. The judge agreed that, absent the NCAA's restraint, top recruits in football and men's basketball could bargain with colleges and universities to receive some form of compensation derived from the licensing of their names, images and likenesses. The restraint, therefore, operates as a price-fixing agreement among those (colleges and universities) who are in the market to "purchase" the athletic talent of students who are recruited to play.<sup>80</sup> Additionally, Judge Wilken found, the NCAA's ban on athlete compensation ensures that colleges and the conferences they belong to can enter into licensing agreements with television broadcasters and other users of athletes' names, images and likenesses (namely, video game producers) without having to compete with the athletes themselves. If the NCAA did not restrict the athletes from doing so, they would otherwise be in a position to collectively (via a group license) undercut the license fees that individual universities and conferences charge to broadcast or otherwise use the athletes' names, images and likenesses.

Having concluded that the plaintiffs satisfied their initial burden, the court then considered the NCAA's various arguments that the challenged restraints serve some procompetitive purpose,<sup>81</sup> ultimately concluding that two of the NCAA's proposed justifications satisfied the defendant's burden at this stage of the inquiry. The NCAA argued that foreclosing athletes' compensation for their names, images, and likenesses is justified by the need to maintain the NCAA's tradition of amateurism, which in turn, ensures that the NCAA's product is distinct from that offered by professional sports. While there was no evidence to suggest that a

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80. As Judge Wilken points out, an agreement among buyers to only buy at a certain price (a monopsony) is just as much price-fixing as an agreement among sellers to only sell at a certain price (a monopoly). *O'Bannon*, 7 F. Supp. 3d at 993. It is also possible to look at colleges and universities as those in the business of selling the college-athletic experience. In this light, the restraint on players' rights to capitalize on their names, images, and likenesses is built into the price of selling that experience, and thus may be seen as monopolistic price-fixing as well. *Id.*

81. The NCAA had offered an additional argument that was dismissed prior to trial for lacking a sufficient evidentiary basis to survive summary judgment. In *Re NCAA Student-Athlete Name and Likeness Licensing Litigation*, C 09-1967 CW, 2014 WL 1410451, at \*16 (N.D. Cal. Apr. 11 2014). Specifically, the judge rejected that the restraints on athletes' compensation are necessary to ensure that athletic programs can provide adequate support non-revenue sports, including women's sports. There was no evidence, she reasoned, to suggest why the NCAA couldn't lift the restraint but still implement rules that would ensure those sports are protected. For example, the NCAA could require member institutions to distribute some portion to licensing revenue to non-revenue sports. *Id.*

“sweeping prohibition” on such compensation was necessary to ensure a market for amateur athletics, the court agreed that *some* upper limit on athlete compensation was justified by this rationale.<sup>82</sup>

The court also agreed that restricting athletes’ compensation to some degree was justified by the NCAA’s goal of ensuring that college athletes are integrated into their academic communities. Though the court rejected that this goal justified the blanket restriction on athletes’ compensation for the use of their names, images, and likenesses—indeed, some compensation could provide some students with the means to focus more of their attention on academics—the court agreed that some limits on athletes’ compensation could be justified by the wedge that money would drive between athletes and other students.<sup>83</sup>

The court rejected others of the NCAA’s procompetitive arguments, however. The court concluded that the NCAA failed to prove that its desire for competitive balance among teams justifies its restraints on athlete compensation. The NCAA did not provide any evidence that restricting athletes’ compensation actually promotes competitive balance, and even if it did, the court acknowledged that any such effect would be neutralized by the lavish spending that some athletic programs spend on facilities, amenities, and the salaries of their coaches.<sup>84</sup> Along similar lines, the court rejected the idea that foreclosing athlete compensation was necessary to increase “outputs”—i.e., teams, and thus, games—by attracting more schools to join the NCAA and by lowering the financial burden of doing so. The court found no credible evidence that colleges and universities were attracted to the NCAA because of its ban on athlete compensation, or that changing the rules would have significant impact on its membership.<sup>85</sup>

Since restraining athletes’ compensation serves, at least in part, to ensure a market for distinctly amateur athletics and to promote athletes’ academic integration, the court considered the NCAA’s burden to be satisfied and looked to the plaintiffs to prove that a less restrictive approach could as effectively serve the same goals. The court agreed with two of the plaintiffs’ proposed alternatives to the blanket restriction on athlete compensation: first, the NCAA could allow colleges and universities to use licensing revenue to provide athletes with stipends that would make up any difference between the true cost of attendance and the grants-in-aid to tuition, room and board, and books.<sup>86</sup> Because the stipends athletes would receive in this model could be used for school supplies and educational expenses, this less-restrictive alternative would still ensure amateurism and

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82. *O’Bannon*, 7 F. Supp. 3d. at 999.

83. *Id.* at 1003.

84. *Id.* at 1002.

85. *Id.* at 1004.

86. *Id.* at 1005.

promote academic integration.<sup>87</sup>

Second, the court agreed that the NCAA as an alternative could allow colleges and universities to divert some of the proceeds they receive from licensing athletes' names, images, and likenesses to a trust from which athletes would be compensated once they are no longer enrolled.<sup>88</sup> The court found that such a policy would not hurt consumer demand for the NCAA's product so long as the payments were limited in amount (the court endorsed \$5000 as an upper limit to this amount, based on the absence of evidence that payments that low would harm the market for college athletics<sup>89</sup>) and distributed by equal shares to all members of the team.<sup>90</sup> Delaying payment until after their time in college would ensure that payments did not impair the athletes' education by separating them from the rest of the student body.<sup>91</sup>

As the court concluded that both of these less-restrictive alternatives support the NCAA's procompetitive justifications for restricting athletes' compensation, the court issued a two-part injunction against the NCAA that will require the association to modify its amateurism policy. The injunction first prevents the NCAA from enforcing any rules that would "prohibit its member schools and conferences from offering their FBS football and Division I [men's] basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, in addition to a full grant-in-aid."<sup>92</sup> However, the injunction expressly permits the NCAA to cap such payments at true cost of attendance as defined by the NCAA. Secondly, the injunction prohibits the NCAA from enforcing any rules that would "prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I [men's] basketball recruits, payable when they leave school or their eligibility expires."<sup>93</sup> This aspect of the injunction permits the NCAA to cap the amount of money that may

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87. *Id.* at 983.

88. *Id.* at 1005-06.

89. The court also noted the testimony of the NCAA's own witness that he "would not be troubled" by payments of \$5000, as well as that of Stanford athletic director that concern for set in at compensation levels of "six figures." *Id.* at 983. The court also acknowledged the findings of the NCAA's expert who conducted a survey on attitudes regarding college sports. 38% of the survey's respondents would be less likely to watch or attend college football and basketball games if athletes were paid \$20,000 or more, and 47% would be less likely to watch or attend games if athletes were paid more than \$50,000. *Id.* at 975-76. From this, the expert concluded that the smaller the degree of athlete compensation, the less of an effect it would have on the popularity of college sports. *Id.* at 983.

90. *Id.* at 983.

91. *Id.*

92. *Id.* at 1008.

93. *Id.*

be held in trust, though that cap may not be less than five thousand dollars “for every year that the student-athlete remains academically eligible to compete.”<sup>94</sup> The NCAA has filed its intention to appeal this decision to the U.S. Court of Appeals for the Ninth Circuit.<sup>95</sup>

While the NCAA challenges the district court’s ruling on appeal, it must simultaneously defend additional antitrust litigation that has since been filed to challenge NCAA’s ban on athlete compensation beyond the context of licensing revenue. Some athletes, including West Virginia University’s Shawne Alston, have sued the NCAA and the powerful Division I conferences SEC, ACC, Big 12, Pac-12 and Big Ten, arguing that restraining colleges from compensating athletes for the true cost of attendance is an unlawful restraint on trade.<sup>96</sup> Separately, Clemson’s Martin Jenkins, through his attorney, antitrust lawyer Jeffrey Kessler,<sup>97</sup> filed an antitrust challenge targeting more generally the NCAA’s ban on athlete compensation. Alston’s and Jenkins’s lawsuits, along with others of a similar nature, have been consolidated and assigned to Judge Wilkens, the same judge that ruled against the NCAA in the O’Bannon case.<sup>98</sup> An absolute victory in Jenkins’s case would prohibit the NCAA from enforcing any limits on compensation that NCAA member institutions can offer to their athletes and shift the college recruiting process to a free market paradigm.<sup>99</sup> It is also possible to imagine various partial victories, however, if the judge determines—as she did in *O’Bannon*—that some upper limit on athlete compensation is justified by one of the NCAA’s procompetitive arguments, such as to promote athletes’ academic integration, to retain a marketable distinction between the NCAA’s product and professional sports, or to ensure competitive equity among programs. While the latter of these arguments was rejected by Judge Wilken in *O’Bannon*, it is possible that the NCAA could perhaps more persuasively defend in the context of a lawsuit aimed at removing all limits on athlete compensation, as opposed to just the revenue derived from athletes’ names

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94. *Id.*

95. *NCAA Files Appeal of O’Bannon Ruling*, ESPN (Aug. 21, 2014), [http://espn.go.com/college-football/story/\\_id/11387865/ncaa-files-intent-appeal-obannon-decision](http://espn.go.com/college-football/story/_id/11387865/ncaa-files-intent-appeal-obannon-decision).

96. *Shawne Alston Suing NCAA, Others*, ESPN (Mar. 6, 2014), [http://espn.go.com/college-football/story/\\_id/10558893/ncaa-conferences-sued-scholarship-value](http://espn.go.com/college-football/story/_id/10558893/ncaa-conferences-sued-scholarship-value).

97. Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the N.C.A.A.*, N.Y. TIMES, Aug. 27, 2014, <http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html>.

98. Jon Solomon, *Judge Draws NCAA Doubleheader with O’Bannon, Scholarship Cases*, CBS SPORTS (June 17, 2014), <http://www.cbssports.com/college-football/writer/jon-solomon/24590912/judge-draws-ncaa-doubleheader-with-obannon-scholarship-cases>.

99. See Edelman, *supra* note 43, at 1054–55.

and likenesses. In sum, while the legal ramifications of the district court ruling in *O'Bannon* remain to be seen, the case certainly creates potential for a wide range of restrictions on the NCAA's amateurism policy as it stands today.

## II. APPLYING TITLE IX TO AMATEURISM REFORM

As described in the section above, college athletics may soon be compelled by law to modify its amateur paradigm. Unless either defendant successfully appeals *Northwestern* or *O'Bannon*, some players will be able to capitalize on the market demand for their participation in college athletes, whether by sharing somehow in the proceeds of broadcasts and other endeavors that use their names, images, and likenesses, or by harnessing their collective bargaining power to obtain some form of compensation or other benefits above and beyond what the NCAA currently permits as part of athletics grant-in-aid. This Part will identify the possible outcomes that could result directly or indirectly from the above-mentioned litigation, and analyze the implications for Title IX.

### A. The Right to Engage in Collective Bargaining

The NLRB's ruling, if upheld on appeal, only applies directly to scholarship football players at Northwestern University—and not even all Northwestern football players at that. The Director's decision singled out for exclusion from his ruling non-scholarship or "walk-on" players, who do not receive a scholarship as compensation for services and who are not as restricted as scholarship players from engaging in academic pursuits. In making the distinction even among players on the same team, the Director clearly signaled that not all college athletes are employees under the NLRA. Going forward, therefore, the degree to which the decision could be relied upon in support of other athletes' rights to engage in collective bargaining<sup>100</sup> would depend on the similarity of those athletes' experience to those of the Northwestern football players, on the matters that influenced the Director's decision—namely, whether they provide services for compensation and are subject to institutional control.

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100. Athletes who persuade the NLRB that they are employees under the NLRA could theoretically elect to be represented by CAPA. It would be up to the NLRB to determine the appropriate bargaining unit for each successful petition, based on the community of interests among the unit's members. 29 U.S.C. § 159(b) (2014). Such an analysis would consider, among other factors, the degree to which athletes are similar in terms of "skills, interests, duties and working conditions." *Kindred Nursing Ctrs. East, LLC v. N.L.R.B.*, 727 F.3d 552, 560 (6th Cir. 2013) (quoting *N.L.R.B. v. ADT Sec. Servs., Inc.*, 689 F.3d 628, 633 (6th Cir. 2012)).

### 1. Are female athletes subject to institutional control?

Female athletes in many big-time programs—in particular, basketball programs—could likely convince the NLRB that their lives are controlled by athletics to a degree comparable to that of Northwestern's football players.<sup>101</sup> To this end, the Board would consider whether a women's program is subject to a similar commitment of time and comparable regulations of their private lives and their academic pursuits. Some research by the NCAA suggests that at least in general, the time commitment for Division I women's basketball (37.6 hours per week) is similar to that of men's basketball (39.2 hours) and football (43.3 hours).<sup>102</sup> Female basketball players reported a slightly higher number of missed classes per week (2.5) than football players (1.7),<sup>103</sup> a result that is consistent with other independent research shows that male and female athletes perceive that athletics interfere with their academic work at similarly high rates—78% and 82% respectively.<sup>104</sup> A similar percentage of Division I female basketball players (16%) as FBS football players (17%) reported taking certain classes at the suggestion of their coaches<sup>105</sup> and choosing classes because they fit in with their practice schedule (47% of FBS football players and 45% of Division I women's basketball players).<sup>106</sup> Though a contested petition to unionize would likely require the female athletes to show in the context of their particular program that the degree of institutional control is comparable, and could raise points of

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101. Male athletes in programs other than Northwestern's football program would have to make this showing as well. This question would have to be decided on a case-by-case basis, based on the unique characteristics of each program. Though the implications of Northwestern decision on men's nonrevenue sports are interesting and worthy of consideration, they are outside the scope of this Article which seeks to answer questions about the implications of the decision when viewed in concert with Title IX.

102. GOALS STUDY, *supra* note 102, at slide 22. DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE, NAT'L. COLL. ATHLETIC ASS'N., slide 17 (Nov. 2011), available at [http://www.ncaa.org/sites/default/files/DI\\_GOALS\\_FARA\\_final\\_1.pdf](http://www.ncaa.org/sites/default/files/DI_GOALS_FARA_final_1.pdf) (PowerPoint Presentation)[hereinafter *GOALS Study*]. Other women's sports reported a smaller time commitment at 33.3 hours per week. *Id.*; see also Steve Wieburg, *NCAA Survey Delves Into Practice Time, Coaches' Trust*, USA TODAY, Jan. 15, 2011, [http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey\\_N.htm](http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey_N.htm).

103. GOALS STUDY, *supra* note 102, at slide 22.

104. Josephine R. Potuto & James O'Hanlon, *National Study of Student-Athletes Regarding Their Experiences as College Students*, 41 C. STUDENT J. 947, 961 (2007).

105. GOALS STUDY, *supra* note 102, at slide 28. Interestingly, men's basketball players had a significantly higher response than either women's basketball or football, with 27%. *Id.* These questions also served to differentiate women's basketball from the rest of women's sports, as female athletes outside that sport were significantly less likely (only 6%) to have been influenced by a coach in the selection of their classes. *Id.*

106. *Id.* On this issue, women's basketball players and other female athletes were similarly constrained.



similarity that go beyond the scope of these data, the NCAA's and other's research at least provide the grounds on which to predict that such a showing could likely be made by female athletes in many Division I basketball programs.

## 2. Do female athletes provide services for compensation?

Next, female athletes petitioning to unionize would have to convince the NLRB that they provide services of comparable value to those provided by Northwestern's scholarship football players, for which they receive compensation. The Director's conclusion that the Northwestern football players satisfied this aspect of the statutory definition flowed from three findings: (1) athletic scholarships amounted to a "transfer of economic value" to the football players receiving them; (2) the existence of a quid-pro-quo relationship between the scholarship and a football players' athletic participation; and (3) that the university derives value from the football players' athletic participation.<sup>107</sup> Though female athletes are similarly situated with respect to the first and second of these reasons—the scholarships they receive are of similar value to those awarded to their male counterparts and are also conditioned on athletic participation<sup>108</sup>—they are, at least in many cases, distinguishable on the third. The Director found that Northwestern's football program produced \$235 million in revenue from 2003 to 2012, a number derived from ticket sales, broadcast contracts, and merchandise.<sup>109</sup> He also noted that the team incurred expenses of \$159 million over that time, resulting in a profit of \$76 million over nine years.<sup>110</sup> The Director also found that for the academic year 2012–13, the football program generated net revenue along the lines of \$8 million (when adjusted for the cost to maintain the stadium), and that the profit Northwestern generates from football is used to subsidize non-revenue generating sports.<sup>111</sup>

In context, however, the profitability of Northwestern's football team is not a characteristic shared even by most Division I football programs, let alone other men's sports and women's sports. For example, according to a 2013 report by the NCAA, 53% of Division I FBS<sup>112</sup> football programs and

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107. See *supra* Part I.C.1.

108. It is relevant that the Northwestern football players' scholarships provided a relatively high degree of "job security" compared to the majority of athletic scholarships that are awarded on a year to year basis. Yet the Director still recognized them as conditioned on the athletes' participation and compliance with team rules.

109. Northwestern Univ. & Coll. Athletes Players Ass'n., N.L.R.B. No. 13-RC-121359, at \*13 (Reg. 13 Mar. 26, 2013), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4581667b6f>.

110. *Id.*

111. *Id.*

112. The NCAA report provided separate data for Division I schools whose

56% of men's basketball programs generated net revenue while only one women's basketball program in this category reported turning a profit. Of those profitable programs, the median net revenue for football programs was approximately \$11.5 million, for men's basketball programs, \$3.06 million, and for women's basketball, \$1.3 million.

Thus, to the extent the NLRB wanted to continue to rely on generated net revenue as an indicator of the value of an athletes' labor, it could exclude most female athletes (as well as those male athletes who participate in nonrevenue sports) from the statutory definition of employee. To prevail on this ground, female athletes would have to argue that the extent to which their efforts produce revenue is not a relevant consideration in the analysis of whether one is an employee for purposes of the NLRA. To this end, they could point out that other NLRB decisions examining the definition of employee emphasize wages-for-work, and do not dwell on the question of whether and the extent to which their services produce revenue.<sup>113</sup> On the other hand, there is NLRB precedent—namely, the Brown University case about graduate students—for excluding students from the definition of employee on the grounds that their relationship with the university is primarily educational. The Board may be more likely to conclude that the relationship between a university and a student whose efforts generate substantial revenue is not primarily educational and offer this as a principled way of distinguishing the status of athletes in non-revenue generating sports.

This factor therefore operates as the bigger roadblock for any efforts by female athletes to petition for eligibility to join CAPA or any other union for the purposes of collective bargaining. However, explained in the next Section, this outcome would not prevent female athletes from nevertheless benefiting from the union's collective bargaining.

#### B. Title IX's Application to Benefits Obtained Through Collective Bargaining

If the Regional Director's ruling certifying the football players' union

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football programs compete in the Bowl Championship Series (the Division I Football Bowl Subdivision, formerly Division I-A), those whose football programs compete in the NCAA Championship (the Division I Football Champion Subdivision, formerly Division I-AA) and those Division I schools without football program. It also reported data for Divisions II and III.

113. WBAI Pacifica Found., 328 N.L.R.B. 1273, 1275 (1999) (rejecting that claim that unpaid staff are employees under the NLRA because “[u]npaid staff do not receive compensation for their work at the station.”); Town & Country Elec. Inc., 309 N.L.R.B. 1250, 1253 (1992), *aff'd*, N.L.R.B. v. Town & Country Elec., Inc., 516 U.S. 85 (1995) (“As long as union organizers employed by or seeking work with an employer do so for wages in return for assigned work, they meet the standard dictionary definition of ‘employee.’”).

petition is upheld, CAPA will head to the bargaining table with Northwestern and likely, eventually, other private universities with similar athletic programs. As mentioned, the bargaining would likely ensue over various benefits including comprehensive health insurance, multi-year scholarships, and educational trust fund, stipends, or other compensation. The union's successful bargaining for any of these benefits would indirectly affect female athletes, even if they are not part of the union, because Title IX requires institutions to treat men's and women's sports equally in the aggregate.

### 1. Under Title IX, Separate Athletic Program Must Be Equal

Title IX is a federal statute passed in 1972 that simply prohibits discrimination on the basis of sex in federally funded educational institutions.<sup>114</sup> Title IX's application to college athletics—though initially contested by the NCAA<sup>115</sup>—was confirmed by Congress in 1987 when it amended the law to require Title IX's application to all of a covered institution's programs, including programs like athletics that don't directly receive federal funds.<sup>116</sup> Though the statutory mandate is vague, Title IX's implementing regulations, enforced by the Department of Education, clarify the statute's application to various contexts, including athletics.

Title IX's regulatory provision governing athletic programs is rather unique to civil rights law, in that it applies a separate-but-equal framework.<sup>117</sup> In contrast to most other aspects of education, athletics may permissibly be segregated by sex.<sup>118</sup> But, institutions must be able to demonstrate equality between the two programs in three general contexts: the number of opportunities they provide to members of each sex, the

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114. 20 U.S.C. §§ 1681 (2014). Because of its application to educational institutions, Title IX would not apply to compensation or benefits athletes received from third parties, such as commercial sponsors.

115. SMITH, *supra* note 3, at 147.

116. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (*codified at* 20 U.S.C. § 1687). This amendment to Title IX nullified *Grove City College v. Bell*, 465 U.S. 555 (1984), a Supreme Court decision holding that Title IX only prohibited sex discrimination within those programs that received federal funding, rather than institution-wide.

117. See, e.g., Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 254 (2008) ("The 'separate but equal' doctrine has flown beneath the radar and continued to thrive in the realm of athletics, where Title IX is perhaps best known for prohibiting discrimination on the basis of sex.").

118. Aside from athletics, Title IX's application to prison programs and single-sex classes may also be said to apply a separate-but-equal framework—in contrast to Title IX's application to other contexts like employment and admissions. See *id.*; Christine M. Safarik, *Constitutional Law - Separate but Equal: Jeldness v. Pearce - An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337 (1996).

overall quality of the program, and the comparability of scholarship dollars awarded to athletes of each sex. With regard to the first matter, the Department of Education's well-known three-part test provides a flexible measure of equality in the number of opportunities: an institution must either demonstrate athletic opportunities proportionally to the gender breakdown of the student body, or be able to show historical and continuous program expansion for women (as the "underrepresented sex"), or be able to show that women's interests and abilities in athletics are fully satisfied by whatever lopsided distribution of athletic opportunities the institution presently maintains.<sup>119</sup>

The second aspect of equality examines the quality of those athletic opportunities made available to men's and women's programs in the aggregate. According to the Title IX regulations, an institution must ensure "equal treatment" in terms of such exemplary factors as facilities and equipment, practice and competition schedules, access to and quality of coaching, academic services, medical services, and publicity, among others.<sup>120</sup> To be clear, equal treatment does not require identical overall aggregate spending on men's and women's sports (though disparate expenditures will warrant a nondiscriminatory explanation).<sup>121</sup> Nor does equal treatment require athletic departments to offer identical benefits to men's and women's teams.<sup>122</sup> Differences that result from unique aspects of particular sports are, appropriately, permitted.<sup>123</sup> But the overall quality of the men's and women's programs must be equivalent. While it is permissible under these regulations to implement a tiering system under which some sports receive higher-quality resources than others, tiering must benefit a similar number of female as male athletes.<sup>124</sup> Athletic-based

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119. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation].

120. 34 C.F.R. § 106.41(c)(2)-(10) (2010).

121. *Id.* at § 106.41(c) ("Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.").

122. 1979 Policy Interpretation, *supra* note 119, at 71,415.

123. *Id.* For example, equal treatment does not require men's and women's programs to receive "the same" equipment, but rather, that men's and women's needs with respect to equipment are met to a comparable degree.

124. *Id.* at 71,422 ("[N]o subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the 'major/minor' classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to

financial aid is also an aspect of equal treatment, as Title IX regulations requires that athletic-based financial aid be distributed proportionately to the number of students of each sex who are participating in athletics.<sup>125</sup>

## 2. Title IX Does Not Permit Unequal Treatment Arising from Market-Based Sexism

Title IX's regulations apply the concept of equality differently in the context of athletics than elsewhere in education.<sup>126</sup> For the most part, Title IX requires educational institutions to provide men and women with equality of opportunity, rather than equality of outcome.<sup>127</sup> For example, to the extent that Title IX applies to college admissions, or to employment, the law is satisfied when no one is turned away because of a sex-based exclusion or quota.<sup>128</sup> As long as men and women have an equal opportunity to compete for a spot in the entering class, or for a job on the faculty, a college or university is largely free<sup>129</sup> to apply neutral criteria—interest and ability, for example—even in ways that produce disproportionate outcomes.

If athletics worked the same way, then access to athletic opportunities could be similarly based purely on merit and interest. Title IX would be satisfied by allowing women to try out for the football team, regardless of whether any woman tried or succeeded to make the team. Pragmatically, however, the regulations' drafters recognized that such a standard would never produce more than hypothetical equality, since women's historical exclusion from athletics has suppressed their interests and abilities relative to men's.<sup>130</sup> And courts, for their own part, have rejected arguments that

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the members of one sex.'").

125. 34 C.F.R. 106.37(c) (2004).

126. See, e.g., *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) (recognizing Title IX's unique application to athletics, resulting from Congress's recognition that "athletics presented a unique set of problems not raised in areas such as employment and academics.").

127. Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 737–38 (2003) ("The drafters made clear that with respect to admissions, Title IX would require only formally equal treatment of women and men. Women and men would compete against each other on a 'level playing field,' one in which they were measured against the same set of criteria, for the same spots in the same academic programs.").

128. *Id.*

129. In some contexts, Title IX prohibits conduct that is not intentionally discriminatory but that produces a disparate impact on the basis of sex. See, e.g., David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 276–78 (2005) (discussing Title IX's incorporation of a disparate impact standard).

130. As Professor Brake explains, Title IX's application to athletics rejects a "liberal" feminist approach that would require equality for female athletes only so far as they are similarly situated to their male counterparts in terms of interest and ability.

male students' relatively higher interest in athletic participations justifies a disproportionate distribution of opportunities in their favor.<sup>131</sup>

Instead, the regulations require that an athletic program's participation *outcomes* are equalized—preserving opportunities and resources for female athletes without conditioning them on a demonstration of interest and ability. In this way, Title IX allows women to overcome the historical and contemporary social forces that, unmitigated, would continue to constrain their opportunities.

Consistent with this reasoning, judicial and regulatory interpretations of Title IX's equal treatment mandate foreclose an institution from defending a disparity on grounds tracing back to third-party or market-based sexism. For one example, high school boys' teams often have active and generous booster clubs that donate resources and amenities.<sup>132</sup> These donations may, and frequently do, produce an unequal outcome wherein some male athletes have access to higher quality equipment, a better facility, or other perks that no female athletes have access to. OCR has clearly stated that schools cannot use the fact that they relied on donated funds as a defense for unequal treatment.<sup>133</sup> In a 1995 opinion letter, OCR explained that "private funds . . . , although neutral in principle, are likely to be subject to the same historical patterns that Title IX was enacted to address."<sup>134</sup> The equal treatment mandate "could be routinely undermined" if third-party sexism provided a defense.<sup>135</sup>

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Deborah L. Brake, *Title IX As Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 537 (2007). Instead, Title IX's separate-but-equal approach incorporates a "substantive equality/accommodation model" that, like affirmative action, "justif[ies] gender-conscious treatment as a way of ensuring meaningful athletic opportunities for women." *Id.*

131. *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 767–69 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir. 1996); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 899 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993). In rejecting the relative interest theory, these courts necessarily read Title IX's three-part test as going beyond a formal equality approach that would require equal treatment only so long as women and men are similarly situated in terms of interest and ability. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 56 (2001).

132. See Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX's Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 442 (2012).

133. *Id.*

134. Letter from John E. Palomino, Regional Civil Rights Director, Office for Civil Rights, to Karen Gilyard, Esq., Atkinson, Andelson, Loya, Ruud & Romo (Feb. 7, 1995), available at <http://www2.ed.gov/about/offices/list/ocr/letters/jurupa.html>; see also OFFICE FOR CIVIL RIGHTS, TITLE IX INVESTIGATORS MANUAL 5 (1990).

135. Letter from John E. Palomino to Karen Gilyard, *supra* note 134; see also *Daniels v. Sch. Bd. of Brevard Cnty., Fla.*, 985 F. Supp. 1458, 1462 (M.D. Fla. 1997) ("The Defendant suggests that it cannot be held responsible if the fund-raising activities

It is equally clear that a sport's ability (or potential) to generate revenue does not justify unequal treatment.<sup>136</sup> As one federal court has succinctly noted, "Title IX requires that revenues from all sources be used to provide equitable treatment and benefits to both girls and boys. A source of revenue may not justify the unequal treatment of female athletes."<sup>137</sup> Title IX's legislative history further helps clarify this point. In 1974, Senator John Tower proposed an amendment that would have exempted revenue-producing intercollegiate sports from Title IX's coverage.<sup>138</sup> Congress's rejection of this and subsequent similar amendments<sup>139</sup> sends a clear message that the law authorizes no special treatment based on revenue, a sentiment echoed by OCR as well.<sup>140</sup>

Case law also provides support for the idea that a sport's potential to generate revenue creates no exception to a college or university's obligation to provide equal treatment to its men's and women's athletics programs.<sup>141</sup> In one case, plaintiffs challenging unequal treatment of Temple University's women's athletics program as a violation of the Equal Protection Clause relied in part on the fact that Temple spent "\$2100 more per male student athlete than female student athlete."<sup>142</sup> The university attempted to neutralize this disparity by arguing that it was skewed by the inclusion of revenue-producing sports. But the court rejected the relevance of this consideration. For one reason, the court was not satisfied that Temple's women's sports would not also produce revenue if they received the same investment of resources. More fundamentally, however, the court understood that "it is clear that financial concerns alone cannot justify gender discrimination."<sup>143</sup> In another case, the Washington State Supreme

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of one booster club are more successful than those of another. The Court rejects this argument. It is the Defendant's responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach."

136. *Brake, supra* note 130, at 125-26 (noting that the sports that produce revenue "do so because educational institutions have chosen to invest substantial resources in them to make them popular").

137. *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1112 (S.D. Cal. 2012).

138. 120 Cong. Rec. 15,322, 15,322-15,323 (1974).

139. For detailed legislative history on this issue, see Christina Johnson, Note, *The Evolution of Title IX: Prospects for Equality in Intercollegiate Athletics*, 11 GOLDEN GATE U. L. REV. 759, 764-66 (1981).

140. 1979 Policy Interpretation, *supra* note 119, at 71,419 ("[A]n institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity.") (quoting April 18, 1979, Opinion of General Counsel, Department of Health Education and Welfare, page 1).

141. *Haffer v. Temple Univ.*, 678 F. Supp. 517 (E.D. Pa. 1987).

142. *Id.* at 527-28.

143. *Id.* at 530.

Court rejected the University of Washington's argument that "[b]ecause football is operated for profit under business principles, [it] should not be included in determining whether sex equity exists."<sup>144</sup> Though the court went on to affirm an injunction that allowed each sport to "reap the benefit of revenue it generates," it emphasized that this allowance did not change the university's overall obligation to "achieve sex equity under the Equal Rights Act."<sup>145</sup> To be sure, the courts in these two cases were applying federal and state equal protection mandates rather than Title IX. The relative lack of litigation on this point under Title IX only reflects that the statute's treatment of this issue is even more clearly settled.

### 3. Benefits Obtained Through Collective Bargaining Are Subject to Equal Treatment

Consistent with these fundamental principles of equality reflected in Title IX, including the idea that sexism in the marketplace does not absolve universities of discrimination based on sex, courts and regulators properly ought to continue to interpret the statute to prohibit college and university athletic departments from providing a higher-quality athletic experience to athletes of one sex—even if the favorable treatment that creates that disparity arises from a collective bargaining process.<sup>146</sup> Imagine, for example, that Northwestern decided to provide comprehensive health insurance to athletes on the football team. Now imagine that the university decides to limit this benefit only to athletes on the football team, on the grounds that football generates the most revenue, or on the grounds that football has an active booster club that has raised and donated money for this purpose. There is nothing in Title IX that prohibits the university from extending that benefit to those players for those reasons. But, applying the analysis above,<sup>147</sup> the law clearly requires the university to provide a commensurate number of female athletes with the equivalent benefit, even

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144. *Blair v. Wash. State Univ.*, 740 P.2d 1379, 1383 (Wash. 1987).

145. *Id.* at 1384.

146. Some may object on fairness grounds to a result in which female athletes would benefit from compensation they have not essentially earned by offering marketable labor or names, images, and likenesses. To address this discomfort, I first point out that the O'Bannon trust fund itself, before considering its application to female athletes, already allows free-riders, by requiring payments "in equal shares" to the athletes on a team—including those who did less or nothing to contribute to the overall demand for the right to broadcast the team's games. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014). As for collective bargaining, that too—generally speaking, has been known to benefit free-riders such as public sector employees who exercise their rights under right-to-work laws to opt out of union membership. *See, e.g., Harris v. Quinn*, 134 S. Ct. 2618 (2014) (enjoining the enforcement of a provision of state law that would have required home health care workers to pay dues to a public sector union as a means of deterring free riders).

147. *See supra* Part II.B.2.



though the reasons for extending it to the football players do not apply to them. Now change the university's reason for providing its football players with comprehensive health insurance to one rooted in collective bargaining. The Title IX outcome does not change; there is nothing in the statute that prohibits the university from extending that benefit to those players for that reason. But it must still comply with equal treatment by extending that benefit to a proportionate number of women.

Comprehensive health insurance is arguably the most straightforward example to illustrate the role that Title IX, properly construed, should have on benefits that are obtained by athletes through collective bargaining. This is because the "laundry list" of factors the Title IX regulations provide as the basis for measuring equal treatment of men's and women's athletics programs expressly includes "provision of medical services"<sup>148</sup>—a factor that has been interpreted to include "health, accident, and injury insurance coverage."<sup>149</sup> Other items that could potentially be on the bargaining table include multi-year scholarships, stipends, trust fund payments, or other manners of financial compensation, things that are not expressly mentioned in the equal treatment regulation. Yet, it is still proper to conclude that Title IX would require a college or university to offer these benefits to female athletes as well. For one reason, the regulations make clear that the laundry list is not exhaustive; it is preceded with language stating that equal treatment is measured by consideration of these "*among other factors*"<sup>150</sup> and, OCR has elsewhere considered non-laundry list items such as recruiting and administrative support to be components of equal treatment.<sup>151</sup>

For another reason, the concept of equal treatment in the aggregate also underscores the regulation pertaining to athletic financial aid.<sup>152</sup> This regulation would apply to any bargained-for compensation that is tied to educational expenses, such as increased scholarship amounts or cost-of-attendance stipends. Because the regulation requires an allocation of dollars that is proportionate to the percentage of athletes of each sex,<sup>153</sup> a

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148. 34 C.F.R. § 106.41(c)(8) (2010).

149. 1979 Policy Interpretation, *supra* note 119, at 71,417.

150. 34 C.F.R. § 106.41(c) (2010); 1979 Policy Interpretation, *supra* note 119, at 71,415.

151. 1979 Policy Interpretation, *supra* note 119, at 71,417.

152. 34 C.F.R. § 106.37(c) (2004).

153. 1979 Policy Interpretation, *supra* note 119, at 71,415 ("The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results.").

college or university would have to provide a proportionate match for women any increase in dollars that it allocates to male athletes.<sup>154</sup> Other ways in which athletes may bargain to be compensated could be construed to fall outside the scope of the financial aid regulation, which by its terms addresses grants and other non-grant assistance such as loan assistance or work-study that is aimed at defraying educational costs. However, such compensatory payments would properly be governed by the more general principle of equal treatment codified elsewhere in the regulations. Whether a college or university was induced by collective bargaining to provide seasonal stipends to union athletes, or even to buy them all cars, those benefits become characteristics of the athlete experience no different in kind from access to academic tutoring, special housing or meal privileges, laundry service, or any other perk that universities already provide their athletes and which already must be available to male and female athletes on equal terms.

#### 4. College Athletes with "Employee" Status Are Not Outside the Scope of Title IX's Regulations Pertaining to Athletics

One final issue to consider in determining the Title IX implications for benefits obtained through collective bargaining is the extent to which Title IX applies to college athletes who have been deemed "employees" under the NLRA. Given that part of the NLRB's reasoning in reaching that conclusion was distinguishing the college football players in Northwestern from students to whom the label employee did not apply, it may be tempting to assume that being considered an employee for labor law purposes forecloses treating that individual as a student for other purposes.

Yet the fact that unionized athletes are considered employees for labor law purposes does not foreclose applying Title IX's regulations that apply to athletic opportunities and athletic financial aid. Regulators apply a functional test to determining the opportunities to which Title IX's athletics regulations apply. Specifically, the test considers whether the participant is "receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season" and who practices or competes with the team and is listed on the roster as an eligible member of the squad.<sup>155</sup> As long as these factors

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154. Multi-year scholarships raise a different consideration as the decision to award multi-year scholarships does not itself change the total scholarship dollars that a college or university is making available to its athletes of either sex. However, the fact of having a multi-year scholarship (and with it, the security of automatic renewal) is properly considered a component of equal treatment that, separate from consideration of the dollar amounts, should benefit female athletic opportunities proportionally.

155. 1979 Policy Interpretation, *supra* note 119, at 71,415. Alternatively, if injury

continue to describe those students who may also, by virtue of the NLRB's determination, be considered employees under the NLRA, there is no justification for excluding their athletic opportunities from a Title IX analysis. And while it may seem unusual that Title IX and the NLRA would simultaneously apply to the same enterprise given the respective statutes' distinct and different scope and purpose, considering the hybrid nature of big time college athletic programs helps to clarify that this is indeed the correct result. The educational aspect of college athletic programs—the fact that they are run by educational institutions and purport to have an educational purpose and mission (not to mention the benefit of education's tax-exempt status)—justifies application of Title IX and its regulations that subordinate the institution's business objectives to higher priorities like equality and nondiscrimination. The commercial aspect of college athletic programs—the fact that they are utilizing the labor of others in pursuit profits—justifies applying labor law principles that apply to any other private business.

This “both/and” mentality (i.e., that college athletes may be both employees for purposes of labor law and still partake in athletic opportunities under Title IX) means that it is not enough to apply traditional employment discrimination principles regarding equal pay to the compensation college athletes may obtain through collective bargaining—as tempting as that may be for colleges and universities who would rather not provide compensation to female athletes in nonrevenue sports. Some have argued that courts and regulators are sometimes permissive of revenue-based justifications for higher compensation for coaches of men's teams than women's, and argued that this standard would justify excluding female athletes from a compensation that male athletes obtained through collective bargaining. One commentator in particular<sup>156</sup> pointed to *Stanley v. University of Southern California*,<sup>157</sup> in which the Ninth Circuit Court of Appeals concluded that a female women's basketball coach who was paid less than the male men's-team counterpart failed to make a prima facie case of pay discrimination because the men's team's capacity for revenue made the jobs sufficiently dissimilar to warrant comparable pay. Yet, this case should not be read to support the conclusion that male players' capacity justifies paying them to the exclusion of female counterparts. For one reason, the proper reading of *Stanley* is a narrow one. The EEOC has issued guidance that suggests revenue-generation does not justify compensation disparities between male and female coaches unless “the woman is[] given

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prevents an athlete from meeting these requirements but that individual nevertheless receives athletic financial aid, the athlete's opportunity will count for Title IX purposes as well. *Id.*

156. Edelman, *supra* note 5. Edelman, *supra* note 43, at 1051.

157. 178 F.3d 1069 (9th Cir. 1999).

the equivalent support to enable her to raise revenue”<sup>158</sup> a condition that likely only applies to few women’s teams. More importantly, however, *Stanley* is a case about coaches, whose terms and conditions of employment are outside the scope of Title IX’s equal treatment regulations governing the athletic opportunities available to students.<sup>159</sup> Since coaches’ rights are provided for elsewhere in Title IX and not under the “separate but equal” framework that applies to athletic programs, it is not proper to analogize coaches’ compensation to that of athletes.

### C. Title IX’s Application to the *O’Bannon* Remedies

Having examined the Title IX implications for benefits obtained through collective bargaining, the outcome at stake in *Northwestern*, this Part will now turn to the *O’Bannon* remedies to address what particular Title IX related considerations would apply. If the district court decision survives appeal, the NCAA will have to loosen its restrictions on athletes’ partaking in revenue generated by the use of their names, images, and likenesses by allowing its members to use licensing revenue to increase athletic financial aid to cover the true cost of attendance and to fund a trust from which to make payments to athletics upon graduation.<sup>160</sup> Because the *O’Bannon* plaintiffs included Division I FBS football players and Division I men’s basketball players,<sup>161</sup> the validity of NCAA restrictions on compensation of other athletes, including female athletes, is outside the scope of her opinion and apparently not addressed by the injunction issued in the case. Title IX, however, would apply to any payments made to athletes under *O’Bannon*, for the same reasons that the statute applies to compensation obtained through collective bargaining. As explained above, if colleges and universities are paying to enhance the athlete experience in some way, the source of funding for that enhancement does not matter. It is already the case that colleges and universities use licensing revenue from men’s

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158. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON SEX DISCRIMINATION IN THE COMPENSATION OF SPORTS COACHES IN EDUCATIONAL INSTITUTIONS, EEOC Notice No. 915.002 (1997), available at <http://eeoc.gov/policy/docs/coaches.html>.

159. To be clear, Title IX regulations do include access to coaching and quality of coaching as factors on the laundry list. But OCR and courts are clear that aspect of Title IX protects students’ rights to receive equal treatment in this regard and does not protect coaches against discrimination. Title IX (along with Title VII and the Equal Pay Act) does protect coaches against sex discrimination, but the unique separate-but-equal framework that Title IX uses for athletic opportunities does not apply to employment (see discussion above).

160. See *supra* Part I.C.2.

161. Order Granting in Part and Denying in Part Motion for Class Certification, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09–1967 CW, 2013 WL 5979327, at \*3 (N.D. Cal. Nov. 8, 2013).

basketball and football to fund various aspects of their athletic programs.<sup>162</sup> Just as Title IX does not permit them now to use the fact that men's sports generates more of that revenue as a justification for more favorable treatment for those programs relative to women's programs, they may not use that argument in the future to limit trust payments or cost-of-attendance stipends only to members of one sex.<sup>163</sup>

Relatedly, as explained above, the fact that courts' and regulators' interpretations of the Equal Pay Act consider revenue generation as a factor "other than sex" that can (in limited circumstances) justify pay disparities among coaches does not supersede Title IX's requirement that institutions provide equal treatment in the aggregate to athletes in men's and women's programs.<sup>164</sup> Yet even if it was appropriate to construe revenue generation as a sex-neutral factor, revenue-generation is not the criteria institutions will use to determine who is eligible for payments from an *O'Bannon* trust. Under the terms of the court's injunction, the NCAA may not prohibit institutions from offering trust fund payments "in equal shares" to all members of the team.<sup>165</sup> An institution cannot withhold or reduce payment from those members of the team who contributed less or not at all to the team's marketability. Eligibility for trust payments is not determined by revenue generation; it is determined by participation on a team.<sup>166</sup> As such, trust fund payments should be equalized by sex just as other benefits that are bestowed by virtue of participation on a team are equalized under Title IX.

Additionally, the fact that a trust mechanism could be used to essentially hold athletes' payments in escrow until graduation arguably should not change the Title IX analysis either. While they may be former athletes when they receive the payment, they are eligible for it by virtue of having participated in college athletics. The vested interest in future payment<sup>167</sup>

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162. NCAA REVENUES/EXPENSES DIVISION I REPORT, *supra* note 39, at 30. Division I FBS institutions generate a median of \$10.4 million in revenue from distributions from their conferences and the NCAA. These distributions are, in turn, funded with revenue from contracts with broadcasters. See Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014), <http://www.forbes.com/sites/chris-smith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/>; see also *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Mar. 13, 2015).

163. See *supra* Part II.B.2. See also Jason Chung, *The NCAA and the Student-Athlete Trust Fund: Is Compromise Possible?* (Apr. 26, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318909](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318909) (concluding that Title IX applies to *O'Bannon* trust fund payments).

164. See *supra* Part II.B.4.

165. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

166. *Id.*

167. See Michael McCann, *What Ed O'Bannon's Antitrust Victory over the NCAA Means Going Forward*, SPORTS ILLUSTRATED (Aug. 9, 2014),

becomes an aspect of participation in college athletics, which as such must be equalized between the programs for each sex.<sup>168</sup> Nor can institutions avoid their Title IX compliance obligations by allowing trusts to be administered at the conference level, rather than creating their own. While it is arguable that a conference may not itself have an obligation to comply with Title IX,<sup>169</sup> a conference-administered trust would be funded with payments or diverted revenue from the college or university and earmarked specifically for application to the trust.<sup>170</sup> Payments from the trust are thus the equivalent of institutional payments, to which Title IX would apply.<sup>171</sup>

In light of the conclusion that Title IX applies to *O'Bannon* remedies, the NCAA would have to amend its bylaws to permit institutions to offer some manner of commensurate compensation to female athletes; otherwise, NCAA members would face a dilemma of compliance with NCAA bylaws or Title IX.<sup>172</sup> While it is clear that such a bylaw change would have to permit member institutions to comply with Title IX, there is arguable flexibility in the form such compliance could take. One justifiable approach would be to permit member institutions to match the aggregate increased spending attributable to *O'Bannon* with a dollar amount to compensate female athletes that is proportionate to the percentage of the institution's athletes who are female. This proportionality approach finds its support in the Title IX regulations governing athletic scholarships and grants-in-aid,<sup>173</sup> arguably the closest analogs to stipends and trust fund payments that are expressly mentioned in the Title IX regulations. The regulations require that institutions distribute athletic scholarship dollars in aggregate proportion to the percentage of athletes of each sex.<sup>174</sup> To illustrate how this measure of equality would apply to the *O'Bannon*

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<http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (recognizing the possibility of Title IX's application to trust fund payments by analogizing them to deferred compensation).

168. See *supra* Part II.B.3.

169. Cf. *NCAA v. Smith*, 525 U.S. 459 (1999) (holding that the NCAA does not have an obligation to comply with Title IX simply by virtue of receiving dues from federally-funded institutions).

170. See *id.* at 468 (distinguishing the payment of dues from payments that are earmarked for a particular purpose).

171. See *supra* Part II.B.3.

172. *O'Bannon* operates to enjoin the NCAA from enforcing its bylaws to the extent they prohibit cost-of-attendance stipends and trust fund payments to male basketball and football players. So it is not necessary for the NCAA to revise its bylaws to allow members to make such payments. However, the injunction does not prohibit the NCAA from enforcing its bylaws to the extent they prohibit payments to any other athletes. The NCAA would therefore have to relax its restrictions on athlete compensation as they pertain to female athletes, in order to let institutions satisfy their obligations under Title IX.

173. 34 C.F.R. § 106.37(c) (2004).

174. *Id.*

remedies, imagine an institution where 52% of the athletes are male and 48% are female. Then imagine that, pursuant to *O'Bannon*, the institution makes 150 \$10,000 payments<sup>175</sup>—a total of \$1,500,000—in a given year to football and men's basketball players. Borrowing the scholarship regulations' proportionality approach, the institution would be obligated to make an additional \$1,384,615 available to female players, since that is the dollar amount relative to \$1,500,000 that is proportionate to 48%. The per-player distribution of that amount would be up to the institution, subject to whatever limits the NCAA retains on the dollar value per scholarship and the number of scholarships per team. Alternatively, the NCAA would arguably be justified from a Title IX standpoint if it permitted colleges and universities to match stipends and trust fund payments "one-for-one." This approach finds support in the regulation's requirement that institutions provide equal treatment to men's and women's programs in the aggregate.<sup>176</sup> Trust fund payments and cost of living stipends are just another way in which football and men's basketball are "tiered."<sup>177</sup> Viewed this way, the same benefits should be made available to some combination of women's teams whose combined roster totals would be comparable to the combined number of men's basketball and football players.

### III. TITLE IX IMPLICATIONS FOR COLLEGE ATHLETIC REFORM

*Northwestern* and *O'Bannon* raise the cost of running athletic departments that are educational and commercial in nature. Not only by mandating the compensation of athletes whose labor is valuable, but because of the simultaneous application of Title IX, the compensation of other athletes as well. The NCAA worries that the cost of compensating athletes will destroy college sports.<sup>178</sup> To the extent that this is true, it is even more so when we factor in the added cost of Title IX compliance.<sup>179</sup> The result is that it may be too costly for college athletic departments to

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175. One-hundred and fifty is the institution's combined football and men's basketball roster, and \$10,000 reflects the total of a \$5,000 payment to the trust plus a \$5000 stipend to reflect the trust cost of attendance that is not already covered by grant-in-aid. See, e.g., Michael A. Lindenberger, *Texas Athletic Director: With New Rules, Longhorns Would Pay Each Player \$10,000*, DALLAS MORNING NEWS, Oct. 21, 2014, <http://www.dallasnews.com/sports/college-sports/headlines/20141021-texas-athletic-director-with-new-rules-longhorns-will-pay-each-player-10000.ece>.

176. See *supra* Part II.B.1.

177. See 1979 Policy Interpretation, *supra* note 119, at 71,422.

178. See, e.g., Edelman, *supra* note 43, at 1054 (noting and criticizing the NCAA's argument that athlete compensation would "destroy college sports").

179. See SACK & STAUROWSKY, *supra* note 14, at 145 (suggesting that Title IX responsibilities associated with commercial model could push schools in the direction of educational reform).

operate as they presently do. This reality, however, should not be an argument that compliance obligations should not apply. Rather, it should be harnessed as leverage for meaningful reform of college athletics.

To this end, I argue in this Part that the costly compliance burdens college and university athletic departments are facing result as much from the choices they have made about the nature of the programs they run as they do from the external application of law. In particular, college athletics has cultivated for itself a hybrid status that seeks to capitalize on the benefits of being both educational and commercial in nature.<sup>180</sup> *Northwestern* and *O'Bannon* force college athletics to internalize more of the cost of its commercial endeavors by ensuring that it, like any other business, adheres to the rules of the marketplace. If college athletics does not wish to add those compliance obligations onto its existing regulatory burden, which includes Title IX, it has the choice to reform itself into a purely educational model, one to which the reasoning of *Northwestern* and *O'Bannon* would no longer apply. Alternatively, college athletics could choose to accept the cost of pursuing commercial interests and reduce its compliance burden by abandoning its relationship with higher education. Both of these options for reform are discussed more fully in this Part.

#### A. Purely Educational Athletics Programs

College athletics' affiliation with higher education comes with both benefits and costs. Benefits include exemption from tax on generated income,<sup>181</sup> ability to issue bonds and take on low-interest debt for capital projects,<sup>182</sup> institutional subsidies,<sup>183</sup> and goodwill of the public, students, and alumni. Costs, in turn, include compliance with laws like Title IX, which constrain college athletic department from making the kind of free-market choices that businesses would otherwise make. Title IX, like other civil rights laws, represents a democratic consensus that constraints on capitalism are justified by a higher priority on equality in such fundamental

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180. See ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6 (Princeton University Press 1999) (arguing that big-time college athletic departments have it both ways by aligning with education for tax purposes and using business rationale but objecting to Title IX on business grounds).

181. Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateuism*, 45 SAN DIEGO L. REV. 495, 502 (2008) (also pointing out that colleges and universities are not required to pay Unrelated Business Income Tax on revenue generated by their athletic departments).

182. STEPHEN E. WEYL & RONALD F. RODGERS, TAX-EXEMPT BONDS: CONSIDERATIONS FOR COLLEGE AND UNIVERSITY IN-HOUSE COUNSEL 1-2 (2006), available [at http://www.higheredcompliance.org/resources/resources/TaxExemptBonds.pdf](http://www.higheredcompliance.org/resources/resources/TaxExemptBonds.pdf).

183. NCAA REVENUES/EXPENSES DIVISION I REPORT, *supra* note 39, at 30, tbl. 3.7.



contexts as education.<sup>184</sup> Accordingly, Title IX prevents college athletic departments from using commercial objectives as the sole basis for allocating resources, and instead requires equal treatment to women's sports even though they have less potential to generate revenue.<sup>185</sup>

For a college athletic department that wishes to retain its association with higher education, compliance with Title IX is mandatory. Compliance with labor and antitrust law, on the other hand, is not. A project of reform that distances college athletics from commercial objectives and practices would necessarily render inapplicable both *Northwestern's* requirement that athletic departments collectively bargain with athletes and *O'Bannon's* antitrust scrutiny over the NCAA's amateurism rules. One essential aspect of such reform is the revival of the Sanity Code's ban on athletic scholarships,<sup>186</sup> in favor of a system like that of the Ivy League and Division III, in which financial aid is awarded based on need rather than athletic participation.<sup>187</sup> This change would undermine the Regional Director's rationale in *Northwestern* for concluding that some athletes qualify as employees based on the presence of compensation and control.<sup>188</sup> As discussed earlier, the Director found that the athletic scholarship was tantamount to compensation, while the fact that it was conditioned on the athletes' continued participation suggested control.<sup>189</sup> But if college athletic departments replaced athletic scholarships with need-based support, they would no longer be engaging compensation or control, because an athlete could discontinue participation on the team and still be eligible for financial aid. Such reform would also signal that the institution's priority is the student's education rather than his participation in athletics. In this way, it addresses concern that college athletes are exploited, since it would restore an athlete's choice to participate in athletics without concern for economic consequences.<sup>190</sup>

A second aspect of education-based reform is to drastically reduce the

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184. E.g., Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1213 (2014) (acknowledging the conflict between civil rights and private choice); Andrew Altman, *Civil Rights*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 3.2 (Edward N. Zalta et al. eds., Summer 2013), available at <http://plato.stanford.edu/archives/sum2013/entries/civil-rights/>.

185. See *supra* Part II.B.2.

186. See *supra* Part I.B.

187. See GRANT, *supra* note 12, at 456; see also JOHN GERDY, *AIR BALL, AMERICAN EDUCATION'S FAILED EXPERIMENT WITH ELITE ATHLETICS* (2006); Brian L. Porto, *Completing the Revolution: Title IX As Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 403-04 (1998)

188. See *supra* Part I.C.1.

189. *Id.*

190. See Buzuvis, *supra* note 49, at 119 ("To eliminate exploitation and promote right-sized college athletics programs, it is also necessary to eliminate athletic scholarships.").

time commitment required for participation in college athletics. In addition to neutralizing the Director's arguments about the presence of employer-like control,<sup>191</sup> such reform would satisfy concerns about athlete exploitation by ensuring that participation in athletics does not obstruct pursuit of meaningful education. Time commitment restraints would provide athletes with the freedom to select majors and courses with less concern for conflicts with practice schedules and travel obligations.

Reform that restores the priority of academics in this manner would also have the effect of subordinating a college athletic department's commercial objectives. Right-sized expectations about revenue will reduce the pressure to engage in the very spending arms race that made the NCAA's restraints on player compensation harder to defend in *O'Bannon*.<sup>192</sup> Moreover, replacing athletic scholarships with need-based financial aid and reducing the maximum time commitment for athletics would operate "to integrate student-athletes into academic communities of their schools,"<sup>193</sup> and would thus help the NCAA defend its amateurism rules. As various antitrust cases against the NCAA have made clear, the NCAA is more vulnerable to antitrust liability when it coordinates members' commercial operations than when it is engaging in non-commercial functions.<sup>194</sup> For this reason as

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191. See *supra* Part I.C.1.

192. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014) (rejecting the NCAA's argument that restraining athlete compensation is necessary to promote competitive balance among teams, in part because it is already the case that colleges and universities spend exorbitantly on athletic programs). Moreover, the court relied on the increased commercialization of college athletics to distinguish the facts in *O'Bannon* from the facts that gave rise to an earlier court's finding that competitive balance could justify amateurism restrictions. *Id.* (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 546 F. Supp. 1276, 1296, 1309–10 (W.D. Okla. 1982)).

193. *Id.* at 1004. See also *id.* at 1003 (noting that the goal of athlete integration is promoted by, among other things, access to financial aid and restrictions on requiring athletes to practice more than a certain number of hours each week).

194. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). In *Board of Regents*, the Court invalidated the NCAA's plan to regulate its member institutions' television broadcasts as an unreasonable restraint on trade. Yet, the Court emphasized the narrowness of its decision by including language that suggested other aspects of the NCAA roles not affected by its decision, including the association's "critical role in . . . maintain[ing] [the] revered tradition of amateurism in college sports." *Id.* at 120. Relying on this distinction in *Board of Regents*, some lower courts have rejected antitrust challenges to those efforts of the NCAA, like setting rules of eligibility, that are "not related to the NCAA's commercial or business activities." *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998), *rev'd on other grounds*, 525 U.S. 459 (1999); see also *Pocono Invitational Sports Camp v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004). This distinction suggests that the less commercial college athletics, the less vulnerable the NCAA is to antitrust liability. Moreover, even in those courts that have refused to carve out special treatment for the NCAA's non-commercial activities have done so on grounds of today's reality that "big time" college programs are infused with commercial values. See *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012) ("No knowledgeable observer could earnestly assert that big-time college

well, education-based reform would operate not only to insulate NCAA members from an obligation to engage in collective bargaining with athletes, but from antitrust liability as well.

An education-based reform would eliminate arguments that athletes are exploited, foreclose an institution's obligation to engage in collective bargaining, and reduce antitrust scrutiny on the NCAA's amateurism rules. In addition, such reform would have the benefit of improving Title IX compliance. Without the pressure to generate revenue, athletic departments would have more freedom to distribute resources across a wider array of programs, including both women's sports and non-revenue men's sports.<sup>195</sup> While an education model of college sports would likely force some programs to sacrifice revenue, this is not necessarily a threat to women's sports because many revenue-generating programs do not turn a profit that can be used to support other programs.<sup>196</sup> Moreover, it is also the case that programs in an educational model should be less expensive to run. In addition to no longer having to pay athletic scholarships, restrictions on athletes' time commitment would drive institutions to replace expensive, long-distance competition with a less expensive, regional schedule of competition. Athletic opportunities that are compatible with education are also arguably more deserving of institutional subsidies. If reform efforts transform college athletics into providing genuine extracurricular activities, imparting educational values in a manner consistent with the institution's

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football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program."); *O'Bannon*, 7 F. Supp. 3d at 999–1000 (relying on plaintiff's "ample evidence" showing "that the college sports industry has changed substantially in the thirty years since Board of Regents was decided" in rejecting that the Court's favorable language about the NCAA's amateurism policy should apply today); see also Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 254–55 (2014) (arguing that the amateurism "myth" that courts have relied on in upholding the NCAA's eligibility rules in antitrust cases "ignores the fact that the NCAA has become a profit-seeking enterprise that governs multi-billion dollar entertainment products."). Such rationale further suggests that if the commercialism of college athletics was minimized through reform, the NCAA would have an easier time justifying its actions under antitrust law.

195. SACK & STAUROWSKY, *supra* note 14, at 130 (noting that Title IX compliance costs money that universities can't afford to spend if they are busy sinking costs into pursuit of the commercialized model of college sport); Buzuvis, *supra* note 49, at 111 ("Commercialism in college athletics threatens women's sports with permanent second-tier status because it authorizes universities to invest in teams in a manner proportionate to their attractiveness to spectators and fans—a measure that is stacked against women's sports—instead of in a manner designed to maximize the educational value of sports to student-athletes themselves, the ostensible mission of college athletics."); Porto, *supra* note 187, at 405.

196. 54 out of 123 Division I football programs in the Football Bowl Subdivision do not generate net revenue. NCAA REVENUES & EXPENSES DIVISION I REPORT, *supra* note 39, at 27, tbl. 3.6.

overall mission, it should not need to rely on external revenue to justify its value to the college or university. For these reasons, the reform contemplated in this section is one that should unite reformers concerned about athlete exploitation, advocates for women's sports and non-revenue men's sports, as well as athletic departments that oppose *Northwestern* and *O'Bannon* out of concern for the high cost of compliance.

### B. Purely Commercial Athletics Programs

In contrast to a strategy of education-based reform, college athletic departments can alternatively reduce their compliance burdens by jettisoning their affiliation with higher education.<sup>197</sup> In this model of reform, colleges and universities would spin off their commercialized athletic departments into separate corporate entities that lack formal affiliation with the school. These new commercial entities—let's call them College Athletics Inc.—would forego existing institutional and governmental support for higher education and embrace the obligations of labor and antitrust law (as well as other laws that govern commercial enterprises like workers compensation, fair labor standards, and business income tax).<sup>198</sup> But in turn, College Athletics Inc. would no longer be

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197. CHARLES CLOTFELTER, *BIG-TIME SPORTS IN AMERICAN UNIVERSITIES* 215 (2011) (attributing this idea originally to former University of Michigan president James Duderstadt); GRANT, *supra* note 12, at 456; SACK & STAUROWKSY, *supra* note 14, at 142; *see also* Frank Deford, *Let's Separate the Schoolin' from the Sports*, NPR (June 26, 2013), <http://www.npr.org/2013/06/26/195501710/lets-separate-the-schoolin-from-the-sports> (“We in the U.S. think, nostalgically, of athletics as integral to higher education, but perhaps they're so unusual that they should be entirely separated from the academic and simply turned into an honest commercial adjunct.”); Peter Morici, *Stop the NCAA insanity: Separate University Athletics from Academic Requirements*, FOX NEWS (Mar. 31, 2014), <http://www.foxnews.com/opinion/2014/03/31/stop-ncaa-insanity-separate-university-athletics-from-academic-requirements/> (“The solution may be to permit the top 30 or 40 major universities to form football and basketball teams ‘affiliated’ with their institutions and a major pro-franchise, but require those be self-financing based on ticket sales, TV revenues and contributions from their professional team.”).

198. Because of the commensurate cost, such an approach would only be attractive to institutions in the top-earning conferences of Division I's FBS. GRANT, *supra* note 12, at 458. The recent reorganization of the NCAA's “Power Five”—the Big 10, the Big 12, the Pacific-12, the Southeastern Conference, and the Atlantic Coast Conference—could potentially provide limit to the scope of such a proposal. Because the Power Five conferences, with 65 members among them, generate the most revenue from broadcasts and ticket sales, they have both the incentive and the means to attract talented athletes by offering market-based compensation. Perhaps they are already taking a step in this direction, as the Power Five are reportedly already planning to consider proposals that would allow members to offer athletes stipends up to the cost of attendance. Dan Wolken, *NCAA Board Approves Division I Autonomy Proposal*, USA TODAY (Aug. 7, 2014), <http://www.usatoday.com/story/sports/college/2014/08/07/ncaa-board-of-directors-autonomy-vote-power-five-conferences/13716349/>.

subject to Title IX's requirement to support women's sports, since the law's scope only extends to programs run by federally funded educational institutions.<sup>199</sup> By divorcing college athletes from higher education, the commercialized athletic enterprises would be free to devote resources in any manner they wish in the pursuit of maximizing profits, including compensating employees on whatever terms the market would bear.

Of course, these employees would no longer be students<sup>200</sup> but professional athletes in the paradigm of a minor league.<sup>201</sup> Those that do not continue their careers into the NFL or the NBA could elect to pursue college education once their engagement with College Athletics Inc. is over.<sup>202</sup> They could even potentially bargain for future tuition payments as a form of deferred compensation.<sup>203</sup> In this way, a move to purely commercial college athletic programs would eliminate concerns about athlete exploitation. College athletics could no longer pretend that

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199. 20 U.S.C. §§ 1681, 1687 (2014). In order for an enterprise like College Athletics, Inc. to fall outside of Title IX, it would have to be legally as well as functionally separate from its former university. If the university continues to provide funding and exert control over the incorporated athletic department, the athletic department would still appear to be an "operation" of a "college [or] university. . .any part of which is extended federal funding assistance" and thus subject to Title IX. *Id.* at § 1687; *Williams v. Bd. of Regents of the Univ. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 1997).

If outside the scope of Title IX, College Athletics, Inc. would not have to provide commensurate resources to women's athletics program, since that "separate but equal" model of equality is unique to Title IX and justified when athletic opportunities are being provided in an educational setting. As an employer, College Athletic, Inc. would be prohibited by Title VII from discriminating on the basis of sex in its hiring decisions and in the terms and conditions of employment. As this applies to the hiring of athletes, however, Title VII would only require the employer to avoid using sex as a reason not to hire an otherwise qualified female athlete for the position. It would not require the enterprise to offer separate programs for women or hire female athletes who do not meet the physical requirements of the position. *See, e.g., Lanning v. Southeastern Pa. Transit Auth.*, 308 F.3d 286 (3d Cir. 2002) (upholding employer's requirement for physical fitness that had a disparate impact on female applicants); *see also* Syda Kosofsky, *Toward Gender Equality in Professional Sports*, Note, 4 HASTINGS WOMEN'S L.J. 209, 236 (1993) ("Since professional sports are a form of paid employment, theoretically, the Civil Rights Act and the Equal Pay Act should be useful in rectifying the discrimination that professional women athletes experience in the form of denial of opportunity and unequal pay . . . .However, both the Acts themselves and their judicial interpretation are inherently limited by the underlying theories of gender differences.").

200. If athletes receive "institutionally-sponsored support normally provided to athletes competing at the institution," then Title IX would apply. *See supra* Part II.B.4 (citing 1979 Policy Interpretation, *supra* note 119, at 71,415).

201. GRANT, *supra* note 12, at 456.

202. *Cf. Morici*, *supra* note 197 ("Pay the athletes, offer them the opportunity to earn a degree over five or even six years, but don't require them to enroll if they are not capable or are simply disinclined.").

203. SACK & STAUROWSKY, *supra* note 14, at 142.

“student-athletes” are students and use the semblance of an education as an excuse not to pay them. Athletes could make clear choices about whether to pursue playing career or an education, or even to fully engage in the former and then the latter.

While such an approach would not increase women’s athletic opportunities within College Athletics, Inc., this version of athletics reform would have the benefit of sequestering the problem of gender inequality outside the realm of education where it is particularly powerful and offensive.<sup>204</sup> Meanwhile, the institution itself could continue to provide a more diverse array of lower-cost athletic opportunities for men and women consistent with the educational model discussed above. In fact, the institution could generate revenue necessary to fund those opportunities by leasing its facilities and licensing its trademark name and mascots, etc. to the incorporated athletic department.<sup>205</sup> In this way, the reform described in this section could potentially produce a net increase in the number of college athletic opportunities as well as gender equality among those that remain under the auspices of higher education.

Though limited in attractiveness to only the most profitable programs, within that group this proposal could potentially appeal to reformers opposed to athlete exploitation, advocates for women’s sports and men’s nonrevenue sports, as well as those concerned about the cost of compliance.

### CONCLUSION

As a result of recent litigation, college athletics may soon be compelled by law to reform its long-standing policy of amateurism that prohibits compensation to athletes. This result, which flows from the application of labor and antitrust law to increasingly commercialized college athletics, will raise the cost of running college athletic departments, not only to provide the compensation to the athletes in commercialized programs, but, by virtue of Title IX, to female athletes in non-revenue sports as well. Yet rather than downplaying the role of Title IX in this regard, reformers should embrace its potential to help ensure that the commercial/educational hybrid model of college athletics is one that is too costly to sustain. By converting from hybrids into purer versions of either education or commercial, college athletics can minimize concerns about exploitation, promote gender equity, restore educational compatibility, and contain costs. For these reason, it is important that college athletics confront the Title IX implications of decisions that result in compensation for athletes.

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204. See, e.g., Brake, *supra* note 131, at 82 (“Educational institutions play a key role in the social processes that construct the cultural meaning of sport and its relationship to masculinity and femininity.”).

205. GRANT, *supra* note 12, at 456; CLOTFELTER, *supra* note 197, at 215.