

Nos. 20-512, 20-520

In the Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, *ET AL.*,
Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioners,

v.

SHAWNE ALSTON, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF OF HISTORIANS AS *AMICI CURIAE*
SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether compensation restraints that the NCAA defends as necessary for “amateurism” should be summarily exempt from Section 1 of the Sherman Act, as Petitioners contend, or whether courts should evaluate the competitive impact of those restraints using anti-trust law’s rule of reason—a fact- and market-based analysis that this Court has applied to agreements restricting competition among NCAA members.

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INTRODUCTION AND INTERESTS OF *AMICI*¹

Amici curiae are historians who have taught or conducted research on the history of sport, including intercollegiate athletics and the National Collegiate Athletic Association (NCAA). They are well schooled on the history of athletic scholarships, the role of amateurism, intercollegiate commercialization and professionalization, and the exploitation of athletes as evidenced in the history of the NCAA throughout the twentieth century and into the twenty-first century.

Ronald A. Smith is professor emeritus at Penn State University. His bachelor's degree is from Northwestern University and master's degree and Ph.D. are from the University of Wisconsin, Madison. He has written ten books including *Sports and Freedom: The Rise of Big-Time College Athletics* (Oxford University Press, 1988); *Play-by-Play: Radio, Television, and Big-Time College Sport* (Johns Hopkins University Press, 2001); *Pay for Play: A History of Big-Time College Athletic Reform* (University of Illinois Press, 2011); and *The Myth of the Amateur: A History of College Athletic Scholarships* (University of Texas Press, 2021).

Taylor Branch is a historian, of particular note in the area of Civil Rights, who received his undergraduate degree from the University of North Carolina, Chapel Hill and a Masters of Public Affairs from the Woodrow Wilson School, Princeton

¹ All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission.

University. His trilogy on Martin Luther King stands out: *Parting the Waters: America in the King Years*; *Pillar of Fire: America in the King Years*, and *At Common Edge: America in the King Years*. His critique of the NCAA in *The Atlantic*, in 2011, “The Shame of College Sports,” exposed the NCAA as a cartel and an exploiter of college athletes.

Richard Crepeau is a professor emeritus at the University of Central Florida. He received his bachelors at the University of Minnesota, his masters from Marquette University and his doctorate from Florida State University. He has researched the role of athletics in Catholic higher education and has written two books on professional sport, *America’s Diamond Mind, 1914-1941* (University Presses of Florida, 1980), and *NFL Football: A History of America’s New National Pastime* (University of Illinois Press, 2014). He is a past-president of the North American Society for Sport History.

Sarah Fields is a professor in the Department of Communications at the University of Colorado Denver. She has a B.A. from Yale University, an M.A. from Washington State University, JD from Washington University of St. Louis, and a Ph.D. from the University of Iowa. Her many publications include *Female Gladiators: Gender, Law, and Contact Sport in America* (University of Illinois Press, 2007); *Sport and the Law: Historical and Cultural Interactions*, edited with Samuel Regalado (University of Arkansas Press, 2014); and *Game Faces: Sport Celebrity and Laws of Reputation* (University of Illinois Press, 2016).

Jay M. Smith is a historian at the University of North Carolina, Chapel Hill. His B.A. and M.A. are

from Northern Illinois University and his Ph.D. is from the University of Michigan. While his research specialty is French history to the French Revolution, he has pursued an interest in the history of athletes in higher education with personal involvement and a publication, *Cheated: The UNC Scandal, the Education of Athletes, and the Future of Big-Time College Sports* (Potomac Books, 2015, revised edition, 2019).

John Thelin is a professor at the University of Kentucky. An alumnus of Brown University, he concentrated in history and was a varsity wrestler. He received his M.A. and Ph.D. from the University of California, Berkeley. John is author of *Games Colleges Play* and *A History of American Higher Education*, both published by Johns Hopkins University Press. He has been an invited speaker on college sports for The Knight Commission and from 2008 to 2010 served as a charter member and co-chair of the NCAA Research Advisory Committee.

SUMMARY OF ARGUMENT

Amateurism in top-tier college sports is a myth that is neither necessary to the activity nor fair to the students who participate.² Petitioners nonetheless assert that enforcing some arbitrary line of supposed amateurism is an essential pro-competitive feature of top-tier college sports and should be exempt from ordinary antitrust scrutiny. See, *e.g.*, NCAA Pet. Br. 2, 8, 14-16. In doing so they rely on passing comments in this Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85, 102, 120 (1984), making unsupported references to the NCAA's claimed "historic role in the preservation and encouragement of intercollegiate amateur athletics" and to a supposedly "revered tradition of amateurism in college sports." The trouble with the NCAA's position and this Court's passing comments in *Board of Regents*, and Petitioners' claimed concern for amateurism here, is that neither has any meaningful historical support.

1. The concept of amateurism in top-tier college athletics cannot be justified on historical grounds. From its inception, top-tier athletics honored the amateurism ideal more in the breach than in the observance. Although the NCAA has often given lip-service to amateurism over the years and used the concept to justify varying restrictions on college athletes receiving compensation or benefits, it has just as often ignored that supposed principle and has

² The discussion in this brief addresses only the so-called big-time or top-tier college sports of NCAA FBS football and Division I basketball. The history and circumstances of other college sports are more varied.

repeatedly abandoned it in many aspects of its rules. Indeed, while the NCAA has wholly abandoned any wage-limiting pretense of amateurism in connection with professional coaching staff, it has continued to use that pretense to slow, but not stop, the growth of compensation for the college athletes themselves. Like so many examples in life, however, a principle, once abandoned, cannot then be redrawn as a line in the sand and remain free of further scrutiny of the more complex and self-serving decisions being made. Whatever NCAA's claimed reasons for denying fair compensation to college athletes while showering coaches and schools with riches, they should be analyzed on their own terms under the Rule of Reason, without the false totem of amateurism as a thumb on the scale.

2. Just as the concept of amateurism in top-tier college sports is a historical fiction, so too is the notion that the "amateur" status of college athletes is essential for defining and maintaining demand for a distinct product of top-tier college sports. Student participation and intra-college competition are the actual defining characteristics of any unique product offered by top-tier NCAA sports. There is no historic support for the notion that changes in compensation schemes—whether for coaches, administrators, or college athletes—alter the viability of or demand for top-tier college sports. Indeed, history suggests quite the opposite, with the tremendous growth in top-tier college sports correlated with an increase in compensation and a decrease in "amateurism" in such sports.

3. The NCAA's disparate approach to amateurism concerns in its treatment of college athletes compared to coaches and administrators has also been profoundly unfair. Increasingly, throughout the 1970s and 1980s the athletes in the two major sports were from poorer families, often coming from inner cities. Yet while those poor students received, at best, limited scholarship benefits that often did not even cover their true living costs, their labor was earning millions for their schools and coaches, including through side-deals whereby coaches were compensated for having their students wear branded apparel. While a financially needy basketball player would be prohibited by "amateurism" rules from using athletic funds to pay for a trip home at Thanksgiving, the coach could draw several hundred thousand dollars for placing basketball shoes on that player. An anachronistic reliance of claims of "amateurism"—itself a classist relic that reflected the European aristocracy's contempt for labor in all its forms—cannot justify the diversion of profits made off student talent and labor into the pockets of coaches, schools, and administrators, and it is not a sound basis for shielding the NCAA's conspiracy to suppress compensation of college athletes from genuine scrutiny under the Rule of Reason.

ARGUMENT

I. Amateurism in Top-Tier College Sports Is a Historical Fiction Honored Mostly in the Breach.

Amateurism as a defining and sustaining principle of top-tier college sports has no historic basis. While petitioners cite passing comments from *NCAA v. Board of Regents*, 468 U.S. 85, 102, (1984), that “[i]n order to preserve the character and quality of the ‘product’ [of college football], athletes must not be paid,” those comments lack factual and historical support. The character of the “product” of top-tier college sports has never been dependent on the false purity of amateurism and there is not any credible suggestion that the quality of the product has suffered as payments in cash or kind have grown over the years.³ Many historians, including some of the *amici* here, have written at length about the myth of amateurism in college sports. See, e.g., Ronald A. Smith, *THE MYTH OF THE AMATEUR: A HISTORY OF COLLEGE ATHLETIC SCHOLARSHIPS* (Univ. of Texas Press 2021) ; Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 38 STAN. L. & POL. REV. 181 (2017). While some may consider the notion

³ This Court had no need or basis for making such assertions about amateurism restrictions, as opposed to inter-school competition over television rights, in *Board of Regents*. Such armchair (dare we say “amateur”) speculation regarding the role of amateurism *per se* as a substantial factor in the product of college sports should not displace genuine judicial fact-finding under the Rule of Reason.

of amateurism charming or noble, it is a cynical fiction as far as top-tier college sports are concerned.

College athletes have been given financial favors or offers from the time of the first intercollegiate American contest in 1852 to the present.⁴ In the very first intercollegiate contest, an 1852 crew meet between Harvard and Yale on Lake Winnepesaukee in New Hampshire, a railroad magnate invited the two schools' rowers to an all-expense-paid, 8-day vacation if they would row a couple matches.⁵ A half-century later, when football and not crew was the dominant sport, the captain of the undefeated Yale football team used his property right to his name, image, and likeness (NIL) to profit from a commercial endorsement of cigarettes. James Hogan, a three-time all-American, received a commission on every pack of

⁴ For women's sports, the erosion of the supposed amateurism ideal has taken a somewhat slower path, due to many factors not the least of which is sexism layered on top of the baseline aristocratic contempt for paid labor that underlies the amateurism "ideal." Many have written about the particular history of how women's amateurism was lost and women's athletic scholarships came to be in the 1970s. See Ying Wushanley, *PLAYING NICE AND LOSING: THE STRUGGLE FOR CONTROL OF WOMEN'S INTERCOLLEGIATE ATHLETICS, 1960-2000*, at 62-75 (Syracuse Univ. Press 2004); Welch Suggs, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX*, at 61-62 (Princeton Univ. Press 2005).

⁵ Thomas C. Mendenhall, *THE HARVARD-YALE BOAT RACE, 1852-1924 AND THE COMING OF SPORT TO THE AMERICAN COLLEGE* 15-21 (Mystic Seaport Museum 1993); *New York Herald*, Aug. 10, 1852, at 2.

cigarettes of the American Tobacco Company sold in New Haven, Connecticut.⁶

Athletes have been paid in football, the leading big-time college sport since the 1890s, and in basketball, the second most dominating college sport since the 1930s. The NCAA's rules of amateurism have never hewed to any fixed principle but were instead self-serving and ever-changing creatures of convenience.

The NCAA was created during the football crisis of 1905-06, and it took a nominally hard line regarding compensation of college athletes in any form. The original 1906 NCAA Constitution opposed an athlete "who is paid or receives, directly or indirectly, any money or financial concessions." In 1916, the NCAA defined an amateur as "one who participates in competitive physical sports only for pleasure, and the physical mental, moral, and social benefits directly derived therefrom." In 1922, the NCAA added that an amateur is one for whom "the sport is nothing more than an avocation."

But throughout this time, it was widely known that many college athletes were receiving under-the-table compensation for their participation in college sports. The famed Carnegie Foundation report of 130 institutions in 1929, *American College Athletics*, decried the widespread "subsidization" of athletics, and eight years later the football team at the University of Pittsburgh literally went on strike for

⁶ Roger R. Tamte, *WALTER CAMP AND THE CREATION OF AMERICAN FOOTBALL* 273-74 (Univ. of Ill. Press 2018); Henry B. Needham, *The College Athlete*, *MCCLURE'S MAGAZINE* (June 1905), at 124.

higher wages and benefits. To address such widespread practices, the NCAA in 1948 adopted its “Sanity Code,” which claimed to prohibit “promised pay in any form for participation in athletics,” yet simultaneously allowed the payment of athletes’ tuition and fees. In 1957, the NCAA expanded the allowable payments to college athletes to include payment of tuition, room, board, books, fees, and \$15 per month. Both the 1948 and 1957 NCAA legislative efforts were deliberately intended to substitute standard above-board compensation for the widely disparate but widespread “under the table” compensation found in big-time football and basketball.⁷

“Amateurism” rules by the NCAA continue to be a “moving goalpost.” In 1974, the NCAA, changing policy, allowed professionals in one sport to participate on an “amateur” basis in another. In 1999, the NCAA created the Student Assistance Fund to further erode amateur principles while aiding athletes financially. In 2011, the NCAA permitted athletic scholarship recipients to be paid the cost of attendance or \$2,000. In 2012, the NCAA permitted colleges to grant multi-year athletic scholarships, when once they were only one-year grants. In 2015, the NCAA allowed the granting of athletic scholarships up to the cost of attendance, but only did so following litigation. In 2016, the NCAA created the Academic Enhancement Fund to allow the payment to athletes

⁷ In 1973, the Association of Intercollegiate Athletics for Women (which opposed paying athletes like that of the NCAA) allowed full athletic scholarships after the *Kellmeyer* case was settled.

through academic support programs. Nevertheless, in a self-contradicting mandate of 2019, the NCAA declared that an athlete is ineligible if the “athlete uses his or her athletic skill (directly or indirectly) for pay in any form, in that sport.” *NCAA Division I Manual, 2019-2020*, art. 12.1.2(a).⁸

Today, the NCAA’s enforcement of the amateurism ideal and its allowance for the payment of athletes are a far cry from their initial bright-line insistence on the need for motivational purity in college sports. For example, a professional basketball player is now allowed to play “amateur” collegiate football under NCAA rules.⁹ Attorneys may now provide advice to college basketball and football players when once the NCAA banned players for using lawyers.¹⁰ Athletes

⁸ Over the years there was, of course, some retrogression as well: In 1975, the NCAA eliminated the \$15 per month “laundry money.” The same year, the NCAA voted “no” to allowing scholarship athletes to earn up to \$1,500 per year from outside employment. In 1982, the NCAA deducted Federal Pell Grants from athletes on full athletic scholarships. In a 1996 reversal, Pell Grants, following a federal government investigation, allowed athletes to retain all of the grants. The original lawsuit challenging the NCAA over restricting Pell grants going to athletes was the 1978 case, *Wiley v. NCAA*, 612 F.2d 473 (10th Cir. 1979). The U. S. General Accounting Office eventually found out about the illegal athletic administration seizing of money from athletes, and the policy was stopped. *Letter from Richard C. Stiener, Director, GAO, to Senator Sam Nunn*, Jan. 10, 1995, at gao.gov/assets/90/84329.pdf.

⁹ *NCAA Division I Manual, 2020-21*, art. 12.1.3., “Amateur Status if Professional in Another Sport.”

¹⁰ The NCAA, today, allows a certified agent to represent some athletes prior to matriculation, and lawyers may now give legal advice, though they may not be involved in professional

may receive financial awards outside of athletic scholarships, once forbidden under NCAA rules.¹¹ Two NCAA granting agencies, the Student Assistant Fund and the Academic Enhancement Fund pay athletes for a variety of expenses from health and safety charges to auto parking fees.¹² Athletes may now keep their Pell Grants in addition to their cost-of-attendance athletic scholarships when once the NCAA demanded that any excess over a full scholarship must be taken away from the athletes. There are other benefits such as football bowl game awards and March Madness basketball gifts that accrue to athletes.¹³

contract negotiations. *NCAA Division I Manual, 2020-21*, art. 12.2.4.3, 12.3.1.2; 12.3.1.2.3, 12.3.2, and 12.3.2.1.

¹¹ For instance, an Olympic athlete who won gold medals and was paid \$355,000 in medal bonuses was allowed to participate for Stanford University as an “amateur” under NCAA rules. Andrew Joseph, *Katie Ledecky Just Accidentally Proved Why the NCAA Rules Are So Ridiculous*, USA TODAY, Sept. 14, 2016, at ftw.usatoday.com/2016/09/ncaa-rules-katie-ledecky.

¹² Jared Thompson, *Special Financial Assistance Delivered to Division I Members*, Apr. 19, 2017, at <https://www.ncaa.org/about/resources/media-center/news/special-financial-assistance-delivered-division-i-members>; Michelle Brutlag Hosick, *DI to Distribute Revenue Based on Academics*, Oct. 27, 2016, at ncaa.org/about/resources/media-center/news/di-distribute-revenue-based-academics.

¹³ Andrew Zimbalist, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 42-43 (Princeton Univ. Press 1999); William Gerberding, *Historical Perspective on Amateurism*, 22 J. OF COLL. AND UNIV. L. 11, 19 (1995). Gerberding, ex-president of the University of Washington, noted that “amateurism is surrounded by myth,

Athletes are paid in such a broad variety of ways in 2021 that the term “amateurism” is, at best, antiquated and should be dropped from the NCAA lexicon.¹⁴ Since the NCAA was formed in 1905, it has never successfully defined an “amateur” athlete, and the NCAA has produced shifting definitions of what constitutes an “amateur” in relation to a “professional.” Because of that, NCAA’s use of “amateurism” as a totem in defending against antitrust challenges lacks any authentic historic basis. As is true in so many areas of the law, a claimed principle, once abandoned, cannot then be gerrymandered to suit momentary whims and still remain free of further scrutiny of the more complex and self-serving decisions being made. *Cf. Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 185-95 (1999) (underinclusive pursuit of a claimed interest undermines the importance of that interest).

self-delusion, and hypocrisy” and that Pell Grants to athletes add strength to “the myth of amateurism” or as the University of Kansas coach called the NCAA and university Pell Grant actions, “Robin Hood in reverse,” taking from the poor and giving to the rich. See Walter Byers, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 238 (Univ. of Mich. Press 1995).

¹⁴ The failure to meaningfully hold any principled line in defense of “amateurism” also can be seen in other indirect exceptions made to that principle over the years. Paid coaches, early on, were condemned as violating amateurism, and many institutions, following Harvard’s lead, would not allow pro coaches. Archibald C. Coolidge, *Professional Coaches*, HARVARD GRADUATES’ MAGAZINE (14 March 1906), 392-395. By the 1920s, amateur coaches were generally considered irrelevant.

II. There Is No Historical Basis for Supposing that Amateurism Is a Material Factor Defining or Driving Demand for the Distinct “Product” of Top-Tier College Sports.

There is little if any historical evidence that allowing top-tier college athletes greater compensation for their labor will have a negative impact on the consumer product of commercialized and professionalized Division I basketball and FBS football. Similarly, no historical evidence exists suggests that spectators have attended football or basketball, or any other sport, because the players have been called “amateurs.”

A thousand or so spectators watched the 1852 crew meet between Harvard and Yale on Lake Winnepesaukee in New Hampshire. They were not deterred by the fact that the college athletes received a lavish vacation as compensation and watched the principal contest not because the crew members were amateurs, but because those attending were interested in the two most elite colleges in America.

Men’s college athletics were prospering in 1904, the year before the NCAA was formed, even though the captain of America’s then-premier college football team profited from his own brand of cigarettes.¹⁵ The selling of “Hogan’s Cigarettes,” however, did not keep fans from consuming Yale football. The Yale stadium was filled to capacity when Yale participated against the other then-elite football schools in America, Harvard and Princeton. There is no evidence that

¹⁵ Needham, *The College Athlete*, at 124.

Hogan's popularity, or that of Yale football, was diminished because he was not an "amateur" under individual college rules at the time. More than a century later, the NCAA's overbroad restrictions on payment of athletes in higher education is still not necessary to protect income-producing football and basketball competition.

It is not amateurism that is crucial to the survival and success of top-tier college football and basketball, but rather that the consumers are identifying with the educational institutions sponsoring football and basketball. Fans consume Alabama, Nebraska, and Ohio State football or Duke, Kentucky, or UCLA basketball because they identify with the individual institution, often because of geography, not because of amateurism. The various financial payments made to athletes through the years had not diminished the number of consumers of college sports. These included payments such as Pell Grants, G.I. Bill of Rights benefits, NCAA Academic Enhancement Funds (AEF) and Student Assistant Funds (SAF), and cash rewards or prepaid debit cards for bowl games or March Madness participation. Indeed, recent empirical research, not NCAA assumptions, has shown that increased pay for athletes has had no negative effect on either the number of consumers at the stadium or those watching television.¹⁶ The NCAA's claimed

¹⁶ One study found that significantly increased "cost of attendance" (COA) payments to NCAA "Power Five" football players beginning in 2015 had no negative consumer effects from the previous year when COA payments did not exist. Thomas A. Baker, III, Marc Edelman, and Nicholas Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law:*

importance of a “revered tradition of amateurism in college sport” thus rings hollow to academics who have researched and written about intercollegiate athletics and the myth of amateurism.

Although the NCAA continues to argue, with no credible data, that amateurism is the key to FBS football and Division I basketball product, and that amateurism is the key to differentiating between the professional and college sports, NCAA Pet. Br. 14-15, it is “naïve to suppose that simply the *pretense* of maintaining the amateur ideal is essential to continuing” with the limited compensation rule.¹⁷ Indeed, there is no historical evidence that misleading the public through contrived claims of “amateurism,” supported by underpaying college athletes for their labor, is needed to preserve consumer demand.¹⁸

The ultimate distinguishing feature of the NCAA’s “product” is not some sharp demarcation whereby professionals are paid while college athletes are not. Both professionals and “amateurs” are paid in one form or another. Rather, the difference is that college athletes are involved in higher education and

A Legal and Statistical Analysis, 85 TENN. L. REV. 661, 697-99 (2018).

¹⁷ Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1312 (1992) (italics in original) (quoting Sharon E. Rush, *Touchdowns, Toddlers, and Taboos: On Paying College Athletes and Surrogate Contract Mothers*, 31 ARIZ. L. REV. 549, 587 (1988)).

¹⁸ And it would be peculiar, to say the least, if such horizontally organized deceit used as a means to increase consumer demand qualified as a *pro-competitive* business practice.

professionals are not. Connection to education, not the false concept of amateurism, is the key to the different sports' "products" on the market, not the false pretense that college athletes are participating *only* for mere love of sport rather than for career and financial opportunity as well. Given this *actual* differentiator of college sports, consumer demand for college athletics will likely remain well after the term "amateurism" is eliminated from the NCAA Constitution and Bylaws, something the Olympics did in the 1980s.¹⁹

III. Amateurism Is Little More than an Excuse for Exploitive and Unfair Treatment of College Athletes as Compared to Others Involved in Top-Tier College Sports.

Despite increasing allowance of direct and indirect compensation for top-tier college athletes, such concessions still do not amount to free and fair payments for their labor. For example, even with "full-ride" athletic scholarships, the additional cost of attending college can be thousands of dollars beyond that covered by such scholarships. For athletes such as Respondent Alston, as well as those who come from low-income families, these additional expenses can create financial hardships in college and beyond.²⁰

¹⁹ Matthew P. Llewellyn and John Gleaves, *THE RISE AND FALL OF OLYMPIC AMATEURISM* 142-64 (Univ. of Ill. Press, 2016); Allen Guttmann, *THE OLYMPICS: A HISTORY OF THE MODERN GAMES* 178 (Univ. of Ill. Press, 1992).

²⁰ To pay for the difference between an athletic scholarship and the cost of attendance, Alston took out a \$5,500 Federal Direct Subsidized Loan. *Shawne Alston suing NCAA, others*,

Rather than share the wealth with the college athletes whose labor is central to the NCAA's top-tier college sports products, the tremendous and growing earnings from the two principal sports were used to increase coaches' and administrators' pay, with several coaches being paid over \$10 million. The money also was spent to build or renovate arenas and stadia, erect "jock" houses, create athlete-academic centers to help keep athletes eligible, and construct training centers for the athletes. These helped athletes to compete for the commercialized and professionalized institutions, but the increased revenues did not go directly to athletes or their families. Athletes had state-of-the-art locker rooms but no money, for instance, to travel home to see an ill parent.

The NCAA has been far more interested historically in cashing in on the commercial aspects of football and basketball, such as television contracts, bowl games, and March Madness, than improving the welfare of the athletes. Nebraska's great football coach, Tom Osborne, (1973-1997) once wrote that "There is no question that the players are the most important and least considered element of athletic competition as far as the NCAA is concerned." *Letter from Tom Osborne to Chancellor Martin Massengale,*

ESPN.COM, Mar, 5, 2014, at https://www.espn.com/college-football/story/_id/10558893/ncaa-conferences-sued-scholarship-value. Alston explained at trial that he needed more money "so he could eat more, have clothes, go home during breaks, pay phone bills." Dorothy M. Atkins, *Alston et al. v. NCAA, Trial Commentary*, Sept. 2018, available at <https://dorothymatkins.com/alston-et-al-v-ncaa/>.

Nov. 17, 1986, Chancellors' Files, Box 299, Folder 20, University of Nebraska Archives.

Perhaps the most publicized work criticizing the NCAA's amateurism rules was written a decade ago by one of the *amici* here, Taylor Branch, who observed that, “[n]o legal definition of amateur exists, and any attempt to create one in enforceable law would expose its repulsive and unconstitutional nature * * *. Without logic or practicality or fairness to support amateurism, the NCAA's final retreat is to sentiment.” Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, (Oct 2011), available at <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>. But sentiment for a fictional reframing of a past time when the aristocracy viewed labor for money with contempt yet reaped anti-competitive profits by conspiring to restrain the market is no justification for excusing the modern echoes of such past exploitation.²¹

²¹ Amateurism serves no *useful* purpose for the athlete in 2021, but still serves the NCAA and member institutions in their opposition to the possibility of taxing their revenues or being subject to workers' compensation. Allen L. Sack, COUNTERFEIT AMATEURS: AN ATHLETE'S JOURNEY THROUGH THE SIXTIES TO THE AGE OF ACADEMIC CAPITALISM 111-16 (Penn. State Univ. Press 2008); Smith, THE MYTH OF THE AMATEUR, *supra*, at 147-59. In 2020, the student newspaper at the University of North Carolina, Chapel Hill stated that it would no longer use the term “student-athlete” because it was created in the 1950s as an effort by the NCAA to prevent worker compensation awards since athletes were students, not workers. *The Daily Tar Heel will no longer use the term 'student athlete'*, DAILY TAR HEEL, Aug. 9, 2020, available at

The time for protecting the exploitation of college athletes' labor under the pretense of amateurism is long past. As aptly noted in an insightful 1992 Note in the Harvard Law Review, "judicial invalidation of the amateurism principle may actually allow the NCAA to place more emphasis on academic values in its members' sports programs."²² An emphasis on education and the welfare of college athletes, not amateurism, should be underscored.

CONCLUSION

Historically, the NCAA's claim that amateurism is central to college sport is false. NCAA amateurism, originally opposed to any athlete being paid in any form, has been modified so drastically that there are more than a dozen types of payment to athletes currently allowed by the NCAA Bylaws. There is no reliable evidence that preserving the lingering pretense of NCAA "amateurism" is needed to maintain consumer demand in the sports of Division I basketball and FBS football. What sets college athletic participation apart from "professional" sports is not that intercollegiate sports are amateur, but that they are part of institutions of higher education. College sports are intended to be educational—professional sports are not.

Allowing competitors to conspire to reap extraordinary profit from the underpaid labor of college athletes is so fundamentally unfair and

<https://www.dailytarheel.com/article/2020/08/student-athlete-term-editorial>.

²² *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. at 1316.

contrary to free-market principles that it should, at a minimum, be denied any special exemption from the ordinary antitrust scrutiny of the Rule of Reason.

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