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## AMERICAN AMATEUR PLAYERS ARISE: YOU HAVE NOTHING TO LOSE BUT YOUR AMATEURISM

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# AMERICAN AMATEUR PLAYERS ARISE: YOU HAVE NOTHING TO LOSE BUT YOUR AMATEURISM\*

William B. Gould IV\*\*

*Enormous wealth obtained by universities and affiliates through the labor of so-called student athletes, disproportionately Black Americans, is a scandal awaiting redress through law, legislation and the solidarity of the athletes themselves. The response of players to these inequities has taken a number of forms: minimum wage litigation, representation petitions filed with the National Labor Relations Board, antitrust litigation and now so-called pay-to-play legislation in California and elsewhere. The COVID-19 crisis has exposed university reliance upon unpaid labor for revenues, and this has inspired new demands by student athletes.*

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\* With apologies to Karl Marx & Frederick Engels, THE COMMUNIST MANIFESTO 687 (Charles H. Kerr & Co. 1888) (1848) (reprinted in WILLIAM Ebenstein, Great Political Thinkers, 1957) (“The proletarians have nothing to lose but their chains. They have a world to win . . . Working Men of All Countries, Unite!”).

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## I. INTRODUCTION

“80% of full-scholarship athletes live at or below the federal poverty level. Meanwhile, the NCAA and universities use these athletes to generate billions in profits, through ads, TV deals and ticket sales.” – Senator Nancy Skinner and Senator Steven Bradford of California in the SB206 Assembly Floor Analysis.<sup>1</sup>

There is a great disparity between the extraordinary revenues that Defendants garner from Division I basketball and FBS football, and the modest benefits that class members receive in exchange for their participation in these sports relative to the value of their athletic services and the contributions they make. Class members contribute their elite talent and time, they limit their educational options, and they risk their long-term health to create enormous financial value for Defendants.<sup>2</sup>

The Twentieth Century witnessed the development of professional players’ unions or associations in virtually all of the major league sports,<sup>3</sup> a development occurring well after the organization of professional sports. The process started with baseball<sup>4</sup> and extended to other sports as well.<sup>5</sup> Notwithstanding the absence of judge-made antitrust

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1. SENATE THIRD READING SB 206, 2019-2020 Sess., at 2 (Cal. 2019), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200SB206](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200SB206) (follow “09/04/19- Assembly Floor Analysis”) (“The NCAA president Mark Emertt made over 3 million dollars in salary just last year, while any athletes who put their bodies on the line struggle to make ends meet.”)

2. *In re NCAA Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1110 (N.D. Cal. 2019) (said Judge Claudia Wilken). “For all their dedication, labor, talent, and personal sacrifice, Student-Athletes go largely uncompensated. [C]ollege sports viewership has only increased since we reduced some limitations on student-athlete compensation . . .” *In re NCAA Grant-in-Aid Cap Antitrust Litig. (Alston)*, 958 F.3d 1239, 1266 (9th Cir. 2020) (Smith, J., concurring).

3. William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL’Y REV. 61, 65 (2004). But this has not yet applied to the minor leagues. *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017) (denying a challenge to MLB’s minor league pay practices under antitrust law). See generally Nathaniel Grow, *The Save America’s Pastime Act: Special-Interest Legislation Epitomized*, 90 U. OF COLO. L. REV. 1014 (2019).

4. See WILLIAM B. GOULD IV, *BARGAINING WITH BASEBALL: LABOR RELATIONS IN AN AGE OF PROSPEROUS TURMOIL* 67-68 (2011).

5. *Id.* at 1-2. ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 55-57 (Praeger 2nd ed. 1993). Professor Berry taught the very first Sports Law course offered in the United States (and most probably, the world) at Boston College Law School in 1971-72. In large part, inspired by his work, a course addressing this subject matter was developed at Stanford Law School in the mid-eighties by Leonard Koppett, Alvin Attles and the author. See ROBERT C. BERRY & G. M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* (Auburn House Publ. Co. 1st ed. 1986); ROBERT C. BERRY & G. M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* (Auburn House Publ. Co. 1st ed. 1986). *Professor Robert C. Berry, 1936-2011*, B.C. L. (Nov. 30, 2011), [https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1678&context=law\\_school\\_publications](https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1678&context=law_school_publications). See

law,<sup>6</sup> baseball was the first sport to develop institutionalized protection for its players due to a muscular union under the effective leadership of Marvin Miller from the 1960s onward.<sup>7</sup> The other major sports like football,<sup>8</sup> basketball,<sup>9</sup> boxing,<sup>10</sup> and hockey eventually following suit.<sup>11</sup>

This tidal shift was not the result of professional players having a strong bargaining position, initially because their abbreviated careers relegated them to precarity, but rather the legal weaponry of athletes with whom the public did not easily identify—thus making them vulnerable to replacement during strikes.<sup>12</sup> By no means were professional players in a position of parity with the owners across the bargaining table. This imbalance was solidified through subsequent labor law interpretations fashioned by the courts.<sup>13</sup>

In contrast, the development of similar protection in so-called “amateur” sports at the collegiate level did not see such success.<sup>14</sup> Their progress was impeded by the very label given, i.e., the idea was that if the players were participating on an amateur level, the kinds of considerations applicable to the professionals did not apply, even though amateurism constituted a pipeline to professional status.<sup>15</sup> Proper analysis of this relationship was hindered by the Frank Merriwell idea that sports at the amateur level were the antithesis of the professionals, with athletes playing for the pure joy of the sport.<sup>16</sup> However, the underlying unstated

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*generally* ROBERT C. BERRY, WILLIAM B. GOULD IV & PAUL D. STAUDOHR, *LABOR RELATIONS IN PROFESSIONAL SPORTS* (1986).

6. *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof. Baseball Clubs*, 259 U.S. 200, 208-09 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 364-65 (1953); *Flood v. Kuhn*, 407 U.S. 258, 285 (1972).

7. *See generally* CHARLES P. KORR, *THE END OF BASEBALL AS WE KNEW IT: THE PLAYERS UNION 1960-81* (2002); ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW 73-74* (1998); Robert C. Berry & William B. Gould IV, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, *CASE W. RES. L. REV.* 685, 743 (1981).

8. *Radovich v. NFL*, 352 U.S. 445, 447-48 (1957).

9. *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975).

10. *Int’l Boxing Club of N.Y. Inc., v. United States*, 358 U.S. 242 (1959).

11. *Bos. Prof. Hockey Ass’n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972), *rev’d*, 472 F.2d 127 (1st Cir. 1972).

12. *See NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 337 (1938).

13. *Brady v. NFL*, 644 F.3d 661 (8th Cir. 2011); *Brady v. NFL*, 640 F.3d 785, 786 (8th Cir. 2011).

14. *See, e.g.,* Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, *N.Y. TIMES* (Apr. 17, 2015), <https://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrbsays-northwestern-football-players-cannot-unionize.html>.

15. Dan Levy, *Can College Athletes Unionize?*, *BLEACHER REP.* (Oct. 8, 2013), <https://bleacherreport.com/articles/1802827-can-college-athletes-unionize>.

16. Robert H. Boyle, *Frank Merriwell’s Triumph*, *VAULT* (Dec. 24, 1962), <https://vault.si.com/vault/1962/12/24/frank-merriwells-triumph> (“[Frank Merriwell is a] hero of the most widely read juvenile saga ever published, his very name is synonymous with the spectacular in sports.”).

assumption was that the professionalism of amateur sports would diminish public interest and thus both diminish attendance and television, internet proceeds, and the like.

But considerable dissatisfaction with the amateur model has developed, and with it, substantial skepticism about “the revered tradition of amateurism in college sports” as a “long-standing tradition [which] defines the economic reality of the relationship between student athletes and their schools.”<sup>17</sup> Tightly woven into this picture is the reality that so-called student athletes in Division I colleges are predominantly Black Americans<sup>18</sup> and overwhelmingly so at the starting player superstar level, which is likely to obtain professional draft status.<sup>19</sup> The NCAA and the competitively strong universities, disproportionately in the South and the West, invite a description which could consist of Black players in white universities.<sup>20</sup> Against the backdrop of enormous wealth for the universities, there exists a symbiotic relationship between the universities and the professional leagues for which they serve as minor league preparatory bodies, which has helped to fuel discord. Players frequently do not complete their education, and in basketball, where the best can graduate to the professional level at the end of one year of college, the phrase “one and done” has encapsulated the prevailing practice.<sup>21</sup>

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17. *Berger v. NCAA*, 843 F.3d 285, 291 (7th Cir. 2016); *see also NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984). Excellent critical commentary about this tradition has been provided by JOE NOCERA & BEN STRAUSS, *INDENTURED: THE BATTLE TO END THE EXPLOITATION OF COLLEGE ATHLETES* (2018); Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

18. NCAA Research, *Diversity Research*, NCAA, <http://www.ncaa.org/about/resources/research/diversity-research> (last visited Oct. 26, 2020); *cf.* Jemele Hill, *It's Time for Black Athletes to Leave White Colleges*, ATLANTIC (Oct. 2019), [https://www.theatlantic.com/magazine/archive/2019/10/black-athletes-should-leave-white-colleges/596629/?gclid=EAIaIQobChMI1I6R9Jm47AIVfCCtBh0jRghaE-AAYASAAEgIp4fD\\_BwE](https://www.theatlantic.com/magazine/archive/2019/10/black-athletes-should-leave-white-colleges/596629/?gclid=EAIaIQobChMI1I6R9Jm47AIVfCCtBh0jRghaE-AAYASAAEgIp4fD_BwE).

19. *NFL Draft - Picks*, NFL, <https://www.nfl.com/draft/tracker/picks?year=2020> (last visited Oct. 26, 2020) (showing that the majority of college football players picked in the first round of the 2020 draft were Black).

20. The Louisiana State University football team, which won the 2020 National Championship, is composed of predominately Black players. *See* LSU Sports, *2019 Football Roster*, LSU (2019), <https://lsusports.net/sports/football/roster/2019>. However, data shows that white students widely outnumber students of color at LSU. For example, in the Fall 2020 semester, LSU reported just over 22,000 white students, compared to just over 5,000 Black students. *See* LSU Office of Fin. & Admin., *Enrollment by Race*, LSU, <https://www.lsu.edu/bgtplan/trend/dashboards/race.php> (last visited Oct. 26, 2020).

21. The attacks upon these kinds of labor restraints and practices have thus far withstood challenge under antitrust law. *Clarett v. NFL*, 369 F.3d 124 (2nd Cir. 2004). The “one and done” rule is a NBA rule which prohibits high school basketball players from being drafted and requires one year of college basketball prior to being drafted. *Why NBA players think one and done rule unfair*, NBC SPORTS (Apr. 13, 2020), <https://www.nbcsports.com/northwest/portland-trail-blazers/why-nba-players-think-one-and-done-rule-unfair>.

As a result of this discord, the legal challenges have taken essentially three different forms. The first consists of minimum wage and maximum hour legislation at both the state and federal levels, with the federal level consisting of the Fair Labor Standards Act of 1938.<sup>22</sup> A second challenge involves resort to the National Labor Relations Board under the National Labor Relations Act<sup>23</sup> for the purpose of union representation of the players and as a vehicle to protest employment conditions which they deem to be unfair.<sup>24</sup> A third avenue is that of antitrust law, which has as its focus (i) NCAA prohibitions against player compensation for the use of their name, image, and likeness (NIL), an area of income for the universities themselves<sup>25</sup> and (ii) any and all restrictions placed upon income up to and beyond the cost of attendance as well as player mobility.<sup>26</sup> Litigation involving the prohibition on compensation for NIL has played a substantial role in the enactment of so-called “pay-to-play” state laws, which are designed to give student athletes the ability to obtain compensation from third parties other than the universities themselves.

## II. MINIMUM WAGE LITIGATION

The key issue in all of these cases which seek compensation for time spent on the field in games, practices, scrimmages, workouts, travel, and rules relating to curfews, etc., is whether the players can be properly characterized as employees.<sup>27</sup> The issue of students, who frequently obtain jobs and compensation while in university, can be treated similarly as students and employees that are teaching and research

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22. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

23. 29 U.S.C. §§ 151-69.

24. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9 (1962).

25. *NCAA NIL Proposal Prohibits College Athletes From Using School Logo, Endorsing Certain Businesses and More*, SPORTS ILLUSTRATED (Sept. 14, 2020), <https://www.si.com/college/2020/09/14/ncaa-survey-proposal-name-image-likeness>. The NCAA is currently working on developing rules that would allow students to be compensated for their NIL. *Id.*

26. *See In re NCAA Grant-in-Aid Cap Antitrust Litig. (Alston)*, 958 F.3d 1239 (9th Cir. 2020).

27. Sports cases arising under the different standards of the National Labor Relations Act have characterized umpires, as well as players, to be employees. *Am. League of Prof. Baseball Clubs*, 180 N.L.R.B. 190, 193 (1969). The same issue involving referees has not yielded the same dispositive answer. *Pa. Interscholastic Athletic Ass'n v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019). For contrasting approaches taken by the same court, see *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563, 570 (D.C. Cir. 2016). *See generally* William B. Gould IV, *The Future of the Gig Economy, Labor Law, and the Role of Unions: How Will They Look Going Forward?*, (Stan. Pub. L., Working Paper, 2017); William B. Gould IV, *Dynamex is Dynamite, but Epic Systems Is Its Foil—Chamber of Commerce: The Sleeper in the Trilogy*, 83 MO. L. REV. 989 (2018).

assistants who work on educational subject matter. The issue has been resolved differently by the National Labor Relations Board (albeit under different standards<sup>28</sup>) over the years. Early on, the Board concluded that such students are not employees,<sup>29</sup> but the Board more recently has characterized them as employees protected by the NLRA.<sup>30</sup> The principal argument against employee status for such students has been that they are deeply enmeshed in the educational product and that their status as employees would interfere with the product of education.<sup>31</sup> This argument is less persuasive for student athletes since the production of games has little or nothing to do with education itself.

But in the minimum wage arena, the position of players attempting to seek protection as employees has been uniformly unsuccessful. The leading case here is *Berger v. NCAA*,<sup>32</sup> where the Seventh Circuit contrasted student athletes against work study programs, which involved students working at food service counters or selling programs or ushering at athletic events where the Fair Labor Standards Act applies.<sup>33</sup> Unlike student workers, student athletes, said the court, “participate in their sports for reasons wholly unrelated to immediate compensation” and were, therefore, not considered employees nor were they entitled to a minimum wage under the FLSA.<sup>34</sup> Judge Hamilton, while concurring, noted that the track and field competition involved in the instant case was not a “revenue”-producing sport and the plaintiffs did not receive scholarships.<sup>35</sup> Had those considerations been present, said Judge Hamilton, the “economic reality and the tradition of amateurism may not point in the same direction.”<sup>36</sup>

The Court of Appeals for the Ninth Circuit, in *Dawson v. NCAA*, while careful to note its unwillingness to adopt the “analytical premises” and “rationales” employed by the Seventh Circuit, came to the same

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28. *Tr. of Colum. Univ. in the City of N.Y.*, 364 N.L.R.B. 90 (2016); *Brown Univ.*, 342 N.L.R.B. 483 (2004); *N.Y.U.*, 332 N.L.R.B. 1205 (2000).

29. *Brown Univ.*, 342 N.L.R.B. at 493.

30. *Tr. of Colum. Univ. in the City of N.Y.*, 364 N.L.R.B. at 60; cf. William B. Gould IV, *Too much Politics in Labor Law*, ST. LOUIS POST-DISPATCH, Sept. 7, 2016, at A15. For the proposition that the board shifts back and forth, see William B. Gould IV, *Politics and the Effect on the National Labor Relations Board's Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501 (2015); Clyde W. Summers, *Politics, Policy Making, and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); W. Willard Wirtz, *The New National Labor Relations Board: Herein of "Employer Persuasion,"* 49 NW. U.L. REV. 594 (1954).

31. *Brown Univ.*, 342 N.L.R.B. at 484-85.

32. *Berger v. NCAA*, 843 F.3d 285 (7th Cir. 2016).

33. *Berger*, 843 F.3d at 293.

34. *Id.*

35. *Id.* at 294.

36. *Id.*

conclusion as *Berger*.<sup>37</sup> In *Dawson*, the court held that a University of Southern California (USC) student athlete in the football program was not an employee of either the NCAA or his collegiate athletic conference, the PAC-12 Conference, under either the FLSA or the California Labor Code.<sup>38</sup> Without addressing the question of whether the plaintiff was an employee of USC, an issue the court left for another day, it concluded that since member schools award and distribute financial aid, and neither the NCAA nor the PAC-12 provided the plaintiff with a scholarship or any expectation of a scholarship, the issue of whether the scholarship “engendered an ‘expectation of compensation’” was not properly before the court.<sup>39</sup> Chief Judge Thomas said, speaking for a unanimous panel, that while the NCAA Bylaws “pervasively regulate college athletics,” since neither the NCAA nor the PAC-12 had any power to hire or fire him, that factor could not be relied upon to establish employee status vis a vis those organizations.<sup>40</sup> Moreover, the court said that “precedent demonstrates that revenue does not automatically engender or foreclose the existence of an employment relationship under the FLSA . . . . [T]he revenue generated by college sports does not unilaterally convert the relationship between student-athletes and the NCAA into an employment relationship.”<sup>41</sup> The panel, therefore, concluded that neither the NCAA nor PAC-12 were the plaintiff’s employers.<sup>42</sup> Recognizing a long and “storied history,” the court concluded that, under California law, the universities were not deemed to be employers of athletes, and that the student athletes were not employees of the NCAA or PAC-12 either.<sup>43</sup> This was based upon the court’s reading of the education code, which recognized that student athletes may incur medical expenses in intercollegiate athletics, but that this did not extend the employment relationship to them.<sup>44</sup> Said the court:

Instead of extending employment-related protections to student-athletes, however, the Legislature provided for scholarship compensation and the payment of insurance deductibles and medical expenses for injured students, the availability of financial and life skills workshops, and due process protections for student-athletes involved in disciplinary actions facing loss of athletic scholarship funds.<sup>45</sup>

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37. *Dawson v. NCAA*, 932 F.3d 905, 908 n.2 (9th Cir. 2019).

38. *Id.* at 913-14.

39. *Id.* at 909.

40. *Id.* at 910.

41. *Id.*

42. *Id.* at 911.

43. *Dawson*, 932 F.3d at 912-14.

44. *Id.* at 913.

45. *Id.*

Accordingly, for the reasons expressed by the Seventh and Ninth Circuits, plaintiff student athletes have been entirely unsuccessful in their legal efforts to obtain employee status for these purposes. However, the Ninth Circuit has left open future actions against universities.<sup>46</sup> Further, Judge Hamilton would seem to view minimum wage actions in the mainstream revenue producing sports as a different matter entirely.<sup>47</sup>

### III. THE NATIONAL LABOR RELATIONS ACT

College players have attempted to use the National Labor Relations Act (NLRA) and its Board (NLRB) for the purpose of organizing into a union and to thus invoke the collective bargaining process to address some of the areas of dissatisfaction in the current relationship.<sup>48</sup> The key consideration in this area is, again, whether the players could be characterized as employees—this time within the meaning of the NLRA. The issue was addressed in *Northwestern University*.<sup>49</sup> During the proceedings, the Regional Director in Chicago provided an extremely thorough and comprehensive opinion, which concluded that Northwestern football players were employees within the meaning of the Act based upon (1) the required adherence to football activities and attendance as a condition for retaining the provided scholarship; (2) the providing of services for the benefit of the college; (3) the college's control of the football players in the performance of their duties; and (4) the lack of overlap of the services with the educational mission of the university and the athletic players who do not engage in such academic tasks, in contrast to student teaching or research assistants.<sup>50</sup> The Board, in its opinion, did not address the Regional Director's conclusions inasmuch as it determined that it would not effectuate the policies of the Act to assert jurisdiction over grant-in-aid scholarship players.<sup>51</sup> The Board concluded unanimously that jurisdiction should be declined even if it could be assumed that the players were employees within the meaning of the Act because the overwhelming majority of Northwestern's competitors were public colleges and universities over which the Board does not have

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46. *Id.* at 913-14.

47. *See Berger v. NCAA*, 843 F.3d 285, 294 (7th Cir. 2016).

48. Much or most of these two paragraphs are taken from WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 522-23 (6th ed. 2019).

49. *Northwestern Univ.*, 362 N.L.R.B. 1350 (2015).

50. *Id.* at 1362-64.

51. *Id.* at 1367-68.

jurisdiction.<sup>52</sup> Therefore, it reasoned that it would not promote stability in labor relations to assert jurisdiction.<sup>53</sup>

Without addressing the question of whether team-by-team organizing or bargaining would be foreclosed in the future, the Board noted that it had jurisdiction over only seventeen of the approximately 125 colleges and universities in Division I, which were private and thus within the jurisdiction of the Board.<sup>54</sup> In *Northwestern*, the Board declined jurisdiction, notwithstanding the fact that elsewhere it has asserted jurisdiction<sup>55</sup> where conditions of employment may have been promoted or dictated by government, which is beyond the Board's jurisdiction.<sup>56</sup>

Meanwhile, in a memorandum rescinded by the Trump General Counsel, the General Counsel appointed by President Obama subsequently concluded that collegiate football players are employees.<sup>57</sup> The General Counsel of the Board acts as an independent prosecutor, so to speak, who brings actions before the Board for adjudication.<sup>58</sup> As a result, the issue is sure to be addressed in the years to come, whatever the composition of the Board and General Counsel of the Board.

#### IV. THE ANTITRUST CASES AND PAY-TO-PLAY LEGISLATION

A series of actions by college players has been instituted, invoking the Sherman Antitrust Act of 1890.<sup>59</sup> These actions have been filed by college players to establish that financial aid rules denying players' compensation, which are set by colleges and universities under the auspices of the NCAA and rooted in the concept of amateurism, constitute an

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52. *Id.* at 1350-52.

53. *Id.* at 1352. The decision is criticized in William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1 (2015). See generally Andrew McInnis, *Play Under Review: How the NLRB Failed to Protect Some of the Most Vulnerable Employees—College Athletes*, 2018 MICH. ST. L. REV. 189 (2018).

54. *Northwestern Univ.*, 362 N.L.R.B. at 1351.

55. *Mgmt. Training Corp.*, 317 N.L.R.B. 1355, 1358 (1995).

56. 29 U.S.C. §2 (2006).

57. Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice to Peter Sung Ohr, Reg'l Dir., Region 13 (Sept. 22, 2016); Memorandum from Peter B. Robb, Gen. Counsel, N.L.R.B., to All Reg'l Dir., Officers-in-Charge, and Resident Officers, N.L.R.B., (Dec. 1, 2017) (rescinding Memorandum from Barry J. Kearney, *supra*); see also Joseph Wilkinson, *New NLRB General Counsel rescinds memo that labelled football players as employees*, DAILY NW, (Dec. 15, 2017), <https://dailynorthwestern.com/2017/12/15/lateststories/new-nlr-general-counsel-rescinds-memo-labelled-football-players-employees/>.

58. See Wilkinson, *supra* note 57.

59. See *Sherman Antitrust Act*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act) (last visited Nov. 5, 2020) (“[The Sherman Antitrust Act] prohibits activities that restrict interstate commerce and competition in the marketplace.”).

unlawful conspiracy in restraint of trade.<sup>60</sup> At issue in *O'Bannon v NCAA*,<sup>61</sup> a Ninth Circuit Court of Appeals case, was the NCAA's refusal to allow financial compensation to exceed the full cost of attendance at college or university.<sup>62</sup> All-American UCLA basketball player Ed O'Bannon challenged the use of his likeness in a video game, a use to which he had not consented and for which he had not been compensated.<sup>63</sup> The plaintiff complaint, therefore, alleged that the use of amateurism rules by the NCAA constituted an illegal restraint of trade under the so-called Rule of Reason and that he, O'Bannon, and others similarly situated should be compensated for the use of their likenesses.<sup>64</sup> The district court judge, Judge Claudia Wilken, agreed with the plaintiffs and the court found antitrust liability for failure to compensate the players involved, sweeping aside the arguments that such a decree was inconsistent with "amateurism" and would harm the competitive balance which makes it possible for college athletics to appeal to the public and to integrate academics and athletics.<sup>65</sup> The court noted that some players, such as those playing in tennis, were allowed to receive prize money before attending college and could accept Pell Grants, which raised their financial package beyond the cost of attendance.<sup>66</sup> Amateurism, said the district court, was not the "primary driver of consumer demand for college sports," though "it did find that amateurism served some pro-competitive purposes."<sup>67</sup> Finding antitrust liability, the court held that less restrictive alternatives compared to the prohibition against compensation were available, including: (1) allowing schools to award stipends up to the cost of full attendance; and (2) allowing schools to distribute licensing revenues for their likenesses to the student athletes after they leave college.<sup>68</sup> As a remedy, the court fashioned a \$5,000 post-eligibility award.<sup>69</sup>

On appeal, in an opinion authored by Judge Jay S. Bybee, the Court of Appeals for the Ninth Circuit accepted the proposition that the compensation rules constitute commercial activity subject to antitrust law and that "the transaction in which an athletic recruit exchanges his labor

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60. Much of the discussion of *O'Bannon* is taken from GOULD, *supra* note 48, at 519-21.

61. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

62. *Id.* at 1053.

63. *Id.* at 1055.

64. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014), *aff'd in part, vacated in part* by *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

65. *Id.* at 1009.

66. *Id.* at 974.

67. *O'Bannon*, 802 F.3d at 1059.

68. *Id.* at 1060-61.

69. *Id.* at 1061.

and NIL [licensing] rights for a scholarship at a Division I school [is correct] because it is undeniable that both parties to that exchange anticipate economic gain from it.”<sup>70</sup> The court was of the view that the compensation cap constituted an anticompetitive effect by fixing prices between the school and the recruit, thereby precluding competition between those schools.<sup>71</sup> The compensation cap, which represented the full cost of attendance, was a substantially less restrictive means of accomplishing the pro-competition objectives of the NCAA.<sup>72</sup> Accordingly, the court determined the district court’s injunction for violation of antitrust law coupled with compensation up to the full cost of attendance was correct.<sup>73</sup>

However, the Ninth Circuit held that the district court had erred in allowing post-eligibility cash payments of \$5,000 to be “untethered to their education expenses.”<sup>74</sup> With rather murky and illogical reasoning, the court appeared to accept the proposition that amateurism constituted the appropriate means to achieve college sports’ objectives. The court stated: “[w]e cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both *equally* effective in promoting amateurism and preserving consumer demand.”<sup>75</sup> Offering student athletes education-related compensation while offering them cash sums unrelated to educational expenses was not a minor matter, but rather, “it is a quantum leap.”<sup>76</sup> The panel majority, vacating the post-eligibility payments, concluded that providing monies up to the cost of attendance was a less restrictive means to implement its “tradition of amateurism in support of the college sports market.”<sup>77</sup>

Subsequently, in a new round of litigation involving the compatibility of general financial aid to college athletes, Judge Wilken concluded that the NCAA grant-in-aid rules constitute an unreasonable restraint on trade under the Sherman Act.<sup>78</sup> However, notwithstanding her

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70. *Id.* at 1065.

71. *Id.* at 1071.

72. *Id.* at 1049.

73. *O’Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015).

74. *Id.* at 1076.

75. *Id.*

76. *Id.* at 1078.

77. *Id.* at 1079. Chief Judge Thomas, concurring in part and dissenting in part, concluded that he “respectfully disagree[d]” when the conclusion that \$5,000 in deferred compensation above the full cost of attendance constituted error. *Id.* at 1079. But Judge Thomas’ opinion pointed out that the key objective to be preserved was the popular demand for college sports rather than the concept of amateurism which, said Judge Thomas, was “relevant only insofar as it relates to consumer interest.” *O’Bannon*, 802 F.3d at 1081.

78. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109-10 (N.D. Cal. 2019).

condemnation of the NCAA practices, her opinion was constrained by the “quantum leap” language in the Ninth Circuit’s *O’Bannon* ruling.<sup>79</sup> Accordingly, while the court’s ruling regarding the illegality of compensation prohibition was clear, the remedy was not.<sup>80</sup> All that had been achieved was a kind of judicial chipping away at the amount or adequacy of payments which could be characterized as educational.<sup>81</sup> This ruling was affirmed by the Court of Appeals for the Ninth Circuit by a unanimous panel in a comprehensive opinion authored by Chief Judge Thomas.<sup>82</sup> The court affirmed Judge Wilken’s conclusion that “NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits.”<sup>83</sup>

But now another shoe was to drop. Inspired by Judge Wilken’s rulings, State legislatures have started to place considerably more pressure upon both the NCAA and universities.<sup>84</sup> This constituted legislation which was passed initially by California<sup>85</sup>—and now Colorado and other

79. *Id.* at 1106-07.

80. Winston Cho, *NCAA ruling unlikely the watershed advocates hoped*, DAILY J. (Mar. 15, 2019), [dailyjournal.com/articles/351573](https://dailyjournal.com/articles/351573); Marc Tracy, *Judge Opens the Door to More Compensation for College Athletes*, N.Y. TIMES (Mar. 8, 2019), <https://www.nytimes.com/2019/03/08/sports/ncaa-amateurism-ruling.html>; Marc Tracy, *The N.C.A.A. Lost in Court, but Athletes Didn’t Win, Either*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/ncaa-court-ruling-antitrust.html>.

81.

[T]he N.C.A.A. has allowed colleges to grant ‘cost of attendance’ stipends along with scholarships, relaxed tough rules on transferring and encouraged spending on mental health treatment and meals for athletes, though most changes have required prompting by the courts or public opinion. (The N.C.A.A. did away with limits on food that could be provided for athletes when Shabazz Napier, a Connecticut basketball star, told reporters at the 2014 Final Four that he often went to bed hungry.)

Billy Witz, *California Lawmakers Vote to Undo N.C.A.A. Amateurism*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/sports/college-athlete-pay-california.html>; see also Marc Tracy, *Players Hold Power Over the N.C.A.A., if They Feel the Hunger*, N.Y. TIMES (Apr. 8, 2019), <https://www.nytimes.com/2019/04/08/sports/final-four-ncaa-amateurism.html>.

82. *In re NCAA Grant-in-Aid Cap Antitrust Litig.* (*Alston*), 958 F.3d 1239, 1239-40 (9th Cir. 2020).

83. *Id.* at 1260.

84. See Matt Norlander, *Fair Pay to Play Act: States bucking NCAA to let athletes be paid for name, image, likeness*, CBS SPORTS (Oct. 3, 2019, 5:43 PM), <https://www.cbssports.com/college-football/news/fair-pay-to-play-act-states-bucking-ncaa-to-let-athletes-be-paid-for-name-image-likeness/>.

85. Cal. Educ. Code § 67456 (West). The legislation allows college athletes playing a sport at a qualified academic institution in California that makes \$10 million or more in media rights annually to enter the marketplace and profit from their names, images, and likenesses. Educ. § 67453. The law forbids educational institutions from suspending or otherwise penalizing a student for pursuing such sponsorship or endorsement deals. Educ. § 67456. It also allows student athletes to retain the services of an agent and/or attorney to help them obtain and secure such deals. Educ. § 67456.

jurisdictions<sup>86</sup>—provide for so-called pay-to-play. These developments have caught the attention of the NCAA, which in April 2020, issued a Board of Governors’ Final Report advocating that players be allowed to pursue financial opportunities from third parties (not the universities themselves) which would provide student athletes compensation for their “market value” for players’ service and reputation.<sup>87</sup> “The new N.C.A.A. plan would let athletes make deals as social media influencers, appear in commercials and hold paid autograph sessions, among other opportunities.”<sup>88</sup> But the devil is in the details, a whole host of issues which might involve universities in determining market value, establishing criteria for agents who would represent athletes, and determine such issues as whether the third party providing financial assistance can be viewed as an agent of the university (this is prohibited).<sup>89</sup> Quite clearly, 2020 represents a watershed moment in college player-university relationships, though problems abound in the months and years to come.

Finally, one of the areas of greatest controversy lies in the attempt by the NCAA to obtain a so-called “safe harbor” from antitrust liability of the kind with which they have been confronted before Judge Wilken in San Francisco. Moreover, the NCAA wants a legal determination that college athletes are not employees, a finding which would exculpate them from wage and hour litigation and deprive subordinate or second string players who cannot obtain market value from possessing any compensation whatsoever.

A better approach might allow college athletes to band together into labor organizations (addressing the NLRA issue left unresolved in *Northwestern*) to bargain with the universities and, where appropriate, the NCAA, so as to find answers to some of the problems described

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86. H.R. SB20-123, 72nd Gen. Assemb., 2d Reg. Sess. (Colo. 2020), <http://leg.colorado.gov/bills/sb20-123>. The bill

states that, effective January 1, 2023, except as may be required by an athletic association, conference, or other group or organization with authority over intercollegiate athletics (association), including the National Collegiate Athletic Association, an institution of higher education (institution) shall not uphold any rule, requirement, standard, or other limitation that prevents a student athlete of the institution from earning compensation from the use of the student athlete’s name, image, or likeness (compensation).

*Id.*

87. NAT’L COLLEGIATE ATHLETIC ASS’N BOARD OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 2-5 (2020).

88. Billy Witz, *N.C.A.A. Outlines Plan to Let Athletes Make Endorsement Deals*, N.Y. TIMES (Apr. 29, 2020), <https://www.nytimes.com/2020/04/29/sports/ncaabasketball/ncaa-athlete-endorsements.html>.

89. Laine Higgins & Louise Radnofsky, *NCAA Wants to Allow Athletes to Cash In...to a Point*, WALL ST. J. (Apr. 29, 2020, 11:36 AM), <https://www.wsj.com/articles/ncaa-wants-to-allow-athletes-to-cash-in-to-a-point-11588174568>.

above.<sup>90</sup> Driven by the COVID-19 crisis, athletes have begun to demand negotiations about safety, scholarships, compensation and other issues with universities<sup>91</sup> whose financial stake in, and exploitation of, the labor of so-called amateurs knows no bounds.<sup>92</sup> Perhaps something along the lines of “final offer” arbitration like that negotiated in baseball would be an appropriate mechanism.<sup>93</sup>

## V. THE COVID-19 CRISIS

Nothing has laid bare more clearly the fiction of the student athlete concept than the Covid-19 crisis in the midst of which the Supreme Court agreed to accept a petition for certiorari in the NCAA<sup>94</sup> case

90. In a sense, this would provide an approach somewhat analogous to that which now exists in professional sports. *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

91.

Thirteen Pac-12 Conference football players threatened Sunday [Aug. 2] to opt out of the coming season, saying they would not play until the systemic inequities that have been highlighted by college athletics’ response to the coronavirus pandemic were addressed.

The players, who are from 10 schools and include All-American and honor roll candidates, said that playing a contact sport during the outbreak would be reckless because of what they described as inadequate transparency about the health risks, a lack of uniform safety measures and an absence of ample enforcement.

Those shortcomings, they added, are emblematic of a system in which players have little standing to address social, economic or racial inequalities—and, they said, far more of the millions of dollars they help generate should go toward addressing them.

Billy Witz, *A Group of Pac-12 Football Players Threaten to Opt Out of the Season*, N.Y. TIMES (Aug. 2, 2020), <https://www.nytimes.com/2020/08/02/sports/ncaafootball/coronavirus-college-football-pac-12.html>. “Some players, emboldened by this year’s wave of student activism across college sports, have voiced concerns about taking the field and threatened boycotts if certain demands are not met.” Alan Blinder & Billy Witz, *Cancellations, Opt-Outs and Virus Cases Put Heat on College Football*, N.Y. TIMES (Aug. 5, 2020), <https://www.nytimes.com/2020/08/05/sports/ncaafootball/coronavirus-uconn-cancels-football.html>. Cf. Rusty Simmons, *Stanford, Cal football players among group threatening boycott of ‘reckless’ season*, S.F. CHRON. (Aug. 3, 2020, 10:05 AM), <https://www.sfchronicle.com/college-sports/article/Pac-12-football-players-to-sit-out-unless-safety-15453157.php>.

92. The extraordinary dependence of many universities upon football revenues is set forth in Jon Wilner, *Hotline newsletter: The financial impact of canceling football, Pac-12 loan program, Chip Kelly tested positive for coronavirus*, MERCURY NEWS (Aug. 7, 2020, 11:38 AM), <https://www.mercurynews.com/2020/08/07/hotline-newsletter-the-financial-impact-of-canceling-football-pac-12-loan-program-chip-kelly-tested-positive-for-coronavirus/>.

93. Final offer arbitration means that the arbitrator must devise an award which chooses between the final offer of one side or the other. See generally Josh Chetwynd, *Play Ball? An Analysis of Final-Offer Arbitration, Its Use in Major League Baseball and Its Potential Applicability to European Football Wage and Transfer Disputes*, 20 MARQ. SPORTS L. REV. 109 (2009), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1011&context=sportslaw>.

94. *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig. (Alston)*, 958 F.3d 1239 (9th Cir. 2020), cert. granted (U.S. Dec. 16, 2020) (No. 20-520). Winston

underlying it. As the summer of 2020 unfolded, it was clear that most of the NCAA affiliates contemplated playing a football season even though most universities moved toward remote online education on the theory that student presence on the campus was too dangerous.<sup>95</sup> The NCAA intent was best manifested by a policy devised by many member schools that required athletes to sign waivers of liability as a result of participation in college sports.<sup>96</sup> This drew the attention of Senator Booker of New Jersey and Senator Blumenthal of Connecticut who emphasized that the universities were conceding that there was a major problem with playing under these circumstances given their insistence upon a waiver.<sup>97</sup> The NCAA was to relent within a little more than a month, but it was clear that the colleges were initially planning to play sports notwithstanding the pandemic crisis.<sup>98</sup> More overtly conferences where the play of the games has almost completely subordinated the educational process decided to play, initially the Pac-12 and Big 10

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Cho, *NCAA review could undermine lawmakers' efforts, attorneys say*, DAILY J. (Dec. 17, 2020), [dailyjournal.com/articles/360796](https://dailyjournal.com/articles/360796).

95. Ross Dellenger & Pat Forde, *Inside SEC's AD Meetings: The Fight to Preserve Marquee Non-Conference Games, Rivalry Clashes*, SPORTS ILLUSTRATED (July 15, 2020), <https://www.si.com/college/2020/07/15/sec-2020-football-schedule-plans>.

96. Tommy Beer, *University Requiring All Student-Athletes To Sign Coronavirus Liability Waiver Before Return To Campus*, FORBES (June 15, 2020), <https://www.forbes.com/sites/tommybeer/2020/06/15/university-requiring-all-student-athletes-to-sign-coronavirus-liability-waiver-before-return-to-campus/?sh=6945ba5299ff>.

97.

These broad liability waivers are not only legally dubious, they are morally repugnant. Many students depend on their athletic scholarship to attend college. Threatening to revoke athletes' scholarships if they do not sign away their rights forces these students into making an impossible decision: risk contracting COVID-19 or give up on their college education. That is completely unacceptable.

Letter from Richard Blumenthal, Senator, U.S. Senate, and Cory A. Booker, Senator, U.S. Senate, to Mark Emmert, President of the National Collegiate Athletic Association (June 24, 2020).

98. Billy Witz, *With or Without the Say of Players, College Football Moves Toward a Return*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/sports/ncaa-football/coronavirus-college-football.html>; Melissa Korn & Rachel Bachman, *As College Football Games Vanish, So Do Their Millions*, WALL STREET J. (Aug. 16, 2020, 10:00 AM), <https://www.wsj.com/articles/as-college-football-games-vanish-so-do-its-millions-11597586426?page=1>; Jason Gay, *College Football Isn't a Bubble*, WALL STREET J. (Aug. 12, 2020, 6:37 AM), <https://www.wsj.com/articles/college-football-isnt-a-bubble-11597228659>; Laine Higgins & Rachel Bachman, *College Football Faces Decision on Fall Season*, WALL STREET J. (Aug. 10, 2020, 12:59 PM), <https://www.wsj.com/articles/college-football-faces-its-coronavirus-reckoning-11597078739>; John Branch, *College Football Season Seems To Be Edging Toward a Collapse*, N.Y. TIMES, July 12, 2020, at A31; Sara Germano & Alan Smith, *Lucrative US college sports industry faces uncertain future*, FINANCIAL TIMES (June 27, 2020), <https://www.ft.com/content/08dadaf2-9769-44ab-88e3-93f90494b6e5>.

exercised caution and indicated that they would to play in the fall,<sup>99</sup> and indeed some of the Pac-12 players expressed an interest in both a boycott and demands for compensation and health and safety protection among other matters.<sup>100</sup> But this was not to last for long, said Billy Witz of the New York Times:

Wisconsin's chancellor urged students to 'severely limit' their movements after more than 20 percent of its tests on students over Labor Day weekend came back positive. At Iowa, where the fall semester is less than a month old, more than 1,800 students have tested positive, and there are a whopping 221 cases in the athletic department alone.

It was against this backdrop that the Big Ten Conference, with the virus running rampant on many of its campuses, reversed course on Wednesday and declared it would play football starting next month.<sup>101</sup>

And the Pac-12 was soon to follow.<sup>102</sup> Once again, the student athlete concept was like the Emperor's Clothes:

For more than six months now, many workers deemed essential have had to strap on face masks for shifts at meatpacking plants, Walmarts, grocery stores, hardware stores and restaurants. It is a necessary sacrifice for the nation's well-being. But at universities across the country, while scores of professors, staff and students start the academic year remotely to curb the spread of the coronavirus, another class of worker will be asked to strap on protective gear to

99. Tiffany Hsu, *With Conferences Punting, TV Networks Will Absorb a Hit*, N.Y. TIMES, Aug. 13, 2020, B10; Connor Letourneau, *Pac-12's decision means a quiet fall*, S.F. CHRON., Aug. 12, 2020, D1; Laine Higgins & Rachel Bachman, *Big Ten, Pac-12 Postpone Football. Will the Rest Follow?*, WALL STREET J. (Aug. 11, 2020, 10:29 PM), <https://www.wsj.com/articles/big-ten-postpones-football-in-the-fall-11597173404>; Alan Blinder & Billy Witz, *Two Leagues Decide Not to Play, Roiling College Football Season*, N.Y. TIMES, Aug. 12, 2020, at A1.

100. Alan Blinder & Billy Witz, *College Players Battle to Save Season at Risk*, N.Y. TIMES, Aug. 11, 2020, at A1; Jon Wilner, *Pac-12 players threaten to sit out season, demand revenue sharing, extended health care and more*, MERCURY NEWS (Aug. 3, 2020, 4:41 AM), <https://www.mercurynews.com/2020/08/02/pac-12-players-threat-to-sit-out-season-demand-revenue-sharing-extended-health-care-and-more/>; Rusty Simmons, *Stanford, Cal football players part of group seeking boycott*, S.F. CHRON., Aug. 3, 2020, A1; Billy Witz, *Citing Systemic Inequities, 13 Pac-12 Football Players Opt Out of Season*, N.Y. TIMES, Aug. 3, 2020, at D1.

101. Billy Witz, *In the Big Ten, Football Gets to Play by Its Own Rules*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/sports/ncaaf-football/big-ten-football.html>; see also Laine Higgins, *Big Ten Football Returns—as Covid-19 Surges in the Midwest*, WALL STREET J. (Oct. 23, 2020, 7:00 AM), <https://www.wsj.com/articles/big-ten-football-returns-as-covid-19-surges-in-the-midwest-11603450800>; Alan Blinder, *Big Ten Will Play Football in 2020, Reversing Decision*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/16/sports/ncaaf-football/covid-big-ten-football-season.html>.

102. Ann Killion, *Pac12 caves, so fall football is on*, SF. CHRON., Sept. 26, 2020, C1.

do their job – without the face coverings: college football players . . . Until there is such a thing as a socially distanced quarterback sack, the other three so-called Power 5 conferences [should not play] . . . What message does it send to athletes and their families that they must stay on campus if they want to play football – and bring in dollars for their school – while other students can more safely attend classes via their home computers?<sup>103</sup>

The end of 2020 brought some soul searching about the price of the large number of virus cases and its worth to the players at least<sup>104</sup> as well as the promise of negotiation over the status of unfulfilled television contracts due to the current circumstances.<sup>105</sup> The upshot of all of this has taken the form of legislation introduced by Senator Booker, the College Athletes Bill of Rights<sup>106</sup> which would provide “lifetime scholarships, government oversight of health and safety standards, public reporting of booster donations, and unrestricted transfers and create a commission with subpoena power to ensure compliance.”<sup>107</sup> The bill, co-sponsored by Senator Blumenthal of Connecticut and has, at the end of 2020, the support of Senator Gillibrand of New York and Senator Schatz of Hawaii.<sup>108</sup> (A competing bill which would give the NCAA much more control and exempt them from anti-trust liability has been put forth by Senator Wicker.<sup>109</sup>) The Booker bill leads unaddressed the question of

103. Editorial Board, *College Football Is Not Essential*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/college-football-covid.html>.

104.

How long before all admit that collegiate athletes are now pawns in a high-stakes game with life and death consequences? Football and basketball players that represent their prominent universities have long been amateurs in name only. The way such colleges trot them out to provide entertainment amid the pandemic’s most deadly surge proves that these competitors are, in fact, workers. They deserve pay. Kurt Streeter, *Virus Cases in College Sports Prove Athletes Are Workers*, N.Y. TIMES (Dec. 12, 2020), <https://www.nytimes.com/2020/12/12/sports/ncaafotball/coronavirus-college-sports-athlete-pay.html>; see also, John Branch, *Its Football Season Over, Cal Wonders: Was it Worth It?*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/sports/ncaafotball/cal-football-pac-12.html>.

105. Kevin Draper & Alan Blinder, *College Football Season Is Nearly Over. Then the Big TV Negotiations Begin.*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/sports/ncaafotball/big-ten-television-espn-fox.html>; Alan Blinder, Lauryn Higgins, & Benjamin Guggenheim, *College Sports Has Reported at Least 6,629 Virus Cases. There Are Many More.*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/sports/coronavirus-college-sports-football.html>.

106. College Athletes Bill of Rights, S.5062, 116th Cong. (2020).

107. Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 19, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaafotball/college-athlete-bill-of-rights.html>.

108. College Athletes Bill of Rights, S.5062, 116th Cong. (2020).

109. Collegiate Athlete Compensation Rights Act, S.5003, 116th Cong. (2020).

whether athletes are employees for the purposes of labor law, but would provide them with payments according to Senator Booker of:

\$173,000 a year to football players, \$115,600 to men's basketball players, \$19,050 to women's basketball players and \$8,670 to baseball players who are on full scholarship. Those figures pale in comparison with coaches' salaries. Fifty head football coaches, for example, earned at least \$3 million this year, according to a USA Today database. At Ohio State, four assistant coaches earned at least \$1 million.<sup>110</sup>

## VI. CONCLUSION

The second decade of this century has opened up the potential for opportunities for amateur players undreamed of at the turn of this century. The 2020 pandemic has made the entire student athlete label even more questionable than it was previously, given the strong effort by some universities to have students perform in the athletic arena, even if they cannot enroll for classes!<sup>111</sup> The Emperor's Clothes of the universities, conferences and NCAA are revealed for all to see!

This is now the beginning of what will be a sometimes bumpy and difficult road to realize the gains for amateur players as they either seek more education, immediately jump to the professional leagues, or fail in their attempt to do so. This future will be quite different from the one which we have witnessed in the century preceding.<sup>112</sup> Like their professional counterparts beginning a half-century ago, the players have found their voice, and seem to be obtaining real gains<sup>113</sup> or on a route to so doing.

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110. Witz, *supra* note 107.

111. Billy Witz, *With or Without the Say of Players, College Football Moves Toward a Return*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/sports/ncaaf-football/coronavirus-college-football.html>; Billy Witz, *Should We Play? Two College Football Teams Have Very Different Answers*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/sports/ncaaf-football/coronavirus-college-football-hbcus-clemson.html>; John Branch, *College Football Season Teeters on the Brink*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/sports/ncaaf-football/coronavirus-college-football-season-canceled.html>.

112. The NCAA has already expressed its commitment to press on to the Supreme Court, notwithstanding its Ninth Circuit losses. Joe Nocera, *The NCAA Won't Drop Its Fight to Curb Pay for Student Athletes*, BLOOMBERG (July 13, 2020, 3:00 AM), <https://www.bloomberg.com/news/articles/2020-07-13/ncaa-is-still-fighting-against-student-athlete-pay>.

113. Laine Higgins, *College Football Players Have Found Their Voice. Coaches Beware.*, WALL ST. J. (June 12, 2020, 8:11 AM), <https://www.wsj.com/articles/college-football-players-have-found-their-voice-coaches-beware-11591963916>.