

THE DUKE MODEL: A PERFORMANCE-BASED SOLUTION FOR COMPENSATING COLLEGE ATHLETES

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I. INTRODUCTION

A man reaps what he sows,¹ or at least he should. The limit placed by the Ninth Circuit in the *O'Bannon*² case, regarding the damages college athletes can receive, unfairly prevents college athletes from earning compensation that is commensurate with their valuable efforts.³ The Ninth Circuit's holding warrants a conversation between the NCAA, its member institutions, and college athletes to address the inequities flowing from a situation in which the multi-billion dollar business of college athletics continues to thrive and grow while those creating the product for that business—college athletes—remain undercompensated and exploited.⁴

In *O'Bannon*, plaintiffs consisting of current and former college football players and Division I men's basketball players sought compensation for the use of their names, images, and likenesses in, among other things, video games.⁵ The district court held that the NCAA's prohibition on athletes earning compensation for the use of their names, images, and likenesses violated anti-trust law under the Sherman Act.⁶ It ordered that the NCAA could not prevent its member institutions from providing full cost of attendance scholarships.⁷ The district court also ordered that the NCAA could not prevent its member institutions from providing college athletes up to \$5,000 in shared revenue after graduation.⁸ A three-judge panel of the Ninth Circuit (hereinafter the "Ninth Circuit") affirmed the district court's holding that the NCAA's prohibition on athletes earning compensation for their names, images, and likenesses constituted an anti-trust violation. The Ninth Circuit also affirmed the district court's order allowing full cost of attendance scholarships, but it vacated the portion of the order that allowed the NCAA's member schools to

¹GALATIANS 6:7.

²*O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

³*O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

⁴See William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University Challenge to the NCAA*, 35 LOY L.A. ENT. L. REV. 1, 8–9 (2015) (discussing the multibillion dollar industry of men's college basketball and football); see also *Division I Manual*, NCAA, § 12.1.2 (Aug. 1, 2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> (providing that a college athlete becomes ineligible if one "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport"); Amy C. McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496–97 (2008) (stating the NCAA is a \$60,000,000,000 industry); Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 846–47 (2014) (addressing the multibillion dollar industry of major college sports).

⁵*O'Bannon*, 802 F.3d 1049, 1052 (9th Cir. 2015).

⁶*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).

⁷*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 989 (N.D. Cal. 2014). Traditional grant-in-aid scholarships cover tuition, room, books, and board. Full cost of attendance scholarships cover the gap between grant-in-aid scholarships and the full cost of attendance that can include transportation to and from school, miscellaneous personal expenses, administrative fees, which can range between \$2,000 and \$5,000. See Michelle B. Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes' Viewpoints Dominate Business Session Discussions*, NCAA (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); see also Brian Bennet, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (stating "the full cost-of-attendance stipends . . . could be worth between \$2,000 and \$5,000 per player").

⁸*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

pay its athletes deferred compensation up to \$5,000 per year because those expenses were “untethered to educational expenses.”⁹

The Ninth Circuit acknowledged how critical college athletes are to the product of major college athletics. “The labor of student-athletes is an integral and essential component of the NCAA’s ‘product,’ and a rule setting the price of that labor goes to the heart of the NCAA’s business.”¹⁰ Despite recognizing that college athletes serve as the first-hand suppliers of the NCAA’s business and product—i.e., the football and basketball games that the public consumes in droves¹¹—the Ninth Circuit limited the damages that college athletes could receive.¹² In doing so, the Ninth Circuit decided to treat college athletes, who are adult citizens, differently than every other adult citizen. In the United States, an adult citizen, as well as children, are entitled to receive damages that are commensurate with their injuries.¹³

One cannot dispute that education for college athletes possesses value.¹⁴ Nevertheless, some athletes contribute to a growing industry of major college athletics that generates billions of dollars of revenue.¹⁵ Those athletes who create such a valuable product should be able to earn compensation for their efforts as every other American is entitled to do. The contributions for some athletes to major college athletics go beyond the value of scholarships that players receive,

⁹O’Bannon v. NCAA, 802 F.3d 1049, 1053, 1078 (9th Cir. 2015). Plaintiffs’ request for the Ninth Circuit to rehear the appeal en banc was denied. O’Bannon v. NCAA No.14–16601 (9th Cir. 2015) (order denying rehearing en banc).

¹⁰O’Bannon v. NCAA, 802 F.3d 1049, 1066 (9th Cir. 2015).

¹¹See *College Sports (NCAA)—Statistics & Facts*, STATISTA, <http://www.statista.com/topics/1436/college-sports-ncaa/> (last visited Jan. 21, 2016) (approximating forty-nine million people attended college football games in 2012, fifty-four million people watched at least one college basketball game on TV in 2014, and twenty-nine million people attended at least one college sports game in 2014). Attendance at the Ohio State University’s 2016 spring practice football game exceeded 100,000 people. Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, ESPN (Apr. 16, 2016), http://espn.go.com/college-football/story/_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game. This last spring ESPN even broadcasted spring “practice” games for a number of college football teams. See *Every SEC Spring Game to Be Televised*, SEC SPORTS, <http://www.secsports.com/article/15048848> (last visited Feb. 11, 2017) (reporting ESPN or ESPNU broadcasted state practices for Alabama, Auburn, and Mississippi); Derek Volner, *ESPN3 to Stream Six ACC College Football Spring Games*, ESPN MEDIA ZONE (Mar. 23, 2016), <http://espnmediazone.com/us/press-releases/2016/03/espn3-to-stream-six-acc-college-football-spring-games/> (showing ESPN3 streamed the spring games for Duke, Kansas, Clemson, Wake Forest, Florida State, Miami, Stephen F. Austin, and Georgia Tech).

¹²O’Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

¹³See, e.g., *Wiltz v. Brothers Petroleum, LLC*, 140 So. 3d 758, 787 (La. Ct. App. 2014) (awarding a teenage boy \$3,000,000 in damages for suffering brain injury and paralysis in a drinking and driving car accident); *Roy v. Dackman*, 124 A.3d 169 (Md. 2015) (noting a teenage boy was awarded a sizeable amount in damages that he suffered from lead poisoning).

¹⁴See Val Ackerman & Larry Scott, *College Athletes Are Being Educated, Not Exploited*, CNN (Mar. 30, 2016), <http://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/> (contending college athletes are not being exploited by the millions they are generating for their respective schools because they are students and are receiving an education); see also Howard P. Chudacoff, *Let’s Not Pay College Athletes*, WALL ST. J. (Mar. 28, 2016, 7:15 PM), <http://www.wsj.com/articles/lets-not-pay-college-athletes-1459206949> (arguing the perks of being a college athlete provides them with the opportunity to live opulent lifestyles in college and it is unfair for them to be allowed to live so lavishly while also receiving a free education).

¹⁵See Richard T. Karcher, *Broadcast Rights: Unjust Enrichment, and the Student Athlete*, 34 CARDOZO L. REV. 107, 129 (2012) (describing the unjust enrichment the universities receive by using players images and likeness without compensating them); Taylor Branch, *The Shame of College Sports*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (last visited Feb. 11, 2017) (alleging college athletes contribute to the multibillion dollar industry of college sports, many without pay).

and that value beyond scholarships is what college athletes ought to receive regardless of their designations as both students and athletes.

The time has long come for the NCAA, its member institutions, and college athletes to sit down and discuss compensating college athletes for playing. Rather than continue a war of words with increasing animosity between college athletes and the NCAA,¹⁶ the parties should take advantage of the existing infrastructures, where fora already exist for college athletes to voice their concerns, to devise a plan to compensate college athletes. For instance, a student-athlete advisory committee (SAAC) consists of college athletes who “provide insight on the student-athlete experience. The SAAC also offers input on the rules, regulations, and policies that affect student-athletes’ lives on NCAA member institution campuses. NCAA legislation mandates that all member institutions . . . and conferences have SAACs.”¹⁷ The existence of SAACs and other infrastructure provide an opportunity for college athletes, the NCAA, and member institutions to engage in meaningful dialogue regarding the issue of compensation for playing.¹⁸

Once the parties begin that conversation about compensation for college athletes above their scholarship amounts, this article sets forth a proposal, the “Duke Model,” that serves as an archetype for how to pay college athletes.¹⁹ The Duke Model provides a detailed and comprehensive compensation structure for athletes that the parties might agree on if they discussed a compensation system for athletes in men’s college basketball and football.

¹⁶See, e.g., Cardale Jones (@CJ12_), TWITTER (Apr. 11, 2016, 11:57 AM), https://twitter.com/CJ12_/status/719569962134847488 (commenting by a former star player at Ohio State University, Cardale Jones, on how the NCAA’s rules and regulation exploit college athletes); Cardale Jones (@CJ12_), TWITTER (Apr. 11, 2016, 12:07 PM), https://twitter.com/CJ12_/status/719572562179661826 (alleging “[t]he NCAA control[s] [college athletes’] lives with insane and unfair rules”).

¹⁷*Student-Athlete Advisory Committee*, NCAA PUBLICATIONS, <http://www.ncaapublications.com/productdownloads/SAAC02.pdf> (last visited Oct. 17, 2016).

¹⁸I purposefully refuse to refer to athletes (except in quotes by others) in college as student-athletes based on the history of the phrase “student-athlete.” Professors Robert and Amy McCormick traced the roots of the NCAA’s phrase “student-athlete” to a Colorado Supreme Court holding in 1953, noting that:

[I]n *University of Denver v. Nemeth*, the Colorado Supreme Court upheld a determination by the state Industrial Commission that Ernest Nemeth, a football player at the University of Denver, was an ‘employee’ within the meaning of the Colorado workers’ compensation statute. Thus, the university was obligated to provide workers’ compensation for his football injuries. Stunned by the Nemeth decision, the NCAA responded by coining the term ‘student-athlete’ and requiring its exclusive use thereafter. By emphasizing the identity of athletes as ‘students,’ the NCAA endeavored to diminish any tendency to characterize them as ‘employees’ [The NCAA] crafted the term student-athlete, and soon it was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes. [The NCAA] told college publicists to speak of “college teams,” not football or basketball “clubs,” a word common to the pros. The NCAA adopted and mandated the term “student-athlete” purposely to buttress the notion that such individuals should be considered students rather than employees.’

Robert A. McCormick & Amy C. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 83–84 (2006).

¹⁹The phrase “Duke Model” comes from the author’s law school alma mater. The Duke University men’s basketball team represents one of the most prestigious, successful, and profitable college basketball programs in the country. Since men’s college basketball is one of the two major sports (along with football) included in the payment model, the title is apropos.

Section I briefly discusses the NCAA and the existing structures that would facilitate implementation of the Duke Model. Section II provides the legal background, including a discussion of the *O'Bannon* case, along with the NCAA's most effective defense to date of its policy against compensating college athletes above their scholarship amounts—amateurism. Section III discusses the Duke Model for football and men's basketball, which includes the following: (1) base compensation; (2) athletic bonuses; and (3) academic bonuses. Section IV discusses the counterarguments to the Model and responses thereto.

This article provides a starting point, if not a complete model, to discuss how to compensate college athletes.²⁰

II. OVERVIEW OF THE NCAA AND EXISTING INFRASTRUCTURE

Before discussing the Duke Model, this article briefly discusses the NCAA as it exists today, as well as the existing infrastructure that allows for college athlete interaction with the NCAA, conference administrators, and university presidents and chancellors.

A. *The NCAA and Division I Governance Structure*

The NCAA, which is an unincorporated non-profit organization, regulates and oversees college athletics on a national level.²¹ It includes more than 1,200 member institutions spanning three divisions: (1) Division I, Division II, and Division III.²² Division I offers full scholarships to college athletes, and this division represents “the highest level of competition in most sports.”²³ Division II uses a partial-scholarship model,²⁴ and it competes at an intermediate level.²⁵ Division III does not offer scholarships and represents the lowest level of competition for these divisions.²⁶ In the late 1970's, the NCAA divided Division I college football teams into Division I-A and Division I-AA.²⁷ In 2006, the NCAA re-branded Division I-A as the Football Bowl Subdivision

²⁰Although other legal commentators and scholars have discussed models for paying college athletes, those models lack the specificity and breadth that this model includes. Robert Grimmatt-Norris, *Roadblocks: Examining Title IX & the Fair Compensation of Division I Intercollegiate Student-Athletes*, 34 St. LOUIS U. PUB. L. REV. 435, 448–54 (2015). The other models include the following: pay-for-play, revenue sharing, free market, and trust fund. *Id.* A pay-for-play model would compensate college athletes for their participation in various athletic programs by giving them a monthly stipend. *Id.* at 448–50. A revenue sharing model entails requiring universities to share, with student-athletes, a percentage of the revenues generated by their respected teams. *Id.* at 450–52. A free market system allows the market to set appropriate compensation for each athlete depending on their skill level. *Id.* at 452–53. The trust fund model involves athletes receiving compensation for athletic competitions, as well as outside incidental activities, but the revenue would be entered into a trust fund where the athletes would be permitted to withdraw funds. *Id.* at 453–56.

²¹*National Collegiate Athletic Association and Subsidiaries*, NCAA, https://www.ncaa.org/sites/default/files/2014-15NCAA_Financial_Statement.pdf (last visited Jan. 23, 2017).

²²*Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Jan. 25, 2016).

²³MATTHEW MITTEN ET AL., *SPORTS LAW AND REGULATION* 99 (3d ed. 2013).

²⁴*Division II Partial Scholarship Model*, NCAA, <http://www.ncaa.org/about/division-ii-partial-scholarship-model> (last visited Jan. 23, 2017).

²⁵MATTHEW MITTEN ET AL., *SPORTS LAW AND REGULATION* 99 (3d ed. 2013).

²⁶MATTHEW MITTEN ET AL., *SPORTS LAW AND REGULATION* 99 (3d ed. 2013).

²⁷*Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Jan. 25, 2016).

(FBS) and Division I-AA as the Football Championship Subdivision (FCS).²⁸ The FBS falls under Division I athletics.²⁹ Division I schools typically consist of the most numerous student bodies, the largest athletic budgets, and the greatest number of athletic scholarships awarded.³⁰

The NCAA's governance structure consists of legislative bodies—made up of volunteers from [its] member schools—that govern each division, as well as a group of committees that set association-wide policy.³¹ These committees manage topics affecting sports rules, championships, health and safety, matters impacting women in athletics, and opportunities for minorities.³² The NCAA Board of Governors is a NCAA-association wide committee that represents the highest governing body of the NCAA.³³ The Board of Governors consists of twenty members, including the NCAA president, chairs of the Division I Council and the Division II and Division III Management Councils, and chancellors or presidents from Division I, II and III schools who serve on other NCAA committees.³⁴

In 2014, Division I “redesigned its governing system to create a structure that is nimbler and streamlined and to be more responsive to membership needs. Members adopt bylaws governing Division I through two legislative processes, which include Autonomy and Council Governance.”³⁵

Both processes—Council Governance and Autonomy—which are discussed below, include input from presidents, chancellors, directors of athletics, athletics administrators, coaches, faculty representatives, conference personnel, and, critical for purposes of the Duke Model, college athletes. NCAA committees are populated by membership personnel that conduct the division's day-to-day business and establish strategic direction for the future. The membership receives assistance in this regard from staff at the NCAA national office.³⁶

Division I's committee structure oversees everything from championships administration and sport oversight to strategic planning and the overall health of Division I.³⁷ According to the

²⁸*Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Jan. 25, 2016).

²⁹William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 8 (2015).

³⁰*NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Jan. 25, 2016).

³¹*Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> (last visited Jan. 23, 2017).

³²*Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> (last visited Jan. 23, 2017).

³³*Board of Governors*, NCAA, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (last visited Jan. 23, 2017).

³⁴*Board of Governors*, NCAA, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (last visited Jan. 23, 2017). The NCAA president and chairs of the Division I, II and III councils are the ex officio nonvoting members, “except that the NCAA president is permitted to vote in the case of a tie among the voting members present and voting.” *Id.* The other members include, specifically, “eight chancellors or presidents from the Division I Board of Directors from Football Bowl Subdivision institutions; [t]wo chancellors or presidents from the Division I Board of Directors from Football Championship Subdivision institutions; two chancellors or presidents from the Division I Board of Directors from Division I subdivision institutions; two Division II chancellors or presidents from the Division II Presidents Council; and two Division III chancellors or presidents from the Division III Presidents Council.” *Id.*

³⁵*Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> (last visited Jan. 23, 2017).

³⁶*Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> (last visited Jan. 23, 2017).

³⁷*Governance*, NCAA, <http://www.ncaa.org/governance?%2520Division=d1> (last visited Jan. 23, 2017).

NCAA, “[t]he student-athlete voice is an important component of the Division I governance structure,” and the 2014 restructuring gave “more emphasis to student-athlete voice at every level of decision-making.”³⁸

i. Council Governance & the Division I Council

The Council Governance includes the Division I Council, which is “responsible for day-to-day operations of the division” and constitutes the division’s primary policy-making body.³⁹ The Division I Council is comprised of forty members who are “athletics administrators (e.g., athletics directors, senior woman administrators, conference administrators, compliance administrators and other senior level administrators), faculty athletics representatives and student-athletes.”⁴⁰ Two members of the Division I Student-Athlete Advisory Committee participate and vote in meetings of the Division I Council. The Student-Athlete Advisory Committee also has a voting college athlete on each of the eight standing committees of the Council.⁴¹ The Division I Council committees create legislation on a variety of topics relating to the well-being of college athletes.⁴² The other major governing process in Division I, Autonomy, also includes college athletes in the decision-making processes.

ii. Autonomy

In 2014, the new governance model also “grant[ed] flexibility to schools in the Atlantic Coast, Big 12, Big Ten, Pac-12 and Southeastern conferences[, the Power Five conferences,] to change [or pass] rules for themselves in a list of specific areas within Division I.”⁴³ This structure is referred to as autonomy, and college athletes participate actively in the autonomy governance

³⁸*Governance*, NCAA, <http://www.ncaa.org/governance/committees?division=d1> (last visited Jan. 23, 2017). Potential new NCAA rules and changes to existing policies “develop within the committee governance structure throughout the year, while other legislative measures are submitted by member conferences.” *Governance*, NCAA, <http://www.ncaa.org/governance/%2520Division=d1> (last visited Jan. 23, 2017).

³⁹*Governance*, NCAA, <http://www.ncaa.org/governance/%2520Division=d1> (last visited Jan. 23, 2017). The NCAA governance structure is composed of legislative bodies that volunteer from member schools that govern each division, as well as a group of committees that determine association-wide policy. *Id.*

⁴⁰*Division I Manual*, NCAA, § 4.3 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

⁴¹*Division I Council Substructure*, NCAA, <https://www.ncaa.org/sites/default/files/DI%20Council%20Substructure.pdf> (last visited on Jan. 23, 2017). The following eight Standing Committees report to the Council: the Student-Athlete Experience Committee, the Strategic Vision and Planning Committee, the Legislative Committee, the Competition Oversight Committee, the Men’s Basketball Oversight Committee, the Football Oversight Committee, the Women’s Basketball Oversight Committee, and the Division I Student Athlete Advisory Committee. *Id.*

⁴²*Division I Council Substructure*, NCAA, <https://www.ncaa.org/sites/default/files/DI%20Council%20Substructure.pdf> (last visited on Jan. 23, 2017). The Council also “[r]ecommend[s] nonacademic policies to the Board of Directors,” which also includes a college athlete as one of its membership, along with twenty presidents, a faculty representative, athletics director and female administrator. *Division I Manual*, NCAA, § 4.2.3 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

⁴³*Division I Committees*, NCAA, <http://www.ncaa.org/governance/committees?division=d1> (last visited Jan. 23, 2017); *Division I Manual*, NCAA, § 5.02.1.1 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

structure. Conferences choose fifteen (15) college athletes to be part of the eighty votes cast on autonomy legislation.⁴⁴

The areas of autonomy for the Power Five conferences include, among others, financial aid and “awards, benefits and expenses for enrolled student-athletes and their families and friends.”⁴⁵

Non-Power Five conference schools may, but are not required to, follow any of the autonomy legislation passed by the Power Five conferences.⁴⁶ In addition to the new governance structure of Division I that allows college athletes to interact with university leaders and the NCAA, student-athlete advisory committees provide similar opportunities nationally and conference-wide.

iii. SAAC

A student-athlete advisory committee (SAAC) consists of college athletes who “provide insight on the student-athlete experience” and the “rules, regulations and policies that affect student-athletes’ lives.”⁴⁷ The NCAA requires “all member institutions . . . and conferences have SAACs.”⁴⁸ The work of SAACs provide an opportunity for college athletes, the NCAA, and member institutions to discuss a variety of topics, which should include the issue of compensation for playing.

Each conference typically allows for each academic institution to send two representatives to the conference SAAC, which includes male and female athletes.⁴⁹ Also, each conference SAAC

⁴⁴*Division I Committees*, NCAA, <http://www.ncaa.org/governance/committees?division=d1> (last visited Jan. 23, 2017). The other votes are institutional votes consisting of the members of the Power Five conferences.

⁴⁵*Division I Manual*, NCAA, § 5.3.2.1.2 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>. Some of the other areas of autonomy include time demands, meals and nutrition, recruiting restrictions, health and wellness, insurance, career transition, and academic support. *Division I Manual*, NCAA, § 5.3.2.1.2 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

⁴⁶*Division I Manual*, NCAA, § 5.3.2.1.2.2 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>. See Michelle B. Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes’ Viewpoints Dominate Business Session Discussions*, NCAA (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); Brian Bennet, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (stating “the full cost-of-attendance stipends . . . could be worth between \$2,000 and \$5,000 per player”).

⁴⁷*NCAA Student-Athlete Advisory Committees (SAACs)*, NCAA, <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs> (last visited Jan. 23, 2017).

⁴⁸See *NCAA Student-Athlete Advisory Committees (SAACs)*, NCAA, <http://www.ncaa.org/student-athletes/ncaa-student-athlete-advisory-committees-saacs> (last visited Jan. 23, 2017) (defining National and Campus SAACs, along with student representative number requirements for Division I, II, and III); *SAAC Web Information*, NCAA, <http://www.ncaa.org/sites/default/files/SAAC%20Web%20Information.pdf> (last visited Jan. 23, 2017) (listing one of SAAC’s duties as “[s]tudy issues [and] make policy [and] legislative recommendations regarding amateurism, recruiting, financial aid, awards [and] benefits”).

⁴⁹See *Big 12 Conference Student-Athlete Advisory Committee*, BIG 12 SPORTS, <http://www.big12sports.com/ViewArticle.dbml?ATCLID=1523127> (last visited Jan. 23, 2017) (listing the members of the Big 12 SAAC and their representative schools); *Student-Athlete Advisory Committee (SAAC)*, ACC, <http://www.theacc.com/page/SAAC> (last visited Feb. 11, 2017) (providing a short history of the ACC’s SAAC); Chris

includes a chair and vice chair, who are elected by their peers.⁵⁰ The SAAC from each Division I Conference selects one representative to represent the college athletes' interests, from their conference, on the NCAA SAAC.⁵¹

A conference SAAC “serve[s] as a medium of communication through which student-athletes, conference administrators, institutional representatives, NCAA representatives and coaches discuss and take action on issues relating to rules and regulations, student-athlete welfare, and community service.”⁵²

Conference SAACs have the power to do the following: vote on new rules or changes to existing rules; recommend potential legislation in their respective conference; and recommend potential NCAA legislation.⁵³ They also “review, react, and comment to the governance structure on legislation, activities, and subjects of interest.”⁵⁴ Some recent subjects of interest have been the time demands of Division I college athletes, the NCAA Division I shared governance, and financial literacy (i.e., talking to athletes about financial issues, including ways to best “manage increased money provided through cost of attendance”).⁵⁵

In addition to these topics of conversation, SAACs vote members onto the Division I Board of Directors, Council, and various committees (competition oversight committee, football oversight committee, men and women’s basketball oversight committee, etc.).⁵⁶ They also vote members onto their own committees to fill void spots.⁵⁷

B. Opportunities for Conversations

The NCAA emphasizes the new governing structure for Division I gives a “voice” to college athletes, particularly in voting on legislation that affects college athletes at every level of decision-making.⁵⁸ The governing structure and SAACs allow for productive discourse between college athletes, representatives of the universities and conferences, athletic directors, and representatives of the NCAA. The discussions can and should address the *O’Bannon* decision, which places a limit on what athletes can receive as compensation.⁵⁹ This conversation remains

Taylor, *Taylor Serves as ACC SAAC Representative*, GO DUKE (July 18, 2015), <http://www.goduke.com/ViewArticle.dbml?ATCLID=210224587> (describing his experience as the SAAC representative for Duke University);

⁵⁰*Big 12 Conference Student-Athlete Advisory Committee*, BIG 12 SPORTS, <http://www.big12sports.com/ViewArticle.dbml?ATCLID=1523127> (last visited Jan. 23, 2017).

⁵¹*Student-Athlete Advisory Committee (SAAC)*, ACC, <http://www.theacc.com/page/SAAC> (last visited Feb. 11, 2017) (“There will be one student-athlete from the SAAC who will represent the ACC on the NCAA SAAC.”).

⁵²*Student-Athlete Advisory Committee (SAAC)*, ACC, <http://www.theacc.com/page/SAAC> (last visited Feb. 11, 2017).

⁵³*Student Advisory Committee*, WVU SPORTS, <http://www.wvusports.com/page.cfm?section=12109> (last visited July 25, 2016).

⁵⁴*Student Advisory Committee*, WVU SPORTS, <http://www.wvusports.com/page.cfm?section=12109> (last visited July 25, 2016).

⁵⁵See, e.g., *Report of the NCAA Division I Student-Athlete Advisory Committee*, NCAA (July 2015).

⁵⁶*Id.*

⁵⁷*Big 12 SAAC Meeting Minutes & Agendas-Big 12 Conference*, BIG 12 SPORTS 3 (June 2012), http://www.big12sports.com/pdf8/848268.pdf?DB_OEM_ID=10410.

⁵⁸*Division I Governance*, NCAA, <http://www.ncaa.org/governance?division=d1> (last visited Jan. 23, 2017).

⁵⁹*O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

critical as revenues from major college athletics continue to rise with, among other things, television contracts for football and men’s basketball games, as well as the popularity of the college football playoff system.⁶⁰

Stakeholders involved in the existing infrastructure of the NCAA, from the conference SAACs to the autonomy participants to the Division I Council, can and should engage in meaningful dialogue about how college athletes can receive compensation for their efforts in creating the lucrative product of college athletics. Practically speaking, the council governance structure, which includes the Division I Council and the autonomy mechanism, can be used to seek reform of the NCAA rules that prohibit compensation for playing one’s sport. The autonomy mechanism and conference SAACs could then facilitate the discussion on how to compensate college athletes in a fair manner. The Duke Model proposed within this article serves as an excellent starting point for that discussion. Furthermore, because of the detail in the Duke Model, the parties might choose to adopt the entire Duke Model, or agree upon aspects of it, in the amounts stated herein or whatever reduced amounts the universities could afford.

III. RELEVANT LEGAL BACKGROUND

This section provides background on the Sherman Act, the *O’Bannon* case (which applied the Sherman Act), the NCAA’s leading defense against compensation for college athletes (that it argued for in *O’Bannon*), amateurism, and labor law.

A. *The Sherman Act and the Board of Regents*

The Sherman Act, Section 1, makes it illegal to form any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”⁶¹ Since every contract restrains trade to a certain extent, “the Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’”⁶²

A plaintiff bringing a claim under Section 1 of the Sherman Act must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a Rule of Reason analysis; and (3) that the restraint affected interstate commerce.”⁶³

A Rule of Reason analysis includes a burden-shifting test “the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition.”⁶⁴ A plaintiff can show the “anticompetitive effect by proving that the defendant possessed the requisite

⁶⁰See Kristi Dosh, *College Football Playoff Payouts by Conference for 2016–17*, FORBES (Dec. 31, 2016, 2:41 PM) <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/kristidosh/2016/12/31/college-football-playoff-payouts-by-conference-for-2016-17/&refURL=https://www.google.com/&referrer=https://www.google.com/> (providing a conference-by-conference breakdown of the payouts for the bowl games associated with the College Football Playoff during the 2016–2017 season).

⁶¹15 U.S.C. § 1 (2004).

⁶²*Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984)).

⁶³*Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996).

⁶⁴*Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.”⁶⁵ If the plaintiff satisfies this initial burden, then the burden shifts to the defendant.⁶⁶ The defendant must then establish a procompetitive justification of the challenged restraint for the anticompetitive effect on the free market.⁶⁷ This is a heavy burden for the defendant who must provide only legitimate procompetitive justifications that, on balance, actually show “the challenged restraint enhances competition.”⁶⁸ For example, “mere profitability or cost savings have not qualified as a defense under the antitrust laws.”⁶⁹

If the defendant satisfies its burden, the burden then shifts again to the plaintiff who “must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”⁷⁰ Once each of “these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is reasonable.”⁷¹

The United States Supreme Court in *Board of Regents* applied a Rule of Reason analysis to college athletics, and courts continue to do so.⁷² *Board of Regents* involved the NCAA’s

⁶⁵Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998); *see also* Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business”).

⁶⁶NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984)

⁶⁷NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984). Legitimate procompetitive objectives include “lowering transaction costs, facilitating other output-promoting transactions,” as well as “increasing output, creating operating efficiencies, enhancing product or service quality, and widening consumer choice.” ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE* 207–08 (2d ed. 2008).

⁶⁸NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 (1984).

⁶⁹Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998). Procompetitive justifications require actual evidence, while speculative, unsubstantiated, or uncertain claims generally are deemed insufficient to refute evidence of anticompetitive effects. Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 774–75 (2012) (analyzing the Rule of Reason test).

⁷⁰Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998); *accord* Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1319 (9th Cir. 1996); *Orson Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1368 (3d Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

⁷¹Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998). Courts sometimes use the quick-look approach under the Rule of Reason. *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998). The quick-look approach applies when the challenged restraint involves an obvious anticompetitive effect, such as an agreement not to compete in terms of price (price-fixing) or output. If that is the case, then “the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under the ‘quick look’ analysis.” *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998).

⁷²NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86–135 (1984); *see also* Am. Needle, Inc. v. Nat’l Football League, 560 U.S. 183, 186 (2010) (“The legality of that concerted action must be judged under the Rule of Reason.”); Agnew v. NCAA, 683 F.3d 328, 343 (7th Cir. 2012) (“[E]ither a more searching Rule of Reason analysis will be necessary to convince us of its procompetitive or anticompetitive nature, or a quick look at the rule will obviously illustrate its anticompetitiveness.”); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829 (3d Cir. 2010) (“[T]he court required the jury to analyze the alleged restraint under full rule of reason principles.”); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 294 (2d Cir. 2008) (“MLBP’s operations should be analyzed under the rule of reason.”); *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (“We find it appropriate to adopt such a quick look rule of reason in this case.”); *Chicago Prof’l Sports P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 596 (7th Cir. 1996) (“We concluded in 1992 that the district court properly condemned the NBA’s superstition rule under the quick-look version of the Rule of Reason.”); *United States v. Brown Univ.*, 5 F.3d 658, 672 (3d Cir. 1993) (“We thus agree with the district court that Overlap must be judged under the rule of reason.”); *McCormack v. NCAA*,

previous restrictions in the 1980s concerning televising college football games.⁷³ The NCAA capped the number of college football games that could be televised and the number of games that a school's team could appear on television.⁷⁴ Also, any contracts between television networks and universities needed approval from the NCAA.⁷⁵ The Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association sued the NCAA, claiming that these restraints violated the Sherman Act. The Supreme Court applied a Rule of Reason analysis and held for the plaintiffs, striking down the NCAA's restrictions as anticompetitive without any procompetitive justifications, which violated the Sherman Act.⁷⁶

B. O'Bannon

The plaintiffs in *O'Bannon*, comprised of current and former college football players and Division I men's basketball players, sought relief for the licensing of their names, images, and likenesses in videogames, archival game footage, live game telecasts, and re-broadcasts.⁷⁷ The district court held the NCAA's compensation rules that prohibit college athletes from receiving compensation for the use of their names, images, and likenesses violates the Sherman Act and constitute an unlawful anticompetitive effect.⁷⁸ As a result, the district court ordered two permanent injunctions: (1) the NCAA could not prevent its member institutions from providing full cost of attendance scholarships; and (2) the NCAA could not prohibit its member institutions from providing their athletes up to \$5,000 from the shared revenue that would be placed in trust for athletes, which could be collected by the athletes after graduation.⁷⁹ The Ninth Circuit affirmed the district court's ruling that the NCAA violated the college athletes' rights under the Sherman Act. The Ninth Circuit upheld the first permanent injunction against the NCAA that allows member institutions to provide athletes full cost of attendance scholarships, but it vacated the second injunction that allows member institutions to pay athletes up to \$5,000 per year of deferred compensation, reasoning that the \$5,000 compensation was "untethered to educational expenses."⁸⁰

Under the Rule of Reason, both the district court and also the Ninth Circuit held that the plaintiffs satisfied their initial burden by showing that the NCAA's prohibition on athletes receiving compensation for the use of their names, images, and likenesses constituted a significant anticompetitive effect on the relevant market. In particular, the courts deemed the relevant market

845 F.2d 1338, 1344 (5th Cir. 1988) ("The essential inquiry under the rule-of-reason analysis is whether the challenged restraint enhances competition. Applying this test, we have little difficulty in concluding that the challenged restrictions are reasonable."); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) ("Plaintiffs' claims in this case must be analyzed under the rule of reason."); *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004) ("[T]he summary judgment evidence must be examined in accordance with 'rule of reason' analysis."); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 585 (E.D. Pa. 2004) ("I find that there is no *per se* restraint and will apply rule of reason analysis.")

⁷³*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85 (1984).

⁷⁴*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85 (1984).

⁷⁵*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85 (1984).

⁷⁶*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85–89 (1984).

⁷⁷*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014).

⁷⁸*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014).

⁷⁹*O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 983, 989 (N.D. Cal. 2014).

⁸⁰*O'Bannon v. NCAA*, 802 F.3d 1049, 1053, 1078 (9th Cir. 2015).

as the college education market where “colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.”⁸¹ If the NCAA prohibition did not exist, then the NCAA’s member institutions would compete with each other by paying the college athletes for their names, images, and likenesses as a part of obtaining the services of college athletes; instead, the prohibition functions as a price-fixing mechanism where the member institutions agree to pay the college athletes nothing for their names, images, and likenesses.⁸² Also, “[a]bsent the NCAA’s compensation rules, video game makers would negotiate with student-athletes for the right to use their NILs [*i.e.* names, images, and likenesses].”⁸³

The district court’s analysis then shifted to the second part of the Rule of Reason analysis, where the defendant must show a procompetitive justification for the restraint of trade. The NCAA argued there were four purported procompetitive justifications—amateurism, integrating athletics and education, maintaining competitive equity, and increasing output. The district court and the Ninth Circuit both accepted the first two justifications, but the district court found that the compensation rules “play a limited role in integrating student-athletes with their schools’ academic communities.”⁸⁴ The Ninth Circuit did not disturb that finding.⁸⁵

The analysis then shifted to the last part of the Rule of Reason analysis regarding less restrictive alternatives. The district court identified two: “(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.”⁸⁶ The Ninth Circuit held “that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their [names, images, and likenesses] is virtually as effective as the NCAA’s current amateur-status rule.”⁸⁷ The Ninth Circuit prohibited compensation for college athletes above their scholarship amounts opining that compensation tied to college athletes’ educational expenses is much different from compensation for college athletes “untethered” to educational expenses.⁸⁸

C. Amateurism

The NCAA’s argument regarding amateurism boils down to this: if college athletes are paid to play, then they are no longer amateurs, which will change the nature of the product—*i.e.*, the games—resulting in less consumer demand, meaning fewer people watching the games. The NCAA commissioned a study in *O’Bannon* to try to demonstrate that consumers generally oppose payment for college athletes.⁸⁹

⁸¹*O’Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015).

⁸²*O’Bannon v. NCAA*, 802 F.3d 1049, 1052, 1069 (9th Cir. 2015).

⁸³*O’Bannon v. NCAA*, 802 F.3d 1049, 1067 (9th Cir. 2015).

⁸⁴*O’Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015).

⁸⁵*O’Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015).

⁸⁶*O’Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015).

⁸⁷*O’Bannon v. NCAA*, 802 F.3d 1049, 1074 (9th Cir. 2015).

⁸⁸*O’Bannon v. NCAA*, 802 F.3d 1049, 1060 (9th Cir. 2015).

⁸⁹*See* Transcript of Record at 2603–605, *O’Bannon v. NCAA*, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW) (showing Dr. Michael Dennis’ survey results on how the paying of student athletes affect demand, particularly in “viewing and attending college football games and basketball games”).

The relevant finding of the study showed that consumers, regardless of whether they self-identified as sports fans or simply members of the general public, tended to approve less of payment for college athletes the higher the potential payment amount rose for athletes. For instance, 38% of the general public said they would be less likely to view or attend games if college athletes were paid \$20,000 a year.⁹⁰ 57% of the general public indicated they would feel no more or less likely to view or attend games.⁹¹ About 5% of the general public showed they would be more likely to view or attend games if college athletes were paid \$20,000.⁹² Disapproval rates increased as payment levels increased as follows: (1) disapproval rate at the \$20,000 level: 38% for the general public and 36% for the fans; (2) disapproval rate at the \$50,000 level: 47% for general public and 52% for the fans; and (3) disapproval rate at the \$200,000 level: 53% for general public and 62% for fans.⁹³

The study suffered from a major flaw as “the survey’s initial question skewed the results by priming respondents to think about *illicit* payments to student-athletes rather than the possibility of allowing athletes to be paid.”⁹⁴ In fact, the district court in *O’Bannon* found the study unpersuasive.⁹⁵

The study suffered further criticism from plaintiff’s expert witness, Dr. Daniel Rascher, who discussed previous surveys regarding consumer demand.⁹⁶ Those respective surveys involved expected consumer demand in anticipation of professional baseball players’ salaries skyrocketing in the 1970’s and professional athletes competing in the Olympics.⁹⁷ In both surveys, consumers indicated they would watch baseball and the Olympics less once the salaries increased in baseball and once professionals were allowed to compete in the Olympics, but viewership actually increased after the players’ salaries rose and once professional athletes began participating in the Olympics.⁹⁸

The district court also attacked the NCAA’s argument that amateurism served as a proper procompetitive justification.⁹⁹ Judge Wilkins of the Northern District of California found that “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways.”¹⁰⁰ Judge Wilkins noted that the NCAA’s

⁹⁰Transcript of Record at 2643–644, *O’Bannon v. NCAA*, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW).

⁹¹Transcript of Record at 2644–646, *O’Bannon v. NCAA*, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW).

⁹²Transcript of Record at 2651–652, *O’Bannon v. NCAA*, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW).

⁹³Transcript of Record at 2651–652, *O’Bannon v. NCAA*, 2014 WL 6907634 (N.D. Cal. June 24, 2014) (No. C–09–3329 CW).

⁹⁴*O’Bannon v. NCAA*, 802 F.3d 1049, 1059 (9th Cir. 2015).

⁹⁵*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 975–76 (N.D. Cal. 2014).

⁹⁶*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 976–77 (N.D. Cal. 2014).

⁹⁷*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 977 (N.D. Cal. 2014).

⁹⁸*O’Bannon v. NCAA*, 802 F.3d 1049, 1081 (9th Cir. 2015) (Thomas, S., concurring in part and dissenting in part) (showing the correlation of viewership to the payment of athletes).

⁹⁹*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 999–1005 (N.D. Cal. 2014).

¹⁰⁰*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).

“current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.”¹⁰¹

Despite its harsh criticism, the district court noted that “some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball,” finding however that there were less restrictive means to achieve this procompetitive justification.¹⁰²

The Ninth Circuit embraced the procompetitive justification of amateurism stating, “[T]he amateur nature of collegiate sports increases their appeal to consumers.”¹⁰³ The Ninth Circuit asserted, “not paying student-athletes is *precisely what makes them amateurs*.”¹⁰⁴ Quoting the Supreme Court in the *Board of Regents*, the Ninth Circuit opined that amateurism allows the “market for college football” to remain “distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league [football].’”¹⁰⁵

Courts, including in the *O’Bannon* case, show incredible deference to the NCAA in overseeing all competitive college athletics.¹⁰⁶ In *Board of Regents*, the United States Supreme Court stated that the NCAA must establish:

[R]ules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.¹⁰⁷

¹⁰¹*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014). The district court explained:

A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of ‘core principles.’

O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).

¹⁰²*O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014) (acknowledging that “‘maximiz[ing] consumer demand for the product’ is a legitimate procompetitive justification” (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984))).

¹⁰³*O’Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015).

¹⁰⁴*O’Bannon v. NCAA*, 802 F.3d 1049, 1076 (9th Cir. 2015).

¹⁰⁵*O’Bannon v. NCAA*, 802 F.3d 1049, 1076–77 (9th Cir. 2015).

¹⁰⁶*See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 86 (1984) (giving deference to the NCAA); *see also O’Bannon v. NCAA*, 802 F.3d 1049, 1050 (9th Cir. 2015) (deferring to the NCAA); *Agnew v. NCAA*, 683 F.3d 328, 347–48 (7th Cir. 2012) (affirming the district court’s dismissal of the plaintiffs case because they failed to find “a relevant market for student-athlete labor”); *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1021–22 (S.D. Ind. 2013) (holding “[p]laintiff’s proposed market is impermissibly narrow” and “not legally cognizable”); *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ari. 1983) (showing deference to the NCAA’s rulemaking activity since “the NCAA’s action does not constitute an unreasonable restraint under the Sherman Act”).

¹⁰⁷*NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984).

The Court noted that the NCAA attempts to sell to the public a product brand of football, college football, which includes an academic tradition.¹⁰⁸ The Supreme Court believed that “to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”¹⁰⁹ According to *Board of Regents*, “[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”¹¹⁰

D. Labor Law

The conversations advocated for in this Article that may take place between college athletes, athletic administrators, and others may resemble aspects of collective bargaining. The National Labor Relations Act Section 8(d) provides that collective bargaining between labor and management entails negotiating in good faith on topics of “wage, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.”¹¹¹ These topics provide the essential terms for discussions between college athletes and conferences to determine how college athletes should be paid.

Professor Robert Berry and the late Professor William Gould’s article, “A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes,” comprehensively chronicles the rise of professional sports associations and unions in professional football, basketball, baseball, and hockey.¹¹² The rise of these players’ associations and collective agreements resulted from, among other things, “a growing sentiment among the players that their grievances were being ignored and that unanimity was needed.”¹¹³ College athletes from the Northwestern football team felt the same way and sought to unionize to protect their interests.¹¹⁴

In the Northwestern case, a regional director of the NLRB, Peter Ohr, ruled that football players from Northwestern University were primarily employees.¹¹⁵ The Northwestern football players called themselves the College Athletes Players Association (CAPA). Ohr, thus, called for an election wherein each current Northwestern football player with eligibility remaining would vote on whether the player wanted CAPA to represent him for collective bargaining purposes.¹¹⁶

¹⁰⁸NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102–03 (1984).

¹⁰⁹NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

¹¹⁰NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

¹¹¹National Labor Relations Act, § 8(d); 29 U.S.C. § 158(d).

¹¹²Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CAS. W. RES. L. REV. 685, 685 (1981).

¹¹³Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CAS. W. RES. L. REV. 685, 744 (1981).

¹¹⁴Nw. Univ. Emp’r & Coll. Athletes Players Ass’n, No. 13-RC-121359, 2014 WL 1246914, at *15 (N.L.R.B. Mar. 26, 2014).

¹¹⁵Nw. Univ. Emp’r & Coll. Athletes Players Ass’n, No. 13-RC-121359, 2014 WL 1246914, at *19 (N.L.R.B. Mar. 26, 2014).

¹¹⁶Nw. Univ. Emp’r & Coll. Athletes Players Ass’n, No. 13-RC-121359, 2014 WL 1246914, at *1 (N.L.R.B. Mar. 26, 2014).

When the full board of the NLRB reviewed the case, however, it declined to exercise jurisdiction stating that it maintains jurisdiction over only private entities, while many of the schools competing in the Big Ten conference against Northwestern are public entities.¹¹⁷ The full Board did not address the issue of whether college athletes are employees or primarily athletes.¹¹⁸

On January 31, 2017, Richard Griffin, Jr., General Counsel of the NLRB (“General Counsel”), sent a memorandum to regional directors and officers of the NLRB, resolving the issue of whether Division I FBS scholarship football players at private institutions are considered employees pursuant to the NLRA.¹¹⁹ General Counsel determined unequivocally that these football players are employees under the NLRA.¹²⁰

The General Counsel’s memorandum is not a binding ruling or decision, but it provides guidance for “employers, labor unions, and employees that summarizes [NLRB] law . . . and explains how the office of the General Counsel will apply these representational decisions in the unfair labor practice arena.”¹²¹

The General Counsel stated that Division I FBS scholarship football players at private colleges and universities are employees under Section 2(3) of the NLRA and the common-law test of agency which defines employees “any person ‘who perform[s] services for another and [is] subject to the other’s control or right of control.’”¹²² Section 2(3), for example, includes a broad definition of employee, and none of its enumerated exceptions include “university employees, football players, [or] students.”¹²³ Under the common-law test, according to the General Counsel,

¹¹⁷Nw. Univ. Emp’r & Coll. Athletes Players Ass’n., No. 13-RC-121359, 2014 WL 1246914, at *3 (N.L.R.B. Mar. 26, 2014).

¹¹⁸Nw. Univ. Emp’r & Coll. Athletes Players Ass’n., No. 13-RC-121359, 2014 WL 1246914, at *3 (N.L.R.B. Mar. 26, 2014).

¹¹⁹NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> (“This Report also addresses the question left open in Northwestern University, and sets forth the General Counsel’s position on whether scholarship football players at NCAA Division I Football Bowl Subdivision (‘FBS’) private colleges and universities are employees under the NLRA.”).

¹²⁰NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 16 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> (“[W]e conclude that scholarship football players in Division I FBS private sector colleges and universities are employees under the NLRA, with the rights and protections of that Act.”).

¹²¹NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 1 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>; *Old Harbor Native Corp. v. Comm’r on Internal Revenue*, 104 T.C. 191, 206–07 (1995) (“First, a general counsel memorandum is not binding precedent on this Court. A general counsel memorandum is a legal opinion from one division of the Commissioner’s Office of Chief Counsel to another.”).

¹²²NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 18 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹²³NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 18 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>). Section 2(3) of the NLRA reads as follows:

scholarship football players at private Division I FBS schools, such as Northwestern and other schools, “perform services for their colleges and the NCAA, subject to their control, in return for compensation.”¹²⁴ The Northwestern football program generated \$76,000,000 in net profit over a ten-year period, positively impacted Northwestern’s reputation, which “undoubtedly boosted student applications and alumni financial donations.”¹²⁵ Northwestern football players, in return, received scholarships worth “up to \$76,000 per year for up to five years” and, beginning in 2015, a stipend to cover additional expenses not included in the scholarship, such as travel expenses.¹²⁶

Most notably, the General Counsel indicates that Division I FBS football players at private institutions are afforded the protections of Section 7 of the NLRA even if they never choose to form or support a union.¹²⁷ Section 7 provides employees with the “right to engage in concerted activities ‘for mutual aid or protection.’”¹²⁸ The General Counsel goes even further stating that these football players “should be protected by Section 7 when they act concertedly to speak out about aspects of their terms and conditions of employment [, which includes actions to . . .] reform NCAA rules so that football players can share in the profit derived from their talents.”¹²⁹

Not only is the General Counsel of the NLRB stating that scholarship football players at Division I FBS private institutions are employees, but he is also paving the way (if not

The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C.A. § 152(2) (West 2016).

¹²⁴NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 19 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹²⁵NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 19 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹²⁶NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 19 n.118 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹²⁷NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 21 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> (“Section 7 protections [are] afforded to all unorganized private sector employees who may never elect to form or support a union.”).

¹²⁸NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 21 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>; *see also* 29 U.S.C. § 157 (West 2016).

¹²⁹NAT’L L. & REL. BOARD, General Counsel’s Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context 21 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

encouraging) these football players to advocate for increased compensation based on the profit they generate.¹³⁰

This memorandum certainly opens the door for “future labor complaints on behalf of football players at the seventeen FBS private universities.”¹³¹

What is most alarming for the NCAA and its member institutions about this memorandum is that Section 7 activity, which the memorandum says the football players are protected doing, includes the right to strike.¹³²

If the college athletes from any or all of the private Division I FBS decided to strike, then those strikes could lead to the cancellation of not only inter-conference games (i.e., games against teams who play in different conferences such as Southern California, USC, in the Pac 12 and the University of Texas in the Big 12), but also intra-conference games (i.e., games against teams in the same conference, such as the Big Ten, which include both public schools, such as Ohio State, and private schools, such as Northwestern).

Thus, despite the similarities between college athlete and member institution conversations and labor unions and ownership negotiations in professional sports, the NCAA and its member institutions would much rather prefer that college athletes do not proceed under the NLRA where the strike weapon would be possible.¹³³

Moreover, scholarship college basketball players fit into the definitions of employee set forth in the General Counsel’s Memorandum because basketball players at private Division I schools “perform services for their colleges and the NCAA, subject to their control, in return for compensation.”¹³⁴ In fact, scholarship basketball players spend nearly 40 hours per week dedicated to their sport,¹³⁵ which brings publicity and revenues to their respective schools.¹³⁶ As

¹³⁰NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 21 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹³¹See Jon Solomon, *NLRB Counsel: Football Players at Private FBS Schools Are Employees*, CBS SPORTS (Feb. 02, 2017), <http://www.cbssports.com/college-football/news/nlr-counsel-football-players-at-private-fbs-schools-are-employees/>. The seventeen universities include the following: Baylor, Boston College, Brigham Young, Duke, Miami, Northwestern, Notre Dame, Rice, Southern California, Southern Methodist, Stanford, Syracuse, Texas Christian, Tulane, Tulsa, Vanderbilt and Wake Forest. See Lester Munson, *NLRB Rules Football Players at Private FBS Schools Are Employees*, ESPN (Feb. 3, 2017), http://www.espn.com/espn/otl/story/_/id/18612851/nlr-rules-football-players-private-fbs-schools-employees.

¹³²*The Right to Strike*, NLRB, <https://www.nlr.gov/strikes/> (“Strikes are included among the concerted activities protected for employees by [section 7].”) (last visited Feb. 15, 2017).

¹³³Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CAS. W. RES. L. REV. 685, 744 (1981) (discussing how the strike weapon helped develop and solidify the effectiveness of collective bargaining).

¹³⁴NAT’L L. & REL. BOARD, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 19 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc>.

¹³⁵Lynn O’Shaughnessy, *Do College Athletes Have Time to Be Students?*, CBS News (Feb. 18, 2011, 1:05 AM), <http://www.cbsnews.com/news/do-college-athletes-have-time-to-be-students/>.

¹³⁶See, e.g., Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016) http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-

a result, college basketball players at Division I schools might bring a successful labor complaint and avail themselves of the protections afforded by the NLRB, which includes the right to strike.¹³⁷

The potential for the NLRB to declare college athletes primarily employees rather than students in a formal opinion or ruling if a football or basketball player(s) brought a labor complaint, along with the threat of labor complaints brought in conformity with the General Counsel's memorandum, remain daunting possibilities for the NCAA.

The NCAA and member institutions would prefer to avoid dealing with labor complaints and possibly unions, which might be formed at school, conference, and/or a national level. The NCAA and member schools would likely rather allow conferences and college athletes, with NCAA oversight and coordination, to determine college athlete compensation in a collaborative and cooperative setting, which is now possible via the current governance structure and SAACs.

IV. THE DUKE MODEL: A PERFORMANCE-BASED SOLUTION

The Duke Model for compensating college athletes in football and men's basketball focuses on how an athlete performs. The model includes a base compensation, bonuses for athletic performance, and bonuses for academic performance. Prior to discussing each of these compensation areas, some of the rationale in developing the model must be explained.

A. Basic Structure

i. NCAA Oversight

Under the Duke Model, the NCAA would serve as the purveyor of information regarding all finances of the conferences and schools. The NCAA would work with each conference to determine appropriate amounts of compensation based on the revenues generated by each conference, the ability of each school in the conference to pay, and the priorities of the conference with regard to payment. The priorities of certain conferences, for example, might be to compensate college athletes based solely on academic bonuses, while other conferences may choose to compensate college athletes using only athletic bonuses, while others still may choose to compensate using all three areas—base compensation, athletic bonuses, and academic bonuses.

Each school would need to submit its financial data to the NCAA to help facilitate this process, which would include all of the revenue streams and expenses for each school, such as revenue from television contracts, ticket sales, and expenses for athletic directors' and coaches' salaries, facilities, and staff salaries. The NCAA already maintains the NCAA fund that is based on its multi-billion contract and extension with CBS Sports ("CBS") and Turner Broadcasting

shatter-record-money-earned-ncaa-men-basketball-tournament. Also, Section 2(3) of the NLRA, which includes another definition of employee that is extremely broad, does not include in its exceptions basketball players. 29 U.S.C.A. § 152(2) (West 2016).

¹³⁷ *The Right to Strike*, NLRB, <https://www.nlr.gov/strikes> ("Strikes are included among the concerted activities protected for employees by [section 7].") (last visited Feb. 15, 2017).

System Inc. (“TBS”) that allows CBS and TBS to broadcast the men’s NCAA Basketball Tournament.¹³⁸

The NCAA would serve as a fact-finding instrument that works with all of the conferences to help determine how much a conference and its individual schools could pay athletes, while still attempting to keep the compensation at a level in line with the NCAA’s purported issue with consumer demand concerns.

ii. Conference-Wide

Implementation of the Duke Model would most likely occur at the conference level for several reasons. First, the university’s payment of its athletes should be based on how much money the university has available to pay its athletes, understanding that money may be reallocated from coaches’ salaries, athletic department personnel salaries, and money spent on facilities. Each university generates a different amount of revenue, some of which includes monies that are earned and shared based on conference-wide television contracts, performance in the men’s NCAA basketball tournament, and the college football playoff system. For example, conferences such as the Pac 12, Big 10, SEC, and ACC share in the revenue from television contracts for football in their respective conferences.¹³⁹

Also, the NCAA pays out money from its basketball fund based on, among other things, how well the conferences’ schools perform in the NCAA tournament.¹⁴⁰ Each game played in the 2016 NCAA Tournament was worth \$265,791.¹⁴¹ The conferences split the money earned amongst its members.¹⁴² The ACC, by virtue of so many of its teams advancing extremely far in the tournament, earned nearly \$40,000,000.¹⁴³ The basketball fund comes from the NCAA’s original \$10.8 billion dollar television contract with CBS Sports (“CBS”) and Turner Broadcasting

¹³⁸*CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010) <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement>.

¹³⁹*Revenue Distribution*, C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 17, 2016).

¹⁴⁰*See Will Hobson, Fund and Games*, WASH. POST (Mar. 18, 2014), <https://www.washingtonpost.com/graphics/sports/ncaa-money> (providing that NCAA payouts increase the better a team performs).

¹⁴¹Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016) http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament.

¹⁴²Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016) http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament.

¹⁴³Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016) http://espn.go.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament.

System Inc. (“TBS”).¹⁴⁴ Those parties reached agreement on the extension of that contract at \$8.8 billion for CBS and TBS to broadcast the tournament through 2032.¹⁴⁵

Similarly, the college football playoff system rewards conferences in the Power Five conferences with a set amount (for 2016–2017 it is \$55 million for each conference), as well as conferences whose teams qualify for the four-team college playoffs (for each team that makes it in a conference receives 2016–2017 in \$6 million) and a non-playoff bowl game under this system (for 2016–2017 it is \$4 million).¹⁴⁶ Several other five conferences, known as the Group of Five,¹⁴⁷ also receive a set amount (for 2016–2017 it is approximately \$83.5 million in aggregate), but it is far less than the Power of Five’s payout.

Other payments under the college football playoff system include: (1) a set amount for each conference (for 2016–2017 it is \$300,000) for each of its school’s football team that meets the NCAA’s APR (Academic Progress Rate)¹⁴⁸ for participation in a post-season football game, and each independent institution also receives a set amount (the \$300,000 in 2016–2017) when its football team meets that standard; (2) a set amount (for 2016–2017 it is \$2.16 million) for each conference whose teams play in the semifinal or national championship game to cover expenses for those games; (3) Notre Dame will receive \$2.83 million if it meets the APR standard, and the other three independents will share \$930,462; and (4) “certain conferences in the Football Championship Subdivision conferences will receive \$2.43 million in aggregate.”¹⁴⁹ Notably, the college football playoff pays out approximately \$500,000,000 total.¹⁵⁰

Conferences, in any event, generate varying amounts of revenue.¹⁵¹ For example, the Southeastern Conference generated \$122,517,029.00 in revenue for football in 2014–2015, and

¹⁴⁴*CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010) <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement>.

¹⁴⁵*CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010) <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement>.

¹⁴⁶*Revenue Distribution*, C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 17, 2016).

¹⁴⁷The Group of Five conferences include the following: American Athletic Conference, Conference USA, Mid-American Conference, Sun Belt Conference, and the Mountain West Conference. See Bill Bender, *Power 5 vs. Group of 5: College Football’s Split Decision*, SPORTING NEWS (June 9, 2014), <http://www.sportingnews.com/ncaa-football/news/power-5-conferences-autonomy-ncaa-group-of-5-nick-saban-mike-slive-division-iv-split/1151s8k6rrjv1gph46mditvr8>.

¹⁴⁸*Academic Progress Rate Explained: What Is the APR and How Is It Calculated?*, NCAA, <http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained> (last visited Feb. 15, 2017) (defining “Academic Progress Rate” as a system in which to hold institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term).

¹⁴⁹*Revenue Distribution*, C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 17, 2016).

¹⁵⁰Associated Press, *College Bowl Payouts Surpass \$500 Million*, ESPN (Apr. 14, 2015), http://espn.go.com/college-football/story/_/id/12688517/college-bowl-game-payouts-surpass-500-million-first-year-college-football-playoff.

¹⁵¹*NCAA Finances: 2014–15 Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/> (last visited Jan. 24, 2017); 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, 16–26 (2015); Daniel L. Fulks, *Revenues and Expenses:*

the Pac-12 Conference generated \$81,255,208.00 in revenue in football in that same year.¹⁵² Both are Power Five conferences.¹⁵³ The Power Five conference school revenues are “five times greater than the revenues of these mid-major institutions,” which stem primarily from the extraordinary differences in ticket sales, rights, and licensing.¹⁵⁴ The annual ticket revenue for the athletic department at the University of Texas, for instance, brings in almost one hundred times the revenue of the athletic department at Troy University.¹⁵⁵

Thus, a conference that generates more revenue can afford to pay its players more than a conference that generates less revenue. As a result, in football, the SEC would likely have a higher base compensation and higher bonuses than Conference USA, a non-Power Five conference. Opponents of differentiated pay scales might argue that this would lead to high school athletes wanting to play in the SEC or Big 10 instead of Conference USA. This, however, is already the case. High school athletes want to, and typically do, play at high-profile schools in the Power Five conferences¹⁵⁶ to give themselves the most exposure, which will give them the best opportunity to make it to the professional ranks.

NCAA Division I Intercollegiate Athletics Programs Report 2004–2013, NCAA (Apr. 2014); Steve Berkowitz, *Pac-12 Zooms Past Big Ten, SEC in College Sports Revenue*, USA TODAY (May 23, 2014); Randy Chua, *How Much Revenue Do College Sports Produce?*, INVESTOPEDIA (Nov. 15, 2011, 2:00 AM); Jon Solomon, *Inside College Sports: SEC, Big Ten Dominate \$100M Revenue Club*, CBSSPORTS.COM (Dec. 17, 2015); *Revenue of College Football Teams in 2014 (in Million U.S. Dollars)*, STATISTA, <http://www.statista.com/statistics/249745/us-college-football-teams-revenue/> (last visited Jan. 24, 2017).

¹⁵²See Peter Berkes, *The SEC Makes More Money Than Every Other Conference, and It's Not Close*, SB NATION (Apr. 26, 2016, 8:39 AM), <http://www.sbnation.com/college-football/2016/4/26/11456612/athletic-department-finances-sec-big-ten-pac-12-acc> (“The SEC makes a per-team average of about \$14 million more in revenue than its closest peer and \$12 million more in average profit after expenses.”); Chris Smith, *The Most Valuable Conferences in College Sports*, FORBES (Jan. 16, 2013, 10:57 AM), <http://www.forbes.com/sites/chrissmith/2013/01/16/the-most-valuable-conferences-in-college-sports/#182a8cc4626f> (recounting in 2013 the SEC received \$270 million dollars in revenue); Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014, 2:49 PM), <http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/#6e68f751145c> (stating that in 2014 the Big Ten conference collected \$250 million in revenue); Chris Smith, *The SEC is Finally the Most Valuable Conference in College Sports*, FORBES (July 20, 2015, 11:53 AM), <http://www.forbes.com/sites/chrissmith/2015/07/20/the-sec-is-finally-the-most-valuable-conference-in-college-sports/#638b919349e5> (estimating the SEC received \$64 million from the football playoff games alone and another “\$374 million in TV money”); Cork Gaines, *The 25 Schools That Make the Most Money in College Football*, BUS. INSIDER (Jan. 16, 2013, 3:38 PM), <http://www.businessinsider.com/the-25-schools-that-make-the-most-money-in-college-football-2013-1?op=1> (ranking schools by the amount of revenue produced by their athletic departments and ranking the University of Texas number 1 with \$104.5 million in revenue for the 2012–2013 season).

¹⁵³See *Division I Committees*, NCAA, (denoting the Power Five to include Atlantic Coast, Big 12, Big Ten, Pac-12, and Southeastern conferences) (last visited Jan. 18, 2017).

¹⁵⁴William 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, 20–21 (2015).

¹⁵⁵William 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, 21 (2015).

¹⁵⁶See Matt Brown, *What We Learned on Signing Day*, SPORTS ON EARTH (Feb. 4, 2016), <http://www.sportsonearth.com/article/163622032/college-football-signing-day-what-we-learned> (breaking down the Power Five schools by ranked recruits signed and finding that the nation’s top recruits will play for Power Five schools). High school recruits are rated on a scale of two to five by recruiting services, with five serving as the top rating, and almost all five-star recruits attend Power Five conferences. See Jeff Nusser, *Rivals, Scout, ESPN, 247: Star Rating Systems Explained*, SB NATION: COUGAR CTR. (Jan. 31, 2016), <http://www.cougcenter.com/wsuf-football-recruiting/2013/2/5/3956800/rivals-scout-espn-247-star-rating-system-national-signing-day> (explaining the star rating system associated with high school recruits).

Second, each conference has a SAAC where college athletes collaborate interactively with athletic directors, coaches, and players from other schools, to discuss and make rules and policies affecting college athletes' lives.¹⁵⁷ Similarly, autonomy legislation allows college athletes to work alongside athletic directors, coaches and players from amongst the Power Five conferences to make policies affecting college athletes' lives.¹⁵⁸ Mechanisms, therefore, already exist to enable these conversations and changes to take place on a conference-wide scale.

A one-size-fits-all base compensation and bonus structure might be affordable to some universities, but not others, or it may be too little for some schools that could readily afford more. If all schools were required to pay a certain base compensation, for example, then some schools might not be able to afford it, potentially forcing some schools to withdraw from competition. By using a basic structure with varying amounts based on how much revenue each conference generates and how much schools in each conference can actually provide to its athletes, the Duke Model allows for consistency, a level of uniformity, predictability, and opportunity for every university to participate.

Also, some conferences may place greater value on academics, choosing to adopt only the academic bonuses and not the base compensation or athletics bonuses. Compensation accomplished on a conference-level allows each conference to promote and reward the performance that its institutions value most.

B. Rationale Behind the Starting Base Compensation

The Duke Model includes a base compensation to protect every player, which is akin to what the NFL and NBA utilize through minimum salaries.¹⁵⁹ Thus, if a player falls out of favor with a coaching staff for defensible or indefensible reasons, then that player still maintains some level of security that he will receive something. Also, the rigor of playing in Division I sports—which includes Division I basketball and the Football Bowl Subdivision (FBS), which represent the “highest level of intercollegiate athletics sanctioned by the NCAA”—in conjunction with the extraordinary revenues generated, warrants some form of compensation.¹⁶⁰

The highest base compensation for football players in a Power Five conference who start every game is set at \$40,000 in the Duke Model. This number is based on the NCAA's argument that amateurism requires college athletes to forgo payment above their scholarships, and if college athletes receive payment above their scholarships, then supposedly less consumers would watch

¹⁵⁷See *NCAA Student-Athlete Advisory Committees (SAACs)*, NCAA, (listing the functions of the committees) (last visited Jan. 18, 2017).

¹⁵⁸See Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, (Jan. 18, 2015, 6:58 AM) <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> (where student athletes “push for involvement” in aspects of policies affecting them).

¹⁵⁹*Compare* Michael Ginnitti, *NFL Minimum Salaries for 2015 and the Veteran Cap Benefit Rule*, SPOTRAC (Feb. 2, 2015), <https://www.spotrac.com/blog/nfl-minimum-salaries-for-2015-and-the-veteran-cap-benefit-rule> (showing that NFL rookies received a \$435,000 minimum salary for the 2015 season), *with What's the Minimum NBA Salary?*, HOOPSHYPE (Oct. 12, 2015), <http://hoopshype.com/2015/10/12/whats-the-minimum-nba-salary> (finding a minimum salary for an NBA rookie was set at \$525,093 for the 2015–16 season).

¹⁶⁰William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University Challenge to the NCAA*, 35 LOY LA. ENT. L. REV. 1, 7–8 (2015).

college athletics.¹⁶¹ Indeed, as discussed supra, the NCAA commissioned a study in the *O'Bannon* case regarding consumer attitudes regarding college athlete payment. The study appeared biased and unpersuasive because, among other reasons, “the survey’s initial question skewed the results by priming respondents to think about *illicit* payments to student-athletes rather than the possibility of allowing athletes to be paid.”¹⁶² Even though the study was flawed, the NCAA might argue the study tended to show that the more a college athlete would be paid, the more disapproving the consumer (both the general public and fans) would be of payment.¹⁶³ Although this contention is highly questionable and lacking reliable evidentiary support, the Duke Model placates the NCAA’s consumer demand argument by choosing a relatively low number for the highest base salaries with a number, \$40,000, that falls between the two lowest numbers used in the survey (i.e., \$20,000 and \$50,000).

Moreover, the Duke Model sets the base compensation at a number that is considered (according to some methods) at the top of the lower class income range and below middle class income.¹⁶⁴ According to the Pew Research Center, which defines middle class as “two-thirds to two times the national median income for your household size,” the range for middle class income is between \$46,960 and \$140,900.¹⁶⁵ A reasonable consumer would likely understand that a college athlete serves as the direct producer of a product that generates billions of dollars, and that consumer would likely not stop watching college sports simply because that college athlete earns a base compensation in the lower class range.

For that same reason, consumers would likely not oppose college athletes earning more than minimum wage for their efforts given the billions of dollars the athletes generate. Using the hours detailed in the *Northwestern* case, paying football players minimum wage (the federal minimum wage is \$7.25¹⁶⁶) based on the hours they spend devoted to football (approximately 1,750 hours) equals approximately \$12,687.50.¹⁶⁷ Under the Duke Model, even a scholarship

¹⁶¹*O'Bannon v. NCAA*, 802 F.3d 1049, 1078 n.22 (9th Cir. 2015) (stating that student athletes play for “the love of the game” and if they were to be paid it would “jeopardize” the public’s view of college sports and result in less viewership).

¹⁶²*O'Bannon v. NCAA*, 802 F.3d 1049, 1059 (9th Cir. 2015). In that case, Dr. Daniel Rascher testified about similar surveys conducted in the past about consumer behavior that turned out to be false. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1081 (9th Cir. 2015) (Thomas, S., concurring in part and dissenting in part) (regarding viewership increasing for major league baseball and the Olympics after consumers in surveys opposed rising salaries in major league baseball and professional athletes competing in the Olympics).

¹⁶³For example, the survey used three amounts, \$20,000, \$50,000, and \$200,000. Both members of the general public and also sports fans increased their disapproval as the payment levels increased. *O'Bannon v. NCAA*, 802 F.3d 1049, 1077, 1083 (9th Cir. 2015).

¹⁶⁴Tami Luhby & Tiffany Baker, *What is Middle Class, Anyway?*, CNN, <http://money.cnn.com/infographic/economy/what-is-middle-class-anyway> (last visited June 28, 2016).

¹⁶⁵Tami Luhby & Tiffany Baker, *What is Middle Class, Anyway?*, CNN, <http://money.cnn.com/infographic/economy/what-is-middle-class-anyway> (last visited June 28, 2016).

¹⁶⁶29 U.S.C. § 206(a)(1) (2012); *see also Minimum Wage*, U.S. DEP’T LABOR, <https://www.dol.gov/general/topic/wages/minimumwage> (detailing the minimum wage requirements) (last visited Jan. 19, 2017).

¹⁶⁷*See Nw. Univ. Employer & C. Athletes Players Ass’n*, No. 13-RC-121359, 2014 WL 1246914, at *5-6, 8-9 (N.L.R.B. Mar. 26, 2014) (detailing the amount of time players devote to football); 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, 1 (2015) (finding that football college athletes spend fifty to sixty hours per week during training camp prior to school, forty to fifty hours per week during the season, and twelve to twenty-five hours per week during the spring

athlete who was not on the first or second team in football would make a base compensation (\$10,000 for the third team or \$5,000 for being on the team a scholarship athlete) lower than minimum wage, despite playing on a team that produced millions of dollars of revenue.

As a result, the highest base compensation of \$40,000 represents a number that reasonable consumers would likely not oppose.

C. *Forms of Compensation*

i. Base Compensation

a. *football*

The Duke Model will be explained using a Power Five conference example to illustrate how the model works. Non-Power Five conferences might agree on a percentage of the Power Five conference proposal, and that concept will be discussed below. In any event, universities and college athlete representatives could arrive at different numbers, or the same numbers as the Duke Model, but the structure provides a functional method to compensate college athletes.

In football, the base compensation in any conference would be based on how many games a player started on offense or defense.¹⁶⁸ In football, every team uses a depth chart to determine who is the starter, the second team player, and the third team player.¹⁶⁹ The starters (i.e., the first

semester); Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNN: MONEY (March 21, 2014, 6:58 AM), <http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs/index.html> (determining that football players at Northwestern spent 1,750 hours doing football-related activities according to the NLRB decision).

¹⁶⁸Eleven players participate on every play for each team. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). On offense, the eleven players consist of linemen who block for the running backs and quarterback, the latter of which typically throws the football, runs with the football, or hands the ball off to the running backs who then run with the ball or catch the ball. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). Wide receivers and tight ends, who are also on offense, typically catch the ball or block. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). The goal of the offense is to advance the football into the opponent's end zone, which is referred to as a touchdown and worth six points. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). Otherwise, the offense wants to move the ball close enough to the opponent's end zone where the team can then try a field goal, which is discussed below. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). On defense, the eleven players consist of linemen, who attempt to tackle the running back and quarterback, linebackers who try to do the same, as well as prevent wide receivers and running backs from catching the ball, and defensive backs who typically cover the wide receivers and tight ends to prevent them from catching the ball. *Football 101: Football Positions & Their Roles*, DICK'S PRO TIPS, <http://protips.dickssportinggoods.com/sports-and-activities/football/football-101-football-positions-and-their-roles> (last visited Feb. 16, 2017). The defense wants to prevent the offense from moving the ball toward the defense's end. *Football 101: Football Positions & Their Roles*, DICK'S PRO TIPS, <http://protips.dickssportinggoods.com/sports-and-activities/football/football-101-football-positions-and-their-roles> (last visited Feb. 16, 2017).

¹⁶⁹A depth chart is a common tool used to map out the placement of starting players, second team players, third team players, and the remainder of players. The chart will typically list starting players on top of a row and list the subsequent back-up players to that position below. See e.g., Appendix A 2016–2017 LSU Tigers Depth Chart.

team) typically play in a majority of the plays, while a second team person plays in a minority of plays, and third team players participate, if at all, even less than second team players in the game.

The base compensation for an individual in a Power Five conference school that started all twelve regular season games on offense or defense would be \$40,000. An individual that served as a second-team player in all twelve regular season games would earn a base compensation of \$20,000. A third-team player would receive \$10,000. And a scholarship player that does not fall within one of those three teams would receive \$5,000.

Fig. 1: Power Five Conference School Football Offensive and Defensive Player Base Compensation

Depth Chart Ranking	Base Compensation
First Team	\$40,000
Second Team	\$20,000
Third Team	\$10,000
On Roster	\$5,000

Thus, if player X started all twelve games, then he would earn \$40,000. If player Y played on the second team the entire season, then he would earn \$20,000, and so on. If a player did not start every game, but started some, then the compensation would be pro-rated based on how many games the player served on the respective teams.

Fig. 2: Power Five Conference School Football Player Pro-Rated Base Compensation

Depth Chart Ranking	Compensation Per Game Equation (Assuming a 12 Game Schedule)	Compensation Per Game
First Team	$\$40,000 \div 12$	\$3,333.33
Second Team	$\$20,000 \div 12$	\$1,666.67
Third Team	$\$10,000 \div 12$	\$833.33
On Roster	$\$5,000 \div 12$	\$416.67

For example, if John Smith started half of the games, but was demoted halfway through the season to second team for not playing well enough to start, then his compensation would be pro-rated as a first and second-teamer based on how many games he served in those roles. \$40,000 divided by twelve (12) equals the amount a starter makes for each game, or \$3,333.33 a game. \$20,000 divided by twelve (12) equals the amount a second team player makes for each game, or \$1,666.67 a game. If John started half of the twelve games ($\$3,333.33 \times 6 = \$20,000$) and served as a second team player the other half ($\$1,666.67 \times 6 = \$10,000$), then his compensation for that year would be his starter compensation earned, \$20,000, plus his second team compensation earned, \$10,000, for a total of \$30,000.

Fig. 3: Power Five Conference School Football Player Base Compensation Scenario A

Player John Smith	Amount of Games	Compensation Per Game Equation	Compensation Earned
First Team	6	$(\$40,000 \div 12) \times 6$	\$20,000
Second Team	6	$(\$20,000 \div 12) \times 6$	\$10,000
Third Team	0		
On Roster	0		
			Total Compensation \$30,000

This same approach would be applied to any scenario that might arise for any player, such as a player serving as a third-team player for three games (\$833.33 multiplied by three games equals \$2,500), earning a second-team spot and playing in that capacity for three games ($\$1,666.67 \times 3 = \$5,000$), and then taking over for the last six regular season games as a starter because the starter at his position suffers injury ($\$3,333.33 \times 6 = 20,000$), resulting in a compensation for that year of \$27,500 (i.e., \$20,000 + \$5,000 + \$2,500).

Fig. 4: Power Five Conference School Football Player Base Compensation Scenario B

Player John Smith	Amount of Games	Compensation Per Game Equation	Compensation Earned
First Team	6	$(\$40,000 \div 12) \times 6$	\$20,000
Second Team	3	$(\$20,000 \div 12) \times 3$	\$5,000
Third Team	3	$(\$10,000 \div 12) \times 3$	\$2,500
On Roster	0		
			Total Compensation \$27,500

If a team went to the postseason for either a conference playoff championship game, a bowl game, or the college football playoffs, then the base compensation would be calculated using a thirteen, fourteen or fifteen game schedule (for the national finalists), meaning the base compensation for each player would be divided by thirteen, fourteen or fifteen to determine how much each game would be worth. The compensation for reaching and winning a conference championship, bowl, or college football playoff game would be disseminated as an athletic bonus, which is discussed below.

The special team players¹⁷⁰ would also be eligible for a bonus based on athletic performance, which is discussed below, but the base compensation for special team players include

¹⁷⁰Special teams refer to plays in a football game where the ball is being kicked, which include a kickoff, field goal, and punt. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). In a kickoff, the kicker begins the play by kicking the ball to the other team off of a tee, and the other team includes the kick returner who will catch the kickoff and run the ball forward. James Alder, *Football 101-Positions on Special Teams*, ABOUT SPORTS, <http://football.about.com/cs/football101/a/positionspec.htm> (last visited Feb. 17, 2017). The team kicking off will run down the field to try to tackle the kick returner, while the kick returner's teammates will block for him. *Beginner's Guide to Football*, NFL,

the following: the starting placekicker would receive \$20,000; and the kick-off specialist, punter, snapper, kick returner, and punt returner would receive \$10,000 each. The placekicker can sometimes play a crucial role in determining the outcome of the game through field goals and extra points, while the punter, kick-off specialist, snapper, kick returner, and punt returner each play a key role in dictating field position throughout the game.¹⁷¹ The placekicker, given his potentially critical role, would receive more than these other special teams players. The placekicker does not, however, play as much as the offensive and defensive players and, therefore, would not warrant the same amount of base compensation as those individuals.

Fig. 5: Power Five Conference School Football Special Teams Player Base Compensation

Special Teams Position	Base Compensation
Placekicker	\$20,000
Kick-off Specialist	\$10,000
Punter	\$10,000
Snapper	\$10,000
Kick returner	\$10,000
Punt returner	\$10,000

The total compensation amount for starters would be \$40,000 multiplied by 22 players (\$880,000), \$20,000 multiplied by 22 (\$440,000), \$10,000 multiplied by 22 (\$220,000), and \$5,000 multiplied by 19 (\$95,000), which equals \$1,635,000.¹⁷² After adding in the special teams

<http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). In a field goal, a person snaps the ball seven yards backwards to a holder, who then places the ball on the ground for the field goal kicker to kick through the field goal post, which is worth three points. *Holder*, AM. FOOTBALL WIKI, <http://americanfootball.wikia.com/wiki/Holder> (last visited Feb. 17, 2017). The other players on the team kicking the field goal block the players on the other team. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). The players on the non-field goal kicking team attempt to block the field goal. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). An extra point kick entails the same players and actions, except the extra point is worth only one point if successfully done and occurs after the offense scores a touchdown. *Beginner's Guide to Football*, NFL, <http://www.nfl.com/rulebook/beginnersguidetofootball> (last visited Feb. 16, 2017). Finally, when a team punts because the offense did not get a first down (which is ten yards for each first down, and each team gets four downs unless they make a first down by moving the ball ten yards forward), a person snaps the ball fifteen yards backwards to a punter, who catches the ball and kicks or punts it downfield. *Dbbm, Punting Formations: A Guide to Safe Punting*, SB NATION (Aug. 14, 2015), <http://www.shakinthesouthland.com/2015/8/14/9146415/punting-formations-clemson-football>. The other team includes a punt returner who catches the punt and runs with the ball while his teammates block for him. Ezra Fischer, *How Are Punts in Football Exciting?*, DEAR SPORTS FAN (Sept. 25, 2014) <http://dearsportsfan.com/2014/09/25/punts-football-exciting/>. Once the punt is kicked, then the punting team runs downfield to try to tackle the punt returner. Ezra Fischer, *How Are Punts in Football Exciting?*, DEAR SPORTS FAN (Sept. 25, 2014) <http://dearsportsfan.com/2014/09/25/punts-football-exciting/>.

¹⁷¹Lisa Horne, *Just How Special are Special Teams in College Football?*, BLEACHER REPORT (Mar. 26, 2013), <http://bleacherreport.com/articles/1580902-just-how-special-are-special-teams-in-college-football> (statistically showing that “special teams . . . can and will impact the final score of [a] game”).

¹⁷²Football teams typically have eighty-five scholarship athletes. *NCAA Division I Manual*, § 15.5.6.1 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>. Whereas men’s basketball teams can have thirteen scholarship athletes. *NCAA Division I Manual*, § 15.5.5.1 (Aug. 1, 2016),

players base compensation for the placekicker (\$20,000), punter, kick-off specialist, snapper, kick returner and punt returner (each \$10,000), the total base compensation amount equals \$1,705,000 (\$70,000 from special teams plus \$1,635,000 for offense and defense).

A non-Power Five conference school, whose revenues fall well short of a Power Five conference's revenues,¹⁷³ would use the same basic structure, except that the compensation would be a certain percentage of the Power Five conference amounts. For example, a non-Power Five conference might agree to pay half of the amounts that the Power Five conferences would pay. If so, the first team players in the non-Power Five conference would earn \$20,000, second team \$10,000, third team \$5,000, and players on the roster would receive \$2,500. The base compensation in this scenario would total \$817,500 for offensive and defensive players. The starting placekicker would earn \$10,000, and the kick-off specialist, punter, snapper, kick returner and punt returner would receive \$5,000 each. The total base compensation, including the special teams' players, under the Duke Model using half of the proposed values would equal \$852,500.

This system of performance-based compensation aligns with the interests of the players who want to start and play as much as possible. This system also aligns with the teams' interests as well, which include encouraging competition amongst the players and rewarding those players who earn starting spots on the roster and those who make advancements on the depth chart.

b. Basketball

In men's college basketball, the base compensation under the Duke Model would depend on how many minutes each player averaged throughout the course of the season. Five players are in the game for each team, and, like football, coaches can substitute in other players throughout the game. Men's college basketball games currently consist of two twenty-minute halves for a total of forty minutes. In a Power Five conference, a player would receive a base compensation equating to the average of minutes played per game over the course of the season assuming the player played in a sizeable number of games. For example, if a player averaged thirty-five minutes per game in a season, then the player's base compensation would be \$35,000.

Using the University of Kentucky (a Power Five conference team) men's basketball team as an example, the players played the following amount of minutes:

<http://www.ncaapublications.com/productdownloads/D117.pdf>. Only scholarship athletes would be automatically a part of the Duke Model.

¹⁷³William 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, 20–21 (2015) (discussing how Power Five conferences' revenues are "five times greater than the revenues of . . . mid-major institutions.").

Fig. 6: University of Kentucky Men’s Basketball Team Games Played and Minutes Per Game During the 2015–2016 Season¹⁷⁴

Player	Games Played	Minutes Per Game
Tyler Ulis	35	36.8
Jamal Murray	36	35.2
Isaiah Briscoe	34	32.2
Alex Poythress	31	23.6
Marcus Lee	36	21.8
Derek Willis	32	18.6
Skal Labissiere	36	15.8
Charles Matthews	36	10.3
Dominique Hawkins	26	9.6
Isaac Humphries	23	9.1
Mychal Mulder	23	3.9
E.J. Floreal	11	1.5
Jonny David	9	1.2

During the 2015–2016 season, under the Duke Model, Tyler Ulis would have earned \$36,800, Jamal Murray \$35,200, Isaiah Briscoe \$32,200, Alex Poythress \$23,600, and so forth. The total base compensation for the University of Kentucky team in 2015 would have totaled only \$219,000.

Players in a non-Power Five conference would receive an agreed upon fraction of their minutes, whether it was 75% of their total minutes played, 50%, or 25%, depending on what the relevant parties agreed. If a Conference USA team averaged the same minutes as Kentucky’s players above, and the parties agreed to compensation worth 75% of minutes played, then a player averaging 35.2 minutes would receive \$26,400 (75% of \$35,200). The total base compensation for the entire team would have been just \$164,250 (75% of \$219,000).

This approach again aligns with the interests of the players and the teams as players want to play as many minutes as possible, and coaches want their best players on the floor as much as possible. In basketball, the first person to come off the bench in the game is referred to as the “sixth man.”¹⁷⁵ Sometimes the sixth man is critical to the success of a team and plays more minutes than a starter or some of the starters.¹⁷⁶ Thus, minutes played in basketball represents the best measure to determine a base compensation for these athletes.

¹⁷⁴*Kentucky Wildcats Stats 2015–2016*, ESPN, http://www.espn.com/mens-college-basketball/team/stats/_id/96/year/2016 (last visited Feb. 18, 2017).

¹⁷⁵*Basketball U on the Sixth Man*, NBA (Oct. 8, 2003, 11:40 AM), http://www.nba.com/canada/bu_sixth_man.html (stating the Sixth Man as a player “who is not a part of a team’s starting five” but is first off the bench after the game begins).

¹⁷⁶Mike Prada, *The Revenge of the Sixth Man: Why They’re More Valuable Than Ever in Today’s NBA*, SB NATION (Feb. 7, 2012), <http://www.sbnation.com/nba/2012/2/7/2782025/nba-sixth-man-james-harden-al-harrington-leandro-barbosa> (showing a revival of the Sixth Man spot and concluding players in this position are invaluable as they can change the outcome of games).

It must be noted that a player in football will be much more likely to earn a full \$40,000 base compensation than a basketball player as basketball players simply do not play all forty minutes of every game over the course of a season. Also, the base compensation totals for the teams are disparate between football and basketball, with football team base compensation totals much higher than basketball team base compensation totals. The disparate treatment in both of those instances—i.e., higher individual and team compensation in football than in basketball—makes sense financially and equitably because football programs tend to generate considerably more revenue than their basketball programs, and football teams typically include eighty-five scholarship athletes while basketball only includes thirteen scholarship athletes.¹⁷⁷

ii. Bonuses—Athletic

The conferences and player representatives may agree that base compensation is sufficient to compensate college athletes. They may, however, also agree to pay bonuses based on athletic performance. Employers, particularly professional sports teams, often employ bonuses in their employees' contracts to incentivize the employees to perform at their maximum levels.¹⁷⁸ The following are the proposed bonuses that align with the interests of the athlete and the university.

a. *statistical leaders*

Under the Duke Model, in football, statistical leaders for the season on each team would receive a \$5,000 bonus. Those statistical categories include yards passing, yards rushing, yards receiving, total touchdowns, total scoring, sacks, defensive tackles, tackles for losses, interceptions, pass break-ups, special teams tackles, kickoff return yardage, and punt return yardage. Each university would pay a total of \$65,000 for statistical bonuses.

In basketball, statistical leaders for the season on each team would also earn \$5,000, and those categories would include points per game, rebounds, assists, blocked shots, and steals. The total statistical bonuses per team would amount to \$25,000.

The flexibility of the Duke Model also allows the conferences and players to select for compensation only certain statistical bonuses, such as passing yards, rushing yards, total touchdowns, sacks, defensive tackles, pass break-ups, and interceptions.

b. *external honors*

Earning external honors aligns with the interests of the players, who want recognition for their efforts, and the schools because they benefit from the additional, positive exposure based on

¹⁷⁷See *Division 1 Manual*, NCAA, §§ 15.5.6.1, 15.5.5 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf> (restricting football teams to eighty-five total scholarships and basketball teams to thirteen). See also *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> (reporting that in 2014–2015 the Texas A&M football program had the highest revenue of any football or basketball program) (last visited June 29, 2016).

¹⁷⁸See Joel Corry, *Agent's Take Notable Players Who Cashed in on Performance Bonuses*, CBS SPORTS (Dec. 30, 2014), <http://www.cbssports.com/nfl/news/agents-take-notable-players-who-cashed-in-on-performance-bonuses> (showing examples of football players that earned bonuses by reaching performance thresholds).

the athletic feats of their athletes. The Duke Model includes the following bonuses for external honors, meaning honors bestowed by organizations or entities outside of the university, as opposed to team awards given weekly (e.g., Rice University’s Football Team’s Top Special Teams Player in the Previous Game) or at the end of the year (such as Rice University’s Most Outstanding Offensive Player for the Year).

The Duke Model would provide bonuses for Associated Press (“AP”) All-American Honors and official All-Conference Honors, with differing levels based on the team one made, such as first team, second team or third team. The amounts would range from \$10,000 to \$2,500 for All-American honors and \$5,000 to \$1,000 for All-Conference honors. Winning the Heisman Trophy, which is awarded annually to the best football player in college football, would earn a player \$25,000. When Robert Griffin III won the Heisman Trophy while playing for Baylor University, “Baylor estimate[d] the Heisman win was worth \$250 million in extra donations, increased ticket sales, licensing fees, sponsorship deals, an expanded deal with Fox Sports Southwest, and higher corn dog sales.”¹⁷⁹

The following chart illustrates the external honors bonuses, and the same numbers could be used for football and basketball.

Fig. 7: Individual External Honors Bonuses

Honor	Bonus
Heisman Trophy Winner	\$25,000
National Player of the Year	\$15,000
Conference Player of the Year	\$10,000
Conference Offensive Player of the Year	\$7,500
Conference Defensive Player of the Year	\$7,500
Conference Freshman/Newcomer of the Year	\$2,500
All-American First Team	\$10,000
All-American Second Team	\$7,500
All-American Third Team	\$6,000
All-Conference First Team	\$5,000
All-Conference Second Team	\$2,500
All-Conference Third Team/Honorable Mention	\$1,000

Reaching a conference championship game, bowl game, or the college football playoffs would warrant an additional bonus payable to each member of the football team to reinforce the notion that success on the team level takes an entire roster.¹⁸⁰ The same rationale applies to basketball.

¹⁷⁹Howard Bloom, *How Much is Winning Heisman Worth?*, SPORTS BUS. NEWS (DEC. 7, 2012, 10:00 PM), <http://sportsbusinessnews.com/content/how-much-winning-heisman-worth>.

¹⁸⁰Michael Aiello, *Compensating the Student-Athlete*, 23 SPORTS L.J. 157, 168 (2016) (stating that post season bonuses given to coaches “should be diverted to student-athletes” because “spectators attend sporting events to watch the players play, not to watch the coaches coach”).

Fig. 8: Football Bonuses Per Player Based on Team Success

Postseason Game	Bonus
Conference Championship Game Participant	\$1,000
Conference Championship Game Winner	\$2,000
Bowl Game Participant	\$2,500
Bowl Game Winner	\$5,000
National Semifinalist	\$7,500
National Runner-Up	\$10,000
National Champion	\$20,000

Fig. 9: Basketball Bonuses Per Player Based on Team Success

Postseason Game	Bonus
Conference Championship Game Participant	\$1,000
Conference Championship Game Winner	\$2,000
NCAA Tournament 1 st Round Participant	\$2,500
NCAA Tournament 2 nd Round Participant	\$5,000
NCAA Tournament Sweet 16 Participant	\$7,500
NCAA Tournament Elite 8 Participant	\$10,000
NCAA Tournament National Semifinalist	\$20,000
NCAA Tournament National Runner-Up	\$25,000
NCAA Tournament National Champion	\$30,000
NIT Participant	\$2,000
NIT Champion	\$4,000

With the base compensation and athletic bonuses described, an examination of two cases might serve useful. We will examine two different hypothetical players who play for the same Power Five conference school to see if the results appear equitable.

Case Study 1: The star running back. In this case study, the star running back starts every game, leads the team in rushing yards and total touchdowns. He earns Conference Offensive Player of the Year, First Team All-Conference and First Team All-American honors. His team reaches the National Semifinal game in the college football playoffs after winning its conference championship game. His total pay would be \$40,000 in base compensation, \$10,000 in bonuses for being a statistical leader in two categories, \$22,500 in individual athletics honors bonuses, and \$9,500 in team athletics honors bonuses, equaling \$82,000. This represents a modest amount given the likely publicity he has garnered for his team and university, the innumerable highlights of him on SportsCenter, and the use of his image by the university and networks to promote the games.

Case Study 2: The back-up cornerback. In this case study, the second-team cornerback plays solidly, but his face is never used on any commercials, billboards, or media items (such as press releases or game day materials). He does not earn any All-American or All-Conference honors or lead the team in any statistical categories. His team reaches the National Semifinal game in the college football playoffs after winning its conference championship game. Despite being a

productive member of a team that generates considerable revenue, his total pay would be just \$29,500 (\$20,000 base compensation plus \$9,500 in team athletics honors bonuses), which is considered a lower class income.

Given these outcomes—a star player earning a total of \$82,000 for playing and a back-up player earning \$29,500—it is highly unlikely that a reasonable consumer will be outraged or offended by these numbers. An average consumer may understand that a player who helps generate millions of dollars and considerable positive exposure for his school, while starring in games and appearing on television commercials that promote the games and highlights, could earn \$82,000. While \$82,000 may be more than that average consumer makes himself, that average consumer likely does not directly generate millions of dollars of revenue in whatever field the consumer works. Also, a reasonable consumer would likely accept a back-up player earning a lower class salary despite serving as a solid contributor to a team that generates millions of dollars of revenue. Consumer demand would likely not suffer.¹⁸¹

The total for a team that included one first team all-American (\$10,000), six all-conference players on the first team (6 x \$5,000 equals \$30,000), six all-conference players on the second team (6 x \$2,500 equals \$15,000), and a national semifinal finish (85 players x \$7,500 equals \$637,500), including all of the statistical athletic bonuses (\$65,000) and base compensation (\$1,705,000), would be \$2,462,500. This type of year would be phenomenal and would reap millions of dollars in revenue, some of which could be allocated to pay the players for achieving those successes for the school.

c. sources of reallocation

Before moving to academic bonuses, given that this Article just provided a sum total for the compensation expenses for base compensation and athletic bonuses under the Duke Model, and those are the most probable areas of compensation for Power Five conferences, this Article briefly discusses potential sources to reallocate money to compensate college athletes. As just stated, a football team that enjoyed an incredibly successful season from both a team and also individual players' standpoint, would need to compensate its players with a total of \$2,462,500 under the Duke Model. There are various sources of money, such as revenue from the college football playoff system, coaches' salaries, and facility expenses, that could be reallocated to cover that expense.

For example, the Big 10 conference saw one of its teams, Ohio State, make the college football playoffs semifinal game but lose (which equals \$55,000,000 for the Big 10 conference) and three of its other teams (Michigan, Wisconsin, and Penn State) participate in non-playoff bowl games that are part of the New Year's Six games (which is \$4,000,000 multiplied by three teams

¹⁸¹Even today the consumer demand for college football is extremely high. ESPN broadcasts a number of spring practice games. *FBS(I-A) Schedule-2016*, ESPN, <http://www.espn.com/college-football/schedule> (last visited Jan. 16, 2017). In the spring of 2016, Ohio State broke its own record for attendance at a spring practice game with 100,189 fans attending the game. Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, (Apr. 16, 2016).

equals \$12,000,000) of the college football playoff system.¹⁸² In total, the Big 10 would split that \$72,000,000 (\$55,000,000 plus \$12,000,000) amongst its fourteen schools, meaning each school would receive \$5,142,857.14. Thus, a team that enjoyed an outstanding year (e.g., totaling \$2,462,500) could compensate its athletes by using only some of the money received from the college football playoff system alone (e.g., \$5,142,857.14).

Even when looking at the traditionally less successful football teams in the Power Five conferences, coaches' salaries could be reallocated to compensate college athletes. For instance, Kentucky's head football coach, Mark Stoops, received \$3,250,000 as salary from the university for 2016, and his football staff received an additional \$3,002,700, for a total salary for coaches (not including athletic director or athletic department staff) at the University of Kentucky of \$6,252,700.¹⁸³

With regard to facilities, Kansas State, another school in a Power 5 Conference, enjoyed the grand opening of its new football facility in 2015 that cost \$68,000,000.¹⁸⁴ Universities can reallocate money from coaches' salaries or money spent on facilities to compensate its players.

Schools in non-power five conferences, such as Conference USA schools, could also reallocate money to compensate student athletes, even if their compensation model included only a fraction of what Power Five conferences would pay. For example, Larry Coker, the head coach of Conference USA's University of Texas at San Antonio received a salary of \$425,000 in 2015, with an additional \$808,681 of salary going to his staff, totaling \$1,233,681.¹⁸⁵ Rice University, another Conference USA university, invested over \$30,000,000 in building a sports facility.¹⁸⁶ Universities and athletics departments can reallocate money in many instances from money spent on facilities or coaches' salaries to player compensation.¹⁸⁷ Recall that the total base compensation for a non-Power Five conference school that decided to compensate its players at half the rate under the Duke Model would only amount to \$852,500.

¹⁸²*Revenue Distributions*, C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 17, 2016).

¹⁸³Steve Berkowitz et. al, *2016 NCAAF Coaches Salaries*, USA TODAY, (Oct. 6, 2014) <http://sports.usatoday.com/ncaa/salaries>. Further, reallocation would be simple as coaching salaries only represent "a fraction of the expenses" that university athletic departments spend. Michael Aiello, *Compensating the Student-Athlete*, 23 SPORTS L.J. 157, 165 (2016).

¹⁸⁴*See K-State Football Announces Plans for Next Bill Snyder Family Stadium Project*, TOPEKA CAP. J. (Sept. 9, 2015, 11:19 AM), <http://cjonline.com/sports/catzone/2015-09-09/k-state-football-announces-plans-next-bill-snyder-family-stadium-project> (recounting "K-State had the grand opening of the \$68 million . . . complex last week, and the next phase of the stadium improvements has a \$15 million price tag").

¹⁸⁵Steve Berkowitz et. al, *2016 NCAAF Coaches Salaries*, USA TODAY (Oct 6, 2014), <http://sports.usatoday.com/ncaa/salaries>.

¹⁸⁶*Rice Holds Ceremonial Groundbreaking for New Brian Patterson Sports Performance Center*, RICE OWLS (Mar. 10, 2015), <http://www.riceowls.com/genrel/031015aab.html>.

¹⁸⁷Money from NCAA executive salaries could also be reallocated to compensate college athletes. The President of the NCAA reportedly made \$1,800,000 in 2013, and a number of other NCAA executives made over \$500,000 each. *See* Steve Berkowitz, *NCAA's Mark Emmert Made More Than \$1.8 Million in 2013*, USA TODAY (June 30, 2015, 3:57 PM), rk-emmert-compensation-tax-return-990-form/29516401/. Reallocation of coaching salaries only represent "a fraction of the expenses" that university athletic departments spend. Michael Aiello, *Compensating the Student-Athlete*, 23 SPORTS L.J. 157, 165 (2016).

The Group of Five conference schools could also use money received from the college football playoff system to compensate its players.¹⁸⁸

As for basketball, if a team that paid its base salary (for instance, \$219,000 from the example above with Kentucky University), all of its statistical leaders (\$25,000), won its conference championship (\$2,000 x 15 players = \$30,000), made it to the national semifinal game of the NCAA tournament (\$20,000 x 15 players = 300,000), saw one of its players win National Player of the Year (\$15,000), Conference Player of the Year (\$10,000), make First Team All-American (\$10,000), and earn First Team All-Conference Honors (\$5,000), along with a teammate (\$5,000), then the total compensation owed the players would be \$619,000. By all standards, this would be a wildly successful year for a basketball program. John Calipari, the head coach of the Kentucky men's basketball team, received a base salary of \$6,580,000 in 2015–2016.¹⁸⁹ A reallocation of the head coach's salary by itself, which was over six and a half million dollars, would have easily covered the entire compensation for the players' entire season, which would have totaled just \$619,000.

Also, money received from the men's NCAA basketball tournament, which the NCAA doles out to conferences based on how many games the conferences' teams win in the NCAA tournament, could also be used to compensate players. In 2016, the Atlantic Coast Conference (ACC) reportedly received almost \$40,000,000, which divided by its fifteen teams would equal a total of over \$2,600,000 per school.¹⁹⁰ Again, the total compensation for a highly successful team and individual players on that team might amount to \$619,000—the money received from the NCAA basketball tournament alone could compensate the players who garnered all of that success for the school and the program.

iii. Bonuses—Academic

Conferences and player representatives may also agree to bonuses based on academic performance. Bonuses based on academic performance would further encourage college athletes to perform well in the classroom and to graduate, which are in accord with the universities' missions and the long-term success of college athletes.¹⁹¹

¹⁸⁸See *Revenue Distribution*, C. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 17, 2016).

¹⁸⁹Steve Berkowitz et. al, *NCAAB Tournament Coaches' Pay*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach> (last visited June 28, 2016).

¹⁹⁰Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016), http://www.espn.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament.

¹⁹¹The Knight Commission on Intercollegiate Athletics formed “in October 1989 in response to highly-visible scandals in college sports . . . promotes reforms that support and strengthen the educational mission of college sports.” Amy Perko, *Knight Commission Calls for NCAA to Transform its Guidelines for March Madness Revenues to Better Support College Athletes and Protect Financial Integrity*, KNIGHT COMMISSION FOR INTERCOLLEGIATE ATHLETICS (May 10, 2016), <http://knightcommission.org/resources/press-room/965-may-10-2016-knight-commission-calls-for-ncaa-to-transform-its-guidelines-for-march-madness-revenues-to-better-support-college-athletes-and-protect-financial-integrity>. The Commission makes recommendations to the NCAA, some of which the NCAA adopted. *Id.* The Commission consistently recommends that the NCAA use its basketball fund to reward academic success and positive academic outcomes of college athlete rather than just reward universities based on their success in the NCAA tournament. *Id.*

The following are the proposed bonuses based on academic performance: Dean’s List, Capital One Academic All-American Team, Academic All-Conference Team, and graduation. The differing levels of success within those categories are demonstrated below in table form and range from \$500 (third team academic all-conference) to \$20,000 if a college athlete makes the Dean’s List for a semester or graduates *summa cum laude*.

Fig. 10: Bonuses Based on Academic Performance

Honor	Bonus
Dean’s List per semester	\$20,000
Academic All-American First Team	\$10,000
Academic All-American Second Team	\$7,500
Academic All-American Third Team	\$6,000
Academic All-District Team	\$5,000
Academic All-Conference	\$4,000
Graduation	\$10,000
Graduation <i>cum laude</i>	\$12,500
Graduation <i>magna cum laude</i>	\$15,000
Graduation <i>summa cum laude</i>	\$20,000

D. Advantages of the Duke Model

The advantages of the Duke Model are plentiful, starting with the flexibility relating to the different forms of compensation, as well as the varying amounts, that conferences and players can choose to adopt.

The NCAA itself benefits from a system of payment created with the players, conferences, and the NCAA for several reasons. First, the NCAA avoids the negative press and costs of continuing anti-trust litigation brought on behalf of college athletes.¹⁹² Second, if college athletes prevailed in any of those anti-trust cases, then the amount of money that could change hands in a free market might be much more than in a controlled, Duke Model. This approach also forestalls any efforts by the NLRB to rule officially that college athletes are employees, and it would likely prevent Division I FBS scholarship athletes at private colleges and universities from bringing a labor complaint.

Moreover, the NCAA avoids any potential government pressure through legislation requiring member institutions to pay college athletes or through Department of Justice investigations involving anti-trust laws. For example, in 2011, “the United States Justice Department announced an investigation to determine whether the NCAA’s prohibition on scholarships violates antitrust laws. Spontaneously, the NCAA changed the bylaw prohibiting multi-year scholarships in 2011 before the Justice Department completed its investigation.”¹⁹³

¹⁹²See, e.g., *Jenkins v. NCAA*, Case No.3:33-av-0001 (D. N.J. filed Mar. 17, 2014) (involving football and men’s basketball players seeking a free market system of payment for college athletes beyond their scholarship amounts).

¹⁹³See Randy Haight, *Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics*, 21 JEFFREY S. MOORAD SPORTS L.J. 19, 32 (2014) (finding suspicion in the abrupt change in

Furthermore, some members of Congress have already shown great interest in college athletics in the past, even going so far as to introduce legislation that would have created a college football playoff and removed the now-defunct Bowl Championship Series (the “BCS”).¹⁹⁴ Eventually, the BCS did give way to the college football playoff. The first ever college football playoff began with controversy when top-tier teams Baylor University and Texas Christian University failed to receive a bid to play in the national semifinal college playoff. Republican Joe Barton of Texas, who “previously used his perch as chairman of the House Energy and Commerce Committee to convene hearings on the much-maligned BCS, even pushing legislation to prod the NCAA to ban it in favor of a playoff system,” wanted further hearings on the new system to add more teams to the four-team playoff.¹⁹⁵

As the push for college athlete compensation continues to gain steam and shows no signs of slowing,¹⁹⁶ particularly when revenues and television deals (such as the \$8,800,000,000

the NCAA bylaws); *Which Schools Offer Multi-Year Athletic Scholarships?*, GOBIGRECRUITING.COM (Sept. 19, 2014), <https://www.gobigrecruiting.com/blog/2014/09/schools-offer-multi-year-athletic-scholarships/> (stating a common complaint of student-athletes is the restriction of scholarships).

¹⁹⁴Rick Klein, *Rep. Joe Barton: College Football Playoff Will ‘Fail Every Year’; Congress May Examine Next Year*, ABC NEWS (Dec. 12, 2014, 5:25 PM), <http://abcnews.go.com/Politics/rep-joe-barton-college-football-playoff-fail-year/story?id=27568131>.

¹⁹⁵Rick Klein, *Rep. Joe Barton: College Football Playoff Will ‘Fail Every Year’; Congress May Examine Next Year*, ABC NEWS (Dec. 12, 2014, 5:25 PM), <http://abcnews.go.com/Politics/rep-joe-barton-college-football-playoff-fail-year/story?id=27568131>.

¹⁹⁶*See generally* Nw. Univ. Employer & C. Athletes Players Ass’n (CAPA), No. 13–RC–121359, 2014 WL 1246914, at *12 (N.L.R.B. Mar. 26, 2014); ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH 23 (1998); ELLEN J. STAUROWSKY, *Piercing the Veil of Amateurism: Commercialisation, Corruption and US College Sports*, in *THE COMMERCIALISATION OF SPORT* 143 (Trevor Slack ed., 2004); Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L. REV. 307 (1998); Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’S Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 372 (2012); Jamie Nicole Johnson, *Removing the Cloak of Amateurism: Employing College Athletes and Creating Optional Education*, 2015 U. ILL. L. REV. 959 (2015); Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L. J. 367, 369 (2015); Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077, 1081; Jay D. Lonick, *Bargaining with the Real Boss: How the Joint-Employer Doctrine Can Expand Student-Athlete Unionization to the NCAA as an Employer*, 15 VA. SPORTS & ENT. L.J. 135, 139–40 (2015) (arguing for athlete compensation); Cesar F. Rosado Marzan & Alex Tillet-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players Are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 301 (2015); McCormick & McCormick, *supra* note 4, at 495; McCormick & McCormick, *supra* note 18, at 71, 72; Michael J. Mondello & Joseph Beckham, *Workers’ Compensation and Collegiate Athletes: The Debate Over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293, 295 (2002); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 25 (2000); Charlotte M. Rasche, *Can Universities Afford to Pay for Play? A Look at Vicarious Liability Implications of Compensating Student Athletes*, 16 REV. LITIG. 219, 240 (1997); Kenneth L. Shropshire, *Legislation for the Glory of Sport: Amateurism and Compensation*, 1 SETON HALL J. SPORT L. 7, 25 (1991); Ellen J. Staurowsky, *“A Radical Proposal”*: Title IX Has No Role in College Sport Pay-for-Play Discussions, 22 MARQ. SPORTS L. REV. 575 (2012); Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 65 (2014); Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid up to \$125,000 Per Year*, FORBES (Aug. 29, 2013), <http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/> [<http://perma.cc/Z9EX-73JY>] (“[T]he best college athletes gain valuable publicity from playing college athletics.”);

extension of the NCAA's and CBS and TBS's agreement for the men's NCAA tournament) continue to soar, the government may feel compelled to intervene, making the Duke Model a favorable option for the NCAA.¹⁹⁷

Also, the NCAA avoids any type of secession by the Power Five conferences from the NCAA system.¹⁹⁸

The member institutions also benefit from this system for the same reasons that the NCAA does as conferences of the member institutions find themselves as defendants in these anti-trust cases with the NCAA.¹⁹⁹

The players obviously benefit from this model because they earn based on their performances and contributions to a multibillion dollar industry. There are a number of advantages, both direct and indirect, stemming from compensating college athletes above their scholarship amount. First, fairness and equity dictate that the laborers and direct providers of a product that generates billions of dollars should be compensated properly. Second, college athletes may stay longer in school if they were receiving compensation and bonuses while in school.²⁰⁰ College athletes could earn money for their families and themselves, which may be extremely attractive for athletes from disadvantaged backgrounds or with lower socioeconomic statuses.²⁰¹ If the college athlete did stay in school longer, then he would benefit by maturing during that time. Also, if the school paid bonuses for graduation, then that might also incentivize athletes to stay in school.

Also, the Duke Model could be applied to Division II and III conferences as well. Conferences in those divisions could choose to adopt any aspects of the Duke Model at whatever fraction of the original amounts that those conferences could afford. Moreover, the conferences and players could revisit the amounts detailed in the Duke Model every five years to adjust, if necessary, for drastic increases or decreases in the revenues and sources of reallocation. This periodic review ensures that colleges and universities are able to compensate athletes in a fiscally responsible manner that is fair to the athletes, which will depend on whether the revenues are increasing, decreasing, or staying relatively constant, and, if there are changes, the amount of those changes.

Sean Gregory, *It's Time to Pay College Athletes: College*, TIME (Sept. 16, 2013), <http://content.time.com/time/subscriber/article/0,33009,2151167,00.html>;

¹⁹⁷See Eric Brady, *NCAA Extends Tournament Deal with CBS, Turner Through 2032 for \$8.8 Billion*, USA TODAY (Apr. 12, 2016) <http://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/> (discussing the \$8.8 billion extension).

¹⁹⁸See Ralph D. Russon, *Will 5 Power Conferences Break Away From FBS?*, ASSOCIATED PRESS: C. FOOTBALL (Jul. 23, 2013, 7:45 PM), <http://collegefootball.ap.org/article/will-5-power-conferences-break-away-fbs> (discussing the possibility of power five conferences leaving the NCAA because those conferences would like more flexibility in running their programs, which the NCAA does not allow).

¹⁹⁹See, e.g., *Complaint and Jury Demand-Class Action Seeking Injunction and Individual Damages*, Jenkins v. NCAA, No. 3:33-av-0001 (D. N.J. Mar. 17, 2014).

²⁰⁰O'Bannon v. NCAA, 802 F.3d 1049, 1730 (9th Cir. 2015).

²⁰¹Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).

By relying on the existing infrastructures that facilitate conversations between college athletes, school and conference representatives, and NCAA personnel, the stakeholders can discuss other issues, which are mentioned below, that would naturally flow from the compensation discussion, such as medical support, the continued expectations of universities, taxes, and Title IX.

i. Medical Support

During the conversations between the athletes, universities, and the NCAA, the topic of athletes receiving financial support for medical expenses resulting from injuries incurred while playing college sports might also be addressed. College athletes, particularly football players, risk incredible injury when playing for their universities.²⁰² Financial security for athletes injured while playing would show strong, long-term support for the overall well-being of college athletes by universities and the NCAA.

ii. Continued Expectations of Universities

Earning compensation for playing would not change the universities' expectations that college athletes maintain academic eligibility to receive compensation.²⁰³ Also, athletes would need to conduct themselves in a manner that comports with the athletic program's and university's standards.²⁰⁴ College athletes, on the other hand, might seek "independent verification of [their] grades" to avoid being removed from the team for non-academic or athletic performance issues.²⁰⁵

iii. Taxes

The compensation above their scholarships that college athletes would receive would be subject to taxation as income. The athletes, schools, and NCAA could discuss the possibility of trying to make the net income received comparable given states without state taxes while keeping in mind that the cost of living will vary dramatically from Palo Alto, California, to Norman, Oklahoma.²⁰⁶

²⁰²See *Georgetown Hoyas Football: RB Ty Williams Breaks Neck, Could Be Paralyzed*, SPORTS ILLUSTRATED (Sept. 6, 2015), <http://www.si.com/college-football/2015/09/06/georgetown-hoyas-ty-williams-broken-neck> (reporting that running back for Georgetown broke 5 bones in his neck and vertebrae); Mark Viera, *Rutgers Player is Paralyzed Below the Neck*, N.Y. TIMES (Oct. 17, 2010), http://www.nytimes.com/2010/10/18/sports/ncaafootball/18rutgers.html?_r=0 (stating a Rutgers University defensive tackle was paralyzed after colliding with another player).

²⁰³Academic eligibility under the NCAA requires athletes in their second year to have a minimum grade-point average "that equals at least 90 percent of the institution's overall cumulative grade-point average required for graduation." An athlete in their fourth or later year must have a "minimum grade-point average that equals 100 percent of the institution's overall cumulative minimum grade-point average required for graduation." *Division I Manual*, NCAA, § 14.4.3.3 (Aug. 1, 2016), <http://www.ncaapublications.com/productdownloads/D117.pdf>.

²⁰⁴Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).

²⁰⁵Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) (on file with author).

²⁰⁶The schools and NCAA could determine the amount of cost of living and factor that into the funds given to student-athletes. See *Cost of Living: How Far Will My Salary Go In Another City?*, CNN: MONEY, <http://money.cnn.com/calculator/pf/cost-of-living/index.html> (last visited Jan. 16, 2017) (allowing individuals to see how their salary would translate to other cities in the nation).

The universities may decide to provide support for its athletes in filling out their tax returns, just as Volunteer Income Tax Assistance (VITA) provides tax assistance to low-income individuals and families.²⁰⁷ Universities already provide extensive academic support for athletes with tutors and study hall; assistance with filing taxes would simply be another form of support.²⁰⁸

iv. Title IX

The SAACs include not only male athletes, but also female athletes. The stakeholders could discuss ways to continue to improve college athletics for women in conjunction with paying male athletes in college football and men's college basketball. Some conferences, such as the American Athletic Conference where the University of Connecticut women's basketball team resides, may determine that revenues in female athletics would enable female sports teams to receive compensation under a variation of the Duke Model. The stakeholders might determine that the academic bonuses or athletic bonuses, or both, as opposed to base compensation, are feasible financially and best reflect the excellence sought by female athletes in certain conferences. Another possibility is that universities spend more money on female athletic programs in proportion to the increase in spending on base compensation and/or bonuses for football and men's basketball, which would improve women's college athletics. Regardless, opportunities for participation amongst female athletes would not decrease just because football and men's basketball players earned compensation.²⁰⁹

V. COUNTER-ARGUMENTS TO THE DUKE MODEL

In addition to the arguments against the Duke Model that are addressed above, this Article also addresses two other major arguments against the Duke Model: (1) this compensation model further devalues education from the perspective of college athletes; and (2) the model should account for the value of education that college athletes receive. Each of these counterarguments are addressed below.

²⁰⁷*IRS VITA Grant Program*, IRS, <https://www.irs.gov/individuals/irs-vita-grant-program> (last updated Oct 5, 2016) (explaining that VITA is an initiative designed to help “low- to moderate-income individuals . . . file their taxes each year”).

²⁰⁸See e.g., *Academic Support Services*, U. OF SOUTHERN CAL., <http://saas.usc.edu/academic-support-services/> (last visited Jan. 16, 2017) (providing “academic counseling services, priority scheduling, study hall, tutorial services, computer labs, travel laptops, excused absence letters, OASIS (Online Academic Student Information System), and disability testing” for all of their student athletes to make sure “they have a successful and delightful college career while engaging in their competitive sports”); *Academics for Student Athletes*, OR. STATE U., <http://oregonstate.edu/studentathlete/> (last visited Jan. 16, 2017) (offering, among other services, a “Bridge Summer Program” designed to “helps student athletes transition to the academics . . . through learning skill development, academic course credit and University orientation programs”); *Longhorn PRIDE Program*, TEXAS SPORTS, http://texassports.com/sports/2013/8/28/academics_0828134433.aspx (last visited Jan. 16, 2017) (discussing a student-athlete academic program called PRIDE (Personal Responsibility in Developing Excellence) as “a comprehensive life skills program committed to the welfare of student-athletes” and has been recognized as one of the best life skills program in the nation).

²⁰⁹One of the purposes of Title IX is to ensure and promote equal participation for men and women in college athletics. 34 C.F.R. § 106.41(a)(b) (2010) (stating that “[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis”).

A. The Duke Model Further Devalues Education for College Athletes

One might argue that the over-commercialization of major college sports devalues the education portion of college athletes.²¹⁰ One might also argue that if colleges and universities compensate college athletes for playing their respective sports, then education will be valued even less by college athletes.²¹¹ As an initial matter, this argument fails if conferences choose to adopt the academic bonuses to compensate college athletes for their academic achievements.

Second, whether education is valued or devalued for each college athlete depends on how each institution approaches academics with its players, as well as how each player values his education.

As for the NCAA, it already appears to value money over education as a large amount of the NCAA's distributions are made based on athletic success.²¹² Moreover, the NCAA allows the scheduling of football and basketball games on weekdays, including Monday through Thursday, which seems counterproductive if the NCAA truly wants college athletes to study during the week while staying fresh for class and practice.²¹³

Reallocating the monies from college football and men's college basketball²¹⁴ will not change the fact that people are receiving money from college athletics; it will simply redirect some of the money to those producing the product of major college sports, the athletes. Nevertheless, a reallocation of money does not dictate that a player, individual school, or conference value or stress academics less or more—each athlete, school, and conference are free to prioritize academics as they want.

B. The Duke Model Should Account for the Value of Athletic Scholarships

Some may argue that the Duke Model should compute in the value of the education/scholarship that athletes receive because the education they receive possesses value.²¹⁵

²¹⁰See Nick Desai, *College Should be About Education First*, HUFFINGTON POST (Sept. 11, 2014, 6:30 PM), http://www.huffingtonpost.com/nick-desai/colleges-should-be-about_b_5669998.html (stating that not only would paying athletes devalue the athletes education it would also create an “imbalance between a student athletes and just a student” and devalue every students education).

²¹¹Rick Burton, *College Athletes are Already Plaid with Their Education*, US NEWS (Apr. 2, 2013, 12:21 AM), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/college-athletes-are-already-paid-with-their-education> (“higher education is often (and falsely) assumed to have no value for athletes”).

²¹²2015–2016 *Division I Revenue Distribution Plan*, NCAA https://www.ncaa.org/sites/default/files/2015-16DI_Revenue_Distribution_PlanFinal_20160622.pdf (last visited Jan 16, 2017).

²¹³See *2017 College Football Schedule*, FBS SCHEDULES (2016), <http://www.fbschedules.com/college-football-schedule/> (last visited Jan. 16, 2017); *2015-2016 Men's College Basketball TV Schedule*, USA TODAY: SPORTS, (Oct. 29, 2015, 5:56 PM), <http://www.usatoday.com/story/sports/ncaab/2015/10/29/2015-16-mens-college-basketball-tv-schedule/74829074/>.

²¹⁴College football and men's college basketball has evolved into a multibillion-dollar business over the years through television contracts, increased ticket sales, and now the college football playoff system. See, e.g., 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, 8–9 (2015) (recounting the evolution of the college sports business).

²¹⁵See Val Ackerman & Larry Scott, *College Athletes Get More Than What A Salary Can Buy*, CNN (Mar. 30, 2016), <http://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/> (stating that college

This argument fails for several reasons. One, it is true that the scholarship represents a value, but the compensation that athletes receive should not be capped arbitrarily at the value of the scholarship. There is no cap on how much coaches can be paid,²¹⁶ how much schools can devote to improving facilities, NCAA executive pay, or athletic director salaries, and there should not be a cap based on the scholarship value for athletes.

Second, this argument ignores the fact that ever since the 1950s universities provided scholarships to its athletes,²¹⁷ well before college athletics became a multibillion dollar industry. Thus, universities have been able to afford athletic scholarships for over half a century, and they can continue to do so. Now that college athletics generates billions of dollars, though, the direct producers of that product—the athletes—should receive some of the revenue they generate.

Finally, as discussed above, universities and colleges have the ability to pay college athletes by reallocating the money generated by college athletics that is currently given to others (e.g., coaches and athletic directors).

VI. CONCLUSION

College athletes should reap what they sow. They create a product in a multibillion dollar business that relies on their skill, dedication, and performance to thrive. The Duke Model provides a system for compensating college athletes in a fair and reasonable manner. The existing infrastructures in the NCAA allow for the conversations to take place regarding athlete compensation, and those conversations should start with the Duke Model.

athletes are not being exploited by the millions they are generating for their respective schools, because they are students and are receiving an education); Howard P. Chudacoff, *Let's Not Pay College Athletes*, WALL ST. J. (Mar. 28, 2016), <http://www.wsj.com/articles/lets-not-pay-college-athletes-1459206949> (arguing that the perks of being a college athlete permit them the opportunity to live opulent lifestyles in college and that it is unfair for them to be allowed to live so lavishly and also receive a free education).

²¹⁶*See* *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (striking down the NCAA rule capping compensation for assistant, entry-level college coaches' salaries).

²¹⁷Amy Christian McCormick & Robert A. McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006) (stating that universities formally sanctioned full grant-in-aid athletic scholarships in 1956).

APPENDIX A

2016–2017 LSU TIGERS DEPTH CHART

2016–2017 LSU Tigers Depth Chart										
Position	No.	Player 1	No.	Player 2	No.	Player 3	No.	Player 4	No.	Player 5
OFFENSE										
WR-X	15	Dupre, Malachi JR/2	39	Gage, Russell JR						
WR-Z	83	Dural, Travin SR/3	82	Chark, D.J. JR/1	19	Dillon, Derrick RS FR				
LT	63	Malone, K.J. JR/2	75	Teuhema, Maea SO/1						
LG	64	Clapp, William RS SO/1	75	Teuhema, Maea SO/1	78	Brumfield, Garrett SO/1				
OC	77	Pocic, Ethan SR/3	72	Dodd, Andy JR/1	79	Cushenberry III, Lloyd FR				
RG	76	Boutte, Josh SR/2	75	Teuhema, Maea SO/1	78	Brumfield, Garrett SO/1				
RT	66	Weathersby, Toby SO/1	75	Teuhema, Maea SO/1						
TE	81	Jeter, Colin SR/TR/2	84	Moreau, Foster SO/1	89	Smith, DeSean SR/3	85	Roddy, Caleb FR		
QB	16	Etling, Danny JR/TR	6	Harris, Brandon JR/2	12	McMillan, Justin RS FR	14	Scott Jr., Lindsey FR	8	Lewis, Caleb RS FR
RB	5	Guice, Derrius SO/1	28	Williams, Darrel JR/2	4	Brossette, Nick SO/1				
FB	44	Moore, John David JR/2	47	Mouton, Bry'Kiethon SO/1	41	Ducre, David SO				
DEFENSE										
DE	92	Neal, Lewis SR/3	98	Clark, Deondre JR/1	96	Logan, Glen FR				
NT	99	Gilmore, Greg JR/2	95	Alexander, Edwin FR	55	Valentine, Travonte RS SO				
DE	57	Godchaux, Davon JR/2	90	Lawrence, Rashard FR						
OLB	46	Bower, Tashawn SR/3	45	Divinity Jr., Michael FR	43	Thornton, Rahssan FR				
ILB	40	Riley, Duke SR/3	24	White, Devin FR						
MLB	48	Alexander, Donnie JR/2	35	Voorhies, Devin JR/2						
OLB	49	Key, Arden SO/1	46	Bower, Tashawn SR/3	87	Martin, Sci FR				
CB	18	White, Tre'Davious SR/3	21	Paris, Ed JR/2	22	Fulton, Kristian FR				
SS	33	Adams, Jamal JR/2	26	Battle, John JR/1	30	Monroe, Eric FR				
FS	26	Battle, John JR/1	13	Thomas, Dwayne SR/3	17	Lewis, Xavier RS FR				
CB	1	Jackson, Donte SO/1	2	Toliver II, Kevin SO/1	8	Smith, Saivion FR				
SPECIAL TEAMS										
P	38	Growden, Josh RS FR								
PK	42	Delahoussaye, Colby SR/2	34	Culp, Connor FR						
LS	50	Ferguson, Blake RS FR	59	Ballis, John RS JR/TR						
H	38	Growden, Josh RS FR	39	Gage, Russell JR						
PR	18	White, Tre'Davious SR/3	1	Jackson, Donte SO/1						
KR	1	Jackson, Donte SO/1	4	Brossette, Nick SO/1	5	Guice, Derrius SO/1				
KO	36	Gamble, Cameron JR/2	34	Culp, Connor FR						
RESERVES										
INJ	91	LaCouture, Christian JR/2	94	Washington, Isaiah SO/1	23	Thompson, Corey SR/3	9	Jefferson, Rickey SR/3	52	Beckwith, Kendell SR/3
SUS	86	Ferguson, Jazz SO/1	97	Herron, Frank JR/1						
LEFT	7	Fournette, Leonard JR/2								

2016–2017 LSU Tigers Depth Chart, OURLADS, <http://www.ourlads.com/ncaa-football-depth-charts/depth-chart/lsu/90981> (last updated Dec. 31, 2016, 10:18 AM).