

# WHY SPORTS LAW?

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*This essay argues that sports law can be more than just a fascinating and topical subject with great appeal to those who work or hope to work in the field. It can also be a valuable intellectual and pedagogical enterprise—even for those who do not or will not work in sports. In particular, sports law can be a useful and clarifying lens through which to study the law more broadly. This is because sports enterprises and issues tend to put unique and potentially illuminating pressures on the law. Ordinary or unexamined assumptions often break down or prove inadequate when confronted with the relatively unique world of sports. This in turn forces scholars, students, and courts to think more deeply about the law—and in the process facilitates that deeper thought.*

*This essay first describes some of the things that make sports relatively unique and therefore challenging to the law. The bulk of this essay then addresses three specific areas of law: 1) antitrust, 2) trademark, and 3) sex discrimination. These three contexts are used to highlight and illustrate the ways in which sports law can call upon us to rethink what we think we know—and thus can help deepen and clarify our thinking. This essay concludes by suggesting that teachers and scholars of sports law should try to tap the intellectual and pedagogical potential the subject offers.*

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## INTRODUCTION

Why teach and write about sports law? Two answers are obvious: student demand and career preparation. Students want to study sports law and hope to

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work in sports, so we teach sports law. But we do not generally organize legal education by industry, and for good reason. Many of our students will not work in sports; and most will deal with many different industries over the course of their careers. In general, we believe that our students will better benefit from training rooted in skills and legal subject matter rather than a series of “law of the horse” industry-specific courses.<sup>1</sup> So those who teach and write about sports law hope to explain why it is a valuable endeavor, even for those who may not work in the field.

There are two familiar responses to the question of why study sports law. First, sports are big business with a large impact on the economy, so legal issues have substantial financial consequences. While this is true, financial impact does not automatically equate to intellectual significance. Second, sports involve significant social issues such as race and gender. This too is true, but the social significance of issues does not itself explain why sports law is a useful lens through which to examine these issues. The key question, especially for those who do not plan to work in the field, is whether and how sports law helps us think about important issues—legal, economic, and social—usefully and well.

I suggest here that sports law is a valuable academic endeavor because particular—if not unique—features of the sports industry put illuminating pressure on the law. When we try to apply the law to sports, it often does not fit well. Standard assumptions break down and familiar doctrinal tools prove ill-suited to the job. In this way sports cases frequently require us to rethink what we think we know about law, economics, and society.

In this essay I describe some of the things that make sports challenging and illuminating for law and policy. I then highlight three areas of the law and some of the pressures they place on our thinking: 1) antitrust, where sports cases require us to think carefully about when and how cooperation can sometimes be necessary to the creation of valuable products; 2) trademark, where sports cases force us to think carefully about the nature of consumer confusion; and 3) sex discrimination, where the necessity for “separate but equal” and other factors require us to rethink not only the aims and operation of anti-discrimination law but also other issues, including the very nature of gender identity and the broader aims of institutions in which discrimination is seen as problematic.

In these and other contexts, we come to better understand the law because the pressures placed on the law by sports force us to think more deeply about the underlying aims and logic of the law. And for this reason, sports law—if approached thoughtfully—can be a valuable intellectual and pedagogical lens through which to examine law and policy more broadly.

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1. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, U. CHI. LEGAL F. 207 (1996).

## I. WHAT IS SPECIAL ABOUT SPORTS?

What is it about sports that is unique, puts particular pressure on law and policy, and prompts the sort of thought I suggest the study of sports law can engender? I would highlight two interrelated things about sports that require us to rethink our assumptions and approaches to legal and social issues. First, sports businesses require a great deal of cooperation and coordination between competitors within sports businesses—as well as cooperation between sports and society at large. Second, the value created or tapped by sports businesses, though vast, is often amorphous, uncertain, and difficult to describe with precision. Neither of these things is completely unique to sports; but taken together, along with other circumstances, they tend to be particularly salient in the sports context.

### A. *The Necessity of Cooperation*

The aspect of sports with the most obvious legal relevance is the necessity for cooperation among competitors. This is not completely unique to sports, as cooperation is needed or helpful in other contexts. Some industries rely, for example, on agreed-upon technical standards, and potential network effects make cooperation sensible and appropriate in many contexts. But cooperation is particularly essential in sports. Regarding professional sports leagues, the D.C. Circuit put it this way: “No NFL club can produce this product without agreements and joint action with every other team.”<sup>2</sup> In the context of college sports, the United States Supreme Court has similarly observed: “[H]orizontal restraints on competition are essential if the product is to be available at all.”<sup>3</sup> This reality can make it more difficult to figure out when and where cooperation is beneficial as opposed to problematic. Thus sports cases encourage and require lawyers and policymakers more broadly to re-examine and refine their thinking about what forms of cooperation are beneficial and why.

### B. *The Inchoate Value of Sports*

A second aspect of sports is arguably even more fundamental, although its legal and policy relevance can be less evident. The value produced by sports businesses is often difficult to describe. What are people paying for when they spend millions to attend, watch, and advertise during sporting events? It is easy to say that sports are entertainment, and that is true; but it begs the question.

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2. Smith v. Pro Football, Inc., 593 F.3d 1173, 1179 (D.C. Cir. 1978).

3. NCAA v. Bd. of Regents of the Univ. of Oklahoma & Univ. of Georgia Athletic Ass’n, 486 U.S. 85, 86 (1984). In making the observation, the Court quoted Judge Robert Bork’s observation that “some activities can only be carried out jointly. Perhaps the leading example is league sports.” *Id.* (quoting Robert H. Bork, *THE ANTITRUST PARADOX* 278 (1978)).

What makes sports entertaining? What makes people eager to watch and willing to pay? No objective measure of on-court excellence can explain why millions of people are glued to NCAA basketball while the NBDL—with a similar level of play—is ignored. Nothing about level of play explains the appeal of high school football’s Friday night lights. Other, more inchoate factors are at work; and they can be hard to nail down, difficult to quantify, and often more fragile than we might imagine.

I cannot offer a comprehensive list of what makes sports appealing, and thus valuable—let alone a thorough account of how those factors interact—but it is worth highlighting some of those, as inherently difficult as they are to describe with precision.

Sports can connect communities and generations. When college football fans fill a stadium, they are there not just for the action on the field, but also for the connection to the larger community. When a parent takes a child to a baseball game, they are paying not just for the play on the field; but for the memories invoked and created by generations of such outings.

Sports can evoke and construct ideas of individual excellence and character. This role has been played by sports since Ancient Greece,<sup>4</sup> and remains so today. Sports provide an arena in which traits and virtues can be displayed and developed. Some of the forms of excellence modeled by athletes are of course physical—strength, speed, grace, endurance, and the like. But we also look to sports for ideas and ideals of courage, leadership, cooperation, fairness, and more. That too is part of what people are looking for—and paying for—when they watch and play.

Sports can also provide an arena of seeming purity, relatively free from the unfairness and arbitrariness that pervades much of social and personal life. People are seeking—and paying for—a sort of escape. Not merely an escape, but also a brief sojourn into what is, in some ways, a better, fairer, purer realm.

Sports are not all high-minded aspiration, of course. Much of the attention devoted to major sports events is driven by gambling<sup>5</sup>—a reality that does not always sit easily with the lofty ideals espoused by sports enterprises. This matters, because law and policy ostensibly designed to protect leagues, players, and fans can often be fully understood only if seen also as efforts to protect the perceived interest of gamblers.

Some of these may seem to be abstract or only academic concerns. Do pragmatic business people and lawyers really need to worry about the complex and inchoate nature of the value produced or tapped by sports? Yes. Business

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4. See, e.g., STEPHEN G. MILLER, *ARETE: GREEK SPORTS FROM ANCIENT SOURCES* (2004) (translating original sources about the role of sports in Ancient Greece).

5. Andrew Brandt’s contribution to this symposium explores this facet of sports. He focuses on recent trends in sports gambling, including daily fantasy sports, and he highlights the ways in which leagues have appeared inconsistent or even hypocritical. Andrew Brandt, *Professional Sports Leagues’ Big Bet: “Evolving” Attitudes on Gambling*, 28 *STAN. L. & POL’Y REV.* (forthcoming June 2017).

people ignore these issues at their peril, because if they forget or fail to understand what makes sports appealing, they risk missing or even undercutting that appeal. Even seemingly rock solid sporting enterprises rest on what may be fragile and shifting ground. Remember when the heavyweight boxing championship of the world was the biggest deal in sports? Remember when everyone watched the Indianapolis 500? To take a more contemporary example, we should not take for granted the odd phenomenon of millions of people riveted to semi-pro level basketball in March.

Nor can lawyers ignore the difficulties inherent in identifying and quantifying the value of sports and sports businesses. The question of what makes sports valuable is not merely an economic concern, but manifestly a legal question. This is because—in ways described below and in other ways—the application of legal doctrine hinges on how we understand and describe the economic realities of the enterprise to which the legal doctrine is being applied.

These two factors—the necessity for cooperation and the often-inchoate value—are not the only things that are special about sports. But they are, I think, two of the primary things that make sports particularly challenging for law and policy, and thus potentially illuminating for scholars and students.

## II. HOW SPORTS MAKE US RETHINK LAW

Here I describe some of the ways in which sports call upon us to rethink our understandings in three areas: 1) antitrust, 2) trademark, and 3) sex discrimination. A detailed description of any of these areas would be beyond the scope of this essay. It will be necessary, however, to describe each area fully enough to highlight the ways in which sports cases can prompt thought. Nor are these the only context in which sports put illuminating pressure on the law, and this essay will briefly note others along the way. But these three main examples will suffice to illustrate the sorts of ways in which sports make us think more deeply—and thus can help us think about the law both inside and outside the context of sports.

### A. *Antitrust Law: When and How Cooperation Can Create Value*

Sports cases have been particularly challenging and influential in antitrust law. The most obvious reason for this influence has been the necessity for cooperation between competitors; but antitrust cases also deeply implicate questions about the nature of the value produced by sports. Whether balancing pro-competitive and anti-competitive effects (in a Sherman Antitrust Act<sup>6</sup> Section 1 case), determining whether a sports enterprise should be considered single entity (thus subject only to Sherman Act Section 2), or evaluating market power in a Section 2 case (which requires defining the relevant market), courts

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6. Referred to throughout this Article as the “Sherman Act.”

must either address or make assumptions about the nature and value of a sports product.

Sports cases have been central to several areas of antitrust law; but there are two issues as to which sports cases have most called upon courts and scholars to think more deeply about the underlying logic and operation of antitrust law. Those are: the question of when and for what purposes an enterprise should be considered a combination between competitors subject to Sherman Act Section 1, rather than a single entity subject only to Sherman Act Section 2; and the question of when a seemingly anti-competitive restraint may be justified under the Sherman Act Section 1 “rule of reason” test. I will highlight the first of these issues—“the single entity” question—then focus in slightly more depth on the second question—the “rule of reason” inquiry—particularly as applied to the NCAA.

Before turning to the specific doctrine, however, it is crucial to clarify the aim and rationale of antitrust law generally. Economic competition is valued, and thus protected by antitrust law, because of what happens when competition is absent. When a large single entity monopolizes a market, or when competitors collude to do so, they have an incentive to reduce output and raise prices. Without rehashing Econ 101, the basic insight is straightforward. In a competitive market, prices approach the cost of production. A seller who tries to charge more will be undercut and lose sales. Absent competition, however, a seller can raise prices. This will reduce sales, of course; but it can still increase profits—both because it costs less to produce fewer products and because the lost sales are offset by increased per-sale profits. So monopolizing sellers charge more and produce less.

This is problematic for two reasons. Most obviously, buyers pay more for products than they otherwise would, thus resulting in a wealth transfer from consumers to sellers. For the past half-century or so, however, most scholars and commentators have explained and defended antitrust law primarily on efficiency grounds.<sup>7</sup> When monopolizing sellers reduce output of a product, resources which in an efficient market would have gone into the production of that product are allocated elsewhere, to a less efficient use. Compared to the distributional consequence of consumers forced to overpay, market efficiency can seem like an abstract or theoretical problem. It is not. Reduced production and misallocated resources can translate into lack of investment, closed factories, and lost jobs.<sup>8</sup>

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7. The seminal academic article is Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 44 (1966). See also RICHARD POSNER, *ANTITRUST LAW* 9-32 (2d ed. 2001).

8. See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and

Thus a central insight underlying antitrust law is that competition allows resources to flow to their best use, while restraints on competition can obstruct that flow, resulting not only in higher prices but also in misallocated resources and dead weight loss. However—and here is the key point for our purposes, explored more fully below—some forms of cooperation actually *increase* competition. Some forms of cooperation actually facilitate the flow of resources to their best uses by allowing in various ways for the more efficient operation of competitive markets. A central task of antitrust law is determining whether a particular challenged restraint can be justified on the basis of such pro-competitive effects.

Turning now to the substance of antitrust law, a threshold question faced by courts in evaluating seemingly anticompetitive practice or arrangement is to decide which section of the Sherman Act applies. This presents the so-called “single entity” question, which in sports cases has arisen primarily in the context of professional leagues. While the cases are complex, the essential point is straightforward.

Section 1 of the Sherman Act prohibits any unreasonable “contract, combination . . . or conspiracy in restraint of trade or commerce<sup>9</sup>,” and is potentially violated when would-be competitors cooperate. But Section 1 does not apply to a single entity, however large and complex. A large single entity is subject to antitrust liability only under Section 2 of the Sherman Act, which makes it a violation to “monopolize, or attempt to monopolize . . . trade or commerce.”<sup>10</sup> In doctrinal terms, the idea is that a single entity cannot be said to “conspire” with itself. In substantive policy terms, it can be good for competition to allow large enterprises to facilitate coordination between sub-units—as long as there are other competitors for that large enterprise as a whole. So when multiple branches of a single entity cooperate, the entity is safe from Section 1 scrutiny, and will face antitrust liability only if the entity has sufficient monopoly power to be held in violation of Section 2.

An antitrust claim involving a large or multi-unit enterprise like a sports league faces a threshold question. Should the enterprise be treated as a combination between competitors or as a single entity with multiple sub-units? The leading recent sports case on this issue is *American Needle, Inc. v. National Football League*, which involved a challenge to the NFL’s decision to grant exclusive licenses to sellers of NFL apparel.<sup>11</sup> The Supreme Court held that, at least for that purpose, the NFL should not be considered a single entity,

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social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.”) Despite such emphatic endorsements of the efficiency rational, some scholars argue that distributional consequences should matter as well. The most cogent exposition of the consumer protection rationale appears in: John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers Not Efficiency*, 84 NOTRE DAME L. REV. 191 (2008).

9. 15 U.S.C. § 1 (2004).

10. 15 U.S.C. § 2 (2004).

11. *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010).

but should be considered a combination of potential competitors subject to rule of reason scrutiny under Section 1 of the Sherman Act. As the Court recognized, this determination cannot rest entirely on the formal structure of the enterprise but requires an examination of how the enterprise actually functions in the market.

We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.<sup>12</sup>

The key point for our purposes is simply that resolving the single entity question requires courts to think carefully about not only the nature of the enterprise itself but also about the need for cooperation and the nature of the value created by the product. Sports cases, given the inchoate value of sports products and the unique necessity of cooperation, can make that inquiry particularly challenging.

Rather than explore the details of the single entity inquiry, however, for our purposes it is more illuminating to turn to a related issue that has received a great deal of public attention lately. The issue is this: what restraints may the NCAA impose on schools and student athletes? In particular, what restraints may be justified on the grounds that they actually promote competition by making possible production of a product (college sports) that would otherwise be unavailable? This question is central to disputes about the appropriate antitrust treatment of NCAA rules on student athlete eligibility and scholarship limits. To frame this issue, it is necessary to establish some basic Sherman Act Section 1 doctrine on the table.

If and when it is determined that an enterprise is not a single entity but rather a contract or agreement between potential competitors, Section 1 of the Sherman Act applies. Section 1 purports on its face to prohibit “any contract, combination or conspiracy . . . in restraint of trade or commerce.”<sup>13</sup> That prohibition, however, cannot be taken literally, given that every contract restrains trade in some sense and to some extent—if only by limiting the ability of parties to take actions in violation of particular contractual obligations. Yet many contracts and agreements are beneficial, indeed necessary, to a functioning competitive market. So it has long been recognized that only “unreasonable” restraints violate Section 1.<sup>14</sup>

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12. *Id.* at 191.

13. 15 U.S.C. § 1 (2004).

14. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 64 (1911) (The Sherman Act intends “to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”).

Some sorts of arrangements, such as price-fixing and market allocation, have traditionally been considered inherently anti-competitive and have thus been considered *per se* violations of Section 1.<sup>15</sup> Many forms of cooperation, however, especially in the sports context, are not inherently or inevitably harmful to competition. Courts engage in “rule of reason” analysis by balancing the anti-competitive effects against the pro-competitive benefits.<sup>16</sup> Again, the question is whether a particular form of cooperation, although restricting competition in some ways, actually increases competition overall, thus serving the aims of antitrust law. This is the challenge faced by the NCAA in defending restraints like scholarship limits and academic eligibility requirements.

The NCAA, although often referred to in the singular, is not in any sense a single entity for purposes of antitrust law. It is, rather, an organization of colleges and universities. It is a vehicle through which the schools—actual and potential competitors—cooperate. As such, the NCAA is subject to scrutiny under Section 1 of the Sherman Act and is potentially liable for agreements that unreasonably restrain trade. So the question in any given case is essentially whether the NCAA can show that a particular challenged restraint on competition actually promotes competition.

It might seem odd to suggest that a cooperative restraint on competition can actually promote competition, but some can; and recognizing this is essential to understanding the problem faced by courts in antitrust cases. Some forms of cooperation can structure a marketplace so as to make it function better and thus more competitively.<sup>17</sup> Alternatively, agreements that restrain competition within one small segment of a market can be seen as pro-competitive if they allow for better competition more broadly. Vertical territorial restrictions, once seen as *per se* violations, can be pro-competitive in this way.<sup>18</sup>

And another, for our purposes crucial, way that seemingly anti-competitive arrangements can actually promote efficient and competitive markets is by making possible products—valuable uses of resources—that would not be possible absent cooperation. This issue has arisen both inside and outside of sports, including in the seminal case of *Broadcast Music, Inc. v. Columbia*

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15. See *N. Pac. Ry. Co.*, 356 U.S. at 5; see also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (price-fixing); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 614 (1972) (divisions of markets and allocations of customers).

16. *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

17. See, e.g., U.S. FED. TRADE COMM’N AND DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR THE COLLABORATION OF COMPETITORS 6 (2000), [https://www.ftc.gov/sites/default/files/documents/public\\_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf](https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf) (“The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example, a competitor collaboration may enable participants to offer goods or services that are cheaper, more valuable to consumers, or brought to market faster than would be possible absent the collaboration.”).

18. *Cont’l T.V. v. GTE Sylvania*, 433 U.S. 36, 50-57 (1977) (clarifying and overruling in part *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

*Broadcasting System*.<sup>19</sup> There, the Court recognized that an arrangement that on its face appeared to be price-fixing might yet be pro-competitive because it made possible a product—blanket licenses allowing for the performance of a range of copyrighted works—that would not be possible otherwise.<sup>20</sup>

This makes good sense. Prohibiting cooperation where cooperation is necessary to the creation of a distinct and valuable product would not increase competition. Rather, it would simply mean eliminating that product from the market—thus reducing competition and increasing dead weight loss. Given the necessity for cooperation characteristic of sports enterprises, it should come as no surprise that sports cases have, characteristically, called upon courts to recognize this reality and think through its implications. A variation of this issue is at the heart of current debates about the antitrust treatment of the NCAA agreements between schools on matters such as scholarship limits and academic eligibility requirements. Are these agreements unreasonable restraints—inefficient, dead weight loss producing collusion in the quasi-labor market for student athletes?<sup>21</sup> Or are some of these restraints necessary to the creation of the product?

Here, some legal history will be useful. The NCAA was slow to recognize its vulnerability under antitrust law; but a series of cases over the last three decades have disabused it of any sense of immunity.

The seminal case was *NCAA v. Board of Regents of the University of Oklahoma & University of Georgia Athletic Association*,<sup>22</sup> which involved agreements to limit television broadcasts of college football games. The Supreme Court held that the agreements were anti-competitive under the Section 1 rule of reason test. The majority in *Board of Regents* assumed that NCAA members could of course legally continue to agree on matters like academic eligibility and amateurism requirements: “In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like. And the integrity of the ‘product’ cannot be preserved except by mutual agreement.”<sup>23</sup> Only Justice White, dissenting, seemed to realize that subsequent challenges would certainly call agreements on those matters into question as well.<sup>24</sup>

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19. *Broad Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

20. *Id.* at 20-24.

21. The question of whether and to what extent student athletes should be considered employees, although beyond the scope of this essay, is itself arguably central to the appropriate antitrust analysis of NCAA rules. William Berry, in his contribution to this symposium, explores that issue. William Berry III, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL’Y REV. (forthcoming June 2017).

22. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma & Univ. of Georgia Athletic Ass’n*, 468 U.S. 85 (1984).

23. *Id.* at 102.

24. *Id.* at 121-36 (White, J., dissenting).

In *Banks v. NCAA*,<sup>25</sup> the Seventh Circuit tried to draw a line in the sand. There, a football player challenged the NCAA rule rendering a player ineligible if he hired an agent. The court recognized that if that particular eligibility requirement were made subject to antitrust scrutiny, it would be difficult or impossible to make principled determinations about which requirements are truly necessary to maintain the “character and quality” of college sports.<sup>26</sup> So the court simply asserted, without much analysis, that there was no anticompetitive impact on any labor market, that NCAA members were not “purchasers of labor” in their relationships with student-athletes, and that there was therefore no antitrust violation.<sup>27</sup> But judicial fiat was not sufficient to forestall the logic of the law.

That logic manifested itself in *Law v. NCAA*,<sup>28</sup> where the Tenth Circuit held that the NCAA was subject to antitrust liability for fixing the wages of certain coaches. This made clear that the NCAA is subject to antitrust scrutiny not only when its members were acting as *sellers* of a product but also as employers—in that case employers of coaches. Still, the court seemed to assume, as did the NCAA, that this would not implicate student-athlete eligibility requirements. Again, there was no warrant for that assumption. Once the NCAA was subject to antitrust scrutiny as an employer, it was inevitable that student-athlete eligibility requirements would be called into question. And they have been.

Recent cases, most notably *O’Bannon v. NCAA*,<sup>29</sup> focus on whether and to what extent some form of amateurism is essential to the nature and appeal of college football. Is the use of unpaid players a substantial part of what distinguishes college football from the NFL and makes it appealing?<sup>30</sup> Or does amateurism have little to do with the appeal of NCAA football?

My point here is not to adjudicate that debate, into which I have waded elsewhere.<sup>31</sup> Indeed, the current controversy over scholarships is just one example of a larger inquiry. Assume that courts determine that amateurism requirements in the form of scholarship limits are inessential, and thus not justified by the rule of reason, it will still be necessary to determine what restraints are necessary and justified. Pending cases, for example, challenge NCAA regulations limiting the ability of student-athletes to transfer from one

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25. *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081 (7th Cir. 1992).

26. *Id.* at 1089 (quoting *Bd. of Regents*, 468 U.S. at 102).

27. *Id.* at 1089-94.

28. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020-21 (10th Cir. 1998).

29. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1076 (9th Cir. 2015).

30. Kelly Crabb’s contribution to this symposium nicely explores the nature and value of the tradition of amateurism both historically and in the context of modern college sports. Kelly C. Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL’Y REV. (forthcoming June 2017).

31. Sherman J. Clark, *College Sports and the Antitrust Analysis of Mystique*, 71 WASH. & LEE L. Rev. 215 (2015).

school to another,<sup>32</sup> and NCAA rules limiting the number of scholarships each school may offer.<sup>33</sup> And it is not difficult to predict that academic eligibility requirements will be challenged next. After all, is it really necessary to the nature and appeal of college sports that only full time students are permitted to play?

Thus these cases will continue to highlight such questions and will force courts to confront not only the line-drawing problem, but also and more essentially the central underlying questions. What makes revenue-producing sports produce revenue? What makes them valuable products? And what restraints are necessary and reasonable to that end? NCAA football and basketball are distinct products from the NFL or NBA. They appeal to fans for different albeit related reasons—many of which have little to do with the level of play on the field. No one thinks that semi-pro leagues playing at the level of NCAA football or basketball would attract anywhere near the same level of attention and revenue. So then, what is it about college sports that makes them appealing? What makes college sports what they are? How is it—in this situation and more generally—that seemingly anti-competitive cooperation can create value by making possible something distinct and valuable?

These may seem like abstract or theoretical questions. No court feels the need to decide what constitutes the essence or appeal of shoes, cars, or most other products. But these or similar questions lie hidden beneath the surface of antitrust litigation generally—even if they are rarely addressed explicitly. And in sports cases those questions are brought to the surface. And that is exactly what makes sports cases so intellectually and pedagogically valuable. They force us to confront and wrestle with underlying questions that are arguably important to a clear understanding and analysis of the law, but which in other areas we can often ignore or avoid.

#### B. *Trademark: The Nature and Relevance of Consumer Confusion*

Trademark is an arena in which sports cases have not so much driven the law as forced courts and scholars to confront its underlying rationale. In particular, courts have struggled to articulate a persuasive and coherent understanding of consumer confusion—a concept central to trademark law. This confusion flows in part from, and contributes to, a deeper confusion between trademark and copyright. Despite cautionary notes from Judge (now Justice) Breyer and others, courts tend implicitly to treat trademarks as a form of property, rather than as vehicles for a right to prevent consumer confusion. This has made for an unsatisfactory and incoherent body of law. This incoherence can often be missed or ignored by courts applying particularly narrow doctrines within trademark law; but the doctrinal and conceptual

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32. Complaint, *Vassar v. NCAA*, Case # 1:16-CV-10590 (N.D. Ill) (pending).

33. *In re NCAA Grant in Aid Cap*, Case # 4:14-md-02541-CW (N.D. Cal.) (settlement pending).

confusion comes to the surface in sports cases. This calls upon scholars—and, one hopes, eventually courts—to think more deeply about the conception of consumer confusion and dilution that purport to drive trademark law.

Trademark, governed by the Lanham Act,<sup>34</sup> has as its aim and operative principle that consumers should be able to know what they are buying. This benefits consumers in two ways. First, and most obviously, it guards against deception in particular purchases. Consumers are protected against accidentally purchasing a product or service from one seller under the mistaken impression that the product's source or origin is a different seller, whose products or services they have reason to prefer or trust. Imagine purchasing what you think to be highly reliable Rolex watch only to find that it is a knockoff that fails even to keep time. The second way in which consumers benefit when the law makes sure they know the source or origin of products is that it gives sellers an incentive to invest in quality. Sellers reap repeat business when consumers experience or learn of the sellers' reputation for quality. But sellers can reap that business—and thus will be willing to invest in quality—only if consumers can reliably identify their products or services. Thus consumers benefit both directly and indirectly when they are able to know what they are buying—when they are not confused about the source or origin of products or services.

Trademark law pursues this aim by facilitating and protecting the exclusive use by a seller of a distinctive symbol or phrase by which consumers can identify the source or origin of a product or service. Consistent with the underlying rationale, the plaintiff in the typical trademark case must show not simply that the defendant has used a symbol or phrase similar to that used by the plaintiff. The plaintiff must also, and more essentially, show consumer confusion—that consumers are likely to be misled about the source or origin of products or services.<sup>35</sup>

Alternatively, a trademark action can be based on what is called “dilution,” rather than contemporary confusion. Such an action serves the same consumer protection ends—albeit less directly—and, properly understood, also aims at preventing or minimizing consumer confusion. The underlying logic of a dilution claim is that some uses of a similar mark, while not demonstrably misleading to current consumers, might over time dilute the capacity of the trademark to help consumers identify the source or origin of products. Thus a dilution action, like a traditional claim of consumer confusion, also aims at preventing confusion, albeit more broadly and over a longer span of time.

The key conceptual point here is that, unlike other areas of intellectual property, trademark does not create a property interest, properly understood. Unlike a copyright or a patent, a trademark is not something one “owns.” It is, rather, a vehicle through which one asserts a particular right—the right to prevent others from confusing consumers about the source or origin of products. In most cases, this means the right to prevent another seller from

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34. 15 U.S.C. §§ 1051-72 (2010).

35. 15 U.S.C. § 1114(1)(a) (2005).

deceiving consumers into thinking that its products come from you. Sellers often talk about “owning” a trademark; and, whether intentionally or inadvertently, conflate the logic of trademark and copyright. They do this, perhaps, in an effort to secure broad, property-like protection for trademarks—even absent the sort of consumer confusion trademark is designed to prevent.

This shift in trademark law toward copyright-like logic is not always evident in the cases, because most cases do not require courts to think about the underlying rationale of trademark law writ large. Sports cases do. Or, at least, sports cases invite and call upon courts to think more deeply about the aims and operation of trademark—even if not every court rises to the challenge.

In many cases, trademark law can be applied to sports businesses just as it is applied in other industries. For example, if a sporting goods manufacturer were to employ labels or brand names likely to cause confusion as to the source or origin of the goods, the case might be factually complex, but would not generate sports-specific doctrinal complications.

The sports case which best illustrates the application of traditional trademark principles, while at the same time suggesting the direction in which this area of law has evolved, is *Indianapolis Colts v. Metropolitan Baltimore Football Club*.<sup>36</sup> That case involved a Canadian Football League team located not in Canada but in Baltimore. When the Canadian Football League granted Baltimore a franchise in 1993, the team owner wanted to name the team the Colts. This name was clearly an *homage* of sorts to the former Baltimore Colts of the National Football League. That team had been moved by owner Robert Irsay to Indianapolis in 1984, and had since been known as the Indianapolis Colts. In what the court assumed was an effort “to improve its litigation posture,” the team agreed to call itself not simply the Baltimore Colts but the Baltimore CFL Colts.<sup>37</sup> The Indiana club’s successful effort to enjoin the Baltimore team’s use of the name reached the Seventh Circuit and produced an illuminating opinion by Chief Judge Posner.

The first issue was the identification of the relevant trademark. The Baltimore team maintained that the Indianapolis club had “abandoned” the mark “Baltimore Colts” when it left town. The court agreed, but noted that the issue was not whether the Indianapolis club somehow owned the name “Baltimore Colts,” but whether the Baltimore team’s use of that name would confuse consumers.<sup>38</sup>

Imagine, for example, if Canadian Football League were to put a franchise in Minneapolis and name it the “Minneapolis Vikings.” The NFL’s Minnesota Vikings would almost certainly bring a trademark-based challenge. Such a challenge would not, however, be based on any claimed ownership of the name “Minneapolis Vikings,” but rather on the likelihood that consumers would be

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36. *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P’ship*, 34 F.3d 410 (7th Cir. 1994).

37. *Id.* at 412.

38. *Id.* at 412-13.

confused by the CFL's use of a name so similar to their own. So too in the Indianapolis Colts case, with the possibility of confusion allegedly generated not merely by the similarity between the names, but also by particular history and circumstances of the parties. As the court put it:

If "Baltimore CFL Colts" is confusingly similar to "Indianapolis Colts" by virtue of the history of the Indianapolis team and the overlapping product and geographical markets served by it and by the new Baltimore team, the latter's use of the abandoned mark would infringe the Indianapolis Colt's new mark.<sup>39</sup>

The opinion then provides a nice explanation and illustration of the manner in which courts determine whether there is a sufficient likelihood of confusion. After observing that "[t]he legal standard under the Act has been formulated variously" the court noted that:

[T]he various formulations come down to whether it is likely that the challenged mark if permitted to be used by the defendant would cause the plaintiff to lose a substantial number of customers.<sup>40</sup>

This is not to suggest that the first user has some proprietary claim on its customers. The lost business serves as a proxy—a way of getting at the confusion and consequent inefficiency that the Lanham Act aims to prevent.

Judge Posner's formulation of the rationale is worth quoting:

The aim is to strike a balance between, on the one hand, the interest of the seller of the new product, and of the consuming public, in an arresting, attractive, and informative name that will allow the new product to compete effectively against existing ones, and, on the other hand, the interests of existing sellers, and again of the consuming, in consumers' being able to know exactly what they are buying without having to incur substantial costs of investigation or inquiry.<sup>41</sup>

The court then reviewed the expert testimony and market research offered by both sides, and concluded that the plaintiff's "far more substantial" study was more credible and persuasive. Having found the requisite likelihood of confusion, the court affirmed the district court's grant of an injunction against the Baltimore team.

At first blush, the opinion in *Indianapolis Colts* seems to illustrate the operation of trademark law in its most traditional guise. A closer look, however, suggests that something more may have been going on. Beneath Judge Posner's confident analysis, the case highlights some of the doctrinal stress put on trademark law by sports related issues.

What, precisely, was the potential consumer confusion? Do we imagine that fans would attend a CFL game in Baltimore *by mistake*, thinking they were

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39. *Id.* at 413.

40. *Id.* at 414.

41. *Id.*

attending an NFL Indianapolis Colts game? Or do we even think that fans would accidentally watch the wrong game on television? No. The confusion, if likely, would have had to do with merchandising—with products bearing the logo of one team or another. Even then, is it likely that people intending to purchase “Indianapolis Colts” merchandise would have bought “Baltimore CFL Colts” gear by mistake? Again, probably not. The risk was more subtle. The risk was that some consumers might have purchased the merchandise of the Baltimore CFL Colts out of a sense of nostalgia—thinking that *that* team, rather than the Indianapolis club, was somehow connected to the lost and lamented Baltimore Colts of old.

Within the context of *Indianapolis Colts*, and as a matter of trademark doctrine, this sort of confusion ought un-controversially to be sufficient to support the injunction, as it was. The Indianapolis colts have the right to prevent others from exploiting consumer confusion by trading on the goodwill they have created—albeit goodwill created when they were operating in a different location and under a slightly different mark. The Lanham Act expressly recognizes that confusion as to “affiliation, connection, or association” is sufficient to support liability. The deeper question is whether this sort of confusion—the sort most often in issue in sports trademark cases—is something with which trademark law, given its underlying consumer-protection rationale, ought always to be concerned.

It may seem obvious that a sports trademark holder has an exclusive right to sell team gear or merchandise, but upon reflection it is not. For the most part, courts do in fact protect this right, but the grounds upon which they do so are substantially less solid—and the analysis substantially less clear—than one might expect.

In *Boston Professional Hockey Association v. Dallas Cap and Emblem Mfg., Inc.*<sup>42</sup> the Fifth Circuit was forced to confront the peculiar function of sports trademarks. The case involved a manufacturer who, without permission from the National Hockey League, began to make and sell embroidered emblems depicting the logos of NHL teams. The district court found for the plaintiff NHL teams, holding that it was sufficient for the defendants to attach a disclaimer informing consumers that the products were not officially licensed by the NHL. The Fifth Circuit, however, reversed, holding that “the team has an interest in its own individualized symbol entitled to legal protection against such unauthorized duplication.”<sup>43</sup>

As the court recognized, the “difficulty in this case stems from the fact that a reproduction of the trademark is being sold, unattached to any other goods or services.”<sup>44</sup> This difficulty in fact comes in two forms—doctrinal and conceptual. Doctrinally, the statute requires a plaintiff to show that the

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42. *Boston Prof'l Hockey Ass'n v. Dallas Cap and Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975).

43. *Id.* at 1004.

44. *Id.* at 1010.

allegedly infringed mark has been used “in connection with the sale . . . of goods.”<sup>45</sup> In response to this problem, the court simply and sensibly endorsed the district court’s finding that “in the instant case, the registered trademark is, in effect, the product itself.”<sup>46</sup>

The conceptual difficulty is less easily dodged. If the symbol itself is the product, shouldn’t it be copyrighted rather than (or in addition to) trademarked? Put differently, even when a team logo *is* attached to a cap or sweatshirt or the like, is it really being used to tell consumers anything about the cap or jersey? In such cases, where the mark itself is the product, how well does trademark rationale apply? The court in *Dallas Cap* did not confront this problem directly, but was forced to deal with it under the rubric of consumer confusion. If a logo itself is what consumers want, and a logo is what they get, can we really say that they were confused in any way that matters?

In *Dallas Cap*, the defendant manufacturers made this point. They argued that consumers knew exactly what they were buying—“emblems portraying the teams’ symbols”—and thus “the buyer is not confused or deceived.”<sup>47</sup> The court responded simply that:

[T]he confusion or deceit requirement is met by the fact that the defendant duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams’ trademarks.<sup>48</sup>

With all respect to the court, this is unsatisfactory. A better argument might be that the consumers were confused as to “affiliation, connection, or association,” but even that would be unpersuasive. The consumers were getting hats with logos, which is just what they knew they were getting. They neither knew nor cared who manufactured the logos *or* the hats, and almost certainly did not think that the NHL had done so. Upon reflection it seems that the only thing consumers in the *Dallas Cap* situation might be confused about is whether the gear they are buying is “official”—whether the league has sanctioned or approved this use. The question is whether this sort of confusion should matter—whether it should be enough to support a trademark infringement claim.

Now, a threshold difficulty with pointing to that sort of confusion is that it renders the analysis somewhat circular. The category “official-ness” is a creation of the law—a *result* of how we define trademark rights rather than a reason for defining them in a particular way. Substantively, we need to think about what sort of confusion ought to matter, given the logic and aims of trademark law. So far, at least, courts have not answered that deeper question particularly well or coherently. But sports law cases—as they tend to do—have and will continue to challenge us to think the matter through. Two sports cases

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45. 15 U.S.C. § 1114(1)(b) (2005).

46. *Boston Prof'l Hockey Ass'n*, 510 F.2d at 1011.

47. *Id.* at 1012.

48. *Id.*

in particular, both of which happen to have involved the Boston Marathon, show the First Circuit wrestling with this question.

The first was *Boston Athletic Association v. Sullivan*,<sup>49</sup> a 1989 case in which the organizers of the Boston Marathon, the non-profit Boston Athletic Association (BAA), successfully enjoined a local merchant from selling unauthorized Boston Marathon t-shirts. The defendant, a firm in Hopkinton, MA, had in fact been making and selling the t-shirts each year for some time, a practice which had been not only tolerated but in fact encouraged by the BAA. In 1987, however, after becoming aware that under cases like *Dallas Cap*, the licensing of merchandise represented a potential source of revenue, the BAA sold the rights to market Boston Marathon t-shirts to a different firm. When the Hopkinton Firm continued to sell the t-shirts, the BAA sought an injunction. The district court dismissed the claim, on the rationale that there was no evidence of consumer confusion.

The First Circuit reversed. Although the court paid lip service to the idea that “a trademark, unlike a copyright or patent, is not a ‘right in gross’ that enables a holder to enjoin all reproductions,”<sup>50</sup> the decision reflects a very different underlying conception. Using language reminiscent of *Dallas Cap*, the court noted that:

“When a manufacturer intentionally uses another’s mark as a means of establishing a link in the consumers’ minds with the other’s enterprise, and directly profits from that link, there is an unmistakable aura of deception.”<sup>51</sup>

This assertion is not explained by the court. There is free riding of sorts, yes; but deception? The defendant is certainly profiting to some extent from the plaintiff’s efforts, but so too are sports writers who describe the race in the articles they sell, and area restaurants who feed hungry runners after the race, and store owners whose sales increase as a result of crowds in town for the event.

Rather than take the opportunity to explore the question of when free riding might be problematic even absent confusion—of how substantively to distinguish the t-shirt maker from the sports writers and local restaurants—the court employs a version of the “official-ness” argument. Here is the holding:

[W]e think it fair to presume that purchasers are likely to be confused about the shirt’s source or sponsorship. We presume that, at the least, a sufficient number of purchasers would be likely to assume—mistakenly—that defendants’ shirts had some connection with the official sponsors of the Boston Marathon. In the absence of any evidence that effectively rebuts this presumption of a “likelihood of confusion,” we hold that plaintiffs are entitled to enjoin the manufacture and sale of defendants’ shirts.<sup>52</sup>

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49. 867 F.2d 22 (1st Cir. 1989).

50. *Id.* at 35.

51. *Id.*

52. *Id.* at 34.

Again, this argument is suspiciously circular. As the court sees it, the retailer to whom the BAA sold a license has a “connection with the official sponsors” and the defendant does not—a matter about which the consumers will be confused. But just what is this “connection” that the licensed seller has? Only that it has paid the plaintiffs for the exclusive right to sell the shirts. And to complete the circle, what is the source of this right? Trademark law. If trademark law did not protect this right, then no seller would necessarily have a “connection with the official sponsors,” and there would be nothing to be confused about.

There is another possible explanation, which the courts appear not to have explored. It may be that there are circumstances under which people actually do care who gets a cut of the profits—such as where they see themselves as literally, rather than merely symbolically, “supporting the team” through the purchase of goods. This may be particularly true as to an event like the Boston Marathon, which is run by a non-profit organization. If so, however, this argues only for requiring a clear designation of official and unofficial merchandise, rather than for permitting an injunction against the latter. Moreover, trademark plaintiffs have so far appeared unwilling to confront, let alone rely upon, the fact that the primary difference between “official” and “unofficial” is who gets the money.

The difficulty in the wake of cases like *Dallas Cap* and *BAA* is that the implicit property rights rationale offers no obvious stopping point. This was the problem confronting the First Circuit in the next significant case involving the Boston Marathon. Trademark holders have the right to control the use of the mark on merchandise, but what else should they be able to control? The BAA soon tried to find out.

After its success in the t-shirt case, the BAA began more systematically to explore (and exploit) the value of that trademark. One such effort involved the sale of broadcast rights. The BAA sold to WBZ-TV (Channel 4) an exclusive license to broadcast the race. Nonetheless, another local station, WCVB (Channel 5) proceeded to broadcast the race anyway, using cameras in helicopters and along the route. Naturally, Channel 5 used the name “Boston Marathon” throughout the broadcast in describing the event to its viewers. The BAA brought suit for damages, and to enjoin future unauthorized broadcasts of this sort, and the case eventually found its way to Judge Breyer, then on the First Circuit, in the form of *WCVB-TV v. Boston Athletic Association*.<sup>53</sup>

Judge Breyer fully appreciated the distinction between a property right (like a copyright, for example) and the more limited rights provided by trademark. The BAA naturally relied on *Sullivan*, arguing that Channel 5, like the unauthorized t-shirt maker in *Sullivan*, was attempting to “free ride”—to take advantage of the Boston Marathon and to benefit from the good will associated with its promotion . . . .<sup>54</sup> The opinion first deals with *Sullivan*,

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53. *WCVB-TV v. Boston Athletic Ass’n*, 926 F.2d 42 (1st Cir. 1991).

54. *Id.* at 45 (quoting *Sullivan*, 867 F.2d at 33).

describing it as rooted in notions of confusion, despite the broader, property-like language used in that opinion. According to Judge Breyer:

The trademark statute does not give the appellants any “property right” in their mark *except* “the right to prevent confusion.” . . . And, nothing in *Sullivan* suggests the contrary.<sup>55</sup>

He then goes on to point out that viewers “do not particularly care about the relation of station to event-promoter.”<sup>56</sup>

True. But Breyer’s decision calls into question the logic of earlier cases, which seem to assume that confusion about a product’s “connection with . . . official sponsors” *does* suffice to support a trademark claim.<sup>57</sup> We are left back where we were—asking ourselves whether and under what circumstances consumer confusion about “official-ness” is the sort of confusion about which trademark law should be concerned.

In thinking this question through, we are forced—as we so often are in sports cases—to think more carefully about the underlying purpose and logic of the law. Why does trademark law care about consumer confusion? Recall that there are two reasons: 1) to make sure consumers get what they think they are getting; and 2) to give sellers an incentive to invest in quality. Neither of these aims seemed threatened by consumer confusion about “official-ness.” The doctrinal upshot of allowing this sort of confusion to suffice is that it treats the trademark like a property right, such that confusion about who “owns” it is seen to be relevant. And the primary substantive consequence of defining the right this way is that it permits trademark holders to both limit supply (thereby presumably raising prices) *and* claim a cut of the profits. Do we really believe that consumers are harmed by their “confusion” as to whether or not the league is getting a cut of the profits? Or is it more likely that they are harmed by the inability to choose where to buy their gear?

Having been somewhat critical of the reasoning in *Dallas Cap*, it is worth noting that the direction the law has taken might well be defensible as a policy matter. Perhaps granting an exclusive property-like right to sell “official” gear is good way to motivate investment. This might be of particular importance in sports, where much of the value created by an enterprise might be described as “associational.” Examining this possible rationale would require careful thinking about one of the very questions that, as noted, make sports unique and challenging—what is it that makes sports valuable?

Without deciding whether an argument along these or similar lines might provide a rationale for the property-like evolution of sports trademark law, it is safe to say that so far courts and commentators have not provided a thoroughgoing explanation for the operation of trademark law in this field. Until such an explanation is available, moreover, the cases will continue to be

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55. *Id.* at 45.

56. *Id.* at 46.

57. *Sullivan*, 867 F.2d at 34.

somewhat difficult to fully reconcile. And no such explanation will be available unless and until scholars take up the challenge offered by these characteristically thought-provoking sports cases and use them to dig down to a better understanding of what the law really is or ought to be about.

C. *Sex Discrimination: The Aims of Anti-Discrimination Law*

Gender equity is an area in which sports cases offer a particularly illuminating perspective—not only on sex discrimination law itself but also on anti-discrimination law more broadly and on the social and institutional contexts in which discrimination and inequality are potentially problematic. These questions are not unique to sports; but can elsewhere be obscured. Sports cases bring to the surface and highlight fundamental and crucial questions about the aims of anti-discrimination law and the relationship between history, past opportunities, and present discrimination.<sup>58</sup> Here, as elsewhere, sports make us think. And perhaps the best illustration is the law governing sex discrimination in college athletics—Title IX.

On its face, Title IX appears to be a straightforward, anti-discrimination statute, modeled after Title XI and Title VII. The text of the statute does not address itself particularly to sports, but simply states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>59</sup> And in many cases Title IX can be applied in ways analogous to other anti-discrimination statutes.

Regarding sports, however, it has proven difficult to interpret Title IX as an ordinary anti-discrimination statute. Instead, regulations promulgated by the Office of Civil Rights (OCR) describe standards for liability.<sup>60</sup> Under those regulations, schools must provide equal opportunities for men and women to participate in intercollegiate sports.<sup>61</sup> One way schools can fall short of this requirement is by treating female athletes less well than male athletes. The OCR has promulgated a fairly concrete set of factors to be considered in this inquiry.<sup>62</sup> Factors include: the provision of equipment and supplies; the scheduling of games and practice time; the opportunity to receive coaching and academic tutoring; and the provision of proactive facilities.<sup>63</sup> Another way schools can violate Title IX—aside from treating female athletes less well than

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58. Indeed, sports cases force us to think not only about sex discrimination, but also about the very nature of gender itself. Some of these issues are highlighted by Ron Katz and Bob Luckinbill in their contribution to this Symposium. Ronald S. Katz & Robert W. Luckinbill, *Changing Sex/Gender Roles and Sport*, 28 STAN. L. & POL’Y REV. (forthcoming June 2017).

59. 20 U.S.C. § 1681(a) (1994).

60. See 34 C.F.R. § 106.

61. 7 C.F.R. § 15a.41(c).

62. *Id.*

63. *Id.*

male athletes—is by providing unequal numbers of opportunities for women to participate in intercollegiate sports at all. The analysis of this sort of Title IX violation has proven surprisingly challenging for reasons and in ways I describe below. But thoughtful scholars and students will embrace this challenge. For it is in contexts like this—where sports challenge the ordinary interpretation and operation of the law—that sports cases can do their signal pedagogical and thought-provoking work.

Consistent with our overarching theme, therefore, the reason that interpreting Title IX in the sports context presents unique and illuminating challenges is that college sports are unique in challenging and illuminating ways. To frame the Title IX debate, it is useful to highlight some particularly distinctive features of college sports.

First sports serve a variety of overlapping roles on college campuses, so it is not easy to describe exactly why and to what extent college sports are valuable. The NCAA officially emphasizes that sports are a part of the educational experience.<sup>64</sup> But some sports, football and men’s basketball in particular, are for some schools also very big business.<sup>65</sup> One journalist has even argued that the real purpose of big time college sports is to distract students—“beer and circus” style—from the inadequacy of the education they are receiving.<sup>66</sup> On a more hopeful note, sports can be a vehicle through which campuses find a sense of unity and identity—bringing students together and alumni back.<sup>67</sup> As is so often the case, the multifaceted and sometimes inchoate nature of the value of sports forces us to think harder about the way the law should work. In particular, our thinking about whether and how to encourage the participation of women in college sports will depend in part on what ends we think sports do or ought to serve.

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64. See NCAA DIVISION I MANUAL 1 (The National Collegiate Athletic Association, August 2016-2017). In Article 1 of the NCAA Constitution, the basic purpose of the NCAA is described as: “The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”

65. See, e.g., GILBERT M. GAUL, BILLION DOLLAR BALL: A JOURNEY THROUGH THE BIG MONEY CULTURE OF COLLEGE FOOTBALL (2015). In basketball, the current contract between the NCAA, CBS, and Turner Broadcasting to broadcast the Men’s Division I basketball tournament is worth almost \$11 billion dollars over a fourteen year period.

66. MURRAY SPERBER, BEER AND CIRCUS: HOW BIG TIME COLLEGE SPORTS HAS CRIPPLED UNDERGRADUATE EDUCATION (2001).

67. JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2002) (“In order for Hamilton to have an identity that distinguishes it from Wesleyan, the students (past, present, and future) need to feel part of a cohesive community. Sports can play an important role in creating a campus ethos—in part through public ritual (the Saturday afternoon game), but also through the banner in the dorm room wall and the stories on the back page of the student paper. These “bonding” effects can be important in attracting students and in making the campus a pleasant place for everyone. They are also thought to sustain alumni loyalty and, over the long run, contribute to the financial strength of the institution.”).

A second way in which college sports differ markedly from other contexts in which we guard against discrimination is that college athletic recruiting is inherently an “affirmative action.” Colleges in recruiting athletes do not simply choose among applicants in such a way as to allow us sensibly to ask whether some subset of those applicants have been discriminated against in the same sense that female or minority college admission applicants might be. Instead, schools recruit, affirmatively, for virtually all opportunities—opportunities that are open in each case only to men or only to women.

And this highlights the unique aspect of sports with the most obvious doctrinal salience. Title IX in the sports context recognizes the appropriateness of separate teams for men and women in most circumstances.<sup>68</sup> This implicitly authorizes, indeed requires, a “separate-but-equal” approach to gender equity—an approach that has been resoundingly rejected in other contexts.<sup>69</sup> We could, after all, purport to “solve” the problem of discrimination in sports simply by mandating that there be one team for each sport, open to the best players, male or female. That is how we would address gender discrimination in other contexts. But that approach would not work in sports—at least if by “work” we mean secure opportunities for women. Nor would it be seen as sensible to adopt the second most simple-seeming solution and require schools to have identical men’s and women’s teams. So the law must figure out how to define equality in the context of separate men’s and women’s sports teams.

These features inform many particular aspects of Title IX enforcement. But they also force into prominence—and thus prompt reflection about—an underlying uncertainty that lurks behind not only Title IX but antidiscrimination law more generally. Is a given law intended simply to prevent any particular person from being treated unfairly on the prohibited basis? Or should the law also be understood and interpreted as an effort to increase opportunities for an under-represented group?

It is worth clarifying the conceptual question at hand, so as to better see how Title IX cases can be illuminating. Often there is little conflict between the dual potential aims of anti-discrimination law—equal treatment and increased opportunities. In most circumstances, efforts to prevent individual members of a group from being discriminated mesh well with an aspiration—whether stated or implicit—to provide greater opportunities to members of that group. For example, preventing a military academy from excluding women accomplishes both aims—preventing discrimination and increasing opportunities.<sup>70</sup>

But these two goals are not the same. Some measures taken in an effort to comply with civil rights laws might limit discrimination, but at the cost of

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68. 34 C.F.R. § 106.41 (2000) (“Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”).

69. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

70. *United States v. Virginia*, 518 U.S. 515 (1996) (holding Virginia violated the Equal Protection Clause by excluding women from military academy).

opportunities. When civil rights laws made it clear that public pools could not discriminate on the basis of race, many municipalities simply closed their public pools.<sup>71</sup> This may have curtailed state-sponsored discrimination; but it did not provide any more opportunities for black people to learn how to swim.

It is even possible that some measures might increase opportunities for an under-represented group, but at the cost of exacerbating unequal treatment. A school might add a football team, for example, if doing so would raise enough money to help fund a different, albeit smaller, women's team in a different sport. Such a measure would add opportunities for women, but at the cost of increasing the disproportion between opportunities for men and women. Whether such a measure should be considered consistent with the aims of Title IX would depend on what we take those aims to be.

In the context of Title IX, the question can be framed this way. Is the statute aimed solely at making sure women and men are treated equally? Or does it also take as its goal to increase opportunities for women to play sports? There are two issues in Title IX litigation that especially force this question into prominence and thus require courts and scholars to confront the underlying uncertainty about the aims and purposes of the statute.

One such issue is the question of whether schools should be permitted to pursue compliance with the proportionality prong of Title IX by cutting men's sports rather than by adding women's sports. Schools have cut men's swimming, wrestling, and other sports in an effort to reduce the disproportion between opportunities for men and women and thus comply with the first prong of the OCR test.<sup>72</sup> No one is happy when this happens. Cutting men's sports appears to do nothing for women. Yet schools sometimes feel they have no choice. As a pragmatic matter, the OCR test requires them to get to proportionality; and sometimes cutting appears to be the only way. This seems foolish and has given rise not just to resentment but to litigation.

Courts, however, have consistently held that it is acceptable for schools to achieve proportionality by cutting men's sports—even though that might do nothing to increase opportunities for women.<sup>73</sup> Why? Because, they say, Title IX is aimed at preventing discrimination, not increasing opportunities. The Seventh Circuit put it this way:

Title IX's stated objective is not to ensure that the athletic opportunities available to women increase. Rather its avowed purpose is to prohibit educational

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71. JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* (2007).

72. *See, e.g.*, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Kelley v. Bd. of Trs., Univ. of Illinois*, 35 F.3d 265, 272 (7th Cir. 1994).

73. *Id.*

institutions from discriminating on the basis of sex.<sup>74</sup>

In this way, pressed by the peculiar features of college sports, courts have been forced to confront the underlying potential tension between preventing discrimination and increasing opportunities.

However, in a wrinkle that further highlights the potentially illuminating power of sports, courts have not always confronted that underlying tension consistently. There is another, related context in which courts seem to have implicitly taken the view that Title IX should be seen as a vehicle not just for the prevention of discrimination but also for the promotion of opportunities for women to play sports.

This context is the debate over the proper interpretation of the third prong of the three-prong OCR test for compliance with the mandate of Title IX to provide equal opportunities for participation in inter-collegiate athletics.

Start with the central test outlined by the key 1979 OCR regulations for compliance with this aspect of Title IX. It requires schools to meet one of three criteria:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion, which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>75</sup>

The first of these prongs is a straightforward proportionality test. Were this the only way for schools to comply with Title IX, it would certainly amount to a quota system inconsistent with the admittedly ambiguous statutory language quoted above. The second prong may seem at first blush to provide an alternative; but as a practical matter it does not—neither doctrinally nor pragmatically. Doctrinally, allowing compliance by moving towards proportionality still roots compliance in proportionality, and thus equally offends the seeming prohibition against such an approach.<sup>76</sup> Pragmatically, schools are not usually sued when they are expanding programs for female

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74. *Kelley*, 35 F.3d at 272 (holding that the University's decision to cut men's swimming in order to comply with the proportionality requirement was neither a violation of Title IX nor an Equal Protection violation).

75. Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71418 (Dec. 11, 1979) (clarified Jan. 16, 1996).

76. *Cohen v. Brown Univ.*, 101 F.3d 155, 193 (1st Cir. 1996) (Torruella, C.J., dissenting).

athletes, but when they are unable or unwilling to do so. So prong two solves neither the doctrinal problem of arguably impermissible proportionality-based quotas nor the pragmatic problem of providing an alternative means of compliance for schools that struggle to meet the proportionality test.

Thus attention has periodically turned to prong three. What does it mean—what should it mean—for a school to demonstrate “that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program?” Courts have read this provision literally. “Fully” is interpreted to mean that all members of the underrepresented sex have their interest and ability to play inter-collegiate sports accommodated.<sup>77</sup> Read this way, however, prong three is essentially a dead letter. No school can ever meet all of the interest and ability among its students, whether male or female. No school can offer every sport; so there will always be at least some interests and abilities that are not accommodated. Thus prong three, strictly interpreted, offers no refuge from the arguably problematic proportionality tests of prongs one and two.

In light of this reality, litigants have attempted to revive prong three by arguing for an alternative interpretation. This argument was framed most cogently in litigation involving Brown University two decades ago.<sup>78</sup> Brown at that time offered 15 women’s sports and 16 men’s sports—far more than most colleges; but the proportion of opportunities was skewed 63%-37% in favor of men—in large part because the football team had so many players.<sup>79</sup> Pressed financially, Brown decided to save money by cutting four sports—women’s volleyball, women’s gymnastics, men’s water polo, and men’s golf. Members of the women’s teams sued, alleging that Brown was in violation of the Title IX mandate to provide equal opportunities to participate in inter-collegiate sports.

Prong one of the three-prong OCR test provided no refuge to Brown, given that the opportunities for women were not substantially proportionate to the percentage of women in the student body. Prong two was not helpful, because Brown, having just cut two women’s sports, certainly could not show a continuing practice or program expansion. Nor did prong three, as traditionally read, offer any assistance. Confronted with two teams worth of now team-less women, Brown could not assert that the interest and abilities of women on campus were being fully and effectively accommodated in the literal sense.

So Brown argued that the “fully and effectively” language in that prong should be read differently. Brown’s position was that prong three should not be interpreted to require that the interests and ability of *every woman* on campus must be met in order to satisfy prong three. Instead, Brown claimed, prong three should be seen as satisfied if the interests and abilities of women on campus are met *as fully and effectively* as are the interests and abilities of men on campus. Brown produced research suggesting that there was more interest in

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77. *Id.* at 176.

78. *Cohen v. Brown Univ.*, 101 F.3d 155.

79. *Id.* at 163.

sports among men on campus than among women. In light of this, Brown argued, it should be permissible to provide more opportunities for men.<sup>80</sup> The First Circuit ultimately rejected this argument; but Brown's position has logical force, and was indeed endorsed by Chief Judge Tourella in dissent. Understanding why this argument has been rejected, despite its force, helps illuminate the underlying dispute about the aims of Title IX.

Brown's argument was rejected on what are essentially policy grounds, and good ones. First of all one might well distrust research suggesting that there is more interest in sports among men. More to the point, even if there is currently less interest among women, that disparity is likely a consequence of the very sort of discrimination that Title IX is aimed to prevent—not discrimination by Brown itself, perhaps, but overall and over time. Women and girls have had less opportunity and encouragement to play sports; so it should not surprise us to find residual disparities in interest and ability. If we want to remedy that—if we want more women to have the chance to play sports—we must encourage the provision of opportunities, which will in turn allow for the development of interest and ability. Allowing current disparities in levels of interest in sports to justify providing fewer opportunities would simply perpetuate the cycle.

That makes good sense. So why do I say that Brown's position nonetheless has some force? As a threshold matter, there is a doctrinal argument. Given that no school can ever realistically meet the interests and abilities of every student, male or female, prong three, read literally, is a dead letter. Should the OCR really be understood as having provided a compliance option that is impossible for any school to meet? This leads to the deeper, substantive argument—that prong three should be read in light of the stated purpose of Title IX—to prevent discrimination.

The argument, in essence, is that Title IX should not be read as enacting a broad social mandate requiring schools and colleges to help increase opportunities for women to play sports. Instead, Title IX should be interpreted as it in fact reads—as preventing schools from discriminating on the basis of sex. It should thus be read to require schools to treat make sure female students are treated as well as male students. That is manifestly the view taken by courts in other Title IX contexts. Recall that courts have held that schools can comply with prong one (achieve proportionality) by cutting men's sports rather than adding women's sports, despite the fact that cutting men's sports does nothing to increase opportunities for women. Why? Because, the courts insist:

Title IX's stated objective is not to ensure that the athletic opportunities available to women increase. Rather, its avowed purpose is to prohibit educational institutions from discriminating on the basis of sex.<sup>81</sup>

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80. *Id.* at 174; Brief of Appellants Brown University, Vartan Gregorian, & David Roach at 25-26; *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (No. 95-2205).

81. *Kelley*, 35 F.3d at 272.

On this understanding, the focus of the Title IX inquiry should be on whether each female student is treated equally as well as each male student. In the unique “separate but equal” context of sports, equal treatment should mean that each female student should have the same level of opportunity as each male student. And that level is not that every male student’s interest and ability to play intercollegiate sports is met. No school could do that. Instead, each male student has some less than 100% chance of having his interest and ability met. If the aim of Title IX really is just to prevent each school from discriminating, it should arguably suffice that each female student is provided the same less than 100% chance of having her interest and ability met.

Imagine that at a given school there are 500 male students who would and could play intercollegiate sports if their sport were offered; but since no school can offer every sport, there are only 250 opportunities. Each male student has, we might say, a 50% chance of having his interest and ability met. Now, suppose that at that school there are only 400 women who would and could play intercollegiate sports if their sport were offered. To make sure a female student on campus has opportunities equal to those offered to men, each should have the same 50% chance of having her interest and ability met. That would mean that the school should offer 200 opportunities for women.

Brown’s argument makes sense based on what courts say in other contexts—that Title IX is not about promoting opportunities but simply about equal treatment. But it also makes perfect sense for courts to reject this argument if they believe that Title IX is not just about equal treatment of individuals but also about addressing a larger and problematic social pattern on unequal treatment and unequal opportunities.

In defense of the courts decision to reject Brown’s argument, it should also be noted that it is in an important sense misleading to speak of college athletics as simply providing opportunities to current students. This is because college sports teams are made up largely of people who would not be at that school if that sport did not exist there. Statistics are not available on this point, and there are certainly student athletes who choose a school first and then participate in intercollegiate sports only if the school happens to offer the sport they play. But given the high level of competition in college sports, it seems safe to say that most students with the interest and ability to play college sports do not simply show up on campus and hope the school offers the sport they play. What this means is that the presence or absence of opportunities for intercollegiate athletic competition at any given school will primarily impact the composition of the student body rather than the number or quality of opportunities available to current students.

This does not mean that colleges and universities cannot have an impact on the total number of available opportunities. Collectively, they most certainly do. The point is that schools are not simply being prevented from discriminating against their own current students. They are, in effect, being required to treat equally not just their own student body, but also a hypothetical student body as it would be composed in the presence of equal athletic

opportunities. In this way they are being asked to participate in the creation of opportunities that must exist in order to remedy larger patterns of inequality. The question is whether this is consistent with the aims of Title IX.

This sort of question—about the multiple overlapping aims of antidiscrimination law—are implicated in many contexts, including highly charged debates about race and affirmative action. When and under what circumstances should we emphasize the equal treatment of individuals? When and where should we think more broadly about the social context in which opportunities, as well as interest and ability, arise. These are questions of profound importance not just in anti-discrimination law but in American life more broadly. But these questions can often be obscured—not only by doctrinal complexity and politically charged rhetoric but also by uncertainty or disagreement about the extent which race does or should matter in various contexts. Sports cases force the question to the fore. Because of the sex specific nature of sports teams, we cannot pretend that sex does not matter.

So then, what is the aim and purpose of Title IX? Is it just about preventing discrimination? Or is it also about promoting opportunities in light of a history of discrimination? The answer is that we don't know. There are differing views; and courts answer the question inconsistently. This is a particular instance of something that we as a society badly need to think and talk about. The point here is simply that sports cases, again, require and thus can help us to think and talk about it better. And that is why sports law is, or at least can be, worthwhile.

#### CONCLUSION

What follows? Granted that sports law can have the sort of thought-provoking educational value I have tried to describe here, what should we as teachers and students do—or do differently? First, and perhaps most obviously, we should keep at it. If what I suggest about the potential intellectual value of sports law is true, law schools should offer the course and scholars should study the subject, and journals like this one should continue to provide venues for scholarship. Beyond that, however the potential for sports cases to prompt thought about the law has implications for the way we teach—and for the way we write.

A sports law course can be approached in a number of ways. It can be tempting to focus heavily on current events and the hottest issues. But currency can come at the expense of depth. The most recent cases are not necessarily the ones that best prompt thought about the law; and this year's hot issue will be next year's legal history. In light of this, perhaps our concern should be not so much with whether our students are up to speed on the issues that dominated ESPN headlines the year they happened to take sports law. We might rather focus on whether they have learned things—and ways of thinking—that will help them throughout their careers.

And we certainly should help prepare students for their careers. But this laudable aim can sometimes incline us to dismiss what some might disparagingly call “theory” in favor of inculcating the pragmatic knowledge we believe our students will need to “hit the ground running.” Fair enough; but what does it mean to prepare students for their careers, long term? Many of our students will not work in sports law; and the course should be valuable to them as well. Even those who will work in the field cannot predict now what issues they will encounter later. Equipped with the ability and inclination to think well about the law, they will be prepared for whatever issues they encounter—likely long after the substantive details learned in the classroom are forgotten and/or obsolete.

So each of us who teach sports law need to think carefully about our pedagogical goals. Given the potential for sports law to provoke thought, it may be a wasted opportunity if—in the name of topical currency or anti-intellectual “pragmatism”—we do not try to use the course to encourage our students to think well about the law more broadly.

Finally, I think the potential for sports law to prompt thought has implications for our scholarship. Sports law scholarship, like teaching, tends to be heavily focused on current events and highly pragmatic—even partisan—in weighing in on the issues. This is largely a good thing. I greatly value work that helps me keep abreast of the rapidly changing sports law landscape; and even the most partisan article/brief can prompt thought. But I would also encourage scholars to tap the potential for sports law to serve as a lens through which to see and think about the law more broadly.

To be clear, I do not hold out this essay as an example of the scholarship I would encourage. This essay is, in part, a call for such work. I have suggested that sports law can help us explore the underlying aims and operation of several areas of law; but in a paper of this length I have been able only to gesture towards the directions those explorations might take. I would like to see scholars take up the challenge. I would like to see scholars not just explain and argue about sports law itself; but also to use sports law as the intellectual vehicle it has the potential to be.

Finally, it is only realistic to acknowledge that some in the academy may question the value of sports law, or consider it a marginal subject. This essay is not written for them; and we should not alter our teaching or scholarship in order to appease elite intellectual snobbery. But nor would it be a bad thing if the academy at large were to see what we have seen—that sports law can be not only a hot topic with appeals to students, but also a valuable and illuminating context in which to think well about law, policy, and society at large.