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# FROM *BOARD OF REGENTS* TO *O'BANNON*: HOW ANTITRUST AND MEDIA RIGHTS HAVE INFLUENCED COLLEGE FOOTBALL

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## I. INTRODUCTION

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.<sup>1</sup>

Justice Oliver Wendell Holmes's comment concerning use of the doctrine of stare decisis has echoed since its first utterance in countless expressions of legal scholarship ranging from law reviews to case books. Recently, this quote was reverberated in a speech given by former Justice John Paul Stevens at the Sports Lawyers Association's annual meeting on May 15, 2015. Justice Stevens applied the quote in criticism of the use of stare decisis by the Court in *Flood v. Kuhn*<sup>2</sup> to preserve baseball's antitrust exemption. Yet, on that same day, the Ninth Circuit considered *O'Bannon v. NCAA*,<sup>3</sup> a case that called into question the way Justice Stevens applied antitrust law to National Collegiate Athletic Association (NCAA) regulations in *NCAA v. Board of Regents*.<sup>4</sup> Justice Stevens wrote for the majority in *Board of Regents* and his holding and dicta in

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1. Justice Oliver Wendell Holmes, Supreme Judicial Court of Mass., Address at the Boston University School of Law Dedication: The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897).

2. 407 U.S. 258 (1972).

3. 802 F.3d 1049 (9th Cir. 2015).

4. 468 U.S. 85 (1984).

that case provided a progeny of circuit and district courts with the fodder needed to develop a dichotomous application of antitrust to NCAA regulations. The dichotomy involved antitrust scrutiny of NCAA regulations that involved commercial activities, but insulated regulations deemed necessary to preserve the “revered tradition of amateur[]” athletics.<sup>5</sup> The Court’s antitrust analysis concerned the NCAA’s television broadcast plan and the limits it imposed on college football broadcasts. Included in the protected regulations were those that limited athlete compensation and prohibited athletes from profiting from the use of their publicity rights, both of which were at controversy before the Ninth Circuit in *O’Bannon*.

While the former Justice did not directly address his opinion in *Board of Regents* or the issues in *O’Bannon* in his speech, his use of Justice Holmes’s quote provided the room of lawyers and scholars with fuel for debating the fidelity of Justice Stevens’s adherence to his application of antitrust in *Board of Regents*. Reason for doubt could be found in the way in which he expanded on the quote by saying, “I think Justice Holmes would agree that his observation is equally applicable to a statement of law - even in one of his own opinions - ‘if the grounds upon it was laid down have vanished and the rule simply exists from blind imitation of the past.’”<sup>6</sup> The statement was based upon Justice Holmes’s drafting of the majority opinion in *Federal Baseball Club v. National League*,<sup>7</sup> the case that crafted the judicial exemption from antitrust law that baseball enjoyed for fifty years prior to *Flood*. To Justice Stevens, the fact that the exemption had survived for five decades did not provide a justification for its continuation, insulating from antitrust law an industry that had changed significantly since the ink dried on Holmes’s holding.

Similarly, the commercial industry of college football has transformed dramatically since 1984, the year Justice Stevens delivered *Board of Regents*. Most of college football’s economic growth can be attributed to the influx of monies flowing from media rights deals made possible by *Board of Regents*. However, none of these new monies have been passed directly into the hands of college football players. The actual athletes for whom the fans flip the dial to watch have seen only modest increases in compensation and remain unable to profit off of whatever fame the glutton of media attention brings to them. The plaintiffs in *O’Bannon* tried to change all of that with their antitrust action

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5. *Id.* at 120.

6. Justice John Paul Stevens, former U.S. Supreme Court Justice, Keynote Address at the Sports Lawyers Association 41st Annual Conference Luncheon 15 (May 15, 2015), [http://www.supremecourt.gov/publicinfo/speeches/JPS\\_SportsLawyersAssociation\\_05-15-15.pdf](http://www.supremecourt.gov/publicinfo/speeches/JPS_SportsLawyersAssociation_05-15-15.pdf) (quoting Holmes, *supra* note 1).

7. 259 U.S. 200 (1922).

against the NCAA's restrictions limiting athlete pay and publicity. In their response, the NCAA in *O'Bannon* relied on Justice Stevens's dicta in *Board of Regents* by maintaining that the prohibitions were insulated under antitrust law as necessary to preserve the product of college football.

This begs the question: If he had to decide *O'Bannon*, would Justice Stevens side with the NCAA's reliance on his dicta? Based on his use of Holmes's quote, we are not so sure. It is our suspicion that Justice Stevens inferred through his use of that quote that the grounds upon which *Board of Regents* were laid have long since vanished. Granted, our reading of subtext into Justice Stevens's speech that day is purely speculative and it would be unfair to both the reader and to his honor to assert our speculation as fact. Still, our suspicion is not without basis as it is based in how *Federal Baseball Club* and *Board of Regents* both concerned sports that underwent dramatic industrialization prior to their respective reconsiderations in *Flood* and *O'Bannon*. In the case of *Board of Regents*, added suspicion on our part as to Justice Stevens's fidelity stems from the manner in which the majority opinion and dicta changed college football in ways that prompted the plaintiffs to initiate *O'Bannon*.

The purpose of this Article is to address the influence of antitrust on the current state and future of college football. To accomplish this purpose, the contents of this article include examinations on (1) the influence of the dichotomous application of antitrust in *Board of Regents* on college football and (2) the application of antitrust to student-athlete regulation based on *O'Bannon*. The article begins with a reflective analysis of some of the more prominent changes caused by the Court's decision in *Board of Regents* to strip the NCAA of what little control it had over the management of media rights for college football television broadcasts. Following the analysis is a description of the manipulations to the market for student-athlete services caused by Justice Stevens's dicta in *Board of Regents*. Next, an examination is provided of the Ninth Circuit's recent decision in *O'Bannon* that refused to recognize a quasi-exemption from antitrust law for NCAA regulation of student-athletes. The article concludes with a discussion of what may ensue in *O'Bannon*, if anything, and in both *Jenkins v. NCAA*<sup>8</sup> and *Alston v. NCAA*,<sup>9</sup> two antitrust actions demanding unlimited compensation for certain classes of student-athletes.

## II. BOARD OF REGENTS: HOW THE COURT CHANGED COLLEGE FOOTBALL

It is both convenient and economical for legal scholars to criticize a

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8. 311 F.R.D. 532 (N.D. Cal. 2015).

9. No. 3:14CV01011 (N.D. Cal. filed Mar. 5, 2014).

thirty-year-old court decision from the vantage afforded to armchair justices. Yet, the past can provide perspective on how matters should be handled going forward. Such is the case with *Board of Regents* and the challenges to it posed by *O'Bannon*, *Jenkins*, and *Alston*. Much has been written on the application of law in *Board of Regents*, but a reexamination of both the decision and the dramatic changes to college football that followed is needed. After all, the influence of *Board of Regents* on the state of college football is still being felt in so many different ways. To understand these changes, let us begin with the controversy in the case and the Court's determinations and proceed from there.

The Plaintiffs in *Board of Regents* were a collection of universities with big-time football programs who challenged the NCAA's television plan that limited the number of games on national television and the number of times each school could be featured on national television.<sup>10</sup> The majority held that the NCAA's television plan constituted an unreasonable restraint on trade in violation of antitrust law.<sup>11</sup> Justice Stevens, writing for the majority, identified the NCAA's plan as a horizontal restraint on trade that prevented individual competitors from competing in the market for college football broadcasts.<sup>12</sup> Justice Stevens found that the limits imposed an anticompetitive effect by inflating the price paid for broadcasts at the expense of consumer preference for more broadcasts.<sup>13</sup> Furthermore, Justice Stevens viewed the NCAA's exercise of "complete control" over televised games as more problematic than the limits the plan imposed.<sup>14</sup> Instead, Justice Stevens aimed to open the market for televised college football in a way that the individual member institutions that make up the NCAA would each be able to manage their own rights and compete for broadcasts in ways that benefited consumers.<sup>15</sup>

The NCAA attempted to justify its control in managing media rights for its members with the position that the plan was the product of a "joint venture" that "assist[ed] in the marketing of broadcast rights. . . ."<sup>16</sup> To this end, the Court could have aligned the NCAA's plan with the policy behind Congress's expressed exemption from antitrust law for any joint marketing of rights for televising *professional* sports.<sup>17</sup> The Court recognized the professional exemption, but in a footnote in *Board of Regents*, Justice Stevens called

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10. *Bd. of Regents*, 468 U.S. at 89, 94.

11. *Id.* at 120.

12. *Id.* at 98–99.

13. *Id.* at 106–07.

14. *Id.* at 112.

15. *Id.* at 115.

16. *Id.* at 113.

17. *See* Sports Broadcasting Act of 1961, 15 U.S.C. § 1291 (2016).

attention to a district court decision in *United States v. NFL*<sup>18</sup> to support his position that an agreement among league members concerning media rights could still offend the Sherman Act's aims.<sup>19</sup> Perhaps *NFL* was not the best fit for what would eventually occur in *Board of Regents* as the court in *NFL* did not strip the league of control over media rights for its members. Rather, the court in *NFL* limited its intervention to analyzing the reasonableness of the specific commercial restraints at controversy.<sup>20</sup>

So why did the Court not limit its intervention in *Board of Regents* to lifting the restriction on the number of broadcasts for NCAA members? Theoretically, the Court could have recognized the NCAA's joint venture justification as procompetitive while requiring an increase of output as a less-restrictive alternative to the limits under the NCAA's plan. For Justice Stevens, however, the NCAA's joint venture justification did not fit because the NCAA was not actually a selling agent for its member institutions.<sup>21</sup> While the NCAA negotiated with the broadcasters in regards to the collective terms and price for the broadcast rights, the NCAA left to the broadcasters and the schools the task of selecting games for telecasts.<sup>22</sup> The Court found that the NCAA's role in managing media rights under the plan was that of a limiter, rather than a facilitator, of televised broadcasts.<sup>23</sup> Thus, the majority viewed the limits on output as the sine qua non of the NCAA's television plan and the extent of the association's cartel control over broadcasting rights for college football.

In addition to the joint venture position, the NCAA had two other procompetitive justifications for preserving the plan that the Court also found factually flawed.<sup>24</sup> The NCAA's second justification concerned a purported economical threat that increased television broadcasts presented to live attendance.<sup>25</sup> The flaw the Court found with this position was the fact that the NCAA had failed to produce any actual evidence that increasing the number of broadcasts and the number of times schools could appear on television would dramatically decrease live attendance.<sup>26</sup>

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18. 116 F. Supp. 319 (E.D. Pa. 1953). In *NFL*, the district court held that antitrust law did not allow the NFL to limit stations from broadcasting games within seventy-five miles of a team not in the match while that team was not playing at home and had its game televised by a station within that same seventy-five-mile range. *Id.* at 326–27.

19. *Bd. of Regents*, 468 U.S. at 104 n.28.

20. *NFL*, 116 F. Supp. at 328–30.

21. *Bd. of Regents*, 468 U.S. at 113.

22. *Id.*

23. *See id.* at 113–14.

24. *See id.* at 115–20.

25. *Id.* at 115.

26. *Id.* at 115–16.

For its third and final justification, the NCAA argued that the limits on broadcasts and appearances in its plan were necessary to maintain competitive balance among its football programs.<sup>27</sup> In dealing with this justification, the Court first recognized the necessity for “a certain degree of cooperation” for sport that distinguishes it from other types of industries.<sup>28</sup> This makes sense in that the market for soft drinks is not dependent on the establishment of controls as to how Coca-Cola and Pepsi compete; and Coca-Cola does not need Pepsi in order to make its beverage. Conversely, the University of Georgia needs the University of Florida in order to hold its annual rivalry game in Jacksonville, Florida. The University of Oklahoma needs the University of Texas to have the “Red River Showdown” game every year at the Cotton Bowl in Dallas, Texas. For those games, and all of college football to function, the Court found that some horizontal restraints are necessary through the formation of regulatory controls governing competition.<sup>29</sup> The Court also recognized that controls of this nature are “procompetitive because they enhance [the] public[’s] interest in intercollegiate athletics.”<sup>30</sup> The problem for the NCAA was that restraints on telecasts did not “fit into the same mold [of] rules defining the conditions of the contest.”<sup>31</sup>

Possibly the bigger issue with the NCAA’s competitive balance justification was that the restraints did not actually result in competitive balance. In fact, “The NCAA [did] not claim that its television plan ha[d] equalized [(or even attempted to equalize)] competition” among its members.<sup>32</sup> The Court noted that while the NCAA’s plan was nationwide, there was “no single league or tournament” for Division I college football.<sup>33</sup> The television plan was not even tailored to result in competitive balance as there was no regulation on the amount of money that schools could spend on their football programs or the ways in which schools could use revenues generated from television broadcasts, ticket sales, concessions, or sponsorships.<sup>34</sup> Furthermore, the Court found that there was “no evidence that [the restraints imposed by the NCAA’s television plan] produce[d] any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.”<sup>35</sup>

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27. *Id.* at 117.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 117–18.

33. *Id.* at 118.

34. *Id.* at 119.

35. *Id.*

While all of that was true, Justice Stevens and the majority missed the mark on one key component, perhaps the most important component and one that framed an underlying battle taking place in *Board of Regents*. The mistake made by the Court was in its position that the plan was not aimed at protecting the competitive power of “any readily identifiable group of competitors.”<sup>36</sup> While it is possible the NCAA did not properly present a class of competitors that needed protecting via the plan, a vulnerable population of member schools most certainly existed. To locate that class of competitors, the Court needed only to look to all Division I football programs that were not part of the class of plaintiffs. After all, those were the football programs that stood to lose from the Court lifting the limits on college football television broadcasts. Supporting this position is the fact that the class of complainants was not the programs that were never featured in broadcasts via the NCAA’s television plan; the class consisted of the programs that were featured the most.<sup>37</sup>

Joining the Universities of Oklahoma and Georgia as plaintiffs were a collection of sixty-four college football programs known as the College Football Association (CFA). These schools represented the “haves” of college football, those with lucrative programs that were members of the major athletic conferences and/or enjoyed automatic access to the postseason bowls with the largest payouts. These were the programs that wanted more broadcasts and revenues for their rank. On the other side of the aisle was the NCAA, which represented the interests for all of its members in Division I, not just those with the most successful football programs. Thus, another way of viewing *Board of Regents* was as a battle between the “haves” and “have-nots” of college football, with the Plaintiffs playing the role of the haves and the NCAA serving as the representative for and defender of the have-nots.

Unfortunately, the actual battle between the proverbial haves and have-nots of college football was probably well on its way to being lost prior to the first filing in *Board of Regents* because the television plan at controversy did not provide for equitable revenue sharing across the Football Bowl Subdivision (FBS).<sup>38</sup> Had that been the case, then perhaps the Court’s perception of the facts would have supported the provision of an exemption from antitrust law for the NCAA’s television plan based on the reasons Congress relied on in exempting from antitrust law media-rights management for professional sports.<sup>39</sup> Instead,

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36. *Id.* at 118.

37. John J. Siegfried & Molly Gardner Burba, *The College Football Association Television Broadcast Cartel*, 49 ANTITRUST BULL. 799, 802 (2004).

38. *See infra* note 71.

39. Justice Stevens noted that the NCAA failed to provide evidence that its plan “produce[d] any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity.” *Bd. of Regents*, 468 U.S. at 119.

the television restraints at issue in *Board of Regents* merely prevented the exacerbation of an already existing disparity in big-time college football. After all, college football's have-nots were already disadvantaged by their lack of access to the payouts provided by the premier bowl games and in the disparity existing in the profits pulled from attendance, sponsorship, and alumni donations.

Justice Stevens and the majority should have better appreciated their position in relation to this tug-of-war between the haves and have-nots of college football. By stripping the NCAA of regulatory control over media-rights management, the Court injected itself into the fray and drastically disturbed the balance of power in favor of the haves. The in-fighting at issue in *Board of Regents* was a type of organizational instability that, in the authors' view, is best left for internal resolution rather than judicial intervention. Not only that, but the majority was mistaken as to the NCAA's role in managing college football media rights for its members—a mistake that was caught in the dissent written by Justice White, with whom Justice Rehnquist joined.

### III. THE COURT'S MISTAKE AND HOW *BOARD OF REGENTS* SHOULD HAVE BEEN RESOLVED

The dissent recognized that the NCAA's role via the plan extended beyond limiting broadcasts. Specifically, the dissent took a practical and realistic view of how broadcast rights for football games were (and still are) actually negotiated and sold within the "competitive market[place]."<sup>40</sup> And under the plan at controversy, the NCAA packaged the broadcast rights for its football-playing members and negotiated the "real . . . price and terms" of the television deals with broadcasters.<sup>41</sup> "The selection[s] of games to . . . broadcast w[ere] left to the networks" to negotiate with the individual schools "to maximize the value of [broadcasts]."<sup>42</sup> While the NCAA did not take a hands-on role in working with member schools and broadcasters in selecting and managing individual game telecasts, that fact did not trivialize the NCAA's function in creating the plan. Hence, the Court used a heavy-handed application of antitrust in meeting consumer interest in more broadcasts. The Court could have, and arguably should have, preserved the NCAA's cartel control over media rights as a joint venture similar to the NFL's management of rights for its franchises. The justifications for exempting the NFL's cartel control over broadcast rights provided a basis for finding a procompetitive purpose for the NCAA's cartel control. In *NFL*, the court recognized:

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40. *Id.* at 127–28 (White, J., dissenting).

41. *Id.*

42. Siegfried & Burba, *supra* note 37, at 801.

the teams should not compete too strongly with each other in a business way. The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. . . . Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.<sup>43</sup>

The court in *NFL* went on to find that one way that professional sport leagues could protect competitive balance on the field is to limit competition off the field through restrictions imposed on television broadcasts.<sup>44</sup> The procompetitive justifications for joint venture management of media rights in *NFL* can be easily applied to the facts at issue in *Board of Regents*. And while it is true that the court in *NFL* still found that the specific limitations imposed by the NFL's plan were illegal under the Sherman Act,<sup>45</sup> the court did not go as far as to strip the league completely of its cartel control over broadcasts.<sup>46</sup> Furthermore, the controversial decision in *NFL* was the primary catalyst for Congress's exempting league control over broadcasts with the Sports Broadcasting Act of 1961.<sup>47</sup> The Act expressly exempts from antitrust law the sale of a television package consisting of broadcast rights by professional sports leagues.<sup>48</sup> With the need to protect the NCAA's weaker programs in mind, the Court, in *Board of Regents*, also could have left unchecked the NCAA's authority over the plan while also advancing consumer welfare by holding that the specific restrictions on broadcast output in the plan violated antitrust law.

By limiting its reach to the broadcast output, the Court would have narrowly tailored its application of antitrust law and drastically reduced the case's impact on the battle between the haves and have-nots for control over college football—allowing the bigger conflict to play out within the organization rather than within the halls of the Supreme Court building. This approach would have been more deferential to the NCAA. Also, the limited approach would have allowed the NCAA to still look out for the have-nots by negotiating terms that included mandatory broadcasts for less-prominent schools, thereby maintaining some degree of revenue sharing through the plan. Additionally, preservation of the

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43. *United States v. NFL*, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

44. *Id.* at 324.

45. *Id.* at 330.

46. *Id.* at 326.

47. 15 U.S.C. §§ 1291–1295 (2016).

48. *Id.* § 1291.

plan would have left intact a foundation that possibly (even if unlikely) could have led to increased management by the NCAA, and this could have resulted in more meaningful sharing of media revenue among the member institutions. As previously stated, the battle may have already been lost for the have-nots, and it is possible that the CFA schools would have eventually wrangled away more control from the NCAA internally, or left the NCAA and formed a new association. Yet, whatever would have happened following a narrowly tailored *Board of Regents* would have happened organically.

Justice Stevens's heavy-handed approach in *Board of Regents* did more than just end the NCAA's control over media management for its members; the decision set in motion a series of acts that eventually shifted the control over media-rights management of football from the NCAA to the conferences.<sup>49</sup> Justice Stevens and the majority may have used *Board of Regents* to open up a market in which individual institutions would compete for the benefit of consumers,<sup>50</sup> but that is not exactly what happened. While a few individual schools manage all three tiers of their media rights,<sup>51</sup> most have deferred media-rights management to their respective conferences.<sup>52</sup> By ending the NCAA's cartel control over managing broadcast rights for *all* of its institutions, *Board of Regents* effectively replaced the NCAA with the CFA, which controlled broadcasting rights for only its members and excluded all non-CFA programs from sharing in the pot.<sup>53</sup> The CFA's cartel control, however, was subsequently limited by another antitrust action in *Regents of the University of California v. American Broadcasting Cos. (ABC Sports)*.<sup>54</sup> In *ABC Sports*, the Ninth Circuit tracked the Court's reasoning in *Board of Regents* and found that antitrust law would not allow the CFA's exclusive deal with ABC to block Columbia Broadcasting System (CBS) and National Broadcasting Company (NBC) from broadcasting University of Notre Dame and Pacific-10 Conference (Pac-10) games.<sup>55</sup> Following *ABC Sports*, the CFA managed media rights for its original members sans Notre Dame and the Pac-10. But in 1995, the CFA lost cartel control and ceased to exist when the SEC and Big East decided to

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49. See Alfred Dennis Mathewson, *The Bowl Championship Series, Conference Realignment and the Major College Football Oligopoly: Revolution Not Reform*, 1 MISS. SPORTS L. REV. 321, 334 (2012).

50. Justice Stevens criticized the NCAA's plan in *Board of Regents* because "[n]o individual school [was] free to televise its own games without restraint." NCAA v. Bd. of Regents, 468 U.S. 85, 115 (1984).

51. Such as Notre Dame, Brigham Young, Army, and Texas.

52. See Mathewson, *supra* note 49.

53. *Id.*

54. 747 F.2d 511 (9th Cir. 1984).

55. See *id.* at 521.

manage their respective media rights.<sup>56</sup>

Accordingly, *Board of Regents* did not accomplish Justice Stevens's vision of media-rights management at the institution/program level. In fact, very few FBS programs manage all three tiers of their media rights.<sup>57</sup> The dissent was correct: the competitive marketplace for college football broadcasts necessitates the collective packaging of rights.<sup>58</sup> Looking at what is happening today, instead of league-wide cartel control at the NCAA level, college football broadcast rights are controlled by a small number of mini-cartels at the conference level. The shift from NCAA management of media rights to conference management that resulted from *Board of Regents* set in motion a tectonic shift in power that would reshape college athletics, not just football.

#### IV. THE FALLOUT RESULTING FROM *BOARD OF REGENTS*

Today, college football consists of mid-major programs (less prestigious programs that form the “Group of 5”)<sup>59</sup> and a group of conferences that are collectively called the Power 5 (P5).<sup>60</sup> The P5 includes the Atlantic Coast Conference (ACC), Big Ten Conference (Big Ten), Big 12 Conference (Big 12), Pacific-12 Conference (Pac-12), and Southeastern Conference (SEC), and represents the most powerful football programs in the FBS.<sup>61</sup> The P5 conferences are also those with the most lucrative television contracts—some even have their own networks.<sup>62</sup> However, it is important to note that not all members of the P5 are power programs in terms of their competitive contributions to the actual sport of college football. The schools within the P5 are fortunate enough to have historical ties to conferences that include prominent and very successful programs. The arbitrariness of conference affiliation in P5 conferences has proved harmful to many successful football programs that found themselves on the outside looking in, while less successful football programs within the P5 have reaped financial benefits from shared

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56. See Mathewson, *supra* note 49, at 334–35.

57. Our research found that only Notre Dame and Brigham Young control their media rights and both are not full participating members of any athletic conference (for all sports).

58. *NCAA v. Bd. of Regents*, 468 U.S. 85, 128 (1984) (White, J., dissenting).

59. The Group of Five consists of the American Athletic Conference, Conference USA, the Mid-American Conference, the Mountain West Conference, and the Sun Belt Conference. Bill Bender, *Power 5 vs. Group of 5: College Football's Split Decision*, SPORTING NEWS (June 9, 2014), <http://www.sportingnews.com/ncaa-football-news/4589827-power-5-conferences-autonomy-ncaa-group-of-5-nick-saban-mike-slive-division-iv-split>.

60. *Id.*

61. *Id.*

62. Some conferences with their own networks are the SEC Network, the Pac-12 Network, and the Big Ten Network.

media-rights revenues derived from conference affiliations.

The P5 conferences were reshaped based on conference realignment from their original formations (mostly based on historical alliances) in the 1990s and throughout the 2000s. *Board of Regents* was a catalyst for conference realignment because the process was fueled by conferences desiring the acquisition of new, large media markets in order to secure bigger and better media deals.<sup>63</sup> Conferences cannibalized each other through realignment with major conferences raiding other major, and even mid-major, conferences for new members for new media markets. The transition was not orderly, and the mass movement of programs from one league to another caused one league to close shop (Southwest Conference) and several others to drop football (Big East Conference, Big West Conference, and Western Athletic Conference). In vain efforts to remain relevant in football, two conferences and two members from realignment-affected leagues actually sued departing members.<sup>64</sup> When the dust had settled, for the time being, realignment had transformed the most prominent football conferences from eight ten-member regional leagues with schools in relative proximity to each other to twelve fourteen-member goliaths with geographic reaches that stretched across the country.

In *Board of Regents*, Justice Stevens recognized that antitrust is a mechanism for “consumer welfare prescription,”<sup>65</sup> but that conference realignment harmed college football consumers because it (1) made travel for road games difficult by increasing the distance between schools and (2) eradicated many longstanding annual rivalry series by separating rival programs into different leagues.<sup>66</sup> Furthermore, Board of Regents did not protect consumers of mid-major football programs as their favorite schools found themselves unable to financially compete with P5 schools for top talent. Compounding that problem is the fact that mid-majors make up almost half of the FBS.

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63. Ronald A. Smith, *Intercollegiate Athletic Associations and Conferences*, in *SPORTS IN AMERICA FROM COLONIAL TIMES TO THE TWENTY-FIRST CENTURY* (Steven A. Riess ed., 2015).

64. Christian Dennie, *Conference Realignment: From Backyard Brawls to Cash Cows*, 1 *MISS. SPORTS L. REV.* 249, 257–64 (2012).

65. *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

66. Dennie, *supra* note 64, at 278; *see also Conference Realignment Poll*, BAYLOR U., <http://www.baylor.edu/survey/> (last visited June 9, 2016) (showing the results of a survey revealing that 76% of alumni polled preferred traditional rivalries between schools in close proximity to each other over those resulting from conference realignment that creates super conferences); Cody T. Havard & Terry Eddy, *Qualitative Assessment of Rivalry and Conference Realignment in Intercollegiate Athletics*, 6 *J. ISSUES INTERCOLLEGIATE ATHLETICS* 216, 222–27 (2013) (noting a study that empirically examined the harm caused to consumers of college football by studying fan reaction to loss of traditional rivalry games based on conference realignment).

Unfortunately for the mid-majors, the management of media rights for college football's postseason also produced substantial inequity. Almost since its inception, college football's postseason has been managed by the bowls, games produced by bowl committees that pit teams from different leagues against each other in a number of mini-championships.<sup>67</sup> The national champion of college football, however, was decided by various polls that often produced conflicting results by crowning different champions.<sup>68</sup> In the early 1990s, the most prominent conferences pulled together with the most powerful bowl committees and interested television networks to coordinate college football's postseason in a way that would result in the crowning of a champion.<sup>69</sup> With no control over regular season broadcast rights or postseason bowl games and their broadcast rights, the NCAA had no place at the table in these discussions. Emerging from this unholy alliance of commercially-driven partners was an entity that would grow into the nefarious Bowl Championship Series (BCS).<sup>70</sup> The NCAA manages the playoffs for its football-playing members in divisions below what was once called Division I-A<sup>71</sup> but does not manage the playoff for its premier college football division.

Before the advent of the playoff for the FBS division, the BCS decided who would play in the national title game for sixteen years<sup>72</sup> and the damage it did to college football is lasting, and likely permanent. The BCS effectively divided programs in the premier subdivision of college football into BCS programs and non-BCS programs; the non-BCS programs were the mid-major programs.<sup>73</sup> The BCS schools were those in the premier athletic conferences (composed mostly of former CFA programs) that enjoyed automatic access for league champions into BCS Bowls (i.e., the premier bowls represented in the BCS format).<sup>74</sup> But more importantly, the BCS schools were also those that

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67. Jodi M. Warmbrod, Comment, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather than Go for an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333, 336–39 (2004).

68. *Id.* at 338–39.

69. C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285, 286–87 (2008).

70. *Id.* (noting that what would become the BCS was first called the Bowl Coalition and then called the Bowl Alliance before changing to the BCS).

71. Division I-A is now called the Football Bowl Subdivision (FBS). *Divisional Differences and the History of Multidivision Classification*, NCAA.ORG, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited June 9, 2016).

72. See Jude D. Schmit, *A Fresh Set of Downs? Why Recent Modifications to the Bowl Championship Series Still Draw a Flag Under the Sherman Act*, 14 SPORTS LAW. J. 219, 229–30 (2007).

73. Rogers, *supra* note 69, at 287–88.

74. *Id.* at 288–89.

automatically shared in the television revenues generated by the package and sale of the rights to televise the BCS bowl games.<sup>75</sup> It took the threat of antitrust litigation for mid-major programs to gain limited access to the BCS, which allowed the few accessing programs to financially benefit.<sup>76</sup> Yet, from its inception to its folding, no mid-major program was ever selected to play in the BCS Championship program. The lack of financial benefits associated with the BCS and the distinction as mid-major were two key variables that made it virtually impossible for mid-major programs to compete with BCS schools for college football recruits.<sup>77</sup>

The truth is that competitive equity never existed in college football, and it is highly possible that the landscape of college football would have eventually been reshaped no matter the result in *Board of Regents*. It is also true that *Board of Regents* set into motion the events that changed college football in ways that harmed consumers, particularly the fans of mid-major programs.<sup>78</sup> In fact, the term “mid-major” did not exist prior to the infusion of commercialization through increased media exposure and media-generated revenues made possible by *Board of Regents*. Thus, no matter what happens in *O’Bannon*, a lasting legacy will remain from *Board of Regents* in the great disparity in power and financial resources that now exist between the haves and have-nots of college football.<sup>79</sup> These disparities were caused because the Court took a side in the battle for control over college football media-rights management, and a strong case could be made that the Court chose the wrong side.

#### V. JUSTICE STEVENS’S DICTA AND THE MANIPULATED MARKET FOR COLLEGE ATHLETES

Justice Stevens was right about one key fact in his decision in *Board of Regents*: consumers wanted substantially more televised college football than the NCAA’s plan provided. It took a bit of time, but in the wake of *Board of*

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75. *Id.* (noting that the BCS “guaranteed almost \$1 million” to each BCS school while all others were “receiv[ing] as little as \$180,000 before expenses”).

76. Schmit, *supra* note 72, at 234.

77. See Craig A. Depken II & Dennis P. Wilson, *Institutional Change in the NCAA and Competitive Balance in Intercollegiate Football*, in *ECONOMICS OF COLLEGE SPORTS* 197, 197–209 (John Fizel & Rodney Fort eds., 2004) (highlighting a study using both the Herfindahl-Hirschman Index and Structure-Conduct-Performance (SCP) measures to examine the influence of regulatory changes on competitive balance in college football between 1888-2001 found that the BCS, in just four seasons, had a negative effect on competitive balance using the SCP measure).

78. See generally Brian Goff, *College Football ‘Mid Majors’ Face Uncertain Future*, *FORBES* (Sept. 1, 2014), <http://www.forbes.com/sites/briangoff/2014/09/01/college-football-mid-majors-face-uncertain-future/>.

79. See Depken & Wilson, *supra* note 77.

*Regents*, college football has ballooned into an industry worth billions of dollars, in large part due to the monies mined from the leverage of media rights.<sup>80</sup> The gross commercialization resulting from the influx of media money has led former University of Texas football coach Mack Brown to believe, “College football is growing closer and closer to being like the N.F.L.”<sup>81</sup> The industrial growth of NCAA football has also increased the competition for college-athlete services and the spending needed to attract them to campus. Yet, the athletes, the most necessary of inputs for the product of college football,<sup>82</sup> have not financially benefited from the gross increases in spending on their sports. Since 1973, NCAA “amateurism” regulations have capped athlete compensation at roughly the same rate, covering only tuition, books, and room and board.<sup>83</sup> Only recently, starting August 1, 2015, has grant-in-aid seen an increase by way of an option for programs to extend athlete compensation to include costs of attendance for each school.<sup>84</sup> The push for this extension was in response to *O’Bannon* and other antitrust actions lodged against the NCAA.<sup>85</sup> While a step in the right direction, a cost of attendance allowance is just a mere extension of the existing cap on student-athlete compensation—one that is not calculated based on revenue.<sup>86</sup>

Still, the cap on student-athlete compensation has not slowed competition for athlete services. Instead, the cap has allowed for the inflation of an “arm’s race” in which NCAA member institutions compete for college athletes by spending on the best coaches and building preposterously lavish facilities.<sup>87</sup> The distorted marketplace for college-athlete services resulting from *Board of*

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80. ESPN has agreed to pay \$7.3 billion over twelve years for the rights to televise seven playoff games per year. Based on revenues from this new playoff system, the P5 conferences saw increases in base revenues from \$28 million in 2013–2014 to about \$50 million in 2014–2015, further adding to the income disparity between the P5 and the Group of 5. Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), [http://www.nytimes.com/2014/12/31/sports/ncaafotball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?\\_r=0](http://www.nytimes.com/2014/12/31/sports/ncaafotball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0).

81. *Id.*

82. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005).

83. Mark Snyder, *The NCAA’s Grant in Aid Cap: Injustice Forced on Student-Athletes 5* (2015) (unpublished comment, Seton Hall University Law School Student Scholarship), [http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1695&context=student\\_scholarship](http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1695&context=student_scholarship).

84. Steve Berkowitz & Andrew Kreighbaum, *College Athletes Cashing in with Millions in New Benefits*, USA TODAY (Aug. 19, 2015), <http://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost-attendance-meals-2015/31904839/>.

85. *Id.*

86. *See id.*

87. Brian Bennett, *Arms Race Proves Recession-Proof*, ESPN (June 14, 2012), [http://espn.go.com/college-football/story/\\_/id/8047787/college-football-facilities-arms-race-proves-recession-proof](http://espn.go.com/college-football/story/_/id/8047787/college-football-facilities-arms-race-proves-recession-proof).

*Regents* matches predictions made for the market for assistant coaches in *Law v. NCAA*.<sup>88</sup> In *Law*, the Tenth Circuit anticipated that a cap on coach pay would not control the constantly spiraling costs for college athletics, as schools would merely find other things on which to spend in competition against each other.<sup>89</sup> The Tenth Circuit's predictions of how a cap on compensation imposed by NCAA regulations would result in schools redirecting rather than limiting spending proved true, but to the detriment of student-athletes rather than coaches. The redirection of monies at the expense of athletes can be blamed, in part at least, on the influence of dicta in *Board of Regents*, which provided federal district and circuit courts with the cover needed to insulate from antitrust law the NCAA's regulation of athlete compensation.

Student-athlete regulation was not even before the Court, yet Justice Stevens addressed the subject with several statements in dicta, including one providing that the NCAA "need[ed] ample latitude" in preserving the "revered tradition of amateurism."<sup>90</sup> Included in Justice Stevens's latitude were athlete regulations that prevent athletes from being paid because he deemed them necessary for protecting consumer interest in safeguarding college football as a product distinct from professional football.<sup>91</sup> Following *Board of Regents*, a number of district courts and appellate circuits relied on Justice Stevens's dicta in fashioning an application of antitrust law that shielded from review all regulation of college athletes. Most did so by refusing to recognize a relevant market for athlete services based on the distinction Justice Stevens drew between amateur and professional football.<sup>92</sup>

In spite of this, there has been a shift in the conceptual framework as to how antitrust applies (or does not) to NCAA student-athlete regulations, and this shift emerged from the Ninth Circuit in *Tanaka v. University of Southern California*.<sup>93</sup> In *Tanaka*, a soccer player at the University of Southern California challenged a Pac-10 transfer rule that required her to sit out one full year prior to her playing for the University of California, Los Angeles on the grounds that the rule violated antitrust laws.<sup>94</sup> At first blush, the fact that the

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88. 134 F.3d 1010 (10th Cir. 1998).

89. *Id.* at 1023.

90. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

91. *Id.* at 101–02.

92. Thomas A. Baker III, Joel G. Maxcy & Cyntrice Thomas, *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 91 (2011); *see also* *Smith v. NCAA*, 139 F.3d 180, 185–86 (3d Cir. 1998); *Banks v. NCAA*, 977 F.2d 1081, 1093 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988); *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 587 (E.D. Pa. 2004); *Gaines v. NCAA*, 746 F. Supp. 738, 745 (M.D. Tenn. 1990).

93. 252 F.3d 1059 (9th Cir. 2001).

94. *Id.* at 1061–62.

Ninth Circuit in *Tanaka* held that the Plaintiff failed to establish a relevant market for her services<sup>95</sup> seems to match the trend of courts refusing to recognize relevant markets for student-athletes following *Board of Regents*. A closer look, however, reveals that the Ninth Circuit in *Tanaka* actually recognized that relevant product and geographic markets might exist for student-athlete services, but the Plaintiff erred in establishing a relevant market by restricting the reach of her product and geographic markets to a single program and the reach of her anticompetitive effect to herself.<sup>96</sup> The Ninth Circuit, in *Tanaka*, left open the possibility that a larger relevant market exists in the competition for student-athlete services on a regional or national level. In fact, the court actually found that the Pac-10 provided the Plaintiff in *Tanaka* with a definable relevant product market based on the fact that she was actively recruited by a number of schools within the league.<sup>97</sup>

The shift in approach continued just four years later with a district court decision, also out of the Ninth Circuit. *In re NCAA I-A Walk-On Football Players Litigation (Walk-On Football Players)* concerned an antitrust challenge to NCAA scholarship restrictions that prevented walk-on players from receiving athletics-based financial aid.<sup>98</sup> The court in *Walk-On Football Players* looked to the Tenth Circuit's reasoning in *Law* to find that the market for student-athletes was not unlike the market the Tenth Circuit recognized for assistant coaches.<sup>99</sup> To show a relevant market, plaintiffs must be able to establish reasonable product interchangeability and cross-price elasticity.<sup>100</sup> The court in *Walk-On Football Players* found that those two requirements were met by the Plaintiffs' proof that a dearth of viable substitutes existed for student-athletes who desired to compete at the highest level of competition in amateur football.<sup>101</sup>

Following *Walk-On Football Players* was *White v. NCAA*,<sup>102</sup> which was the first plausible and well-crafted antitrust attack on the NCAA regulations that limit student-athlete compensation. The plausibility in *White* was found in how the Plaintiffs did not attempt to defeat or dismiss the "preservation of amateurism" justification, and the smart crafting was found in how the Plaintiffs proffered their relevant market. The Plaintiffs in *White* understood

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95. *Id.* at 1063–64.

96. *Id.* at 1065.

97. *Id.* at 1063–64.

98. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1146–47 (W.D. Wash. 2005).

99. *Id.* at 1150.

100. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956).

101. *Walk-On Football Players*, 398 F. Supp. 2d at 1150.

102. *White v. NCAA*, No. CV 06-999-RGK (MANx), 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006).

the uphill battle they would face if they were to wage an attempt at reversing decades of decisions that relied on Justice Stevens's call for ample latitude in preserving amateurism at their expense.<sup>103</sup> The Plaintiffs were modest in their demand and sought incremental gains rather than full-scale assault on the ample latitude that Justice Stevens believed the NCAA needed in preserving amateurism.<sup>104</sup> Specifically, the plaintiffs in *White* did not challenge the NCAA's authority in enforcing a cap on athlete compensation under the antitrust laws. Instead, the Plaintiffs' antitrust claims challenged the artificiality of the grant-in-aid calculation because it did not cover the full cost of attendance.<sup>105</sup>

Turning next to their relevant market, the plaintiffs in *White* carefully proffered markets, both in the NCAA's Division I, consisting of (1) major college football programs and (2) major college basketball programs.<sup>106</sup> In support of these two markets, the plaintiffs asserted that no reasonably interchangeable substitutes existed for the would-be student-athletes who desired the unique mix of academics and athletics offered at Division I's highest levels for each sport.<sup>107</sup> Note that the markets identified in their complaint placed the plaintiffs in the position of buyers rather than sellers—the necessary “inputs” for making the product as acknowledged in *Walk-On Football Players*.<sup>108</sup> By framing the markets in this manner, the Plaintiffs allowed the court in *White* to recognize relevant markets within these sports without having to make determinations on the markets for college athlete services. The thoughtful pleading paid off for the Plaintiffs because the court in *White* denied the NCAA's motion to dismiss and in doing so held that the Plaintiffs' relevant market was legally sufficient to survive judgment as a matter of law.<sup>109</sup> Mere months later, the NCAA settled the case with the Plaintiffs in *White* for \$10 million.<sup>110</sup> While the case did not proceed to verdict and no precedent was set,

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103. See generally Second Amended Complaint for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *White v. NCAA*, No. CV 06-0999-RGK (MANx) (C.D. Cal. Sept. 8, 2006), <http://www.ncaaclassaction.com/complaint.pdf>.

104. Baker, Maxcy & Thomas, *supra* note 92, at 95.

105. Second Amended Complaint for Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *supra* note 103, at 6.

106. *Id.* at 10–11.

107. *Id.* at 11–13.

108. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005).

109. *White v. NCAA*, No. CV 06-0999-RGK (MANx), 2006 WL 8066802, at \*2–4 (C.D. Cal. Sept. 21, 2006).

110. Stipulation and Agreement of Settlement Between Plaintiffs and Defendant NCAA, *White v. NCAA*, No. CV06-0999 VBF (MANx), 2008 WL 890625, at \*10 (C.D. Cal. Jan. 29, 2008). The \$10 million was for distribution on a claims-made basis, and the settlement required that students have

the Plaintiffs in *White* set the stage for what would come in *O'Bannon* and provided the plaintiffs in *O'Bannon* with an antitrust roadmap for attacking the NCAA's compensation cap in a way that would work around Justice Stevens's dicta in *Board of Regents*.<sup>111</sup>

#### VI. *O'BANNON V. NCAA*: THE NINTH CIRCUIT TACKLES *BOARD OF REGENTS*

On September 30, 2015, the Ninth Circuit addressed arguments in *O'Bannon* that were very similar to those presented in *White* and held that the NCAA's amateurism rules are not exempt from the rule of reason analysis under antitrust law.<sup>112</sup> The Ninth Circuit's order affirmed, in part,<sup>113</sup> a district court decision that held that the NCAA's amateurism provisions violated § 1 of the Sherman Antitrust Act.<sup>114</sup> This section of the Article will summarize the specifics of the Ninth Circuit's decision that effectively ended, for now, the quasi-antitrust exemption for NCAA amateurism regulations that emerged from Justice Stevens's dicta in *Board of Regents*.

##### A. *First Down: No Quasi-Exemption Exists for Amateurism Rules*

For its first order of business, the Ninth Circuit quickly put to rest the notion that the NCAA amateurism rules were "valid as a matter of law."<sup>115</sup> In its appeal, the NCAA argued *Board of Regents* held that rules relating to the amateur aspects of college athletics were "presumptively valid."<sup>116</sup> In support of its position of a quasi-exemption for its regulation of student-athletes, the NCAA relied on three decisions from the Ninth Circuit's "sister circuits" in *Smith v. NCAA*, *McCormack v. NCAA*, and *Agnew v. NCAA*.<sup>117</sup> The NCAA was not misguided in relying on these three decisions because all three relied on Justice Stevens's dicta in fortifying the NCAA's amateurism restrictions from antitrust review. Oddly, the Ninth Circuit singled out *Agnew* as the only one from the three that came "close to agreeing with the NCAA's interpretation of *Board of Regents*."<sup>118</sup>

What is odd about that finding is that *Smith* clearly stands for the position that the NCAA's student-athlete regulations were immune to the antitrust laws.

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access to another \$218 million that existed within a slush fund used to fund student expenses. *Id.*

111. Baker, Maxcy & Thomas, *supra* note 92, at 94.

112. *O'Bannon v. NCAA*, 802 F.3d 1049, 1063 (9th Cir. 2015).

113. *Id.* at 1079.

114. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).

115. *O'Bannon*, 802 F.3d at 1061–64.

116. *Id.* at 1063.

117. *Id.* at 1064.

118. *Id.*

In *Smith*, the Third Circuit held that the NCAA's eligibility rules were not commercial or business activities because they did not confer to the NCAA a commercial advantage.<sup>119</sup> The Ninth Circuit recognized this holding in *O'Bannon*.<sup>120</sup> But what the Ninth Circuit neglected was the Third Circuit's finding in *Smith* that even if the regulation at issue was viewed by the court to be economics-driven, the court would have still held it to be noncommercial because it furthered the NCAA's procompetitive goals of fair competition and the survival of intercollegiate athletics.<sup>121</sup> In fact, in *Agnew*, the Seventh Circuit looked to *Smith* as providing a definitive determination that, within the Third Circuit, the NCAA's eligibility regulations were not commercial and, therefore, outside of the Sherman Act's reach.<sup>122</sup> Further, the Seventh Circuit in *Agnew* diverted from *Smith*'s definitive holding and instead found that the antitrust laws apply generally to the NCAA's Bylaws.<sup>123</sup> For the court in *Agnew*, the application of antitrust to NCAA regulations turned on the commerciality of any specific NCAA Bylaw based on a relevant market analysis.<sup>124</sup> This position was in stark contrast to that taken by the same circuit in *Banks v. NCAA*.<sup>125</sup> In *Banks*, the Seventh Circuit held that the NCAA's no-draft rule was incapable of restraining trade in the marketplace for college football players "because the NCAA does not exist as a minor league training ground for future NFL players. . . ."<sup>126</sup> Thus, *Agnew* was a small step forward from *Banks* for student-athlete plaintiffs, and most definitely did not provide the NCAA with a blanket per se presumption of validity, even though the Seventh Circuit was not ready to recognize either a relevant education or labor market existing within NCAA college athletics.

What the Ninth Circuit did next was also curious; it took the NCAA's bait by distinguishing between the per se presumption of validity position and the NCAA's argument that its Bylaws were not commercial. This was curious because the Ninth Circuit had no need to distinguish between the per se validity and the commerciality arguments. After all, the fundamental reason that decades of decisions had exempted NCAA Bylaws from antitrust review was due to the fact that the regulations were found to be noncommercial based on Justice Stevens's dicta in *Board of Regents*. Thus, the two positions were connected rather than distinguishable, and the Ninth Circuit could have (and

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119. *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998).

120. *O'Bannon*, 802 F.3d at 1065.

121. *Smith*, 139 F.3d at 186.

122. *Agnew v. NCAA*, 683 F.3d 328, 339 (7th Cir. 2012).

123. *Id.* at 340.

124. *Id.*

125. 977 F.2d 1081 (7th Cir. 1992).

126. *Id.* at 1089–90.

arguably should have) treated them as such.

The reason why the Ninth Circuit probably should have addressed these positions in one fell swoop, rather than independently, is found in how the court countered the NCAA's noncommercial position. Specifically, the Ninth Circuit distinguished the compensation rules in *O'Bannon* from the regulations at issue in *Smith* and *Bassett v. NCAA*,<sup>127</sup> respectively.<sup>128</sup> The problem with this approach is that it gave credence to the existence of the per se validity provided by the dichotomous approach (which exempted NCAA Bylaws as noncommercial) and required the court to engage in a level of analysis that is not required under the rule of reason. Particularly, by distinguishing the compensation requirements as commercial, in comparison to the noncommercial regulations at issue in *Smith* and *Bassett*, the Ninth Circuit satisfied a "commerciality" step that is not required under the rule of reason analysis. Instead, the court in *O'Bannon* should have simply recognized the applicability of the Sherman Act to the NCAA's Bylaws and then followed the approach taken in *Agnew* by addressing the commercial nature of the compensation caps through relevant market analysis.

So why did the Ninth Circuit in *O'Bannon* go to such exhaustive lengths in countering the NCAA's confounding arguments on the applicability of the antitrust laws to its amateurism regulations? It is possible that the Ninth Circuit was just being thorough. Or perhaps the court's complex and tedious analysis was, in part at least, an act of deference to Justice Stevens and his dicta in *Board of Regents*. Where Justice Stevens in *Board of Regents* was deferential toward the NCAA with the statement that the association "needs ample latitude" to preserve the "revered tradition of amateurism,"<sup>129</sup> the Ninth Circuit in *O'Bannon* showed deference to Justice Stevens with its finding that nothing in *Board of Regents* limited the application of antitrust laws to the NCAA's amateurism rules.<sup>130</sup> To this end, the Ninth Circuit even stated that it did "not treat considered dicta from the Supreme Court lightly" and, where applicable, would afford Justice Stevens's dicta with "appropriate deference."<sup>131</sup> But to the Ninth Circuit, that deference did not extend to it using what was actually a procompetitive justification (preservation of amateurism) to exempt the NCAA's student-athlete compensation regulations from antitrust scrutiny as "automatically lawful. . ."<sup>132</sup> Our review of the decision leads to

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127. 528 F.3d 426 (6th Cir. 2008). In *Bassett v. NCAA*, the Sixth Circuit held that NCAA regulations prohibiting "improper inducements" to athletic recruits were "explicitly non-commercial." *Id.* at 433.

128. *O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015).

129. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

130. *O'Bannon*, 802 F.3d at 1063.

131. *Id.* (quoting *United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013)).

132. *Id.* at 1063–64.

the conclusion that the court in *O'Bannon* took substantial measures because it understood the magnitude of its decision. By subjecting the NCAA's amateurism regulations to the rule of reason analysis, the Ninth Circuit deviated from the line of district and circuit cases that interpreted Justice Stevens's dicta in ways that fortified the NCAA's amateurism restrictions as noncommercial and, therefore, outside of § 1 jurisdiction. Accordingly, the Ninth Circuit in *O'Bannon* may have been a bit clumsy in its analysis on first down, but the court gained positive yardage on the play and set the stage for the first step in the rule of reason analysis, which focused on the relevant markets.

### B. *Second Down: The Markets*

Arguably, no hurdle has been more difficult to clear for student-athlete plaintiffs in establishing antitrust claims against the NCAA than step one of the rule of reason analysis, which requires plaintiffs to show "significant anticompetitive effects within a relevant market."<sup>133</sup> In fact, until *O'Bannon*, no student-driven litigation had ever progressed past this play. The courts and circuits following *Board of Regents* had been steadfast in failing to find a relevant market within NCAA athletics for student-athletes. While *Tanaka*, *Walk-On Football Players*, and even *White* provided the plaintiffs in *O'Bannon* with some traction for overcoming the relevant market hurdle, those cases held no precedential value for the Ninth Circuit. Thus, the Plaintiffs in *O'Bannon* had the very daunting task of convincing the Ninth Circuit to be the first of the federal circuits to find a relevant market that would subject the NCAA's amateurism provisions to the second step of the rule of reason analysis.<sup>134</sup>

Initially, there were two purported markets at play in *O'Bannon* based on the district court's determinations. The first was the college education market. This market included the "unique bundles of goods and services" that FBS football and Division I basketball schools offer in recruiting against each other for the best student-athletes.<sup>135</sup> The second market was a "group licensing market" for three submarkets in which student-athlete names, images, and

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133. *Id.* at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

134. *See Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012). The case involved an antitrust challenge to the cap the NCAA places on football scholarships. While the Seventh Circuit in *Agnew* did not find a relevant market for student-athlete services, it disagreed with the district court's determination that a relevant market could not be established. In this instance, however, the court rejected the markets proffered by the plaintiffs, which were (1) a market for educational services similar to that which was alleged in *White*, and (2) a labor market for student-athlete services. *Id.* at 346. The primary problem the court had with the education product market was that it would include far more than those who were scholarship athletes; making the purported market unclear rather than cognizable. *Id.* The problem with the court had with the labor market was that the plaintiffs did not provide any evidence supporting the existence of the market. *Id.* at 346–47.

135. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014).

likenesses (NILs) were commercially licensed: (1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archived materials.<sup>136</sup>

On appeal, however, the Ninth Circuit consolidated the two markets into one, the college education market. In doing so, the court recognized three factual findings from the district court that were substantially supported by the record: “(1) that a cognizable ‘college education market’ exist[ed]” in the compensation for student-athlete recruits through the offering of scholarships and other “amenities” (coaching and facility use); (2) the NCAA’s compensation rules restrained the competition for student-athlete recruits so that programs were unable to offer compensation for the use of student-athlete NILs; and (3) the restraint imposed by the NCAA’s “compensation rules . . . ha[d] a significant anticompetitive effect on the college education market” by fixing the price for college attendance.<sup>137</sup> Further, the Ninth Circuit found that the NCAA’s appeal “[did] not challenge the district court’s findings,” conceding the existence of a relevant college education market.<sup>138</sup> Instead, the NCAA centered its defense on three “modest” positions for why the Plaintiffs did not establish a significant anticompetitive effect.<sup>139</sup>

First, the NCAA argued that the Plaintiffs’ inability to show a decrease in output of scholarships within the college education market prevented them from demonstrating an anticompetitive effect.<sup>140</sup> The NCAA pointed to increases in opportunities as proof that its regulations were not anticompetitive.<sup>141</sup> The problem with that position, as the Ninth Circuit so easily pointed out, is that “output [reduction] is not the only [type] of anticompetitive effect.”<sup>142</sup> Another type is found in horizontal “price-fixing . . . by purchasers,” and this is true even when the injured parties are sellers rather than consumers.<sup>143</sup> The court looked to the district court’s determination that the students were harmed by the price-fixing agreement that they would only be compensated at the cost of grant-in-aid, thus valuing their NILs at zero.<sup>144</sup> Thus, the price cap imposed by

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136. *Id.* at 968.

137. *O’Bannon*, 802 F.3d at 1070.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (emphasis omitted).

143. *Id.* (alteration in original) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948)). The court also noted that various types of anticompetitive practices like prices raises, output reductions, and market divisions all had the same anticompetitive effects. *Id.* at 1071 (citing *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 777 (1999)).

144. *Id.* (citing *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 972–73 (N.D. Cal. 2014)).

the compensation regulations produced anticompetitive effects.<sup>145</sup>

Next, the court quickly dismissed the NCAA's second argument that there could be no anticompetitive effect because student-athlete NILs were worth nothing.<sup>146</sup> The problem with this position is that the NCAA set the value.<sup>147</sup> The Ninth Circuit then rejected the NCAA's final anticompetitive effect position; the argument that, in the absence of a cap, student-athletes had de minimis value in their NIL rights.<sup>148</sup> The court found that the NCAA's last position was flawed because the "too small to matter" defense was inconsistent with the Supreme Court precedent in *Catalano, Inc. v. Target Sales, Inc.*<sup>149</sup> In *Catalano*, the Court stated, "It is no excuse that the prices fixed are themselves reasonable."<sup>150</sup> The Ninth Circuit also relied on reasoning in *Board of Regents* in which the Court held that the NCAA's television plan could have anticompetitive effects without need for delving into the details of how much the price was fixed.<sup>151</sup> Accordingly, the Ninth Circuit in *O'Bannon* upheld the district court's decision "that the [NCAA's] compensation rules ha[d] a significant anticompetitive effect on the college education market."<sup>152</sup>

### C. Third Down: The NCAA's Procompetitive Justifications

On third and long, the NCAA found itself with the burden of proving that the anticompetitive effects imposed by the compensation regulations were justified by offsetting procompetitive effects. To defend its compensation rules, the NCAA turned to the same tried, but not always true, justifications on which the organization relied on in the few cases that courts found to be at the commercial end of the dichotomy: (1) promotion of amateur athletics, (2) promotion of competitive balance, (3) the integration of student-athletes within the school community, "and (4) increasing output in the college education market . . . ."<sup>153</sup> At the same time, however, the NCAA focused only on the promotion of amateurism in its arguments on appeal.<sup>154</sup> For this reason, the Ninth Circuit had little difficulty "accept[ing] the district court's . . . findings that the compensation rules [did] not promote competitive balance [or] increase

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145. *Id.*

146. *Id.*

147. *Id.* at 1069.

148. *Id.* at 1071.

149. *Id.* (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (per curiam)).

150. *Catalano*, 446 U.S. at 647.

151. *O'Bannon*, 802 F.3d at 1072 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 104–05 (1984)).

152. *Id.*

153. *Id.*; *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).

154. *O'Bannon*, 802 F.3d at 1072.

output in the college education market.”<sup>155</sup>

As for the output argument, the Ninth Circuit was left unconvinced by the NCAA’s claim that its compensation restrictions were procompetitive on the position that they widened student-athlete choice.<sup>156</sup> Specifically, the court recognized that if the NCAA’s compensation rules were abandoned, or at least loosened, then student-athletes would actually have a wider range of choices in terms of which schools to select because student-athletes could make decisions based on scholarship offerings.<sup>157</sup> Further, the Ninth Circuit found that lifting the limits on compensation might actually provide student-athletes with the financial means to stay in school longer based on income derived from the use of their NILs.<sup>158</sup> Accordingly, the Ninth Circuit rejected the NCAA’s outcome or “choices” argument.<sup>159</sup>

The Ninth Circuit, however, was convinced that NCAA compensation rules served two purposes: “[ (1) ] integrating academics with athletics, and [ (2) ] ‘preserving the popularity of the NCAA’s product’” through the preservation of the “revered tradition of amateurism.”<sup>160</sup> The court found that “the district court[’s findings] and . . . record support[] . . . a concrete procompetitive effect in the NCAA’s commitment to amateurism . . . .”<sup>161</sup> The court recognized that the premise of this effect is consistent with Justice Stevens’s dicta in which he assumed that consumers of college football prefer that particular brand to professional football because of the “academic tradition” associated with the college product.<sup>162</sup>

#### D. Fourth Down: Alternatives

The recognition of procompetitive justifications for an anticompetitive restraint shifts the burden back to the plaintiff to prove that the defendant’s justifications could be met with a virtually effective and less-restrictive alternative.<sup>163</sup> The Ninth Circuit in *O’Bannon* added to that burden by recognizing *Board of Regents*’ deferential mandate that the NCAA be afforded “ample latitude” as the superintendent of collegiate athletics.<sup>164</sup> With that

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155. *Id.*

156. *Id.*

157. *Id.* at 1073.

158. *Id.*

159. *Id.*

160. *Id.*; *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

161. *O’Bannon*, 802 F.3d at 1073.

162. *Id.* at 1074 (quoting *Bd. of Regents*, 468 U.S. at 101–02).

163. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001).

164. *O’Bannon*, 802 F.3d at 1074 (quoting *Bd. of Regents*, 468 U.S. at 120).

burden and deference in mind, the Ninth Circuit addressed the two less restrictive alternatives that the district court identified: (1) allowing NCAA member institutions to extend the compensation limit to cover the full cost of attendance; and (2) allowing schools to pay student-athletes a modest amount (up to \$5,000.00 per year) of deferred cash in exchange for the use of student-athlete NILs.<sup>165</sup>

The Ninth Circuit agreed with the district court's first alternative, finding that a cost-of-attendance allowance would not tarnish the revered tradition of amateurism because the money would be used to cover "legitimate costs" to attend school.<sup>166</sup> The court could find no evidence in the record "suggest[ing] that consumers of college sports would be[] less interested . . . if [student-]athletes" were provided the allowance.<sup>167</sup> Similarly, the court could not find anything in the record supporting the notion that a cost-of-attendance allowance "would impede the integration of student-athletes into their academic communities."<sup>168</sup> The Ninth Circuit accepted the cost-of-attendance alternative over fear mongering from the NCAA and its amici, a collection of antitrust law scholars.<sup>169</sup> Both the NCAA and the amici cautioned that such a finding would open the floodgates to all sorts of new litigation directed at incremental changes in NCAA policy.<sup>170</sup> Additionally, the NCAA and its amici asserted that it is not the role of the courts to make marginal market adjustments based on applications of antitrust laws.<sup>171</sup> Instead, they believed that the cap should have been preserved because it served a "reasonably . . . valid business purpose . . . ."<sup>172</sup>

While the Ninth Circuit agreed with the NCAA and its amici that, as a general rule, "[A]ntitrust law [should not be used] to make marginal adjustments to broadly reasonable market restraints," the court disagreed with the argument that a reasonably valid business purpose should trump a

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165. *Id.* at 1074–79 (referencing *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1004–07 (N.D. Cal. 2014)).

166. *Id.* at 1074–75 (quoting *O'Bannon*, 7 F. Supp. 3d at 983).

167. *Id.* at 1075.

168. *Id.*

169. *Id.*; see also Brief for Law and Economics and Antitrust Scholars as Amici Curiae in Support of Appellant, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068), <http://cdn.ca9.uscourts.gov/datastore/general/2014/11/24/14-16601%20Amicus%20brief%20by%20Law%20&%20Econ%20Scholars.pdf>.

170. *O'Bannon*, 802 F.3d at 1075; Brief for Law and Economics and Antitrust Scholars as Amici Curiae in Support of Appellant, *supra* note 169, at 3.

171. *O'Bannon*, 802 F.3d at 1075; Brief for Law and Economics and Antitrust Scholars as Amici Curiae in Support of Appellant, *supra* note 169, at 13.

172. *O'Bannon*, 802 F.3d at 1075.

less-restrictive alternative in antitrust analysis.<sup>173</sup> What the Ninth Circuit was perhaps too polite to address in its response to the NCAA and its amici was the audacity of the reasonably valid business purpose position. Had the court accepted the notion that the mere existence of a reasonably valid business purpose precludes evidence of a less-restrictive alternative, the Ninth Circuit would have effectively altered the rule of reason so as to do away with its third prong. After all, the third step in the rule always follows a court's finding of reasonably valid business purposes that have been labeled as procompetitive justifications. Instead, the court recognized that the degree of modification to the market is irrelevant as long as the means serves as a less-restrictive alternative for achieving the valid business purpose.<sup>174</sup>

The Ninth Circuit then addressed the floodgates argument and did so by restraining its holding to the specific NCAA restraints that limited student-athlete compensation to grant-in-aid.<sup>175</sup> The court cautioned potential classes of future plaintiffs that its decision was not a declaration of open season for shooting down NCAA regulations, stating that courts were not “free to micromanage organizational rules or to strike down largely beneficial market restraints with impunity.”<sup>176</sup> Rather, the Ninth Circuit limited its decision to a restraint that it found to be “patently and inexplicably stricter than . . . necessary.”<sup>177</sup>

Conversely, the Ninth Circuit held that the district court erred in finding a less-restrictive alternative that would have allowed student-athletes to profit off of their NILs.<sup>178</sup> The court contrasted the cost-of-attendance option with NIL compensation and found that the two were not equally effective in meeting the procompetitive purpose of preserving consumer interest in amateur athletics.<sup>179</sup> The Ninth Circuit found that the district court ignored the premise behind the preservation of amateurism justification: “that not paying student-athletes is precisely what makes them amateurs.”<sup>180</sup> With this finding, the court vacated the district court's injunction that required its members to pay student-athletes deferred compensation of up to \$5,000 per year for the use of their NILs.<sup>181</sup>

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173. *Id.*

174. *Id.* (citing *Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975)).

175. *Id.*

176. *Id.*

177. *Id.* (emphasis omitted).

178. *Id.* at 1076.

179. *Id.*

180. *Id.* (emphasis omitted).

181. *Id.* at 1078–79.

*E. Overtime: Did the Plaintiffs Win, Lose, or Draw in the Ninth Circuit?*

Not long after the opinion went public, a plethora of pundits did the same with their opinions on the ramifications of the most high-profile antitrust action involving the NCAA since *Board of Regents*. Two trains of expert thought emerged from the coverage of the case in both traditional and social media: (1) the Ninth Circuit's decision was incredibly significant because it subjected NCAA student-athlete regulations to the rule of reason analysis,<sup>182</sup> and (2) the decision was not significant because the NCAA had already permitted its members to provide cost-of-attendance allowances.<sup>183</sup> Granted, *O'Bannon* had a negligible impact on the operation of college football, and college athletics for that matter. Yet, those who questioned the case's importance failed to properly appreciate the fact that *O'Bannon* was the first circuit decision to recognize a relevant college education market and subject the NCAA's amateurism provisions to all three steps of the rule of reason analysis. And in doing so, the Ninth Circuit deviated from the de facto exemption from antitrust for the NCAA's amateurism provisions that decades of district and circuit court decisions developed based on near dogmatic reliance on Justice Stevens's dicta in *Board of Regents*. Thus, there is now a divide in the federal circuits on how antitrust law applies to the NCAA's regulation of student-athletes and whether a relevant college education market exists.

The presence of a possible split among the federal circuits could provide either the student-athletes or the NCAA with ammunition for a request of certiorari to the Supreme Court following the resolution of the case in the Ninth Circuit. Currently, the case is pending resolution of the student-athletes' request for en banc consideration before the Ninth Circuit. In addition to *O'Bannon*, there are at least three other antitrust actions (*Jenkins v. NCAA*, *Alston v. NCAA*, and *Pugh v. NCAA*) brought by student-athlete plaintiffs that are in early stages of litigation. *Jenkins* is arguably the most threatening of the three because it was brought within the Ninth Circuit by famed antitrust and labor law attorney

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182. See, e.g., Jason Kurtyka, *Post-O'Bannon, the Fight Between Student-Athletes and the NCAA Rages On*, JEFFREY S. MOORAD CTR. FOR STUDY SPORTS L., <http://lawweb2009.law.villanova.edu/sportslaw/?p=3339> (last visited June 9, 2016); Aaron Leibowitz, *O'Bannon Ruling Allows 'Amateurism' Argument to Continue—for Now*, SPORTS ILLUSTRATED (Oct. 2, 2015), <http://www.si.com/cauldron/2015/10/01/ed-obannon-ncaa-lawsuit-appeal-decision>.

183. See, e.g., Jeremy Jarrett, *The Great Escape: The NCAA Receives a Tremendous Ruling for Now and the Future in the O'Bannon Appeal Decision*, SPORTS ESQUIRES (Oct. 1, 2015), <http://thesportsesquires.com/the-great-escape-the-ncaa-receives-a-tremendous-ruling-for-now-and-the-future-in-the-obannon-appeal-decision/>; Joe Nocera, *O'Bannon's Hollow Victory Over the N.C.A.A.*, N.Y. TIMES (Oct. 2, 2015), [http://www.nytimes.com/2015/10/03/opinion/joe-nocera-obannons-hollow-victory.html?\\_r=0](http://www.nytimes.com/2015/10/03/opinion/joe-nocera-obannons-hollow-victory.html?_r=0); Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html>;

Jeffrey Kessler and aims to “strike down permanently the restrictions that prevent athletes in Division I basketball and the top tier of college football from being fairly compensated for the billions of dollars in revenues that they help generate.”<sup>184</sup> If the Plaintiffs in *Jenkins* succeed, the NCAA would not be permitted to impose any cap on student-athlete compensation.<sup>185</sup> The uphill battle for Kessler and his Plaintiffs is in convincing the court to go dramatically further than what was done in *O’Bannon* by rejecting the position asserted by Justice Stevens in dicta in *Board of Regents* that “amateurism” is needed to create the product of college football and basketball.

And this brings us to the multi-billion dollar question, are NCAA amateurism provisions necessary to the creation of the product of college athletics? Certainly, aspects of the NCAA’s amateurism regulations (i.e., academic requirements) distinguish college from professional football. Further, the possibility exists that some consumers consider academic aspects of college football important. After all, the fact that NCAA athletic programs represent universities and alumni, students, faculty, and staff from those schools may place value in the fact that NCAA athletes are also students. Thus, the academic nature of college football may be so intertwined with the product that it drives some degree of sport consumption. Perhaps this academic nature is what the Ninth Circuit actually referenced when it recognized a procompetitive justification for the integration of student-athletes on college campuses. All the same, this position is also nothing more than an assumption that is not supported by any empirical economic evidence and “[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”<sup>186</sup>

The Ninth Circuit in *O’Bannon* followed a line of cases that relied on legal presumptions inherited from Justice Stevens’s dicta by accepting the NCAA’s compensation cap as necessary to the creation of the product of college football. In doing so, the Ninth Circuit linked student-athlete compensation to the academic requirements found within the NCAA’s Bylaws. Yet, student-athlete compensation limits can be severed from academic requirements while still preserving the academic nature of college football. Take, for example, graduate student assistantships. Graduate assistants are graduate students who work for their university in some capacity (e.g., teaching classes and assisting with research).<sup>187</sup> Compensation provided through graduate

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184. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), [http://espn.go.com/ncaa/story/\\_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model](http://espn.go.com/ncaa/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model).

185. *Id.*

186. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992).

187. Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for*

assistantships varies depending on the academic program and the institution. It is common for graduate students to select institutions, at least in part, based on the compensation package provided through a graduate assistantship. However, the graduate students who make those selections are still students and the academic nature of their positions and their integration within the institution remains intact. Therefore, even if we take the leap and accept the assumption that the NCAA's academic requirements (i.e., those that make athletes students) are necessary to the creation of the product of college athletics, that necessity does not justify a horizontal cap on student-athlete compensation.

Thus, the real issue in cases like *O'Bannon* and *Jenkins* is whether caps that limit student-athlete compensation are necessary to the creation of the product of college athletics. Framing the issue in this manner, however, should pose a problem for the NCAA because a collection of sport management professors who wrote as amici in support of the student-athletes in *O'Bannon* could find nothing in their review of relevant sport motivation literature that supported the assumption that consumers of college athletics do so because of limits on student-athlete compensation.<sup>188</sup> In fact, the only study the NCAA could produce in support of its position was dismissed by the district court for lacking credibility.<sup>189</sup> The study was discredited because it included a questionnaire with items that were flawed in a way that was found to have influenced participant responses.<sup>190</sup> Despite the lack of empirical support for its position, both the district court and the Ninth Circuit accepted the NCAA's procompetitive justification as valid and both cited Justice Stevens's dicta from *Board of Regents* in doing so.

Accordingly, if there is one key takeaway from *O'Bannon* that future classes of student-athlete plaintiffs must note, it is that, for some inexplicable reason, *they* bear the burden of disproving an assumption that consumers care about student-athlete compensation. As Kessler and his Plaintiffs in *Jenkins* and the student-athlete plaintiffs in *Alston* prepare their materials for trial, they would be smart to include any empirical economic evidence that supports the position that consumers will still consume college athletics even if the student-athletes receive more than what is provided via cost-of-attendance allowances. Specifically, student-athlete plaintiffs must force the hand of the court with exacting and irrefutable evidence that disproves the assumption

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*Graduate Assistants*, 69 FORDHAM L. REV. 1233, 1236 (2001).

188. Brief for Sport Management Professors as Amici Curiae in Support of Plaintiff-Appellee at 7–8, *O'Bannon v. NCAA*, 803 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068), <http://cdn.ca9.uscourts.gov/datastore/general/2015/01/30/14-16601%20amicus%20brief%201-28%20by%20Sport%20Management%20Prof%20dkt%2057.pdf>.

189. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014).

190. *Id.*

derived from Justice Stevens's dicta.

On the other end of the spectrum, any study presented by the NCAA in defense of its compensation limits should be required by courts to actually evidence that consumption would be affected if student-athletes are compensated beyond the cost-of-attendance. Consumer attitudes about student-athlete pay are meaningless in the market if they do not influence consumption habits. But most importantly, consumer preference should *never* justify horizontal restraints on labor costs. That is what the cost-of-attendance cap is—a cost-saving measure disguised as consumer welfare protection.

## VII. CONCLUSION

In classic Greek mythology, Pandora's curiosity led her to open a box that forever shaped life.<sup>191</sup> Pandora was warned by Zeus not to open the box, but she did and from it escaped all evils known to man. The first of all women tried quickly to close the box and limit what was let into the world, but it was too late. In 1984, the Supreme Court fully opened an already leaking box with its decision in *Board of Regents* and in doing so let all sorts of problems into college football. Similar to how Pandora attempted to limit what escaped from the infamous box, the majority in *Board of Regents* also tried to control the degree of what it unleashed on college football by shielding from antitrust law the NCAA's amateurism provisions, and just like Pandora, the Court's efforts were unsuccessful.

It is time for a new antitrust approach for big-time college athletics, particularly football. In the shadow of *Board of Regents*, college football has ballooned into a multibillion dollar industry. The NCAA's amici of antitrust legal scholars argued in their brief, "Antitrust cases are . . . poor vehicles for courts and agencies to socially reengineer products and services to their liking."<sup>192</sup> Yet, that is exactly what the courts have done by shielding the NCAA's limits on student-athlete compensation from antitrust law. Courts have preserved the "revered tradition of amateurism"<sup>193</sup> by preventing inflation of athlete compensation; inflation that is expected in a free market. Thus, the time has come to lift the veil of amateurism from the face of college football and basketball and subject them to the same antitrust analyses that apply to their professional counterparts. Cases like *O'Bannon*, *Jenkins*, and *Alston* provide courts with the opportunity to effect that change.

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191. For a detailed account of the Pandora myth, *see generally* MARK P.O. MORFORD & ROBERT J. LENARDON, *CLASSICAL MYTHOLOGY* (6th ed. 1999).

192. Brief for Law and Economics and Antitrust Scholars as Amici Curiae in Support of Appellant, *supra* note 169, at 3.

193. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

No matter what the Ninth Circuit decides in regards to the student-athletes' en banc request, the court's final resolution of the case likely will not end the debate.<sup>194</sup> The can will be kicked down the road until it eventually reaches the steps of the Supreme Court building. Whether the case that gets there is *O'Bannon* or some other, the applicability of antitrust to NCAA student-athlete seems destined for Supreme Court determination. This means a reconsideration of the reasoning in Justice Stevens's *Board of Regents* dicta. To that extent, *O'Bannon*, or whatever case makes it to the high court, is to *Board of Regents* what *Flood* was to *Federal Baseball Club*. Will that Court make the same mistake that Justice Stevens said was made in *Flood* by preserving an antitrust analysis that no longer made sense? Based on his comments to the Sports Lawyers Association, the possibility exists that Justice Stevens would do things differently if he could hear the case that challenges his reasoning in *Board of Regents*. But just as Justice Holmes was not around for *Flood*, Justice Stevens will have no say in *O'Bannon*. The great antitrust jurist now finds himself in the same spot as the rest of us, in the cheap seats watching to see how things play out.

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194. At the time this Article was first written, the en banc motion before the Ninth Circuit had yet to be heard and decided. The Ninth Circuit has since rejected that request.