

The Value of Amateurism

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THE VALUE OF AMATEURISM

CODY J. MCDAVIS*

Our chief interest should not lie in the great champions in sport. On the contrary, our concern should be most of all to widen the base, the foundation, in athletic sports: to encourage in every way a healthy rivalry which shall give to the largest possible number of students the chance to take part in vigorous outdoor games.¹

- President Theodore Roosevelt

I. INTRODUCTION

Collegiate athletic programs are a defining feature at many of the higher education institutions sprawling across North America.² Placing a spotlight on the athletic programs makes sense for most institutions. It is an effective way to engage with the local community and, in many cases, the national community as well.³ This exposure has proven to increase new student applications,

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1. President Theodore Roosevelt, Speech Before the Harvard Students (Feb. 23, 1907), in SPALDING'S OFFICIAL FOOT BALL GUIDE, Aug. 1907, at 9. President Roosevelt is credited for having a major hand in the creation of the NCAA. See Rodney K. Smith, *A Brief History of the National College Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS. L. REV. 9, 10-13 (2000). Roosevelt sought to preserve amateurism and mitigate the unsavory violence in collegiate sport. *Id.*

2. University presidents have been quoted as considering their athletics program as the "front porch" to their university. See KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS: QUANTITATIVE AND QUALITATIVE RESEARCH WITH FOOTBALL BOWL SUBDIVISION UNIVERSITY PRESIDENTS ON THE COSTS AND FINANCING OF INTERCOLLEGIATE ATHLETICS – REPORT OF FINDINGS AND IMPLICATIONS 43 (2009) [hereinafter KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS]; see also Dawn Rhodes, *With NCAA Success, Loyola Now Looks for Gains Off the Court*, CHI. TRIB., Mar. 21, 2018, <https://www.chicagotribune.com/sports/college/ct-met-loyola-basketball-university-publicity-20180321-story.html> ("The bottom line is [the basketball team's success] gives the university a chance to tell its story in a very broad, public way.").

3. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 2, at 44. "Athletics builds allegiance to the institution and brings national prominence and pride." *Id.*

especially where the athletic teams win.⁴ Additionally, collegiate athletics provide institutions with a means to maintain their relationship with their alumni base, which is often a significant source for funding.⁵

Within the athletic departments themselves, it is Division I Men's Basketball and the Football Bowl Subdivision ("FBS Football") that typically garner the most attention.⁶ Commonly referred to as the Revenue Generating Sports, Division I men's basketball and FBS football outperform their sibling sport teams in revenue generation at most institutions.⁷ The collegiate sport

4. Rhodes, *supra* note 2. Loyola University Chicago's undergraduate admissions page had a 50 percent increase in new visitors during their historic NCAA basketball tournament run. *Id.* Florida Gulf Coast University and Lehigh University saw new student application increases of 27.5 percent and 9.2 percent, respectively, the year after their mens basketball teams experienced success in the NCAA postseason tournament. Polly Mosendz et al., *NCAA Tournament 2017: What March Madness is Worth to a College*, BLOOMBERG (Mar. 13, 2017), <https://www.bloomberg.com/news/features/2017-03-13/march-madness-more-students-apply-to-schools-that-break-brackets> (noting an "average 4 percent increase for all schools that participated in the NCAA tournament from 2010 to 2014."). See Ahmed E. Taha, *Are College Athletes Economically Exploited?*, 2 WAKE FOREST J.L. & POL'Y 69, 74 (2012) (noting a 22 percent increase in freshman applications after George Mason University's men's basketball team made it to the Final Four of the Division I Men's Basketball Championship tournament); KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 2, at 11 ("A significant majority of FBS presidents believe that athletics success provides substantial benefits to their institutions. These include tangible benefits such as increasing applications, quality of the student body, and donations to the university.").

5. One economist estimates that winning five games more than in the previous year can result in increased alumni donations of 28% for a school. See Michael Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables* 18 (Nat'l Bureau of Econ. Research, Working Paper No. 18196, 2012) (concluding that FBS football schools that win may expect increases in alumni athletic donations, among other things such as enhances in the school's academic reputation, increases in the number of applicants, reduced acceptance rates, and increased average incoming SAT scores); see also Taha, *supra* note 4, at 106 (noting the 25% increase in active alumni and a 52% increase in fundraising for the George Mason University athletic department after a successful men's basketball season); Brad Wolverton et al., *The \$10-Billion Sports Tab*, CHRON. HIGHER EDUC. (Nov. 15, 2015), http://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014 ("College leaders say such investments [in football] help attract prospective students and build connections with donors and other supporters.").

6. See B. David Ridpath, *The College Football Playoff and Other NCAA Revenues Are an Exposé of Selfish Interest*, FORBES, Jan. 17, 2017, <https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#27f01704e1af>. This rule is not without its exceptions, however. Several universities are more well known for sports other than men's basketball or FBS football. See, e.g., Jeff Kolpack, *All Individual Sports at NDSU, UND Lose Money*, BISMARCK TRIB., Apr. 7, 2017, http://bismarcktribune.com/news/state-and-regional/all-individual-sports-at-ndsu-und-lose-money/article_a9ea7b3f-6826-5348-8cb5-d0eadb369df0.html (referring to the University of North Dakota's hockey program as the crown jewel of collegiate athletics in North Dakota); see also Zach Helfand, *The Road to Cal State Fullerton Baseball Greatness is Littered with Parking Tickets*, L.A. TIMES, May 29, 2017, <http://www.latimes.com/sports/la-sp-fullerton-baseball-20170529-story.html> (describing Cal State Fullerton as a "one-sport wonder" while revisiting the storied success of its baseball team).

7. DANIEL L. FULKS, NAT'L COLLEGIATE ATHLETIC ASSOC., NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: FISCAL YEARS 2004 THROUGH 2015, at 36, 62, 88 (2016), <http://www.ncaapublications.com/productdownloads/D1REVEXP2015.pdf> (providing a sport-by-sport breakdown of generated revenues where basketball and football far exceed all other sports in

landscape will likely continue to be dominated by these two sports for some time. The National Collegiate Athletic Association (NCAA) recently signed its most lucrative television agreement to date for the broadcasting rights to the Men's Basketball Championship through 2032.⁸ The Big 10, one of the five major NCAA conferences, recently inked a six-year multibillion-dollar deal for the television rights of their Men's Basketball and FBS Football programs.⁹ All of the major conferences have followed suit.¹⁰

Nationwide popularity and high dollar value television agreements have paved way for the construction of unprecedented college football stadiums and basketball arenas. The Carrier Dome, home to the Syracuse Orange, can sit 49,262 attendees.¹¹ The University of Tennessee stadium holds 106,000 spectators.¹² Michigan football's "The Big House" seats an impressive 107,601 spectators.¹³ For comparison, the largest capacity National Football League (NFL) stadium seats 100,000.¹⁴ Across the country, on television and in the stadium, millions of fans are engaging with collegiate sport and this wild popularity has shown no signs of letting up.

While revenues, viewership, and seating capacity have grown, one thing has remained largely the same—student-athletes may not receive cash compensation.¹⁵ The NCAA caps student-athlete financial aid at cost of

revenues generated with the limited exception of ice hockey). At least for football, this has been true for almost a century. HOWARD J. SAVAGE ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS 83, 87 (1929) [hereinafter CARNEGIE REPORT].

8. Marc Tracy, *N.C.A.A. Extends Basketball Deal with CBS Sports and Turner Through 2032*, N.Y. TIMES, Apr. 12, 2016, <https://www.nytimes.com/2016/04/13/sports/ncaabasketball/ncaa-extends-basketball-deal-with-cbs-sports-and-turner-through-2032.html>. The television agreement, beginning in 2010, is worth \$10.8 billion through 2024 and an additional \$8.8 billion between 2024 and 2032.

9. Roman Stubbs, *Big Ten Formally Announces Six-Year Media Rights Deal with ESPN, FOX, and CBS*, WASH. POST, July 24, 2017, https://www.washingtonpost.com/news/terrapins-insider/wp/2017/07/24/big-ten-formally-announces-six-year-media-rights-deal-with-ESPN-fox-and-cbs/?utm_term=.0defb2381a9f.

10. Kristi Dosh, *College TV Rights Deals Undergo Makeovers*, ESPN (May 13, 2012), http://www.espn.com/blog/playbook/dollars/post/_id/705/ (summarizing the multi-billion-dollar deals of the major NCAA conferences).

11. *History at a Glance - Carrier Dome*, CARRIER DOME: SYRACUSE U., <http://carrierdome.com/history/default.aspx> (last visited Dec. 13, 2018).

12. Robert Sandy, *The Economics of US Intercollegiate Sports and the NCAA*, in HANDBOOK ON THE ECONOMICS OF SPORT 389, 389 (Edward Elgar 2006).

13. *Michigan Stadium*, U. MICH., <http://www.mgoblue.com/sports/2017/6/16/facilities-michigan-stadium.html.aspx> (last visited Dec. 13, 2018). Like the Rose Bowl, the University of Michigan's stadium is quite old, but has been renovated and greatly expanded at a significant cost. *Id.*

14. *AT&T Stadium*, HKS ARCHITECTS, <http://www.hksinc.com/places/cowboys-stadium-2/> (last visited Dec. 13, 2018).

15. This is strictly speaking, of course. It is true that student-athlete's financial aid beyond the costs associated with attending a university have never grown; they have always been zero. However, if one were to consider the increased costs associated with attending a university—arguably one way of valuing a full

attendance.¹⁶ The value of a cost of attendance scholarship can be substantial.¹⁷ However, many argue that student-athletes are entitled to more.¹⁸ These critics point to the “highly commercialized, multibillion dollar endeavor” that is the NCAA and claim that it is “profoundly immoral” to restrict student-athletes’ compensation “while everyone else profits.”¹⁹ Of the five major collegiate

scholarship—as a form of increased compensation for student-athletes, a different conclusion would be had altogether. For example, in 1949, UCLA estimated a maximum annual in-state resident cost of attendance of \$1,243. University of California, *General Catalogue*, U.C. BULLETIN (Aug. 10, 1949), <http://www.registrar.ucla.edu/Portals/50/Documents/catalog-archive/1900-1949/49-50catalog.pdf>. For the 2017-18 academic year, UCLA estimates an annual in-state resident cost of attendance to be \$33,604. *Financial Aid and Scholarships – Cost of Attendance*, UCLA FINANCIAL AID AND SCHOLARSHIPS, <http://www.financialaid.ucla.edu/Undergraduate/Cost-of-Attendance#495791584-residence-halls> (last visited Dec. 13, 2018). Viewed from this perspective, the student-athlete today enjoys an inflation-adjusted compensation increase of 167.57%.

16. Cost of attendance scholarships were recently introduced by the NCAA in 2015. NCAA, 2017-18 NCAA DIVISION I MANUAL art. 15, 15.1, at 198 (Aug. 1, 2017) (allowing cost of attendance scholarships) [hereinafter NCAA DIVISION I MANUAL]. Prior to 2015, the NCAA restricted scholarships to Grant-in-Aid. NCAA, 2014-15 NCAA DIVISION I MANUAL art. 15, 15.1, at 190 (Aug. 1, 2014) (capping scholarship value at grant-in-aid). See *Cost of Attendance Q&A*, NCAA (Sept. 3, 2015), <http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> (announcing cost of attendance scholarship being permitted in the NCAA).

17. Estimates vary. One study finds a men’s basketball scholarship to be worth \$120 thousand per year. See Jay Weiner & Steve Berkowitz, *USA Today Analysis Finds \$120k Value in Men’s Basketball Scholarship*, USA TODAY, Mar. 30, 2011, https://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm; see also Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid Up To \$125,000 Per Year*, FORBES, Aug. 29, 2013, <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#358d980e2b82> (valuing a college athletic scholarship at \$125 thousand per year); Patrick Rische, *Value of College Football Scholarship Exceeds \$2 Million for College Football’s Top 25*, FORBES, Aug. 21, 2011, <https://www.forbes.com/sites/prishe/2011/08/21/value-of-college-football-scholarship-exceeds-2-million-for-college-footballs-top-25/#78edbf9619ef> (estimating the total value of a top college football scholarship to exceed \$2.2 million). But see *Estimated Value of a Full 2014-2015 Indiana University Athletic Scholarship*, IND. UNIV. ATHLETICS (Sept. 15, 2014), http://iuhoosiers.com/documents/2015/5/21/genrel_2014_15_misc_non_event_Sept2014CostScholarship.pdf (valuing a four-year Indiana University scholarship at \$135,766 for in-state students and \$240,274 for out-of-state students).

18. See Travis Waldron, *A Trip to the Men’s Room Turned Jeff Kessler Into the NCAA’s Worst Nightmare*, HUFFINGTON POST (Aug. 7, 2017), https://www.huffingtonpost.com/entry/jeffrey-kessler-ncaa-law-suit_us_59723f33e4b00e4363df3f59 (discussing Jeffrey Kessler, the plaintiffs’ attorney in the current NCAA antitrust litigation, and his belief that college athletes should be better compensated); Rick Maese, *Jay Bilas vs. NCAA: How a Former Player with a Law Degree Became an Agent of Change*, WASH. POST, Nov. 12, 2014, https://www.washingtonpost.com/sports/colleges/jay-bilas-vs-ncaa-how-a-former-player-with-a-law-degree-became-an-agent-of-change/2014/11/12/7f4254ee-6a7d-11e4-bafd-6598192a448d_story.html?utm_term=.9c6845a0db7e (discussing former Duke men’s basketball player, Jay Bilas, as the “grand marshal” of the movement to “do away with the notion of amateurism [and] pay college athletes.”).

19. Jay Bilas, *College Athletes Should Be Compensated*, N.Y. TIMES, Mar. 14, 2012, <https://www.nytimes.com/roomfordebate/2012/03/13/ncaa-and-the-interests-of-student-athletes/college-athletes-should-be-compensated>. See Derek Van Rheenen, *Exploitation in College Sports: Race, Revenue, and Educational Reward*, 48 INT’L REV. SOC. SPORT 550, 2 (2012) (noting that critics believe collegiate sport is a “form of systematic exploitation, perpetuated by the . . . (NCAA) and its member institutions against college athletes.”).

conferences,²⁰ for example, the lowest median salary for football coaches was just over \$2.5 million in 2016.²¹ Athletic Directors of these conferences are well-compensated, too. In 2011, athletic directors at FBS Football schools had an average salary of roughly \$515,000.²²

A deeper dive arguably suggests that the commonly cited salary statistics and television contracts are misleading by their failure to indicate the financial prosperity, or lack thereof, of the NCAA membership.²³ For example, of the 351 Division I institutions,²⁴ only 24 reported positive net generated revenues in 2015.²⁵ The median net generated revenues for Division I as a whole hovered around negative \$12 million during that same year.²⁶ The so-called “revenue generating sports” of men’s basketball and football were only profitable at a rate of fifty-five and fifty percent, respectively, during that same period.²⁷

Today, in 2018, the NCAA maintains that collegiate sports are not as profitable as many are led to believe: “[W]omen’s basketball, in particular, almost everywhere generates less revenue than its costs, while men’s basketball

20. Also known as the “Autonomous Five,” the “Power Five,” or the “Big Five,” the five major collegiate conferences are the Pacific Coast Conference (PAC-12); Big 12 Conference; Big Ten Conference; Southeastern Conference (SEC); and the Atlantic Coast Conference (ACC). See Kent Babb, *NCAA Board of Directors Approves Autonomy for ‘Big Five’ Conference Schools*, WASH. POST, Aug. 7, 2014, https://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1_story.html?utm_term=.e7eafbd71834; see also NCAA DIVISION I MANUAL, *supra* note 16, art. 5, 5.3.2.1.1, at 33 (granting the Power Five conferences the authority to adopt or amend legislation autonomously).

21. ESPN.com News Services, *Michigan Wolverines Coach Jim Harbaugh’s Salary Tops List of College Football Coaches*, ESPN (Oct. 26, 2016), http://www.espn.com/college-football/story/_/id/17892134/michigan-wolverines-coach-jim-harbaugh-salary-tops-list-college-football-coaches. The lowest was the ACC at a median salary of \$2,562,485. *Id.* The SEC, Big 12, Pac-12, and the Big Ten had median football coach salaries of \$4,172,500; \$3,540,788; \$3,102,960; and \$2,753,100, respectively. *Id.*

22. Erik Brady et al., *Major College ADs Averaging More Than \$500,000 in Pay*, USA TODAY, Mar. 6, 2013, <https://www.usatoday.com/story/sports/college/2013/03/06/college-athletics-directors-salaries-increase/1964239/>.

23. In a 2015 investigation of the system of college athletics, *The Chronicle of Higher Education* stated, “All those big television contracts might make you believe that college sports pour money back into campus, or are at least self-sufficient [but] [n]othing could be further from the truth” and went on to note that public universities had spent more than \$10.3 billion in subsidizing their sport programs. Wolverson et al., *supra* note 5. See Lesley Ryder, *Don’t Pay College Athletes*, HUFFINGTON POST (Sept. 18, 2011), https://www.huffingtonpost.com/lesley-ryder/pay-college-athletes-_b_968479.html (“The numbers from ESPN can be deceiving. It’s true that big time sports like football and basketball can rake in millions of dollars in revenue, but for most universities that money still isn’t enough to cover department costs.”).

24. *Composition and Sport Sponsorship of the NCAA Membership*, NCAA (Sept. 2018), <http://www.ncaa.org/about/who-we-are/membership/composition-and-sport-sponsorship-ncaa-membership>.

25. FULKS, *supra* note 7, at 12.

26. *Id.* at 19 (emphasis added).

27. *Id.* at 12.

and football are nearly as likely to generate less revenue than costs, even in Division I-FBS.²⁸ The majority of the NCAA membership cannot cover the costs of their athletic programs.²⁹ As one President of a major university puts it, “I’m amazed that intelligent people really believe that athletics makes a lot of money for the university.”³⁰ How then, are student-athletes to be paid? If they are to be paid, which ones? Will men receive more than women?

The reality of the situation is that collegiate athletics is an expensive endeavor that can lead to a large tab to be picked up by the school, and in many cases by the unknowing general student body.³¹ In 2014, Rutgers athletics operated at a deficit of \$28 million.³² The school subsidized \$18.5 million of the deficit while the student-body subsidized the remaining \$9.5 million by way of student fees.³³ A reported ninety percent of Division I schools similarly rely on school subsidies.³⁴ Paying student-athletes will result in the costs of collegiate athletics to be exacerbated, leading to larger bills to be footed by the general student body in increased tuition fees.³⁵ Moreover, budget constraints have forced some schools to drop athletic teams altogether. In 2013, Temple University announced it would drop seven teams to save money.³⁶ More recently, the University of New Mexico announced a reduction in their athletics budget and specifically included the line item “reduction in sports” in the plan.³⁷

28. Defendants’ Opening Statement at 20, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.* (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

29. See Nathan Boninger, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 802 (2018) (“[A]lthough football and men’s basketball may be profitable, additional funds from the university are still generally needed to support athletic departments.”).

30. KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 2, at 48.

31. For example, a 2010 survey revealed that 54% of students at Ohio University were unaware that they were each paying several hundred dollars in general fees to support the athletic department. Matt Krupnick, *Would Your Tuition Bills Go Up if College Athletes Got Paid?*, TIME: MONEY, Nov. 28, 2014, <http://time.com/money/3605591/college-athletes-sports-costs-students/>. See Boninger, *supra* note 29, at 802 (“Athletic departments often receive funds from the school, such as student fees allocated to athletics and direct transfers from the general fund of the institution.”).

32. Steve Berkowitz et al., *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY, July 1, 2013, <https://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>.

33. *Id.*

34. Phil Mushnick, *Colleges Cutting Sports for ‘Revenue’ Doesn’t Add Up At All*, N.Y. POST, Dec. 28, 2013, <http://nypost.com/2013/12/28/colleges-cutting-sports-for-revenue-doesnt-add-up-at-all/>.

35. Dorfman, *supra* note 17 (“Given that the colleges that lose money on athletics [] subsidize their programs with money from regular student tuition, increasing pay to student athletes could mean tuition increases at many colleges.”).

36. *Id.*

37. Geoff Grammer, *UNM Regents Approve Athletics Budget Calling for ‘Reduction in Sports’*, ALBUQUERQUE J., Apr. 17, 2018, <https://www.abqjournal.com/1160076/unm-board-of-regents-approve->

University of New Mexico's reduction is being made to, in part, repay the \$4.7 million that was borrowed from the main campus.³⁸ One of the teams expected to be cut is men's soccer, which has played in two Final Fours, a national championship, and has been a conference champion seven times since 2001.³⁹ The University of California at Berkeley Athletic Department finished the 2017 fiscal year with a \$16 million deficit and speculation that the University may need a century to pay off their \$440 million in debt despite the main campus agreeing to assume more than half of that debt—\$9.5 million in annual debt service payments.⁴⁰ Temple University and University of New Mexico are two examples, of many, where schools that are already under tight budgetary constraints have stopped providing opportunities to deserving student-athletes to limit costs.⁴¹ UC Berkeley may be the next to join that group.

The funds generated from the revenue generating sports of men's basketball and FBS football are partially used to subsidize all other sports.⁴² And, because the non-revenue generating sports are reliant on football and basketball revenues, it is typically those non-revenue generating sports that get cut when football and basketball are not as lucrative.⁴³ Increased costs, such as those resulting from student-athlete compensation, will inevitably lead to more of

athletics-budget-plan-calling-for-reduction-in-sports.html?utm_source=amp&utm_medium=more%20link&utm_campaign=amp.

38. *Id.*

39. *Id.*

40. Justice Delos Santos, *UC Berkeley to Pay \$238M of Cal Athletics Debt from Stadium Renovations*, DAILY CALIFORNIAN (Jan. 18, 2018), <http://www.dailycal.org/2018/01/17/central-campus-take-chunk-cal-athletics-debt/>.

41. Liz Clarke, *Maryland Athletics' Financial Woes Reveal a Broken College Sports Revenue Model*, WASH. POST, June 28, 2012, https://www.washingtonpost.com/sports/colleges/maryland-athletics-financial-woes-reveal-a-broken-college-sports-revenue-model/2012/06/28/gJQAmEvx9V_story.html?utm_term=.8a4c154c5d2d (noting that 205 NCAA Division I teams have been dropped over a five-year period due to athletic department budgetary constraints).

42. Wladimir Andreff, *Sport and Financing*, in HANDBOOK ON THE ECONOMICS OF SPORT 271, 281 (Edward Elgar 2006). It has been this way for a while. In 1994, former athletics director at the University of Mississippi, Warner Alford, commented on the issue: “[I]t’s tough to get new women’s sports fully funded when only football and men’s basketball bring in revenue.” NCAA, *Former AD: Funding the Biggest Stressor*, NCAA, Sep. 19, 1994, at 1, available at <https://ia801400.us.archive.org/31/items/NCAA-News-19940919/NCAA-News-19940919.pdf>.

43. See Ken Belson, *With Revenue Down, Colleges Cut Teams Along with Budgets*, N.Y. TIMES, May 3, 2009, <http://www.nytimes.com/2009/05/04/sports/04colleges.html> (likening football and basketball to “sacred cows” and implying they will not be cut because of their ability to generate revenue, among other things); see also Wolverson et al., *supra* note 5 (mentioning that subsidies make thousands of athletic scholarships possible, without which would cause “many nonrevenue sports like track and field and swimming [to be] cut.”).

these cuts.⁴⁴ The current president of the NCAA, Mark Emmert, recently noted this very sentiment:

If you were going to move into a model where you were just paying football and basketball athletes . . . the way athletic departments are going to do that is they are going to eliminate other sports. There is really no other way for them to do it. If you just look at the revenue from football you might be able to figure out how to pay football players but you would eliminate all the other sports that are out there in order to do that and take away opportunities from men and women.⁴⁵

Critics argue that the NCAA leads a cartel of colleges and universities that collectively underpays its primary labor force in revenue generating sports.⁴⁶ As this Comment will argue, it is somewhat misleading to call the NCAA a “cartel.”⁴⁷ Team sports leagues of any kind must introduce restraints if they are to operate effectively.⁴⁸ For example, participants must agree to be bound by rules and submit themselves to disciplinary procedures; teams must agree to a system for scheduling games and determining a champion; and, in some cases,

44. Indeed, nearly half of all FBS Presidents have expressed concern that the current status of intercollegiate athletics will affect the number of varsity sports their institution can retain in the future. *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, *supra* note 2, at 24; *see also* Bob Wuornos, *The Future of ‘Other’ College Sports*, NAT’L REV., Jan. 17, 2015, <http://www.nationalreview.com/article/411740/future-other-college-sports-bob-wuornos> (explaining that “anyone who understands the systemic dynamics of [Division I] sports knows that [student-athlete compensation] will inevitably create a competitive crisis. . . . [A]thletic directors will be pressed to make up the difference by cutting the teams that big-money sports once subsidized.”); Dorfman, *supra* note 17 (“Adding direct pay will put financial pressure on schools to drop non-revenue sports.”); Jon Solomon, *If Football, Men’s Basketball Players Get Paid, What About Women?*, CBS SPORTS (June 5, 2014), <https://www.cbssports.com/college-football/news/if-football-mens-basketball-players-get-paid-what-about-women/> (noting NCAA conference commissioners, university presidents, and athletic directors whom have suggested that paying players could result in women’s sports and non-revenue men’s sports being cut).

45. NCAA (@NCAA), TWITTER (Mar. 31, 2018, 9:48 AM), <https://twitter.com/NCAA/status/980124563353886720> (statement by NCAA President, Mark Emmert).

46. *See* Karl W. Einolf, *The Economics of Collegiate Athletics*, in HANDBOOK ON THE ECONOMICS OF SPORT 379 (Edward Elgar 2006); *see also* Sandy, *supra* note 12, at 390 (“The NCAA has been described as a surplus-maximising cartel run primarily for the financial benefit of a small coterie of senior NCAA employees, former employees, and prominent athletic directors and coaches.”).

47. ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 6 (1999) (“[B]ig-time college sports is organized as a cartel . . . through the NCAA”); Andres Rodriguez Brauer, *The NCAA Cartel*, ECON. REV. at NYU (Apr. 19, 2017), <https://theeconreview.com/2017/04/19/the-ncaa-cartel/> (describing the NCAA as an “exploitive cartel”).

48. Stefan Szymanski, *The Sporting Exception and the Legality of Restraints in the US*, in HANDBOOK ON THE ECONOMICS OF SPORT 730, 730 (Edward Elgar 2006) (discussing the sports leagues as a joint venture, which may in all likelihood require the agreement of restraints among the members). *See* Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 101 (1984) (noting that some restraints “must be agreed upon” if competition is to continue to effectively exist amongst the NCAA’s member institutions).

agreements must be made to restrain unbridled competition because it can lead to an environment that lacks competitive balance—where a few teams dominate all others—which is bad for business of sport.⁴⁹ The NCAA’s compensation restrictions are one example of a restraint that is made to mitigate the possibility of monopolies. Compensation restraints in sport have been around since before the NCAA came into existence. Indeed, Major League Baseball began instituting a compensation restraint—known as the reserve clause—in 1879.⁵⁰ The Supreme Court has refused to overturn the reserve clause.⁵¹

Nonetheless, critics—including some student-athletes themselves—are bringing their claims to be heard in a court of law. Broadly speaking, the claims allege that various NCAA rules constitute an unreasonable restraint on trade, which violates federal antitrust law. Recently, in *O’Bannon v. National Collegiate Athletic Ass’n*, several current and former men’s basketball and football student-athletes (the “Plaintiffs”) made this very claim.⁵² Specifically, the Plaintiffs alleged that NCAA rules barring student-athletes from being paid for their names, images, and likenesses (“NILs”) constitute as a violation of Section 1 of the Sherman Act.⁵³ Initially, the Plaintiffs were successful. The district court applied antitrust analysis⁵⁴ and concluded that the NCAA was indeed in violation of federal antitrust law and, while the NCAA could cap the amount of compensation men’s basketball and football student-athletes receive,

49. Szymanski, *supra* note 48.

50. *Id.* at 731. The reserve clause tied a player to the one specific team that held that player’s contract the previous season. Lawrence Hadley, *The Reserve Clause in Major League Baseball*, in HANDBOOK ON THE ECONOMICS OF SPORT 619 (Edward Elgar 2006). If a player wanted to play Major League Baseball, he could only play for the one team that held his contract, unless he was traded at the owner’s discretion. *Id.* Although it is not facially a compensation restriction, the reserve clause has the same effect by reducing player wages due to an elimination of competition on the owners’ side of the labor market. *Id.*

51. The reserve clause was tested in 1922 and again in 1972. In the first case, the Supreme Court decided that antitrust laws do not apply to baseball because it does not involve interstate trade. *Federal Baseball Club v. Nat’l League*, 259 U.S. 200 (1922). In the second case, the reserve clause was again left untouched; instead leaving the rule to Congress to overturn. *Flood v. Kuhn*, 107 U.S. 258 (1972). The clause was eventually overturned by a private arbitrator. David Greenberg, *Why Does Baseball Have An Antitrust Exemption?*, SLATE (July 19, 2002), <https://slate.com/news-and-politics/2002/07/why-does-baseball-have-an-antitrust-exemption.html>. *But see* *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1175 (D.C. Cir. 1978) (affirming the finding that the NFL Draft serves as a compensation restriction and is thus a violation of Sherman antitrust law); *Robertson v. Nat’l Basketball Ass’n*, 389 F. Supp. 867, 890-91 (S.D.N.Y. 1975) (noting that many NBA compensation-related rules appear to be per se violative of the Sherman Act).

52. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

53. *Id.* at 963. As will be addressed later in this Comment, Plaintiffs also alleged that limiting scholarships to Grant-in-Aid, as opposed to the full cost of attendance, is violative of federal antitrust law. *Id.* at 982-93.

54. The analysis applied, known as the Rule of Reason, will be thoroughly discussed later in this Comment.

it could not set the cap below the cost of attendance.⁵⁵ Significantly, the court also held that the NCAA membership must permit cash payments—not to be capped at less than \$5,000—into a trust for each year that the men’s basketball and football student-athlete remained academically eligible, which was to be payable when the student-athlete left the school or their eligibility expired.⁵⁶ Under this holding, for the first time the student-athletes were entitled to compensation specifically related to the added revenues they bring to their institution.

With respect to the Plaintiffs’ compensation claim, their success was short-lived. On appeal, the Ninth Circuit reversed, in part, the holding of the lower court.⁵⁷ The appellate court agreed that the NCAA was in violation of federal antitrust law and that schools should be permitted to provide aid up to the full cost of attendance.⁵⁸ The court disagreed with the lower court’s decision to allow compensation to be placed into a trust and distributed to student-athletes upon graduation or expiration of eligibility.⁵⁹ The court held that allowing pure cash compensation fails to preserve amateurism, which is founded on the idea that student-athletes compete as an avocation rather than as professionals.⁶⁰ Thus, compensation unrelated to educational expenses, such as a trust fund drawn from licensing agreements, is not an available remedy.

The Supreme Court denied certiorari⁶¹ and the Plaintiffs ultimately walked away with the opportunity to receive financial aid up to the cost of attendance, but nothing more. I believe this was the right outcome. The courts have a long history of recognizing amateurism as a justification for NCAA rules that restrict compensation.⁶² Consequently, the Ninth Circuit did what the district court

55. *Id.* at 1008-09.

56. *Id.* at 1009.

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

58. *Id.* at 1072, 1075-6.

59. Or, if the student-athlete never graduates, it is upon expiration of the student-athletes’ eligibility. *Id.* at 1079.

60. *Id.* at 1078.

61. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

62. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 117 (1984) (“It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among *amateur* athletic teams”) (emphasis added); *Id.* at 102 (“In order to preserve the character and quality of the [college sports], athletes must not be paid, must be required to attend class, and the like.”); *see also Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 344-45 (7th Cir. 2012) (“The NCAA’s limitation on athlete compensation . . . directly advances the goal of maintaining ‘a clear line of demarcation between intercollegiate athletics and professional sports,’ and thus is . . . aimed at preserving the existence of amateurism and the student-athlete”) (citations omitted) (quoting *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1089 (7th Cir. 1992)); *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (noting that amateur eligibility centered around amateurism allows the NCAA product

should have done by recognizing the consistency of the courts' jurisprudence and holding that "cash sums untethered to educational expenses . . . is a quantum leap" from the NCAA's current amateurism preserving policy.⁶³

Moreover, an argument originally made by the National Football League (NFL) in *Sullivan v. NFL* would serve to justify the compensation restraints equally as well if borrowed by the NCAA.⁶⁴ In *Sullivan*, the NFL was sued for antitrust violations due to a policy that restricted owners from offering to sell public stock in an NFL team (the "Public Ownership Policy").⁶⁵ In response, the NFL claimed that its Public Ownership Policy "enhanced [its] ability to effectively produce and present a popular entertainment product unimpaired by the conflicting interests that public ownership would cause."⁶⁶ Allowing publicly owned teams, the NFL argued, would conflict with the long-term interests of the league as a whole due to short-term dividend expectations of public shareholders.⁶⁷ The NFL argued that this justification should be considered in the court's antitrust analysis.⁶⁸

The NFL's argument was significant because traditional antitrust inquiries involve restrictions, and the justifications for those restrictions, that reside in the same relevant market. Here, the NFL argued that restrictions in the relevant market of public ownership could be justified by the ancillary benefits to the closely related market of "NFL football in competition with other forms of entertainment."⁶⁹ The district court refused to recognize the NFL's justification, stating "a jury cannot be asked to compare what are essentially apples and oranges."⁷⁰ On appeal, the First Circuit disagreed, noting that antitrust analysis "seems to contemplate the balancing of a wide variety of factors and considerations, many of which are not necessarily comparable or correlative"⁷¹ and concluded that it is appropriate to consider those ancillary benefits in one

to remain distinct from its professional counterpart and reasonably furthers the NCAA goal of integrating athletics with academics).

63. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1078 (9th Cir. 2015).

64. *Sullivan v. Nat'l Football League*, 34 F.3d 1091 (1st Cir. 1994).

65. *Id.* at 1096.

66. *Id.* at 1113.

67. *Id.* at 1102.

68. *Id.*

69. *Id.* at 1112.

70. *Id.* at 1111.

71. *Id.* at 1112 (referring to Justice Brandeis' famous formulation of the rule of reason (citing *Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918))).

market as a justification for restraints in another market so long those markets are closely related.⁷²

The *Sullivan* holding presents the NCAA with an opportunity to make the colorable argument that its compensation restrictions in the plaintiffs' markets of men's basketball and FBS football can be justified by the ancillary benefits that these restrictions provide in the closely related markets of non-revenue generating sports. Specifically, that benefit is maintaining equality of educational access and opportunity so that student-athletes may enjoy the benefits of a worthy higher education.⁷³

Part II of this Comment discusses the history of the NCAA and provides the framework for analysis of antitrust claims under the Sherman Act. Part III examines past NCAA antitrust cases, the recent *O'Bannon* decision, and the currently pending⁷⁴ NCAA antitrust case.⁷⁵ Part IV argues that the courts prior decisions necessarily require a finding that amateurism justifies the NCAA's compensation restrictions. Part V contends that, even if the courts are unpersuaded by the weight of their prior decisions, the NCAA can point to the ancillary benefits of its compensation restrictions as justification. Finally, Part VI applies the ancillary benefits argument to the NCAA's current antitrust litigation, *Alston*.⁷⁶

72. *Id.* at 1113. Notably, the court in *Sullivan* cites to the seminal *Bd. of Regents* decision as "one of the more extensive examples . . . where the Court considered the value of certain procompetitive effects that existed outside of the relevant market in which the restraint operated." *Id.* at 1111. See *L.A. Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1397 (directing the finder of fact to "balance the gain to interbrand competition against the loss of intrabrand competition," where the two types of competition operated in different markets).

73. *U.S. v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993) ("It is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education.").

74. The decision is pending at the time of this writing. It is expected that the decision will be made by the time this Comment is published. See Michael McCann, *Alston v. NCAA: Analyzing College Sports' Grant-in-Aid Trial*, SPORTS ILLUSTRATED, Sept. 4, 2018, <https://www.si.com/college-football/2018/09/04/alston-v-ncaa-trial-news-updates-ncaa-cost-attendance> (nothing that a ruling on the current NCAA antitrust litigation is likely to be made sometime in November 2018).

75. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston)*, No. 4:14-md-02541-CW (N.D. Cal. argued Sept. 25, 2018). For simplicity, the case's colloquial name, *Alston*, will be used throughout this Comment.

76. *Id.*

II. HISTORY

A. Pre-NCAA Collegiate Sport

The first recorded intercollegiate athletic event occurred in 1852 when Harvard and Yale organized a regatta.⁷⁷ The event was commercially sponsored and, to gain an edge over the Yale Bulldog competition, Harvard enlisted the services of a non-student coxswain.⁷⁸ Like so many of today's collegiate contests, the first intercollegiate athletic event "was characterized by commercialization, crowds of spectators, prize money, and an eligibility question."⁷⁹ Robert Evans, reflecting on the history of the intercollegiate sports, states: "The problem of misrepresentation, illegal recruiting, and payment of athletes isn't a new one for big-time college athletics Gymnasium walls have echoed with similar cries ever since the humble beginnings of college sports."⁸⁰

By 1870, collegiate athletics had taken their place in American college life.⁸¹ It was during this year that the first intercollegiate football game occurred.⁸² Baseball was played in all of the prominent eastern colleges.⁸³ Rowing, too, maintained its popularity after the Harvard-Yale regatta of 1852.⁸⁴ The increased prevalence of intercollegiate competition came with an increased desire to form associations that would allow teams to meet each other in athletic competition on a uniform and accepted basis.⁸⁵ To that end, the Intercollegiate Football Association, Rowing Association of American Colleges, and Intercollegiate Association of Amateur Athletes of America were all founded

77. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988-90 (1987).

78. *Id.* at 989. Harvard won. CARNEGIE REPORT, *supra* note 7, at 18. See Sandy, *supra* note 12, at 396 ("At the beginning of intercollegiate athletics some colleges recruited athletes who had no connection with the college, they simply wore the school's jersey for pay.").

79. Smith, *supra* note 77, at 989 (quoting GEORGE MASON UNIV. & AM. COUNCIL ON EDUC., ADMIN. UNIV. PROGRAMS: INTERNAL CONTROL & EXCELLENCE 18 (1986)). These types of eligibility questions would persist. In the latter part of the nineteenth century, a successful student-athlete at Yale was provided with a suite of rooms in the dorm, free meals, a scholarship, the ability to sell programs for profit, was made an agent of the American Tabaco Company, where he received a commission, and a ten-day paid vacation in Cuba. *Id.* at 989 n.23.

80. ROBERT J. EVANS, BLOWING THE WHISTLE ON INTERCOLLEGIATE SPORTS 7 (1974).

81. CARNEGIE REPORT, *supra* note 7, at 18.

82. The game was between Rutgers and Princeton, which was spurred by the loss of Rutgers to Princeton in a baseball game. *Id.* at 19. Rutgers won. *Id.*

83. *Id.* at 20.

84. *Id.* at 19.

85. *Id.* at 21.

during the 1870s.⁸⁶ None of the associations were successful however, as partisanship, rivalry, and inconsistency would prove to be their undoing.⁸⁷

The 1880s saw collegiate athletic competition more fully assume the commercial nature that continues to be present today, due in large part to the influences of university alumni and the acquiescence of university faculty.⁸⁸ Colleges began charging for admission to contests and soliciting financial support from alumni.⁸⁹ The increased funding allowed for coaches that were more technical and were paid salaries.⁹⁰ Salaried coaches led to intensified and elaborated training for student-athletes.⁹¹ The reputation of a college came to be predicated upon its victory count.⁹² Notions of loyalty, power, and social prominence led to the continued generous contributions by alumni to college athletic programs.⁹³

The increasingly blatant commercialization of collegiate athletics did not go unchallenged. Harvard President Eliot's annual report from 1892-93, which set forth the benefits and disadvantages of college athletics, provided the groundwork for a bitter attack on the then-status of college athletics.⁹⁴ The annual report led to a broad controversy, with critics claiming that college athletics is filled with dishonesty; betting and gambling; recruiting and subsidizing; employment and payment of the wrong kind of men as coaches; extravagant expenditures of money; and the general corruption of youth.⁹⁵ Defenders of collegiate athletics (many being college graduates and former players) were quick to point to the vigor and mental alertness of athletes; their "manly character;" their loyalty; and the qualities of leadership that participation in athletics had engendered.⁹⁶ Defenders scoffed at the notion that any college athlete could be paid.⁹⁷

Disagreement regarding the merit, or lack thereof, in collegiate athletics would continue. Agreement did exist, however, regarding the need for centralized agencies that could handle the relationships between colleges and

86. *Id.* at 20.

87. *Id.* at 21.

88. *Id.* at 23.

89. *Id.*

90. *Id.* at 22.

91. *Id.*

92. *Id.* at 24.

93. *Id.* at 23.

94. *Id.* at 24.

95. *Id.* at 25.

96. *Id.*

97. *Id.*

universities.⁹⁸ Three organizations were founded during the last decade of the nineteenth century in an effort to meet this need.⁹⁹ Namely, these were the Southern Intercollegiate Athletic Conference, the Intercollegiate Conference (known today as the “Big Ten”), and the Maine Intercollegiate Track and Field Association.¹⁰⁰ These organizations paved the way for the first nationwide attempt to unite in one body all the reputable colleges and universities supporting intercollegiate competition—the NCAA.¹⁰¹

B. The NCAA

In 1905, alarmed by eighteen deaths and over one hundred injuries in intercollegiate football, President Theodore Roosevelt invited officials from major football programs to participate in a White House conference.¹⁰² The conference was intended to reduce the unsavory violence and mayhem that characterized collegiate football contests.¹⁰³ Additionally, President Roosevelt was concerned with the preservation of amateurism.¹⁰⁴ The meeting ultimately led to the formation of the Intercollegiate Athletic Association of the United States, which was officially renamed the National Collegiate Athletic Association (NCAA) in 1910.¹⁰⁵ The Association had sixty-two original members and was organized specifically to eliminate that “unsavory violence” and to “preserve amateurism.”¹⁰⁶

The NCAA spent its first several years organizing and promoting championship events,¹⁰⁷ leaving the actual governance and running of

98. *Id.* at 26.

99. *Id.*

100. *Id.* at 27.

101. *Id.*

102. Smith, *supra* note 77, at 990. Violence in football was not uncommon. In the 1880’s, then-Harvard President, Charles William Eliot, described football at “brutal” and formally abolished football for two years in 1884. CARNEGIE REPORT, *supra* note 7, at 21-22. See Wray Vamplew, *The Development of Team Sports Before 1914*, in HANDBOOK ON THE ECONOMICS OF SPORT 435, 438 (Edward Elgar 2006) (“[American Football] was a brutal but popular game with many injuries and deaths and in 1905, following a season in which 18 college players had died, [the NCAA] was formed to overhaul the rules.”).

103. James V. Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L.J. 9, 12 (1985).

104. *Id.*

105. Smith, *supra* note 77, at 991. In order to avoid confusion, the NCAA will be referred to as the NCAA even when discussing the Association during the years of 1905 to 1910. See O’Bannon v. Nat’l Collegiate Athletic Ass’n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014) (“The NCAA was founded in 1905 by the presidents of sixty-two colleges and universities in order to create a uniform set of rules to regulate intercollegiate football.”).

106. Smith, *supra* note 77, at 991; CARNEGIE REPORT, *supra* note 7, at 27.

107. Smith, *supra* note 77, at 991.

intercollegiate athletics in the hands of the students as it had always been.¹⁰⁸ In 1929, the NCAA was forced to reconsider this structure due to a damning three-year study by the Carnegie Foundation for the Advancement of Education (the “Carnegie Report”):

[A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth . . . to exercise at once the body and the mind and to foster habits [of] both bodily health and . . . high qualities of character¹⁰⁹

In response, the NCAA restructured recruiting rules, and coaches and administrators began to take a major role in operating and recruiting at each athletic program.¹¹⁰

Scandals would continue to occur however,¹¹¹ prompting the NCAA to enact the Sanity Code in 1948, which was created to “alleviate the proliferation of exploitive practices in the recruitment of student-athletes.”¹¹² The Sanity Code was short-lived,¹¹³ being replaced in 1951 with the Committee on Infractions, an enforcement body with the authority to penalize members involved in rules violations.

108. It was status quo for intercollegiate athletics to be governed and ran by the students. It had been that way since the 1850s:

The rowing clubs had set a precedent for student-run organizations in the early days of intercollegiate athletics, raising their own funds, purchasing equipment, and constructing facilities. In the 1850s the boating organizations were initiated, coached, administered, and financed by students. The captain was indispensable. He assured the continuance of the organization, served as its coach and administrator, organized fund raisers, and promoted his club; he was the sole arbiter of the athletic program, although the team managers controlled the scheduling of contests and the purse strings.

Smith, supra note 77, at 989 n.21. See CARNEGIE REPORT, *supra* note 7, at 21 (noting how management of American college athletics appears to have been entirely in the hands of the students until the late nineteenth century).

109. *Smith, supra* note 77, at 991 (alteration in original).

110. *Id.* at 992.

111. For instance, college athletics faced a major gambling scandal in 1945 when a team was caught shaving points to keep the spread margin down. Ironically, the worst gambling scandal occurred *after* the Sanity Code was introduced in 1948, when thirty players and seven schools were found to have conspired to fix games in 1951. *Smith, supra* note 77, at 989 n.39.

112. *Id.* at 992.

113. The Sanity Code was ineffective because its only recourse was to expel members from the NCAA in the event that a violation was uncovered. *Id.* at 993.

Under the leadership of newly appointed Executive Director, Walter Byers, the NCAA marked a new beginning.¹¹⁴ The power of the new Committee on Infractions was complemented by a new enforcement division coupled with a newfound financial power due to the successful negotiations of the first collegiate football television contract, valued at over one million dollars.¹¹⁵ The NCAA began to play a dominant role in the governance of intercollegiate athletics for the first time.¹¹⁶ This dominance, however, came with competing criticisms that persist today. One set of criticisms asserted that intercollegiate athletics had been commercialized to the point that it was little more than a big business masquerading as an educational enterprise.¹¹⁷ On the other hand, the NCAA was criticized for having enforcement efforts that were too harsh on some schools and not harsh enough on others.¹¹⁸ The NCAA attempted to abate the criticisms with another round of major reform efforts to no avail.¹¹⁹

Legislators, too, were critical. The NCAA was the subject of a congressional investigation into the alleged unfairness of its enforcement procedures and processes in 1978.¹²⁰ In response, the NCAA again amended its procedures.¹²¹ Criticisms continued to grow and reached a fever pitch when an investigation into the drug-related death of a student-athlete revealed a lack of academic integrity at the University of Maryland.¹²² The revelation led to calls for organized protests over abuses in athletic programs and demands that major sports powers cut their athletic budgets.¹²³

Determined to change course, the university presidents called a special convention in June 1985.¹²⁴ Like the NCAA, the university presidents

114. *Id.*

115. *Id.*

116. One of the major governance changes by the NCAA was establishing divisions within college athletics in an effort to group institutions of similar sizes for the purpose of maintaining a similar level of competitiveness. *Id.*

117. *Id.* at 994.

118. Criticism of the NCAA grew in force when, in 1976, the NCAA's rule enforcement powers expanded, allowing for schools to be directly penalized and administrators, coaches and student-athletes to be indirectly penalized as well. *Id.*

119. In 1973, the NCAA formed a special committee to study the criticized enforcement process and ultimately decided to separate the investigative and prosecutorial roles in the Committee on Infractions. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 995 (noting demands that were made by the Carnegie Foundation for the Advancement of Teaching).

124. Smith, *supra* note 77, at 996. See Paul Hardin, *Commission Unified on Proposals*, NCAA NEWS, June 19, 1985, at 2 <https://ia902303.us.archive.org/30/items/NCAA-News-19850619/NCAA-News->

themselves had been feeling competing pressures. On one hand, the university faculty demanded that the presidents recognize their academic mission by de-emphasizing major, “winning” athletic programs that were commercial in both appearance and function.¹²⁵ On the other hand, the university alumni, boosters, board of trustee members, and state legislators pressured the presidents to produce winning athletic programs.¹²⁶ The presidents recognized that if reform was to occur successfully, it needed to be on a national level, as a collective unit.¹²⁷ Competitive pressures of major athletics programs made it impossible to implement major reform on individual campuses, where powerful alumni, boosters, legislators and trustees used their positions to coerce presidents to maintain a competitive edge as paramount, regardless of ethics.¹²⁸ At the June 1985 special convention, the university presidents, through the Presidents Commission, shifted control over intercollegiate athletics by adopting key enforcement legislation in an effort to enhance academic integrity in their athletic programs.¹²⁹ The legislation effectively placed the Presidents and Chancellors in control of the NCAA, replacing a regime of individual accountability:

[The Presidents] are deeply concerned that there be sufficient institutional control of athletics programs, [with] apparent lack of such control in many instances leading to problems for academic values in higher education. Presidents are heartsick

19850619.pdf. (comment by Drew University President Paul Hardin) (“Never before has the NCAA convened . . . at the request of its presidents and never to deal with an agenda proposed by the presidents.”).

125. Smith, *supra* note 77, at 996.

126. *Id.* at 995. The alumni, boosters, board of trustee members, and state legislators were often “power-brokers” that could provide important funds for the university, which could be used to build a science building, for example. Walter Byers, *Executive Director Assesses Status of Intercollegiate Athletics*, NCAA NEWS, Sept. 22, 1986, at 4, <https://ia801402.us.archive.org/1/items/NCAA-News-19860922/NCAA-News-19860922.pdf>. University presidents were placed in the difficult position of having to direct these influential individuals not to have a hand in the operations of the athletic program while also asking for large donations. *Id.* Unprincipled head coaches would seek to bypass the university president and deal directly with the influential individual, creating pressure on the university president to comply. *Id.*

127. Smith, *supra* note 77, at 994.

128. *Id.* at 996-97 (describing the “association syndrome” and its ability to be used to promote values as a collective unit, which could not be promoted in individually due to pressures of power university actors). In support of major reform, then NCAA President Walter Byers described those pressures facing university presidents:

It is difficult sometimes for a [president] who longs for funds to build a new science building to offend one of those power-brokers by directing him not to have a hand in the operations of the athletics program. And it is because of this leverage situation that the popular, unprincipled head coach gets what he wants by dealing directly with the big-time supporter, bypassing the university and athletics administration.

Byers, *supra* note 126.

129. Smith, *supra* note 77, at 997-98.

about the serious violation of rules which are occurring by coaches, alumni and other boosters and are determined to stop them We can make it very clear by our actions here today . . . that the nation's presidents and chancellors are going to determine the direction and the major policies of college athletics, and that we are not going to condone any failure to comply with those policies.¹³⁰

This paradigm shift was timely. A few years prior to the special convention, one coach told an NCAA representative, "While you're out making new rules, we the coaches are meeting at a hotel up the street trying to figure how to get around them."¹³¹

Once the legislation was adopted, the NCAA became a vehicle driven by the universities as a collective unit. The fear that unilaterally adopting legislation would result in a diminished capacity to compete was made less of an issue because legislation would be adopted universally among the NCAA member institutions.

Today, the corporate structure of the NCAA mirrors those significant changes made by the President's Commission in 1985. The highest governance body in the NCAA, the Board of Governors, consists of twenty members, sixteen of whom are Presidents or Chancellors of various large and small colleges throughout the country.¹³² Those sixteen individuals are the only members on the board who are entitled to vote on NCAA legislation, with the exception that the President of the NCAA, currently Mark Emmert, may vote in the case of a tie.¹³³ Thus, the NCAA is simply a conduit by which the universities regulate themselves—a central location where the university presidents and chancellors can meet to discuss, and agree on, binding legislation.¹³⁴

130. *Convention Success Spurs Future Commission Actions*, NCAA NEWS, July 3, 1985, at 1, 10, <https://ia601400.us.archive.org/22/items/NCAA-News-19850703/NCAA-News-19850703.pdf> (statement by NCAA Presidents Commission Chair John W. Ryan). See Smith, *supra* note 77, at 997 ("[t]here is no doubt who is running the show in college sports. It's the college presidents.") (quoting Associated Press sportswriter, Doug Tucker).

131. J. WADE GILLEY ET AL., ADMINISTRATION OF UNIVERSITY ATHLETIC PROGRAMS: INTERNAL CONTROL & EXCELLENCE 25 (1986).

132. NCAA, *Board of Governors*, http://web1.ncaa.org/committees/committees_roster.jsp?Committee-Name=EXEC (last visited Dec. 13, 2018).

133. *Id.*

134. Indeed, it has been accepted that the NCAA can be viewed as a body that "reflects the interests of its member institutions, the colleges, and is directly controlled by college presidents." Sandy, *supra* note 12, at 390. The opposing view is that the NCAA is a "surplus-maximising cartel run primarily for the financial benefit of a small coterie of senior NCAA employees, former employees, and prominent athletic directors and coaches." *Id.*

C. Amateurism

As mentioned in the prior section of this Comment, the NCAA was founded in large part upon the idea of preserving amateurism. The Harvard-Yale regatta of 1852 was significant not only in the fact that it institutionalized a tradition of intercollegiate competition in this country—a tradition of utmost importance to this very day—but also because it put on display the result when both commercialization and competition are mixed: a win at all costs environment.¹³⁵ President Roosevelt expressly acknowledged the issue of amateurism preservation when he called the White House meetings that led to the formation of the NCAA. The lack of a commonly held understanding of what it means to be a student-athlete plagued intercollegiate competition in the years leading up to the formation of the NCAA and continued to be problematic for decades later.¹³⁶ The need to establish boundaries around who could participate in intercollegiate sport, and what their goals ought to be, had to be determined if fair competition was ever to be achieved. It is through the concept of amateurism that the NCAA seeks to set these boundaries. And, when one considers the reports that a standard basketball player in the late 1970's and 80's received \$10,000—or that a top football player might receive \$25,000—the need for those boundaries of amateurism become critical.¹³⁷ This section seeks to review the NCAA's approach toward amateurism and how that concept has been received by critics.

Article VI of the NCAA's original constitution was written to, in part, prevent the participation by non-amateurs.¹³⁸ A well-conceived definition of amateurism remained elusive however, prompting the NCAA to establish a committee to affirmatively define what an amateur is.¹³⁹ The NCAA did just

135. GILLEY ET AL., *supra* note 131, at 17. Indeed, it has been acknowledged that commercialism in collegiate athletics has led to widespread rule-breaking:

[I]t is too much to expect that human nature should not seek to evade detailed regulations, especially when these regulations appear in certain cases to place a premium upon their evasion. With the rise of commercialism in college athletics, its temptations became in many instances too strong to be resisted. The result has been a great increase in the number of ways by which, sometimes even under the guise of philanthropy, the amateur convention is set at naught.

CARNEGIE REPORT, *supra* note 7, at 50.

136. CARNEGIE REPORT, *supra* note 7.

137. GILLEY ET AL., *supra* note 131, at 32.

138. CARNEGIE REPORT, *supra* note 7, at 42.

139. *Id.*

that, becoming the first—domestically or abroad¹⁴⁰—to affirmatively define what it means to be an amateur in 1909:

An amateur in athletics is one who enters and takes part in athletic contests purely in obedience to the play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived. The natural or primary attitude of mind in play determines amateurism.¹⁴¹

Importantly, the NCAA also defined what it means to be a professional athlete, distinguishing the concepts of amateurism and professionalism:

A professional in athletics is one who enters or takes part in any athletic contest from any other motive than the satisfaction of pure play impulses, or for the exercise, training, or social pleasures derived, or one who desires and secures from his skill or who accepts of spectators, partisans, or other interests, any material or economic advantage or reward.¹⁴²

It is significant that the NCAA not only defines amateurism, but also professionalism in athletics, with the primary distinction being the acceptance of pecuniary gain.¹⁴³ Taken together, the two definitions produce an important takeaway: Amateurs don't get paid.¹⁴⁴

In 1916, the NCAA, along with various other organizations,¹⁴⁵ established a national standard of what it means to be an amateur: “An amateur athlete is defined as one who participates in competitive physical sport only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom.”¹⁴⁶

Today, the NCAA maintains a definition of similar thrust, although worded differently:

140. *Id.* at 42, 50 (noting that the NCAA was the first to affirmatively define amateurism in the United States and that the conception of the amateur in international sport owes its definition to amateurism in the United States).

141. *Id.* at 42 (“[The NCAA definitions] make up, so far as can be ascertained, the first attempt affirmatively to define an amateur.”).

142. *Id.* (emphasis added).

143. This distinction exists today. NCAA DIVISION I MANUAL, *supra* note 16, art. 12, 12.01.2, at 61 (“The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.”).

144. The Ninth Circuit relied on this concept expressly in the most recent antitrust litigation regarding student-athlete pay. *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

145. Namely the Amateur Athletic Union (AAU) and the Intercollegiate Association of Amateur Athletes of America (IAAAA). CARNEGIE REPORT, *supra* note 7, at 44.

146. *Id.*

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.¹⁴⁷

The concept of amateurism has thus been present since the NCAA's inception in 1906. The sincerity with which the NCAA actually observes and enforces amateurism is subject to open debate. Critics claim that amateurism is simply the veil behind which the NCAA hides as it profits off the backs of student-athletes with unequal bargaining power.¹⁴⁸ In some instances these critiques seem warranted. For example, the NCAA allows student-athletes to be paid by their respective countries for participation in the Olympics.¹⁴⁹ In 2016, a gold, silver, or bronze medal resulted in a payout of twenty-five thousand, fifteen thousand, or ten thousand dollars, respectively.¹⁵⁰ And, where the student-athlete earns multiple Olympic medals, those figures add up.¹⁵¹

147. NCAA DIVISION I MANUAL, *supra* note 16, art. 2, 2.9, at 4. The distinction of amateurism and professionalism can be compared to that of the distinction between love and money. MARJORIE GARBER, ACADEMIC INSTINCTS 5 (2001). Indeed, the word amateur is derived from the Latin word *Amator*, or lover. *Amateur*, DICTIONARY, <http://www.dictionary.com/browse/amateur> (last visited Dec 13, 2018). The amateur competes for the love of the sport alone, while the professional athlete competes for money. GARBER, *supra*.

148. Jason Whitlock, *Greedy NCAA Still Exploiting Athletes*, FOX SPORTS, Mar. 29, 2011, <https://www.foxsports.com/college-basketball/story/ncaa-amateur-concept-is-a-sham-that-exploits-players-032911>; Jay Bilas, *Until the NCAA Solves the Money Problem and Pays Athletes Its Problems Will Continue*, ESPN (Sep. 28, 2017), http://www.espn.com/mens-college-basketball/story/_id/20841877/until-ncaa-solves-money-problem-pays-athletes-problems-continue; Patrick Hruby, *Why America's Newest Tennis Sweetheart Should Sue the NCAA*, VICE SPORTS (Aug. 28, 2014), https://sports.vice.com/en_us/article/nzpmjx/why-americas-newest-tennis-sweetheart-should-sue-the-ncaa (“[E]veryone knows that amateurism exploits the money-making young men on the field, the football players risking brain damage and men’s basketball players . . .”); Gerald S. Gurney & B. David Ridpath, *Why the NCAA Continues to Work Against Athletes’ Best Interests*, CHRON. HIGHER. ED. (Feb. 29, 2016), <https://www.chronicle.com/article/Why-the-NCAA-Continues-to-Work/235522> (“The [NCAA] is made up of those presidents, athletic directors, and conference representatives who approach college sports as a trade association to forward the best interests of athletic administrators and coaches; the athletes are mere tools of athletic capital to achieve those ends.”).

149. NCAA DIVISION I MANUAL, *supra* note 16, art. 12, 12.1.2.1.3.1.2 & 12.1.2.1.4.1.3, at 64-65 (Operation Gold Grant & Incentive Programs for International Athletes).

150. Steve Berkowitz, *Olympics Offer Rare Chance for NCAA Athletes to be Paid*, USA TODAY, Aug. 2, 2016, <https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/02/paying-ncaa-college-athletes-at-rio-olympics-kyle-snyder-katie-ledecky/87709714/>. In at least one case, a student-athlete competing for his home country received about \$740,000 for winning gold at the Olympics. Patrick Hruby, *The NCAA Lets College Olympians Collect Cash for Gold, Because Amateurism Is a Self-Serving Lie*, VICE SPORTS (Aug. 18, 2016), https://sports.vice.com/en_us/article/8qyxmg/the-ncaa-lets-college-olympians-collect-cash-for-gold-because-amateurism-is-a-self-serving-lie.

151. Katie Ledecy, Stanford University swimmer, took home \$115,000 after earning six Olympic medals in the 2016 Rio Olympics. Jackie Bamberger, *Rio Mystery Solved: Can NCAA Athletes Keep Their*

Additionally, the NCAA allows tennis student-athletes the opportunity to accept up to \$10,000 per calendar year in prize money prior to their full-time collegiate enrollment.¹⁵² A cursory review of these allowances make the hypocrisy of amateurism seem clear and the criticisms warranted. Here, the NCAA allows select student-athletes to be paid, an act directly contrary to the values it contends are paramount. Without more inquisition, it is not entirely unreasonable to conclude that amateurism is indeed a myth, used only to advance the ends of the decisionmakers in the NCAA, rather than the student-athletes.

But, in some cases, like those of the Olympic and tennis student-athletes discussed above, an explanation does exist. In collegiate tennis, it has long been accepted that the sport is dominated by international students.¹⁵³ These international students come from a different culture, one where “nobody plays for free” and very few understand what amateurism is.¹⁵⁴ Moreover, most lose money despite having received prize checks due to travel and training costs.¹⁵⁵ The NCAA specified the losses being absorbed by prospective student-athletes and their families when the legislation allowing tennis student-athletes to earn limited cash amounts was adopted.¹⁵⁶ These foreign players are considered to

Olympic Medal Bonuses?, YAHOO! SPORTS (Aug. 12, 2016), <https://sports.yahoo.com/news/rio-mystery-solved-can-ncaa-athletes-keep-their-olympic-medal-bonuses-032912550.html>. Kyle Snyder, Ohio State wrestler, retained his NCAA eligibility while taking home \$250,000 in the 2016 Rio de Janeiro Olympics. See Adam Kilgore, *College Athletes Can't Be Paid for Their Performances – Unless They're Olympians*, CHI. TRIB., Sep. 5, 2016, <http://www.chicagotribune.com/sports/college/ct-college-athletes-olympics-paid-20160905-story.html>.

152. NCAA DIVISION I MANUAL, *supra* note 16, art. 12, 12.1.2.4.2 & 12.1.2.4.1, at 66 (Exception for Prize Money Based on Performance—Sports Other than Tennis & Exception for Prize Money—Tennis).

153. In 2016, 41 nationalities were represented in 128 slots of the NCAA Division I tennis championships. Chuck Culpepper, *Why There's No Time for Xenophobia in U.S. College Tennis: They Need Internationals to Win*, WASH. POST, May 30, 2017, https://www.washingtonpost.com/news/sports/wp/2017/05/30/why-xenophobia-has-been-beaten-out-of-u-s-college-tennis-they-need-internationals-to-win/?utm_term=.f6ab62b54a9d. Ten years ago, there were thirty-eight nationalities represented. *Id.* And, ten years before that, in 1998, forty-eight of the sixty-four male qualifiers were international students. *Id.*

154. Hruby, *supra* note 148.

155. *Id.*; see also Joe Drape, *Foreign Pros in College Tennis: On Top and Under Scrutiny*, N.Y. TIMES, Apr. 11, 2006, <http://www.nytimes.com/2006/04/11/sports/tennis/foreign-pros-in-college-tennis-on-top-and-under-scrutiny.html> (“Nobody makes a living at playing tennis in satellites and tournaments all over the world.”) (quoting Virginia Commonwealth University Head Coach Paul Kostin).

156. *Amateurism -- Exceptions to Amateurism Rule -- Prize Money Prior to Full-Time Collegiate Enrollment -- Tennis -- \$10,000 Per Year*, NCAA DIVISION I AMATEURISM CABINET, https://web3.ncaa.org/lstdbi/reports/pdf/searchPdfView?id=2941&businessCode=PROPOSAL_SEARCH_VIEW&division (last visited Dec. 13, 2018).

Prospective student-athletes and their families spend exorbitant amounts of money for travel and other expenses related to competing in tennis events . . . Research by the United States Tennis Association Player Development staff place the top junior and senior

have upgraded the level of the college game¹⁵⁷ and their presence within the NCAA has grown substantially over the past decade.¹⁵⁸ The facts suggest that the NCAA is increasing opportunities for student-athletes. This seems even more likely when it is taken into consideration that the NCAA generally loses money through its facilitation of collegiate tennis.¹⁵⁹

With regard to allowing payment for Olympic student-athletes, the motives were similarly to help defray those significant costs that come with training for competition on the world stage.¹⁶⁰ Critics point to instances where NCAA student-athletes received large payouts for their Olympic performances, with one payout nearing one million dollars.¹⁶¹ But, like the coaches with million-dollar annual salaries, these payouts are the exception rather than the rule. The costs associated with training to be a world-class Olympic athlete, worthy of medal recognition, are exorbitant—not to mention the equipment and entrance costs.¹⁶² Most NCAA collegiate athletes participating in the Olympics do not make money.¹⁶³

However, there are some inconsistencies in the NCAA's enforcement of amateurism that are troublesome. The NCAA's profits from the sale of

prospective student-athletes as having made significantly less than \$10,000 per year in prize money as prospective student athletes, and combined with the financial costs to their families, most are not earning prize money in excess of their expenses.

Id.

157. As one coach puts it, “[y]ou cannot win a championship now . . . with all American players.” Culpepper, *supra* note 153.

158. International student-athlete applicants to the NCAA multiplied twelve-fold between 2007 and 2017. Pat Rooney, *International Athletes Commuting in Drovers to NCAA Athletics*, BUFFZONE (Oct. 28, 2017), http://www.buffzone.com/mensbasketball/ci_31410506/international-athletes-commuting-drovers-ncaa-athletics.

159. In 2016, Men's tennis teams had median losses of \$683,000 and women's tennis teams had median losses of \$726,000 at FBS institutions. DANIEL L. FULKS, NAT'L COLLEGIATE ATHLETIC ASSOC., NCAA REVENUES AND EXPENSES OF DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: FISCAL YEARS 2004 THROUGH 2016, at 44 (2017), http://www.ncaa.org/sites/default/files/2017RES_D1-RevExp_Entire_2017_Final_20180123.pdf.

160. “Such funds, even though based on place finish, generally are used to defer a significant amount of expenses incurred by individuals who train to participate in such events.” *Amateurism--Operation Gold Grants*, NCAA DIVISION I BOARD OF DIRECTORS, https://web3.ncaa.org/lstdbi/reports/pdf/search-PdfView?id=505&businessCode=PROPOSAL_SEARCH_VIEW&division=1 (last visited Dec. 13, 2018).

161. The most commonly cited cases are those of student-athletes Katie Ledecky, Joseph Schooling, and Kyle Snyder earning prize monies of \$115,000, \$740,000, and \$250,000, respectively. Kilgore, *supra* note 151.

162. Natalie Finn, *How Olympic Athletes Make Money If They're Not Michael Phelps, Simone Biles or Usain Bolt*, ENEWS (Aug. 5, 2016), <http://www.eonline.com/news/785451/how-olympic-athletes-make-money-if-they-re-not-michael-phelps-simone-biles-or-usain-bolt>.

163. *Id.*

star-players' jerseys¹⁶⁴ and its failure to appropriately sanction high-revenue generating schools¹⁶⁵ are two of the most recent inconsistencies. In these cases, proponents of the NCAA are hard-pressed to reconcile amateurism and the practices of the NCAA. Harder questions arise: Should amateurism be abandoned entirely? Or, alternatively, is it okay that amateurism has not been distilled to its most perfect form? The courts, by way of the Sherman Antitrust Act, have been forced to grapple with these questions. For decades, numerous opinions on this issue have been drafted; and yet, a solution remains elusive. The next section of this Comment outlines the courts' current antitrust framework—the mechanism by which the concept of amateurism has historically been challenged. The rest of this Comment seeks to detail the most relevant cases on this issue and, finally, considers a possible solution.

D. Antitrust Framework

The Sherman Antitrust Act is the primary authority under which claims are brought against the NCAA for restricting student-athlete pay. Specifically, Section 1 of the Sherman Antitrust Act makes it illegal to form any “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”¹⁶⁶ In order to prevail on a claim under this Section, a plaintiff must show: (1) a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce.¹⁶⁷ When it comes to claims against the NCAA, steps one and three of the analysis are low thresholds, which plaintiffs routinely overcome.¹⁶⁸ This is largely because the rules forbidding student-athletes from receiving compensation are codified in the NCAA Manual, an embodiment of the agreed upon rules, which satisfies part one of the analysis. As for step three, the NCAA is a nationally operating enterprise, with member institutions

164. See Laken Litman & Steve Berkowitz, *NCAA Apparel Sales Site Used Athletes' Names in Search*, USA TODAY SPORTS, Aug. 7, 2013, <https://www.usatoday.com/story/sports/ncaaf/2013/08/06/ncaa-shop-search-football-jerseys-johnny-manzel/2625119/> (describing the NCAA's practice of selling star players' jerseys online with the name of player removed).

165. Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES, Oct. 13, 2017, <https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html> (discussing the NCAA's failure to punish the University of North Carolina for its academic fraud scheme).

166. Sherman Antitrust Act, 15 U.S.C. § 1 (2018).

167. *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991).

168. Indeed, the most prominent and contemporary case on the matter, *O'Bannon*, makes no discussion of steps one and three of the antitrust analysis, preferring to discuss only the most contested piece of the analysis, step two. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014); see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014) (making no discussion of parts one and two of the Sherman Antitrust analysis).

operating in every state.¹⁶⁹ Interstate commerce is clearly affected. Thus, claims brought on this issue overwhelmingly turn on step two of a Sherman Antitrust analysis: Did the agreement unreasonably restrain trade?

There are three available means with which the courts answer this question: (1) the Rule of Reason; (2) the Per Se rule of illegality; or (3) the more recently developed Quick Look analysis. Each are briefly discussed below.

1. Rule of Reason

Courts use the Rule of Reason to analyze antitrust claims brought against the NCAA.¹⁷⁰ Under the rule of reason analysis, an agreement unreasonably restrains trade where “the relevant agreement likely harms competition by increasing the ability or incentive profitability to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement.”¹⁷¹ The courts utilize a three-step process of burden shifting between the defendant-NCAA and the plaintiff to determine if an agreement constitutes an unreasonable restraint of trade.¹⁷²

The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market.¹⁷³ A relevant market consists of both a product and geographic market.¹⁷⁴ The product market includes the pool of goods or services that have reasonable interchangeability

169. The nationwide operations of the NCAA generated one billion dollars in revenue last year. *See* DELOITTE & TOUCHE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES 26 (2017). An argument that the NCAA does not affect interstate commerce would be futile.

170. In 1984, the Supreme Court determined that the NCAA should be subject to the rule of reason analysis because it is a joint venture, which requires some self-imposed restraints if it is to exist at all. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1984). The recent *O'Bannon* decision—at both the district court and appellate court levels—cited this very case in its justification for applying the rule of reason analysis. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1063 (9th Cir. 2015); *see also* *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (mandating the use of the rule of reason in cases of joint ventures); Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64. S. CAL. L. REV. 685, 697 (1991) (“[Justice Stevens applied rule of reason analysis] because amateur collegiate athletics require certain horizontal restrictions on competitions (such as requirements for academic credentials and the number of players on each team) in order for the product to be available at all.”)

171. FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 4 (2000). Note, that the quoted language is accurate if somewhat awkward.

172. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014)

173. *Id.*

174. *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988). Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1105 (9th Cir. 1999).

of use and cross-elasticity of demand.¹⁷⁵ The geographic market extends to the area of effective competition where buyers can turn for alternate sources of supply.¹⁷⁶ Once the relevant market is determined, significant anticompetitive effects in the relevant market must be established by the plaintiff. Significant anticompetitive effects may be indirectly established by proving that the defendant possessed the requisite market power within the relevant market.¹⁷⁷ Alternatively, the anticompetitive effect may be established directly by showing actual anticompetitive effects, such as control over output or price.¹⁷⁸

If the plaintiff can satisfy this burden, the defendant must then come forward with evidence of the restraint's legitimate procompetitive justifications.¹⁷⁹ Essentially, the defendant must show that, although they have imposed restraints, those restraints are justified by some procompetitive effect, typically in the same market.

If the defendant can demonstrate such a justification, the burden will shift back to plaintiff to demonstrate that the defendant's justification can be achieved by substantially less restrictive means.¹⁸⁰ The less restrictive means must be "virtually as effective" and must come "without significantly increased cost."¹⁸¹ If, at any point, a party is unable to meet their burden, they will lose.

175. *Oltz*, 861 F.2d at 1446. For example, in *Law*, the product market was defined as college basketball. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1018 (10th Cir. 1998).

176. *Oltz*, 861 F.2d at 1446.

177. *Law*, 134 F.3d at 1019.

178. *Id.*

179. *In re Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014).

180. *Id.* Alternatively, if the defendant cannot meet its own obligation under the rule of reason burden-shifting procedure, the court does not need to address the availability of less restrictive alternatives for achieving a purported procompetitive goal. PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (3d ed. 2006).

181. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1074 (9th Cir. 2015) (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)). However, the test for less restrictive means varies significantly depending on the court:

There is no uniformity in the application or even statement of the [less restrictive alternative] test, either across or within the federal circuits. Instead, confusion and inconsistency permeate the decisions. The two most significant variables in the test are the level of requisite "restrictiveness" and the burden of persuasion. With respect to the burden of persuasion, the majority of the circuits place the burden on the plaintiff to prove the existence of a less restrictive alternative. The U.S. Courts of Appeals for the District of Columbia and the Seventh Circuit, however, place the burden on the defendant to prove the absence of less restrictive alternatives, while the U.S. Courts of Appeals for the Eleventh and Second Circuits have been inconsistent, placing the burden on the defendant in one case and the plaintiff in another. The level of restrictiveness varies from "least restrictive" to "reasonable necessary."

2. Per Se

The Per Se analysis is appropriate where an entity is engaging in practices that can be conclusively presumed illegal without any inquiry into competitive purpose or market effect.¹⁸² Such practices exist where there is clearly a pernicious effect on competition and the practice lacks any redeeming virtue.¹⁸³ Courts have typically presumed practices such as price fixing,¹⁸⁴ output limitations,¹⁸⁵ division of markets,¹⁸⁶ and group boycotts¹⁸⁷ as illegal, applying the per se analysis accordingly. While some may find it appropriate that the NCAA be subject to such an analysis, the Supreme Court has disagreed; recognizing that the NCAA must make and enforce a myriad of rules defining and sometimes restraining the manner in which institutions compete, if the NCAA is to exist at all.¹⁸⁸ Thus the per se analysis has yet to be applied to antitrust claims against the NCAA.

3. Quick Look

Similar to the Per Se analysis, quick look is not typically applied to antitrust claims against the NCAA.¹⁸⁹ The quick look analysis is worth mentioning because it has recently been argued that it is the appropriate lens with which the court should view NCAA antitrust claims.¹⁹⁰ The quick look analysis is a truncated form of the rule of reason analysis and presumes the defendant's restraint is unlawful.¹⁹¹ Therefore, the burden does not start with the plaintiff to demonstrate significant anticompetitive effects within a relevant market.

Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 583 (2009) (citations omitted).

182. Piraino, Jr., *supra* note 170, at 691. The per se analysis is applied where “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979).

183. Piraino, Jr., *supra* note 170, at 691. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”).

184. *U.S. v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-10 (1956).

185. *U.S. v. Topco Assocs., Inc.*, 405 U.S. 596, 608-09 (1972).

186. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990).

187. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-14 (1959).

188. *Bd. of Regents*, 468 U.S. at 100-02.

189. Interestingly enough, the quick look analysis was developed and applied in the seminal Supreme Court case involving the NCAA. See *id.* at 109 (noting that a relevant market analysis is not required by the plaintiff where a naked restraint on price and output exists); see also *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (applying the quick look analysis).

190. *In re Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014).

191. *Id.*

Rather, it skips the initial rule of reason burden entirely, going straight the defendant to justify the restraint. Like the rule of reason, if the restraint can be justified, the burden will shift back to the plaintiff to demonstrate that the plaintiff's justification can be achieved by less restrictive means.

The quick look analysis is appropriate where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”¹⁹² If any plausible justification for the restraint may exist, the quick look form of analysis is inappropriate.¹⁹³ The Supreme Court has found that the NCAA's general restrictions on student-athlete compensation could conceivably enhance competition.¹⁹⁴ Thus, like the per se analysis, the quick look analysis is inappropriate in most antitrust cases challenging the NCAA's amateurism rules.

III. ANTITRUST CLAIMS AND THE NCAA

A. History

More than three decades ago, in 1984, the Supreme Court decided *National Collegiate Athletic Ass'n v. Board of Regents*, a landmark decision that dominates the NCAA's now storied relationship with antitrust law.¹⁹⁵ Proponents of NCAA amateurism rules argue that the fundamental premise of the case is that student-athletes should not be paid.¹⁹⁶ Unsurprisingly, it is this case that the NCAA has relied on the most in defending its amateurism rules.

In *Board of Regents*, the University of Oklahoma and the University of Georgia challenged an NCAA-mandated television plan that limited the amount

192. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

193. *Id.* at 771.

194. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1137 (N.D. Cal. 2014) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-02 (1984)).

195. 468 U.S. 85 (1984). See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 339 (7th Cir. 2012) (referring to the *Board of Regents* decision as the “seminal case on the interaction between the NCAA and the Sherman Act.”). Prior to the *Board of Regents* decision, very few antitrust claims had been asserted against the NCAA. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 337 (2007); see also Ben Strauss, *30-Year-Old Decision Could Serve as Template for N.C.A.A. Antitrust Case*, N.Y. TIMES, June 30, 2014, <https://www.nytimes.com/2014/06/14/sports/ncaabasketball/30-year-old-decision-could-serve-as-template-for-ncaa-antitrust-case.html> (“[The case] set[s] the rules of the game for the N.C.A.A. and how it should be examined as a cartel.”).

196. Strauss, *supra* note 195 (“The fundamental premise of that case, as has been cited a number of times, is that student-athletes should not be paid.”) (quoting NCAA Chief Legal Officer, Donald Remy). See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102 (1984) (“In order to preserve the character and quality of [college football], athletes must not be paid, must be required to attend class, and the like.”).

of times a member institution could appear on television.¹⁹⁷ Restrictive television plans had become routine for the NCAA.¹⁹⁸ The NCAA adopted the first one in 1951 after a year-long study revealed that television has “an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation’s overall athletic and physical system.”¹⁹⁹ Several member institutions, seeking to increase revenues, desired a more liberal number of television appearances and, in 1979, sought to negotiate a television agreement of their own.²⁰⁰ The NCAA publicly announced that it would take disciplinary action against any member that entered into a separate television agreement, effectively killing any chances of a separate agreement coming to fruition.²⁰¹ The Universities of Oklahoma and Georgia brought this antitrust action in response.²⁰²

As discussed, the NCAA is subject to the Rule of Reason analysis for antitrust claims. The plaintiffs met their initial burden of demonstrating significant anticompetitive effects exist in a relevant market: The NCAA television plan restricted each institution’s ability to sell television rights in the relevant market of college football broadcasts.²⁰³ Consequently, the price for those respective television rights were higher and the output was lower than they might be in a less restrictive market.²⁰⁴ Thus, the anticompetitive effects were “apparent.”²⁰⁵

The burden then shifted to the NCAA to justify the restraints imposed through the television plan. The NCAA proffered three justifications,²⁰⁶ only

197. The agreement, negotiated by the NCAA, granted telecasting rights for all NCAA college football games to the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) over a four-year period. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 92-93 (1984). Under the agreement, no single institution could appear on television more than a total of six times and not more than four times nationally. *Id.* at 94. Additionally, the agreement set an absolute maximum on the number of games that could be broadcast. *Id.*

198. The NFL had a similarly restrictive television plan, which allowed for the League to market television rights collectively. SZYMANSKI, *supra* note 48. The NFL’s restrictive television plan was overturned by antitrust legislation in 1953. *U.S. v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953). Congress allowed the television plan to survive however, by granting an antitrust exemption known as the Sports Broadcasting Act of 1961. SZYMANSKI, *supra* note 48.

199. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 89 (1984) (citing the NCAA Television Committee Report).

200. *Id.* at 94-95.

201. *Id.* at 95.

202. *Id.*

203. *Id.* at 105-07, 112-13 (1984).

204. *Id.* at 106-07.

205. *Id.* at 106.

206. The NCAA’s three justifications for the television plan were: (1) it enables the NCAA to better compete against other forms of television entertainment by offering an attractive package sale; (2) it is

one of which the court deemed to have salience: competitive balance amongst amateur teams.²⁰⁷ The NCAA argued that its interest in maintaining competitive balance amongst amateur teams is a legitimate procompetitive justification.²⁰⁸ Significantly, the Supreme Court agreed:

It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.²⁰⁹

The NCAA next argued that its legitimate interest in maintaining that competitive balance amongst amateur teams justified its restrictive television plan.²¹⁰ On this point, the Court disagreed. And, in the end, the Court affirmatively acknowledged that the NCAA needs “ample latitude” in playing the “critical role [of] the maintenance of a revered tradition of amateurism in college sports.”²¹¹ But, a restrictive television plan is not a means of preserving amateurism.²¹² The television plan does not “fit into the same mold” as those rules that preserve amateurism.²¹³ Thus, preserving amateurism is a legitimate justification for which some restrictions will withstand antitrust scrutiny because they enhance public interest in intercollegiate athletics. The Supreme Court found that the television plan did not serve that legitimate purpose.²¹⁴ The restrictive television plan was a violation of antitrust law.²¹⁵

The *Board of Regents* decision is important because it makes clear what the critical role of the NCAA is: to preserve and maintain the revered tradition of amateurism in college sports, which widens consumer choice²¹⁶ and enhances the public interest.²¹⁷ And, “[t]here can be no question but that it needs ample

necessary to protect live attendance at college football games; and (3) it helps maintain competitive balance among amateur athletics teams. *Id.* at 113, 116-17.

207. The first two justifications were given a cursory review before being invalidated. *Id.* at 115-17 (discussing the merits of the first two justifications for a few paragraphs before summarily dismissing them).

208. *Id.* at 117.

209. *Id.* See also *General Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 595 (7th Cir. 1984) (“The essence of successful league competition is maintaining a balance of power among the competitors—a goal antithetic to the goals of competition in a conventional economic market.”).

210. *Bd. of Regents*, 468 U.S. at 117.

211. *Id.* at 120.

212. *Id.* at 117-18.

213. *Id.* at 117.

214. *Id.* at 119-20.

215. *Id.* at 120.

216. *Id.* at 102.

217. The Supreme Court notes that the NCAA widens the educational opportunities available to student-athletes, which is procompetitive. *Id.* at 120. Case law demonstrates that increasing access to a higher

latitude to play that role.”²¹⁸ The Supreme Court is clear: “[T]he role of the NCAA must be to preserve a tradition that might otherwise die.”²¹⁹ Therefore, *Board of Regents* should be read to mean the NCAA has ample latitude in protecting amateurism, which may be done by imposing some restrictions, but not all. The question then becomes: Is restricting student-athlete compensation justified by protecting amateurism? Or, like the television plan, does restricting student-athlete compensation not “fit into the same mold” as those rules that preserve amateurism? Fortunately, the Supreme Court answers this question: “In order to preserve the character and quality of [college sports], *athletes must not be paid*, must be required to attend class, and the like.”²²⁰ Arguably, *Board of Regents* forecloses the question of whether the NCAA may restrict student-athlete pay and the NCAA has been sure to argue as much.²²¹

Several subsequent court decisions have doubled down on the Supreme Court’s *Board of Regents* decision. In *McCormack v. Nat’l Collegiate Athletic Ass’n*, several football players brought suit claiming the NCAA’s compensation restrictions are a violation of antitrust law.²²² The football players argued that amateurism rules are not equally applied to all student-athletes, and thus the rules stifle competition rather than encourage it.²²³ Relying almost exclusively on the *Board of Regents* decision, the court found that the compensation restrictions were reasonable and not in violation of federal antitrust law.²²⁴ The court emphasized the Supreme Court’s *Board of Regents* language stating, “athletes must not be paid.”²²⁵ Acknowledging the football players’ claims that amateurism rules are not equally applied, the court said, “[t]hat the NCAA has

education is in the public interest and; thus, should be considered as a legitimate procompetitive justification. *U.S. v. Brown Univ.*, 5 F.3d 658, 678 (3d Cir. 1993).

218. *Bd. of Regents*, 468 U.S. at 120.

219. *Id.*

220. *Id.* at 102 (emphasis added).

221. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) (restating the NCAA’s contention that an antitrust claim brought against it challenging the amateurism rules must be dismissed under the Board of Regents decision).

222. 845 F.2d 1338, 1342 (5th Cir. 1988).

223. The football players supported their claim with two allegations: (1) “the NCAA permits some compensation through scholarships”; and (2) the NCAA “allows a student to be a professional in one sport and an amateur in another.” *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1345 (5th Cir. 1988).

224. *McCormack*, 845 F.2d at 1344-45.

225. *Id.* at 1344 (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 102 (1984)). *See Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1089 (7th Cir. 1992) (emphasizing the Supreme Court’s language that student-athletes must not be paid) (citing *Bd. of Regents*, 468 U.S. at 102 (1984)).

not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”²²⁶

In *Gaines v. Nat’l Collegiate Athletic Ass’n*, a football player challenged NCAA amateurism rules that declared him ineligible after an unsuccessful bid in the NFL Draft.²²⁷ Albeit in the context of a Section 2 Sherman antitrust claim,²²⁸ the court once again cited the *Board of Regents* decision, finding the NCAA’s restrictions as valid: “[A]thletes must not be paid” and “controls of the NCAA . . . are justifiable means of fostering competition among amateur teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”²²⁹ Speaking specifically to the enhancement of the public interest, the court added its own language: “The public interest is promoted by preserving amateurism and protecting the educational objectives of intercollegiate athletics.”²³⁰

Altogether, *Board of Regents*, *McCormack*, and *Gaines* can be understood to stand for the proposition that, although amateurism has not been perfected, it remains a legitimate justification for some restrictions, so long as those restrictions further amateurism and educational objectives. In the decades since, courts have nodded approvingly at the concept of amateurism and the pursuit of educational objectives:

We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes proper focus on their educational

226. *Id.* at 1345.

227. 746 F. Supp. 738, 740 (M.D. Tenn. 1990). Commonly known as the “no-draft” rule, the NCAA makes a player ineligible for participation in a particular intercollegiate sport when he or she asks to be placed on the draft list or supplemental draft list of a professional league in that sport. *Id.* at 741.

228. A Section 2 Sherman antitrust claim, distinct from the Section 1 claims thus far discussed, alleges that an illegal monopoly has been formed or attempted. “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738, n.4 (M.D. Tenn. 1990) (citing 15 U.S.C. § 2).

229. *Id.* at 747. The court actually has two holdings. First, and most interestingly, the court holds that some eligibility rules are not subject to antitrust review whatsoever. *Id.* at 745. Second, as discussed, the court finds that, even if these rules are subject to antitrust review, the rules are “overwhelmingly procompetitive” because they serve to “preserve the distinct ‘product’ of major college football as an *amateur* sport.” *Id.* at 746 (emphasis added).

230. *Id.* at 747. “Moreover, [the no-draft rule] by the NCAA in fact makes a better ‘product’ available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs.” *Id.* at 746.

pursuits and direct their attention to the quick buck in pro sports.²³¹

As recently as 2012, the Seventh Circuit applied the Supreme Court's *Board of Regents* decision directly to the question of whether student-athletes may be compensated:

The NCAA's limitation on athlete compensation beyond educational expenses . . . directly advances the goal of maintaining 'a clear line of demarcation between intercollegiate athletics and professional sports,' and thus is best categorized as an eligibility rule aimed at preserving the existence of amateurism and the student-athlete.²³²

It seems that a colorable argument could be made that student-athlete compensation restrictions are valid under the Sherman antitrust law. However, the validity of amateurism, and therefore the legality of student-athlete compensation restrictions, remains an open question—possibly more so than ever before. This is because most court decisions that defend the concept of amateurism and pursuing educational objectives as legitimate justifications for various restraints have done so on the basis of the language stated in the Supreme Court's *Board of Regents* decision. Therefore, if the *Board of Regents* language is challenged, so, too, is every other case upon which the NCAA may rely to uphold its amateurism based restrictions. In 2014, the Northern District Court of California did exactly this in its *O'Bannon v. National Collegiate Athletic Ass'n* decision, finding the Supreme Court's compelling amateurism language as dicta.²³³ The next Section discusses the controversial *O'Bannon* decision, and its partial reversal, in detail.

B. The Landmark Decision: O'Bannon

In *O'Bannon*, the lead plaintiff was Ed O'Bannon, a former collegiate basketball player at the University of California, Los Angeles (UCLA).²³⁴ After recognizing himself in a video game that he was not compensated for, O'Bannon brought a class action antitrust suit against the NCAA for forbidding

231. *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1091 (7th Cir. 1992).

232. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012). The court found that NCAA bylaws eliminating the eligibility of players who receive cash payments beyond the costs of attending a university "clearly protect[] amateurism." *Id.* at 343.

233. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013). See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1000-01 (N.D. Cal. 2014).

234. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES, June 9, 2014, <https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html>.

student-athletes from being compensated for the use of their names, images, and likenesses (NILs) in broadcasts and videogames.²³⁵ More specifically, O'Bannon alleged that the NCAA fixes the amount paid to student-athletes for their NILs at zero and forecloses student-athletes from accessing the market for their NILs.²³⁶ O'Bannon sought to prohibit the NCAA from enforcing compensation restriction rules "that preclude FBS football players and Division I men's basketball players from receiving any compensation, beyond the value of their athletics scholarships, for the use of their names, images, and likeness in videogames, live game telecasts, re-broadcasts, and archival game footage."²³⁷ An O'Bannon win would have resulted in a major change to collegiate athletics. In addition to current student-athletes being compensated, it was expected that universities would be allowed to make financial offers to high school recruits as a way to lure them to a given institution.²³⁸

Relying on *Board of Regents*, the NCAA moved to dismiss the claims made by O'Bannon, arguing that the claims made are "nothing more than a challenge to the NCAA's rule on amateurism and therefore must be dismissed under *NCAA v. Board of Regents*."²³⁹ The court disagreed, refusing to accept the proposition that the *Board of Regents* decision permits claims challenging

235. *Id.*

236. Third Consolidated Amended Class Action Complaint, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-01967 CW, 2013 WL 3810438, at 14, (N.D. Cal. July 19, 2013).

237. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014). *See* Eder & Strauss, *supra* note 234.

238. Eder & Strauss, *supra* note 234.

239. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) (internal quotations and citations omitted).

amateurism to be dismissed at the pleading stage.²⁴⁰ This claim would be decided on the merits.²⁴¹

The first and third steps of antitrust analysis require the plaintiff to show an agreement was made that affects commerce among the several states. As mentioned, this burden is routinely met by plaintiffs in antitrust suits against the NCAA. The *O'Bannon* case is no different.²⁴² Therefore, the subsequent discussion—and most NCAA antitrust case law—focuses on the second step of the antitrust analysis: the extent to which the agreement unreasonably restrains trade.

1. Summary Judgment

Both parties moved for summary judgment. The NCAA's motion was denied in full and O'Bannon's granted in part.²⁴³ The court applied the rule of reason and plaintiffs met their initial burden by submitting factual evidence that

240. The court gives several reasons for refusing to grant the motion to dismiss the complaint. Chief among them are: (1) the alleged harms to a competition and the justifications for those harms are intrinsically factual, making them inappropriate to dismiss at the pleading stage; (2) the *Bd. of Regents* decision focused on the restrictive television plan as opposed to restrictive eligibility rules and did not complete a factual inquiry as to whether the compensation ban actually has a procompetitive effect; and (3) subsequent cases have been able to state valid antitrust claims against the NCAA, similar to that of O'Bannon's claim, and have not been barred from doing so by the *Bd. of Regents* decision. *Id.* at 996, 1002, 1003, 1005 (citing *Brennan v. Concord EFS, Inc.*, 369 F. Supp. 2d 1127, 1133 (N.D. Cal. 2005); *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003); *Board of Regents*, 468 U.S. 85, 101 (9th Cir. 1984); *Rock v. Nat'l Collegiate Athletic Ass'n*, 2013 WL 4479815, at *14 (S.D. Ind. 2013); *White v. Nat'l Collegiate Athletic Ass'n*, Case No. 06-999, Docket No. 72, slip op. at 3 (C.D. Cal. 2006); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 347 (7th Cir. 2012)); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (“[T]he NCAA is not exempt from the scrutiny under the Sherman Act.”). See also *Law v. Nat'l Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1404 (D. Kan. 1995) (“[T]he Court does not believe that the Supreme Court intended to give the NCAA carte blanche in imposing restraints of trade on its member institutions or other parties because of its role in the marketplace.”), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

241. Prior case law suggests that a complaint may be dismissed under the *Board of Regents* holding only when the restraint is obviously reasonable. *Metropolitan Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n*, 339 F. Supp. 2d 545, 548 (S.D.N.Y. 2004) (“[T]he challenged rules and expansions are not so obviously reasonable as to fall into the group of restrictions sanctioned by *Board of Regents*.”).

242. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014) (“The NCAA does not dispute that these [challenged compensation restrictions] were enacted and are enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably.”).

243. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

allowed for the plausible inference that the NCAA student-athlete compensation restriction undermines free competition.²⁴⁴

The burden then shifted to the NCAA to identify any procompetitive justifications for its restrictions on student-athlete compensation. The NCAA proffered five such justifications: (1) preservation of amateurism in college sports; (2) promoting competitive balance among Division I teams; (3) integration of education and athletics; (4) increased support for women's sports and less prominent men's sports; and (5) greater output in Division I football and basketball.²⁴⁵ With the exception of the fourth justification—increased support for women's sports and less prominent men's sports—the NCAA met its burden to survive summary judgment.²⁴⁶

The court found against the NCAA on the fourth justification for three reasons. First, the court noted that restrictions in one market may not be justified by benefits in another.²⁴⁷ Thus, restrictions in the college education market for football and basketball recruits cannot be justified by benefits received in the markets of women's sports or less prominent men's sports.²⁴⁸ Second, the court stated that social welfare benefits cannot justify anticompetitive restrictions; it is irrelevant that supporting women's sports and less prominent men's sports serves a broader social purpose.²⁴⁹ Finally, the court concluded that the NCAA can support these other sports through less restrictive means, such as mandating a greater portion of revenues be directed to those less prominent sports.²⁵⁰ The court concluded the compensation restraint was not justified by increasing support to other sports and, accordingly, the NCAA was prohibited from relying on the justification at trial.²⁵¹

2. Trial Verdict

At trial, the plaintiffs again met their initial burden in the rule of reason analysis—establishing that the NCAA created significant anticompetitive effects in the college education market.²⁵² Therefore, the NCAA was tasked

244. *Id.* at 1137. Recall that, under the rule of reason analysis, the plaintiff bears the initial burden of showing that the challenged restraint produces significant anticompetitive effects within a relevant market.

245. *Id.* at 1146.

246. *Id.* at 1155.

247. *Id.* at 1151 (citing *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994)).

248. *Id.*

249. *Id.* at 1150-51 (citing *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990)).

250. *Id.* at 1151-52.

251. *Id.* at 1155.

252. Recall that the Plaintiffs survived summary judgment by establishing an inference that the NCAA restrained competition in the college education and group licensing markets. *Id.* at 1138. At trial, Plaintiffs

with justifying the compensation restrictions. The NCAA relied on the four procompetitive justifications that survived summary judgement to meet its burden.²⁵³

First, and most importantly, the NCAA argued that its compensation restrictions promote consumer demand by preserving its tradition of amateurism and the identity of college sports.²⁵⁴ The NCAA again relied on the *Board of Regents* holding to support this justification.²⁵⁵ The court was not swayed. The court found that the *Board of Regents* language stating that student-athletes “must not be paid,”²⁵⁶ did not serve to resolve any disputed issues of law in the 1984 case and was not based on any factual findings.²⁵⁷ Additionally, the court found the *Board of Regents* decision less persuasive because it was decided so long ago.²⁵⁸ The court concluded that the Supreme Court’s language was an “incidental phrase”²⁵⁹ that does not establish compensation restrictions as procompetitive.²⁶⁰ Accordingly, the NCAA’s reliance on the *Board of Regents* language was unavailing.²⁶¹

The NCAA also supported its amateurism justification by reasoning that college sports’ amateur tradition and identity makes it distinguishable from professional sports and other forms of entertainment, enhancing its popularity with consumers.²⁶² The court was not so convinced, questioning whether amateurism is a tradition at all.²⁶³ The court pointed out that the NCAA has revised its rules governing student-athlete compensation numerous times over

were unable to show that actual injury to competition in the group licensing market had occurred due to the NCAA’s compensation restriction. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 996-98 (N.D. Cal. 2014). Thus, the scope of the antitrust claim was narrowed to the damage caused by the NCAA’s compensation restriction to the college education market. *Id.* at 988, 993.

253. Those four are: (1) preservation of amateurism; (2) competitive balance; (3) integration of academics and athletics; and (4) increased output. *Id.* at 999.

254. *Id.*

255. *Id.*

256. *Id.* (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 102 (1984)).

257. *Id.*

258. *Id.*

259. *Id.* at 1000. Calling the Supreme Court’s language an “incidental phrase” may have been a strategic decision by the district court. The court could have deemed the language to be dicta. However, even Supreme Court dicta requires some deference. *See United States v. Augustine*, 712 F.3d 1290, 1295 (9th Cir. 2013) (“We do not treat considered dicta from the Supreme Court lightly”). Here, the court avoids that problem.

260. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).

261. *Id.* at 999.

262. *Id.*

263. *Id.* at 1000 (“The historical record that the NCAA cites as evidence of its longstanding commitment to amateurism is unpersuasive.”).

the years, sometimes in contradictory ways.²⁶⁴ Noting that current rules allow only tennis players to receive compensation before starting college, the court concluded that amateurism has been “malleable” since its founding and that failure to adhere to a single definition is not indicative of core principles.²⁶⁵ The NCAA also introduced a consumer survey to demonstrate that amateurism does, in fact, increase consumer interest, and is therefore procompetitive.²⁶⁶ The court was unpersuaded by the survey’s finding that respondents across the United States “generally oppose[] the idea of paying college football and basketball players.”²⁶⁷ According to the court, the survey did not appropriately address “how consumers would actually behave if NCAA’s restrictions on student-athlete compensation were lifted.”²⁶⁸ Per the plaintiff’s argument, the court found that compensation restrictions have limited bearing on a sport’s popularity.²⁶⁹ To support this point, the court noted Major League Baseball’s elevated popularity and increased revenues after it removed restrictions on its players’ compensation levels in the face of overwhelming public opposition.²⁷⁰ Ultimately, the court determined that amateurism is “not the driving force behind consumer interest” after considering lay witness testimony suggesting that interest is derived from other sources, such as loyalty.²⁷¹ Unlike the *Board of Regents*, *McCormack*, and *Gaines* decisions, the court here would not observe that “ample latitude”²⁷² previously afforded to the NCAA. Rather, the court determined that Board of Regents and its progeny are only applicable where the

264. *Id.* Specifically, the court noted that the original rules banned the awarding of scholarships to individuals based on athletic ability. *Id.* at 973-75. The court went on to note the general introduction of athletic scholarships in 1956; the allowance for tennis recruits to earn up to ten thousand dollars in prize money before they enroll in college; and permitting student-athletes to receive federal need-based monies beyond the NCAA’s stated maximum allowed. *Id.* at 974-75 (“This conception of amateurism stands in stark contrast to the definitions set forth in the NCAA’s early bylaws.”).

265. *Id.* at 1000.

266. *Id.* at 975.

267. *Id.*

268. *Id.* The survey does ask consumers if they were more or less likely to observe a college football or basketball game based on certain specified levels of pay to the student-athletes. *Id.* The results demonstrated that as the pay per student-athlete increased, the respondents were *less likely* to observe the sporting event. *Id.* (emphasis added). This result, coupled with the finding that consumers across the country generally oppose paying football and basketball student-athletes, arguably allows for the reasonable inference that consumers find collegiate sport appealing because of its amateur character.

269. *Id.*

270. *Id.*

271. *Id.* at 977-78 (emphasis added). Namely, loyalty to the school, which is shared by both alumni and people who live in the region or the conference. *Id.*

272. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 121 (1984). Notably however, the court makes no distinction between a rule change allowing already-pro MLB players to be paid more, and one allowing amateur student-athletes to be compensated for the first time ever—arguably two very different concepts.

challenged restraint “actually play[s] a substantial role in maximizing consumer demand for the NCAA’s products.”²⁷³ Thus, because amateurism is “not the driving force behind consumer demand,”²⁷⁴ it “might justify certain limited restraints”²⁷⁵ but does “not justify the [compensation restrictions].”²⁷⁶

Second, the NCAA asserted that its compensation restrictions are procompetitive because they maintain the current level of competitive balance among football and basketball teams, which is needed to sustain consumer demand.²⁷⁷ The court found that the NCAA simply did not have enough evidence to support that proposition.²⁷⁸ In fact, the court found there was “academic consensus” to the opposite—NCAA amateurism rules “have no discernable effect on the level of competitive balance.”²⁷⁹ The court was also troubled by NCAA policies that seem to hinder competitive balance. Specifically, the court was troubled by the universities’ ability to spend freely on football coaching salaries and the NCAA’s redistributing of revenues to schools that perform well in the Division I men’s basketball tournament.²⁸⁰ The court reasoned that these policies cancel out the leveling effect that student-athlete compensation restrictions might have on competitive balance and generally benefit the highest revenue generating schools more than others.²⁸¹

Third, the NCAA contended that its compensation restrictions promote the integration of academics and athletics by ensuring that student-athletes obtain all available educational benefits while participating in their schools’ academic communities.²⁸² The court found that NCAA rules unrelated to student-athlete compensation—like those prohibiting athlete-only dorms and limits on practice time—are better suited to achieve the integration of academics and athletics.²⁸³ The court acknowledged testimony of university administrators asserting that

273. O’Bannon, 7 F. Supp. 3d at 1000 (emphasis added).

274. *Id.* at 977-78.

275. The court gives insight as to what those “certain limited restraints” might be: “[T]hey might justify a restriction on large payments to student-athletes while in school.” *Id.* at 978, 1001.

276. *Id.* at 978.

277. *Id.*

278. *Id.* at 979 (“Given the lack of such evidence in the record, the Court finds that the NCAA’s challenged rules are not needed to achieve a level of competitive balance necessary, or even likely, to maintain current levels of consumer demand for FBS football and Division I Basketball.”).

279. *Id.* at 978 (quoting testimony from Dr. Noll; a study done by economist Jim Peach; and another finding by Dr. Rascher).

280. *Id.* at 978-79.

281. *Id.*

282. *Id.* at 979, 1002.

283. *Id.* at 980.

student-athletes could make more money than their professors, or be inclined to separate themselves from the broader campus community, if they are to be paid large sums of money.²⁸⁴ But, ultimately the court concluded that, even though “certain limited restrictions on student-athlete compensation may help” to integrate academics and athletics, the NCAA may not use this goal to justify a sweeping prohibition on any student-athlete compensation.²⁸⁵

Finally, the NCAA argued that its compensation restrictions attract schools with a “philosophical commitment to amateurism” to compete at the Division I level while also enabling schools that otherwise could not afford to compete in Division I to do so.²⁸⁶ Overall, these rules allow for more schools and student-athletes to participate in Division I, which increases the overall output of its product, the NCAA argued.²⁸⁷ However, testimony of several university and collegiate sport officials revealed a belief that most schools would remain in Division I athletics even if compensation restrictions were removed.²⁸⁸ And, in any event, the plaintiffs sought an injunction that allowed schools to compensate their student-athletes, not one that required student-athlete compensation.²⁸⁹ The court reasoned that schools would not be driven to financial ruin or leave Division I because they could simply opt not to pay their student-athletes.²⁹⁰ Therefore, the court concluded that the compensation restrictions do not increase the output of Division I basketball and FBS football.²⁹¹ Thus, the justification was not procompetitive.²⁹²

Ultimately, the NCAA found its footing, albeit shakily, on two of its four procompetitive justifications: amateurism and the integration of academics and athletics.²⁹³ For amateurism, the court found that preventing student-athletes from receiving large sums of money *may* increase consumer demand.²⁹⁴ For integration of academics and athletics, the court found that restrictions on pay *may* serve to integrate student-athletes into their communities, improving the

284. *Id.*

285. *Id.* (emphasis added).

286. *Id.* at 1003-04.

287. *Id.*

288. *Id.* at 982 (citing testimony of University of South Carolina President, Dr. Harris Pastides; Conference USA Commissioner, Britton Banowsky; University of Texas Associate Athletics Director, Christine Plonsky; and Sports Management Expert, Dr. Daniel Rascher).

289. *Id.* at 1004.

290. *Id.*

291. *Id.* at 982.

292. *Id.* at 982, 1004.

293. *Id.* at 1004.

294. *Id.*

quality of education services a school offers.²⁹⁵ Therefore, the burden shifted back to the plaintiffs to show that amateurism and the integration can be achieved through less restrictive alternatives.²⁹⁶

Plaintiffs identified two legitimate less restrictive alternatives²⁹⁷: (1) permit schools to allow scholarships to cover the full cost of attendance at any given Division I school; and (2) permit schools to hold limited and equal shares of licensing revenues in a trust to be distributed to student-athletes after their eligibility expires.²⁹⁸ Because this Comment focuses on cash compensation above the costs of receiving an education, the subsequent discussion focuses on the plaintiff's second alternative.²⁹⁹

The court agreed that allowing schools to pay football and men's basketball student-athletes a limited amount of cash is a less restrictive means of preserving consumer demand than are amateurism and academic integration.³⁰⁰ The court determined that, if the NCAA so chooses, it may cap these student-athlete's annual compensation at no less than five thousand dollars.³⁰¹ The determination of five-thousand dollars was based exclusively on two findings. First, NCAA witnesses had stated that their concerns regarding student-athlete pay would decrease if the student-athletes were paid smaller sums.³⁰² Second, five thousand dollars is comparable to the amount that a qualifying student-athlete would receive in federal grant monies.³⁰³ On these two facts alone, the five-thousand-dollar value was determined. If the NCAA

295. *Id.*

296. *Id.*

297. Plaintiffs proposed a third less restrictive alternative: allowing student-athletes to receive money for endorsements. *Id.* at 984. In the findings of fact, the court concluded this was not a legitimate less restrictive alternative because it "would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes." *Id.*

298. *Id.* at 1005.

299. The first alternative—increasing scholarships to the full cost of attendance—was granted by the district court, affirmed by the Ninth Circuit appellate court, and concurrently adopted by the NCAA. *Id.* at 982-83, 1006; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1075-76 (9th Cir. 2015); NCAA, 2015-16 NCAA DIVISION I MANUAL art. 15, 15.1, at 190 (Oct. 2014). The change has not been without consequence, though. See Blair Kerkhoff & Tod Palmer, *They're Not Paychecks, But Major College Athletes Got Extra Scholarship Stipends for First Time This School Year*, KAN. CITY STAR, June 30, 2016, <http://www.kansascity.com/sports/college/article86062792.html> (discussing the inequities that cost of attendance scholarships have created between schools, sports, and genders).

300. *O'Bannon*, 7 F. Supp. 3d at 983.

301. *Id.* at 1008.

302. *Id.* at 983, 1008.

303. *Id.* at 1008.

did not set a cap, the cash payments would be entirely up to the discretion of each school.³⁰⁴

The court further found that the effects of student-athlete pay on consumer demand would be minimized if held in trust until after the student-athlete leaves school.³⁰⁵ Amateurism and academic integration were too restrictive as means of maintaining consumer demand.³⁰⁶ Permissive—but not required—cash payments of up to five thousand dollars were found to be a less restrictive means of maintaining consumer demand.³⁰⁷ Accordingly, the NCAA was enjoined from prohibiting such payments.³⁰⁸

With that, the court delivered a “resounding rebuke”³⁰⁹ to the amateurism foundation of the NCAA, becoming the first of any federal court to find any aspect of the NCAA’s amateurism rules as violative of antitrust law.³¹⁰ FBS football players and Division I men’s basketball players could now collectively earn an estimated \$300 million over a four-year period.³¹¹ Schools could engage in bidding wars for the best high school football and basketball student-athletes.³¹² And those not discussed in the O’Bannon decision—female and other non-football or basketball student-athletes—would be left to wonder if they, too, would be compensated or, worse yet, if they would have a team to play on at all.³¹³ A timely appeal by the NCAA gave the Ninth Circuit Court of Appeals an opportunity to speak on the matter.³¹⁴

304. Ben Strauss & Marc Tracy, *N.C.A.A. Must Allow College to Pay Athletes, Judge Rules*, N.Y. TIMES, Aug. 8, 2014, <https://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html> (“The amounts in the trust funds would be up to the discretion of institutions.”).

305. *O’Bannon*, 7 F. Supp. 3d at 983-84.

306. *Id.* at 1007.

307. *Id.* at 1007-08.

308. *Id.* The court also held that the NCAA may prohibit schools from funding these stipends or trusts with anything other than revenue derived from the use of players’ NILs. *Id.* at 1005.

309. Strauss & Tracy, *supra* note 304.

310. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015) (“As far as we are aware, the district court’s decision is the first by any federal court to hold that any aspect of the NCAA’s amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.”).

311. Strauss & Tracy, *supra* note 304.

312. *Id.*

313. Solomon, *supra* note 44. See Boninger, *supra* note 29, at 801-05 (discussing the NCAA’s inability to provide equal athletic opportunities to men and women without restrictions).

314. *O’Bannon*, 802 F.3d 1049.

3. Ninth Circuit Decision

On appeal, the NCAA again relied on the Supreme Court's seminal *Board of Regents* decision.³¹⁵ The NCAA argued that the Board of Regents decision established that amateurism restrictions are presumptively procompetitive.³¹⁶ The court noted that, if the NCAA's argument were to be accepted, then any restriction related to amateurism would be automatically valid.³¹⁷ The NCAA would effectively have an exemption from antitrust scrutiny for any restrictions made to preserve amateurism.³¹⁸ The court would not be so generous. The court reasoned that the *Board of Regents* decision only mentioned amateurism rules in such a positive light to justify its application of the rule of reason analysis where others might apply the per se analysis.³¹⁹ The language is not a part of the final holding. Thus, the court concluded that the Supreme Court language regarding amateurism is dicta that will be given appropriate deference "where applicable."³²⁰

The court also found that the Supreme Court's *Board of Regents* decision did not compel a decision in favor of the NCAA.³²¹ The NCAA read *Board of Regents* as standing for the proposition that its amateurism restrictions are presumptively procompetitive.³²² However, under the rule of reason analysis, an anticompetitive restriction violates antitrust law if a substantially less restrictive alternative exists.³²³ Therefore, a court may still find that the NCAA restrictions, even if justified, violate antitrust law where a substantially less restrictive alternative exists. Thus, *Board of Regents* does not mean amateurism restrictions are automatically valid under Sherman antitrust law.³²⁴

With preliminary legal arguments dealt with, the court turned to the merits of the appeal under a "clear error" standard of review.³²⁵ The NCAA focused

315. On appeal, the NCAA made two additional arguments based on legal formalities that will not be discussed in this Comment: (1) that the NCAA's compensation restrictions are not covered by the Sherman Act because they do not regulate commercial activity; and (2) that the plaintiffs do not have standing under the Sherman Act because they have not suffered antitrust injury. *Id.* at 1061. The court was not persuaded by either argument. *Id.*

316. *Id.* at 1061-62.

317. *Id.* at 1063.

318. *Id.*

319. *Id.* (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 103 (1984)).

320. *Id.*

321. *Id.*

322. *Id.* at 1063-64.

323. *Id.* at 1064 ("[A] restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well.").

324. *Id.*

325. *Id.* at 1061 ("We review the district court's findings of fact after the bench trial for clear error.").

its appeal entirely on amateurism, arguing that the district court did not give amateurism enough credit as a procompetitive justification.³²⁶ The NCAA argued that its amateurism restrictions are procompetitive because they increase opportunities for student-athletes by giving them the only opportunity to obtain an education while competing as students.³²⁷ The court agreed that broadening choices available to student-athletes can make a restraint procompetitive.³²⁸ However, the court was unable to see the link between compensation restrictions and increased opportunities to student-athletes.³²⁹ Thus, the argument that amateurism rules increase opportunities for student-athletes was rejected on appeal.³³⁰

Ultimately, with regard to the NCAA's procompetitive justifications, the circuit court agreed with the district court's holdings.³³¹ The compensation restrictions play a limited role in: (1) integrating academics with athletics; and (2) preserving consumer demand by promoting amateurism.³³² As discussed, anticompetitive restrictions, even if supported by procompetitive justifications, are still in violation of antitrust law if less restrictive alternatives exist. Accordingly, the court turned to evaluate the legitimacy of the less restrictive alternatives.³³³

The Ninth Circuit relied heavily on the Supreme Court's *Board of Regents decision* to evaluate the less restrictive alternatives—" [W]e must generally afford the NCAA 'ample latitude' to superintend college athletics."³³⁴ To afford the NCAA that deference, the Circuit Court makes clear that only a "strong

326. *Id.* at 1072 (" [The NCAA] argues to us that the district court gave the amateurism justification short shrift"). Accordingly, the court accepted the district court's conclusions regarding the NCAA's other procompetitive justifications because the NCAA did not offer any meaningful argument. *Id.*

327. *Id.* The NCAA also argued that the District Court was inappropriately skeptical of the Association's historical commitment to amateurism. *Id.* at 1073. The Ninth Circuit agreed, but found it was ultimately irrelevant because a proven commitment to amateurism does not equate to a finding that amateurism has procompetitive effects. *Id.*

328. *Id.* at 1072.

329. *Id.* In a footnote, the court noted that the link may be that the compensation restriction reduces the schools' costs, allowing them to fund more scholarships and thereby increase the number of opportunities that recruits have to play college sports. *Id.* at 1073 n.16. The court found this argument to be tantamount to the NCAA's increased output argument, which had been rejected by the district court. *Id.* The NCAA had not directly challenged that holding on appeal and, on that basis, the court affirmed the lower court's holding. *Id.* at 1072-73 n.16.

330. *Id.* at 1073.

331. *Id.* ("We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court.")

332. *Id.* at 1072-73.

333. *Id.* at 1074.

334. *Id.* (citing *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 120 (1984)).

evidentiary showing”³³⁵ that the proposed alternative is “virtually as effective”³³⁶ at achieving the legitimate procompetitive justification will be sufficient to meet the plaintiff’s burden.

On the first alternative to the compensation restriction—allowing schools to offer full cost of attendance scholarships—the plaintiffs met their burden.³³⁷ Under NCAA standards, student-athletes remain amateurs as long as their compensation is for legitimate educational expenses.³³⁸ Allowing student-athletes to receive cost of attendance scholarships therefore has no impact on amateurism.³³⁹ The court affirmed the district court’s finding that restricting scholarships to only grant-in-aid is a violation of antitrust law.³⁴⁰

As for the second alternative—paying student-athletes small amounts of deferred cash compensation—the court was clear: “We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand.”³⁴¹ Indeed, “not paying student-athletes is *precisely what makes them amateurs*”³⁴² and “[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to education expenses is not minor; it is a quantum leap.”³⁴³ The circuit court found the lower court’s decision to be based on “threadbare evidence.”³⁴⁴ Additionally, the court was concerned with the possibility of a slippery slope where lawsuits would be brought until the five-thousand-dollar limit no longer existed, destroying amateurism in its

335. *Id.*

336. *Id.* at 1076.

337. *Id.* at 1075-76.

338. *Id.* at 1075 (“[B]y the NCAA’s own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.”).

339. *Id.*

340. *Id.* at 1075-76. Grant-in-aid scholarships cover most of the costs associated with attending a university, whereas cost-of-attendance scholarships cover all of the costs associated with attending a university. See Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes’ Viewpoints Dominate Business Session Discussion*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> (“[I]n addition to tuition, fees, books and room and board, the scholarship will also include expenses such as academic-related supplies, transportation and other similar items. The value of those benefits can differ from campus to campus.”).

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

342. *Id.* (emphasis in original).

343. *Id.* at 1078 (“[T]he district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is ‘virtually as effective’ for the market as being [an] amateur.”).

344. *Id.* at 1077 (“[T]he court relied on threadbare evidence in finding that small payments of cash compensation will preserve amateurism as well [as] the NCAA’s rule forbidding such payments.”).

entirety.³⁴⁵ Once again referring to the “ample latitude”³⁴⁶ that the NCAA must be afforded, the court vacated the district court’s allowance of cash payments: “The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more.”³⁴⁷

With that, the Ninth Circuit had spoken, affirming in part and vacating in part the decision of the lower court. The district court and the circuit court agreed on several issues, chief among them being: (1) the *Board of Regents* decision does not give the NCAA carte blanche authority to enforce restrictions under the guise of amateurism; and (2) student-athletes should receive compensation equal to the cost of attending their respective institution. As for disagreement, the circuit court can be seen to have overturned the lower court’s allowance of cash compensation for two reasons. First, the district court simply did not have the evidence to support a finding that amateurism can be achieved by delayed payments of cash. Second, student-athletes cannot receive compensation above the costs of their educational expenses because to do so would violate their status as amateurs.

The Ninth Circuit’s decision is current law.³⁴⁸ Today’s Division I student-athlete enjoys the opportunity to receive a full cost of attendance scholarship and all of the benefits of competing at the highest level in collegiate sport.³⁴⁹ Cash compensation remains restricted. It is unclear how long compensation restrictions will last, however. The next section of this Comment discusses *Alston*,³⁵⁰ a student-athlete compensation case that is currently being argued in the same district court that permitted student-athlete compensation before being overruled.

C. Current NCAA Litigation: *Alston*

Several former student-athletes³⁵¹ have stepped into the shoes once occupied by Ed O’Bannon to challenge those same compensation restrictions

345. *Id.* at 1079.

346. *Id.* (citing Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 120 (1984)).

347. *Id.*

348. The Supreme Court denied review of the appellate court decision. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 277 (2016) (denying certiorari).

349. Benefits such as meal plans; money for books and miscellaneous expenses; academic counseling and tutoring; life skill training; nutritional advice; professional coaching; strength and fitness training; and support from athletic trainers and physical therapists. Dorfman, *supra* note 17.

350. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston)*, No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. 2017).

351. Namely: Shawne Alston, Martin Jenkins, Johnathan Moore, Kevin Perry, William Tyndall, Alex Lauricella, Sharriff Floyd, Kyle Theret, Duane Bennett, Chris Stone, John Bohannon, Ashley Holliday, Chris Davenport, Nicholas Kindler, Kendall Gregory-McGhee, India Chaney, Michel’le Thomas, Don “DJ” Banks,

that the NCAA enforces to protect amateurism. Represented by the prominent sports labor lawyer, Jeffrey Kessler, the plaintiffs seek to undo all NCAA restrictions against compensating student-athletes, creating a free market where conferences may choose to offer compensation packages to prized recruits.³⁵² Like in *O'Bannon*, the plaintiffs allege that the NCAA violates federal antitrust law by restricting the compensation a student-athlete may receive.³⁵³ Accordingly, the plaintiffs seek an injunction against the NCAA's rules limiting compensation for student-athletes.³⁵⁴

Recognizing that the allegations made in *Alston* are essentially identical to those in *O'Bannon*, the NCAA moved to dismiss the claims under the doctrine of stare decisis.³⁵⁵ Judge Claudia Wilken, the same judge that presided over the first *O'Bannon* decision that allowed for cash payments of five thousand dollars, denied the motion.³⁵⁶ She reasoned that the *O'Bannon* decision makes clear that student-athletes cannot receive cash compensation untethered to educational expenses.³⁵⁷ Although it is not written in her short opinion, Judge Wilken is clearly suggesting that other benefits may be made available for student-athletes in lieu of cash compensation. Indeed, plaintiffs' attorney Jeffrey Kessler argued

Kendall Timmons, Dax Dellenbach, Nigel Hayes, Anfornee Stewart, Kenyata Johnson, Barry Brunetti, Dalenta Jamerall "D.J." Stephens, Justine Hartman, Afure Jemerigbe, and Alec James. *Parties for In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 4:14-md-02541, CT. LISTENER, <https://www.courtlistener.com/docket/4495063/parties/in-re-national-collegiate-athletic-association-athletic-grant-in-aid-cap/> [<https://perma.cc/6QBX-WXK7>] (last visited Dec. 13, 2018).

352. See Will Hobson, *After NCAA Settlement, Sports Lawyer Jeffrey Kessler Continues Fight to Upend Amateurism*, WASH. POST, Feb. 7, 2017, https://www.washingtonpost.com/news/sports/wp/2017/02/07/ncaa-settlement-on-past-cost-of-attendance-stipends-is-not-nearly-enough-sports-lawyer-jeffrey-kessler/?utm_term=.ea57e6c63f16; see also Travis Waldron, *A Trip To the Men's Room Turned Jeff Kessler Into the NCAA's Worst Nightmare*, HUFFINGTON POST (Aug. 7, 2017), https://www.huffingtonpost.com/entry/jeffrey-kessler-ncaa-lawsuit_us_59723f33e4b00e4363df3f59.

353. Order Denying Motion for Judgment on the Pleadings, No. 14-md-2541-CW, 2016 WL 4154855 (N.D. Cal. 2016).

354. *Id.* The plaintiffs do not seek damages. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541-CW, 2018 WL 1524005, at *3 (N.D. Cal. 2018).

355. Defendants' Motion for Judgment on the Pleadings and Memorandum of Points and Authorities in Support Thereof, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14MD02541, 2016 WL 4943915 (N.D. Cal. 2016).

[U]nder the doctrine of *stare decisis*, the *Jenkins* and consolidated action plaintiffs are not entitled to relitigate the question of whether defendants' rules prohibiting member schools from paying student-athletes more than their cost of attendance violate the Sherman Act, and they are not entitled to an injunction against the enforcement of those rules.

Id.

356. Order Denying Motion for Judgment on the Pleadings, *supra* note 353, at *2.

357. *Id.* ("The Ninth Circuit's decision in *O'Bannon* simply forecloses one type of relief Plaintiffs previously sought: cash compensation untethered to educational expenses.")

this very notion during oral arguments.³⁵⁸ Specifically, Kessler argued that the NCAA could provide tuition for graduate school; improved health care for student-athletes; and funds for athletes' families to attend on recruiting trips, among other benefits.³⁵⁹

Both parties moved for summary judgment.³⁶⁰ Like *O'Bannon*, the summary judgment determination revolved around the veracity of amateurism. The plaintiffs sought to convince the court that amateurism is a myth that does not justify restricting compensation exclusively to academic scholarships.³⁶¹ The NCAA sought to affirm amateurism as fundamental to the appeal of collegiate sport and to have the court reaffirm that the NCAA must be afforded ample latitude to protect amateurism.³⁶²

Unsurprisingly, Judge Wilken did not grant the NCAA's motion for summary judgment.³⁶³

The plaintiffs' summary judgment motion was premised on the idea that the NCAA takes an inconsistent approach to restricting financial aid, generally limiting aid to cost of attendance in most cases but also allowing aid to exceed cost of attendance in certain specific instances.³⁶⁴ Thus, as the plaintiffs would have it, the compensation restrictions are unprincipled restraints that cause unjustified anticompetitive effects.³⁶⁵ The NCAA was unable create a factual dispute on this point and the court found that the compensation restraints do

358. Steve Berkowitz, *Judge Rejects NCAA's Request for Dismissal of 'Kessler,' Alston Suits*, USA TODAY, Aug. 5, 2016, <https://www.usatoday.com/story/sports/college/other/2016/08/05/ncaa-suit-shawne-alston-martin-jenkins-kessler-berman-nigel-hayes-claudia-wilken/88313408/>.

359. *Id.*

360. Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, No. 4:14-md-02541-CW, 2017 WL 3525667 (N.D. Cal. 2017); Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.* (Alston), No. 4:14-md-02541-CW, 2017 WL 4348498 (N.D. Cal. 2017).

361. "Defendants' price-fixing justification based on their ever-elusive concept of 'amateurism' is simply their version of a three-card Monte game in which the line defining amateurism never stays in the same place." Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, *supra* note 360, at 1.

362. Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiff's Motion for Summary Judgment, *supra* note 360 (discussing the century-old principle of amateurism and the courts' continued recognition that the NCAA must have ample latitude to enforce rules to protect amateurism).

363. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *15.

364. *Id.* at *9 ("Plaintiffs contend that because Defendants permit student-athletes to be paid money that does not go 'to cover legitimate education expenses,' they are not amateurs.").

365. *Id.* at *7 ("Plaintiffs contend that . . . Defendants cannot meet their burden to prove that the restraints have procompetitive benefits.").

produce significant anticompetitive effects in the relevant market³⁶⁶ as a matter of law.³⁶⁷

The burden shifted to the NCAA to provide procompetitive justifications for the compensation restrictions. The NCAA proffered the two surviving procompetitive justifications from *O'Bannon*: integrating academics with athletics and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.³⁶⁸ The court found that a factual dispute existed and that these two justifications must be proved at trial once again.³⁶⁹

The NCAA offered seven additional procompetitive justifications.³⁷⁰ The court found that six of them had no evidentiary support and dismissed them.³⁷¹ The NCAA's seventh procompetitive justification called for the court to consider the expanded opportunities that the NCAA is able to provide as a result of the compensation restrictions:

The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundation principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic

366. The relevant market was the same as in *O'Bannon*: "the market for a college education combined with athletics or alternatively the market for the student-athletes' athletic services." *Id.* at *8.

367. The NCAA once again relied on *O'Bannon* precedent, arguing that *stare decisis* barred an allegation that the compensation restrictions cause anticompetitive effects. *Id.* at *8. The court was once again unpersuaded.

368. *Id.*

369. *Id.* ("[T]he validity of the specific rules challenged in this case 'must be proved, not presumed.'") (citing *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1064 (9th Cir. 2015)).

370. The seven additional justifications were:

- (1) expanding output in the college education market . . . ;
- (2) widening opportunities for student-athletes to attend college through athletics scholarships . . . ;
- (3) promoting support for college and universities . . . ;
- (4) creating a more diverse student body;
- (5) providing a broader scope of athletic program offerings . . . ;
- (6) promoting competitive balance . . . ;
- and (7) promoting competitive fairness and improving the quality of college education . . .

Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment, *supra* note 360.

371. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *10 (stating that "Defendants have not attempted to meet [their] burden at all" and that "the Court will grant summary judgment on these six procompetitive justifications" against the NCAA).

rivalry and as an essential component of a comprehensive college education.³⁷²

This final procompetitive justification is reminiscent of the “increased output” justification proffered by the NCAA in *O’Bannon*.³⁷³ The court correctly notes that this justification is distinct because it implicates all student-athletes, students, and alumni, where the “increased output” justification in *O’Bannon* was cabined to increased output for just those student-athletes in football and men’s basketball.³⁷⁴

Here, the court was asked to consider those “other players” in college sports other than men’s basketball and football. And the NCAA provides evidentiary support to validate this procompetitive justification. Dr. Elzinga, an expert for the NCAA, concluded that the relevant market is not simply a one-sided market where the schools are either a seller of an education and athletic opportunities or buyers of athletic services.³⁷⁵ Rather, Dr. Elzinga concluded that the relevant market is a “multi-sided market for college education in the United States” and that restrictions must be enforced to provide an optimal balance for all participants.³⁷⁶ The NCAA also provided testimony from the plaintiffs’ expert, Dr. Lazear, stating that demand in the college education market may include alumni, viewers, and other students.³⁷⁷ The testimony of these experts suggests that the relevant market is larger than the current view adopted by the court, where procompetitive justifications are cabined to those existing within specific sports. Under this procompetitive justification, which implicates a broader relevant market, the court would have to consider all players involved in collegiate athletics. The court dismissed this procompetitive justification, too.³⁷⁸

The court reasoned that, even if all reasonable inferences were drawn in favor of the NCAA, the evidence did not support the proffered justification

372. *Id.* at *10.

373. Recall the fourth procompetitive justification proffered by the NCAA in *O’Bannon*: “The NCAA asserts that its challenged rules are reasonable and procompetitive because they enable it to increase the number of opportunities available to schools and student-athletes to participate in FBS football and Division I basketball, which ultimately increases the number of games that can be played.” *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).

374. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *11.

375. Order on Motions to Exclude Proposed Expert Testimony, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.* (Alston), No. 14-md-02541-CW, at 5 (N.D. Cal. 2018) (comparing Dr. Elzinga’s determination of the relevant market to the single-sided market definition adopted by the court).

376. *Id.* at 5.

377. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *11.

378. *Id.*

because Dr. Elzinga was not expressly referring to the “increased output” justification when making his comments.³⁷⁹ Thus, his comments were mischaracterized and insufficient to raise a genuine issue of material fact.³⁸⁰ The court makes no attempt to disqualify Dr. Lazear’s testimony, which the NCAA also relied on as evidence for the justification.³⁸¹

The seven additional procompetitive justifications were dismissed.³⁸² With the NCAA’s two surviving procompetitive justifications, the burden shifted to back to the plaintiffs to provide a less restrictive alternative for meeting those surviving justifications.

Plaintiffs provided two less restrictive alternatives: allow Division I conferences to set the rules regulating education and athletic participation expenses that the member institutions may provide; or remove all rules prohibiting payments of any kind that are related to educational expenses and any payments that are incidental to athletic participation.³⁸³

The plaintiffs did not seek summary judgment on the less restrictive alternatives, preferring to prove their validity at trial.³⁸⁴ The NCAA did seek summary judgment on these less restrictive alternatives, however, arguing they were foreclosed by *O’Bannon*.³⁸⁵ The NCAA was unsuccessful.³⁸⁶ The court found that *O’Bannon* does not foreclose the plaintiffs’ less restrictive alternatives.³⁸⁷

With that, the court had once again spoken on the issue of student-athlete pay. The court made clear that *O’Bannon* stands for the idea that student-athletes may not receive cash untethered to educational expenses. But nothing more. The NCAA has two procompetitive justifications that have some salience in the eyes of the court: integrating athletics and academics; and preserving the popularity of college sports through the preservation of amateurism. The plaintiffs have the upper hand. The relevant market is apparently cabined to restrictions and justifications that exist in a narrow market, exclusive to men’s and women’s basketball and FBS football

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* at *10-11.

383. *Id.* at *12-13. Plaintiffs’ Opening Argument at 41-42, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.* (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

384. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *11.

385. *Id.*

386. *Id.* at *11-12.

387. *Id.*

student-athletes. And, for now, two less restrictive alternatives exist that will change the face of the NCAA as we know it if they are not defeated.

Oral Argument commences on September 4, 2018 and concludes on September 25, 2018.³⁸⁸ Judge Wilken's decision is expected in late 2018.³⁸⁹

The concept of amateurism has been obfuscated by a barrage of antitrust claims and misleading rhetoric. Over a century ago, amateurism was introduced as a means of ensuring a safe and equitable playing field for a large swath of student-athletes. Today, claims are largely brought for the exclusive benefit of the revenue generating sports of men's basketball and football.³⁹⁰ The value of a free education goes unmentioned as claim after claim alleges that student-athletes receive no compensation for their efforts. And, the consequences of a regime where some student-athletes are paid, while others are not, goes largely undiscussed in any meaningful way by the courts. Here, the court has the opportunity to redirect the conversation toward the value of amateurism in a meaningful way. The remainder of this Comment argues that the court should do exactly that.

IV. THE NINTH CIRCUIT GOT IT RIGHT IN *O'BANNON*

Judge Wilken and the Northern District Court of California (and all other courts for that matter) should recognize that the Ninth Circuit's decision in *O'Bannon* was correct.³⁹¹ To come to this conclusion, one must first consider the general reason that these antitrust cases are brought against the NCAA: to remedy the perceived exploitation of former, current, and future student-athletes. Payments of five thousand dollars do not remedy that perceived exploitation.³⁹² Indeed, the Ninth Circuit opinion reflects the Court's concern that allowing limited and delayed payments of five-thousand dollars was only considered a "first step" towards realizing an outcome where student-athletes received more compensation. It is likely that the "next step" would have been another antitrust lawsuit raising the limit from five-thousand

388. Minute Order, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.* (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. May 22, 2018).

389. *Id.* at *15.

390. Arguably, women's basketball was included in litigation for the exclusive purpose of satisfying federal Title IX regulations. In the NCAA's opening statement, the NCAA correctly points out women's basketball is never mentioned in the Plaintiffs' Opening Statement. Defendants' Opening Statement at 21, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.* (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018) ("[Plaintiffs'] never say a word about women's basketball in particular.").

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

392. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014) (allowing for student-athletes to receive up to five-thousand dollars in a trust per year while eligible).

dollars to twenty-thousand dollars, and so on. The Ninth Circuit expressly acknowledged this very issue: “[W]e have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL.”³⁹³

During the *O’Bannon* trial, several individuals testified that their concern regarding student-athlete pay would be heightened if those payments were large.³⁹⁴ The district court acknowledged these concerns and concluded that small payments would be a better alternative for preserving amateurism than restricting payments altogether would be.³⁹⁵ Small payments are not a valid alternative when the legal action is brought to remedy the perceived exploitation of student-athletes that generate millions of dollars of revenue (not profits) for their university. This concern was also acknowledged by the Ninth Circuit: “[T]he district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is ‘virtually as effective’ for that market as being [an] amateur.”³⁹⁶

For example, consider lead plaintiff Ed O’Bannon. O’Bannon led the University of California, Los Angeles (UCLA) Bruins to a college basketball championship after a twenty-year drought. He averaged 20.4 points and 8.3 rebounds and was named the most outstanding basketball player in all of college basketball.³⁹⁷ UCLA likely generated hundreds of thousands of dollars, if not millions, in revenues (again, not profits) as a result of Mr. O’Bannon’s efforts. Annual payments of five-thousand dollars, which O’Bannon could not have collected until he was done playing, do not eliminate the perceived exploitation. Indeed, the ultimate payment O’Bannon would have received would pale in comparison to the revenues he likely generated for UCLA. The district court’s decision does not remedy the perceived exploitation. It only serves to undermine amateurism.

Furthermore, the district court was unduly skeptical of the NCAA’s historic commitment to amateurism,³⁹⁸ leading to a conclusion that amateurism is only

393. *O’Bannon*, 802 F.3d at 1079.

394. *O’Bannon*, 7 F. Supp. 3d at 983.

395. *Id.*

396. *O’Bannon*, 802 F.3d at 1076.

397. *SPORTS PEOPLE: COLLEGE BASKETBALL; O’Bannon Receives the Wooden Award*, N.Y. TIMES, Apr. 8, 1995, <http://www.nytimes.com/1995/04/08/sports/sports-people-college-basketball-o-bannon-receives-the-wooden-award.html>.

398. The Ninth Circuit acknowledged this skepticism and suggested it may disagree with the district court’s conclusion: “[The NCAA] faults the district court for being inappropriately skeptical of the NCAA’s historical commitment to amateurism . . . we might have credited the depth of the NCAA’s devotion to amateurism differently.” *O’Bannon*, 802 F.3d at 1072.

somewhat procompetitive.³⁹⁹ As discussed in this Comment, the NCAA was founded partially on the premise that amateurism must be preserved within collegiate athletics.⁴⁰⁰ The district court concluded that the NCAA is not truly committed to amateurism because it has adjusted its definition numerous times in its century-old existence.⁴⁰¹ However, an ideal with an evolving definition does not necessarily mean that an organization is less committed to that ideal. As discussed, the NCAA is the first organization in the world to affirmatively define amateurism. It should not be forced to stand by an antiquated definition as the world around it continues to develop. Rather, it should be afforded the opportunity to develop the definition, allowing for the most equitable and all-encompassing result possible.

For example, the district court pointed to the fact that the NCAA allows Division I tennis recruits to preserve their amateur status despite having “accept[ed] ten thousand dollars in prize money the year before he enrolls in college” while a track and field athlete is not afforded the same opportunity.⁴⁰² The district court concluded that this was demonstrative of the NCAA’s malleable and contradictory approach to amateurism.⁴⁰³ However, as discussed in this Comment, the decision to allow tennis recruits to receive prize money was done in an effort to allow tennis players, mostly foreign, the ability to recoup the major costs associated with training, traveling, and entrance into competitions. The NCAA similarly allows prospective student-athletes in *all other sports* in the United States to have their training, traveling, and entrance costs covered by corporate sponsors prior to their enrollment in the college.⁴⁰⁴ The NCAA is shifting the burdensome costs of preparing for college athletics

399. *O’Bannon*, 7 F. Supp. 3d at 1001 (“[Amateurism] restrictions on student-athlete compensation play a *limited role* in driving consumer demand.”) (emphasis added).

400. See *Jones v. Nat’l Collegiate Athletic Ass’n*, 392 F. Supp. 295, 304 (D. Mass. 1975).

The N.C.A.A. was originally established to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions. The N.C.A.A. eligibility rules were . . . designed to . . . implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding.

Id.

401. *O’Bannon*, 7 F. Supp. 3d at 1000.

402. *Id.*

403. *Id.*

404. The NCAA permits the actual and necessary expenses associated with competition to be reimbursed by permissible sources such as event sponsors and club teams. See NCAA, 2017-18 NCAA DIVISION I MANUAL art. 12, 12.02.6, at 62 (Aug. 1, 2017); see also Adam Himmelsbach, *Club Team, Nike Reap Benefits of Sponsorship*, COURIER J., Oct. 17, 2014, <https://www.courier-journal.com/story/sports/college/basketball/2014/10/17/club-team-nike-reap-benefits-sponsorship/17458415/> (“Generally speaking, it is permissible for basketball teams to be sponsored by companies and to provide prospective student-athletes with necessary expenses like travel, food, etc.”).

to corporate sponsors, which will be borne by member institutions of the NCAA once the prospective student-athlete enrolls at a member school. An evolving definition of amateurism is not a sign of contradiction, it is one of growth.

Even if the NCAA has some rules that are contradictory, that does not mean that amateurism as a whole must be abandoned. Like any century-old organization, the NCAA has missteps. Missteps do not justify complete abandonment of the ideals upon which the Association was founded, primarily amateurism. The Fifth Circuit has recognized as much: “That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable.”⁴⁰⁵

The district court also challenged the extent to which amateurism generates consumer interest.⁴⁰⁶ The Supreme Court has attempted to settle this issue as a matter of law.⁴⁰⁷ But even if this were a question of fact, polls indicate that it is an open question. In 2014, a *Washington Post* poll revealed that the public generally opposes paying student-athletes at a rate almost double that of those who support it.⁴⁰⁸ What is more, a large portion of those individuals whom oppose paying student-athletes are strongly opposed to the idea.⁴⁰⁹ *The Washington Post* poll revealed figures consistent with those presented by the NCAA in trial.⁴¹⁰ While these figures are not demonstrative of how the consumer would actually act if student-athletes are paid, they are insightful as to the preferences of the consumer. A product, such as collegiate athletics, is arguably procompetitive if it seeks to maximize the preferences of the consumer.⁴¹¹ The Ninth Circuit succeeded where the district failed by recognizing this fact: “Having found that amateurism is integral to the NCAA’s

405. *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1345 (5th Cir. 1988).

406. *O’Bannon*, 7 F. Supp. 3d at 975-76.

407. In *Board of Regents* the Supreme Court makes clear that “athletes must not be paid” because it preserves the character of college sports as compared to professional sports, which is in the consumers’ interest because it widens the choices available to sports fans. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 102, 117 (1984).

408. Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes, Washington Post-ABC News Poll Finds*, WASH. POST, Mar. 23, 2014, https://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html?utm_term=.a0ab74eea1a5.

409. *Id.* Forty-seven percent were found to be strongly against the idea of paying student-athletes. *Id.*

410. The NCAA survey revealed sixty-nine percent of respondents were opposed to paying student-athletes while only twenty-eight percent were in favor of paying them. *O’Bannon*, 7 F. Supp. 3d at 975. *The Washington Post* poll revealed that sixty-four percent were opposed and thirty three percent were in favor. Prewitt, *supra* note 408.

411. *See Bd. of Regents*, 468 U.S. at 102 (“[NCAA] actions widen consumer choice . . . and hence can be viewed as procompetitive.”).

market, the district court cannot plausibly conclude that [paying student-athletes] is ‘virtually as effective’ . . . as being amateur.’⁴¹²

Ultimately, the Ninth Circuit’s holding in *O’Bannon* is correct because it properly affords the NCAA “ample latitude” in superintending collegiate athletics, as required by the United States Supreme Court.⁴¹³ More than thirty years ago, the Supreme Court recognized higher education benefits in quality and diversity through preservation of the student-athlete.⁴¹⁴ These goals are entirely consistent with the Sherman Act and for this reason, the Ninth Circuit’s *O’Bannon* decision was correct.⁴¹⁵

V. NCAA COMPENSATION RESTRICTIONS ARE PROCOMPETITIVE BECAUSE THEY CREATE ANCILLARY BENEFITS IN CLOSELY RELATED MARKETS

Even if *O’Bannon* is viewed so narrowly as to only stand for prohibiting one type of compensation—cash benefits untethered to education expenses⁴¹⁶—there is still good reason for permitting the NCAA to restrict compensation to cost of attendance scholarships, and it starts with the analysis of the relevant markets. As discussed, the rule of reason analysis is typically limited to those restraints in a product market and the procompetitive benefits derived from those restraints in the same product market. The *O’Bannon* decision limited the rule of reason analysis to the anticompetitive effects in the markets of Division I men’s basketball and FBS football.⁴¹⁷ *Alston* similarly considers those two revenue generating sports, and also nominally includes Division I women’s basketball.⁴¹⁸ In either case it is inappropriate to primarily consider certain specified sports when the antitrust claims implicate all sports and student-athletes under the NCAA’s purview.⁴¹⁹ A regime change where student-athletes can be compensated with cash, or in-kind benefits, will put financial pressures on athletic departments across the country as they try to keep

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

413. *Id.* at 1079 (citing *Bd. of Regents*, 468 U.S. at 120).

414. *Bd. of Regents*, 468 U.S. at 120.

415. *Id.*

416. Order Denying Motion for Judgment on the Pleadings, *supra* note 353.

417. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 986-87 (N.D. Cal. 2014); *O’Bannon*, 802 F.3d at 1070-72.

418. See Defendants’ Opening Statement, *supra* note 390 (noting Plaintiffs’ failure to mention women’s basketball in their opening statement, and suggesting that women’s basketball may have been included to avoid Title IX obligations).

419. In the NCAA’s Opening Statement, the NCAA expressly states its disagreement with the district court’s definition of the relevant market at issue, and reserves the right to challenge the finding. Defendants’ Opening Statement at 6 n.11, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.* (*Alston*), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

up with other institutions by offering competitive compensation packages to prospective Division I men's and women's basketball, and FBS football student-athletes. The ensuing financial pressures will result in non-revenue generating sports being cut altogether.⁴²⁰ Indeed, financial pressures have resulted in this very outcome in the past as a result of the financial pressures accompanied by Title IX:

The NCAA observed that some college presidents had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students due to the economic restraints [of increasing support for women's athletic programs]. At the same time, many institutions felt pressure to 'keep up with the Joneses' by increasing spending on recruiting talented players and coaches and on other aspects of their programs in order to remain competitive with rival schools.⁴²¹

Additionally, tuition costs for the general student body may increase as a result of enlarged financial burdens on the athletic department.⁴²² Because of the pernicious effects of such a regime change, the courts should consider the procompetitive benefits that the compensation restrictions provide in the closely related markets of the non-revenue generating collegiate sports.

In *Sullivan v. NFL*,⁴²³ the court expressly considered those "ancillary benefits" in a closely related market. The owner of the New England Patriots brought antitrust action against the NFL for prohibiting him from offering for sale public stock in the Patriots.⁴²⁴ The district court determined that the relevant market was the market for public stock in NFL teams and a jury trial resulted in a finding against the NFL for antitrust violations.⁴²⁵ On appeal, the NFL argued that all procompetitive effects of its policy, even those in a market different from that in which the alleged restraint operated, should have been

420. It will also lead to cuts within the revenue generating sports themselves. Jon Solomon, *NCAA Conferences: Scholarships Would Be Cut If Players Are Paid*, CBS SPORTS (May 1, 2015), <https://www.cbssports.com/college-football/news/ncaa-conferences-scholarships-would-be-cut-if-players-are-paid/> ("[I]f college athletes are allowed to be paid, the development would 'likely lead many—if not most—Division I institutions' to reduce the number of scholarships for less-renowned football and men's and women's basketball players.").

421. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1012 (10th Cir. 1998).

422. *See* Krupnick, *supra* note 31 ("The most likely outcome . . . would be for at least some . . . universities to drop out of the big-time sports by eliminating athletics scholarships or otherwise scaling back sports programs rather than risking protests by paying athletes and charging students more.").

423. 34 F.3d 1091 (1st Cir. 1994).

424. *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1096 (1st Cir. 1994).

425. *Id.*

considered by the district court.⁴²⁶ Specifically, the NFL argued that its public ownership restrictions ensure that NFL stakeholders are focused on the long-term interests of the league as a whole, rather than short-term dividend interests.⁴²⁷ The NFL reasoned that these aligned interests allow the NFL to better compete in the entertainment market.⁴²⁸ The NFL further reasoned that the entertainment market is closely related to the market identified by the district court—the market for public ownership in NFL teams.⁴²⁹ Thus, the NFL argued that the anticompetitive harms in the market for public ownership in NFL teams can be compared with the resulting procompetitive benefits in the market for entertainment.⁴³⁰ Significantly, the First Circuit court agreed and remanded the case for those benefits in the entertainment market to be considered⁴³¹:

[W]e can draw at least one general conclusion from the case law at this point: courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices.⁴³²

Like the First Circuit, the district court should consider the benefits being realized in the closely related markets of non-revenue generating sports as a result of the men's basketball and FBS football compensation restrictions. In *Sullivan*, the stated market was public ownership in NFL teams and the closely related market was entertainment.⁴³³ Here, the stated markets are the revenue generating sports of Division I men's basketball and FBS football. The closely related market is non-revenue generating collegiate sport. In *Sullivan*, the First Circuit required the district court to consider the benefits being realized in the entertainment market as a result of those public ownership restrictions.⁴³⁴ The district court here should similarly consider the benefits being realized by the student-athletes participating in non-revenue generating sport as a result of compensation restrictions in Division I men's basketball and FBS football. The

426. *Id.* at 1111.

427. *Id.* at 1102.

428. *Id.* at 1112-13.

429. *Id.* at 1112.

430. *Id.*

431. The Fifth Circuit Court of Appeals actually gave the district court a choice. On remand, the district court could allow the jury to consider the benefits to competition in the closely related market or the court could have the jury make a final determination without considering a relevant market whatsoever. *Id.* at 1113.

432. *Id.* at 1112.

433. *Id.*

434. *Id.* at 1113 (“These procompetitive justifications should have been considered by the jury.”).

major benefit being realized is the increased opportunity for student-athletes to compete in amateur sport while earning a quality education.⁴³⁵

This is not a radical proposition. The Fifth Circuit has previously considered, and upheld, NCAA restrictions because the non-revenue generating sports benefit from those restrictions. In *Hennessey v. National Collegiate Athletic Ass'n*, coaches brought an antitrust action against the NCAA because the Association had introduced a new bylaw that limited the number of assistant coaches a school could employ.⁴³⁶ The court recounted that the bylaw had been introduced to preserve the long-term interests of the entire association:

Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to “catch up”, but to “keep up”, were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to the abandonment by many. “Minor” and “minority” sports were viewed as imperiled by concentration upon the “money makers”, such as varsity football and basketball.⁴³⁷

The court upheld the restriction, noting that the fundamental objective of the rule was to reorient schools into maintaining “their traditional role as amateur sports operating as part of the educational processes.”⁴³⁸ In *Alston*, the court has the opportunity to similarly reorient the focus of Division I men’s basketball and FBS football from their purely commercial objectives back to their academic pursuits while competing as amateur student-athletes. The longevity of collegiate athletics stands to benefit from such a reorientation of the otherwise commercialistic objectives held by revenue generating sports. As mentioned, the major benefit will be the continued viability of non-revenue generating sports that risk succumbing to financial pressures.

The benefit that stands to be gained—increased opportunities to earn a quality education while competing in amateur sport—should, at the very least,

435. In *O'Bannon*, the district court considered, and refuted, the NCAA’s argument that compensation restrictions are procompetitive because they increase opportunities to compete in FBS Football and men’s Division I basketball. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 981-82 (N.D. Cal. 2014). This Comment argues that the increased opportunities to all student athletes should be considered and that those opportunities include increased access to a quality education. See Boninger, *supra* note 29, at 805 (concluding that “the NCAA’s prohibitions on compensation are necessary for schools to continue to provide equality of collegiate athletic opportunities for men and women.”).

436. 564 F.2d 1136, 1141 (5th Cir. 1977).

437. *Id.* at 1153.

438. *Id.*

be considered by courts in both an economic and a social welfare sense. In an economic sense, the restriction results in increased consumer choice by making NCAA member institutions more accessible to a greater number of prospective student-athletes.⁴³⁹ Similarly, it maintains access for the general student body by keeping “general fees” from being arbitrarily increased due to increased costs within the athletic department. In a social welfare sense, the restrictions promote the social ideal of equality of educational access and opportunity for all student-athletes, not just those belonging to the lucrative sports of men’s basketball and FBS football. Indeed, the Third Circuit has found that these exact benefits are worth consideration in the antitrust context.

In *U.S. v. Brown*, MIT was sued by the United States Department of Justice for establishing a program where certain Ivy League schools⁴⁴⁰ would collectively agree to a single financial aid package that would be offered to each prospective student.⁴⁴¹ The program was designed to help economically disadvantaged students, so financial aid packages were determined exclusively on the basis of demonstrated need.⁴⁴² MIT argued that the program increased consumer choice by making Ivy League educations more accessible to a greater number of students, particularly those that lack financial resources.⁴⁴³ Moreover, MIT argued that the program was also justified on social welfare grounds by promoting the ideal of equality of educational access and opportunity.⁴⁴⁴ The district court found the program to be in violation of antitrust law.⁴⁴⁵ On appeal, the circuit court reasoned that “[i]t is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education” and “[t]here is no doubt, too, that enhancing the quality of our educational system redounds to the general good.”⁴⁴⁶ Accordingly, the circuit court held that the district court was

439. Here, the student-athletes would be the “consumers” for the purposes of antitrust review. The Ninth Circuit and Northern District Court of California accepted the view of student-athletes as consumers in a market where schools are selling educational and athletic opportunities. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1057-58 (9th Cir. 2015); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014).

440. Those Ivy League schools were: MIT, Brown, Columbia, Cornell, Dartmouth, Harvard, Princeton, the University of Pennsylvania, and Yale. *U.S. v. Brown Univ.*, 5 F.3d 658, 662 n.1 (3d Cir. 1993).

441. *Id.* at 661-63.

442. *Id.* at 662.

443. *Id.* at 674-75 (“[B]y increasing the financial aid available to needy students, [the Program] provided some students who otherwise would have been able to afford an [Ivy League] education the opportunity to have one.”).

444. *Id.* at 675.

445. *Id.* at 664.

446. *Id.* at 678.

obliged to consider the economic and social welfare justifications offered by MIT.⁴⁴⁷

In short, removing financial obstacles for the greatest number of talented but needy students increases educational access, thereby widening consumer choice. Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit.⁴⁴⁸

The district court in *Alston* should feel equally as obliged to consider these procompetitive justifications. Specifically, the court should consider the justification that payment restrictions allow the NCAA to provide a greater number of educational and athletic opportunities to many student-athletes that would not exist if such payment restrictions were lifted.

VI. APPLICATION: *ALSTON*

The Northern District Court of California has demonstrated an unwillingness to grant the NCAA that “ample latitude” that the Supreme Court⁴⁴⁹ and Ninth Circuit⁴⁵⁰ have afforded the NCAA. The recent District Court summary judgment decision is only the most recent example of that. Based on the outcome of the summary judgment motion, it is unlikely that the District Court will change course in issuing its verdict at the close of the *Alston* trial.⁴⁵¹ Thus, the application of this Comment may be more applicable to the subsequent appeal made by the NCAA after an unfavorable outcome.

Regardless of the procedural posture, level of the court, or circuit in which an antitrust claim is being brought against the NCAA, the points made in this Comment should be taken into consideration. Below, I will illustrate how the principles described above should be applied in *Alston*.

447. *Id.* at 661 (“[W]e hold that the district court erred by failing to adequately consider the procompetitive and social welfare justifications proffered by MIT.”).

448. *Id.* at 675.

449. Recall the Supreme Court’s language in the seminal *Board of Regents* decision:

There can be no question but that [the NCAA] needs ample latitude to play [the critical role of maintaining the revered tradition of amateurism in college sports], or that preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85, 120 (1984).

450. *O’ Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1074 (9th Cir. 2015) (“[W]e must generally afford the NCAA ‘ample latitude’ to superintend college athletics.”).

451. “Judge Wilken has shown less deference to the NCAA than most judges, but this case and the fate of the NCAA’s economic model will likely ultimately rest in the hands of the Ninth Circuit and the Supreme Court.” Ralph D. Russo, *NCAA Goes Back to Court, Defending Its Amateurism Rules*, ASSOCIATED PRESS (Sept. 3, 2018), <https://www.apnews.com/db8398e20f8d4f959591b622160e408c> (quoting Director of Tulane University’s Sports Law Program Gabe Feldman).

The relevant market, per the summary judgment decision, is the market for a college education combined with athletics, or alternatively the market for the student-athletes' services. Crucially, the student-athletes described belong to the sports of FBS football and Division I men's and women's basketball—no other sports are considered.⁴⁵² Thus, the sought remedy only benefits those stated sports and no others. As discussed, an injunction that allows prized recruits to be paid in cash or in kind will result in increased financial burdens on any given school. Also discussed, increased financial burdens often lead to the removal of woman's sports and other non-revenue generating sports.⁴⁵³ Therefore, the issues and proposed solutions mentioned in this Comment are directly applicable.

The compensation restrictions were found to be anticompetitive as a matter of law. Therefore, the burden will primarily be on the NCAA at trial to prove the validity of its stated procompetitive justifications for the restrictions. As mentioned, those procompetitive justifications are: (1) integration of academics and athletics; and (2) preservation of amateurism in college sport, which preserves its popularity by distinguishing it from professional sport.

The NCAA should argue that the benefits being derived in the revenue and non-revenue generating sports justify the compensation restrictions. Because the procompetitive justifications have been limited to those two stated above, the NCAA will have to argue that non-revenue generating sports are enjoying those benefits. More specifically, student-athletes in the non-revenue generating sports are enjoying the benefits of having an integrated experience and that, as amateurs, their athletic competition is preserved as a distinct form of athletic participation as compared to professional sports. The NCAA must further argue that neither of these benefits will materialize for non-revenue generating sports whatsoever, if the compensation restrictions are lifted. This is because many non-revenue generating sports will cease to exist in their entirety due to the increased financial burden on many schools. The NCAA should rely on the *Sullivan* decision for this argument, where procompetitive benefits recognized in a closely related market were allowed to be considered as justifications for restrictions in a separate market.⁴⁵⁴ Here, the restrictions in the college education market for football and men's basketball result in benefits being realized in the closely related markets of non-revenue generating sports.

452. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *8.

453. *Id.* The increased financial burdens also increase costs for the average collegiate student. *See supra* notes 30-34 and accompanying text.

454. Recall that in *Sullivan*, the anticompetitive restrictions occurred in the market for public ownership in NFL teams, yet the appellate court remanded the case for the district court to consider the benefits that exist in the entertainment market as a result of the restrictions.

Those benefits are having an integrated experience between academics and athletics and a distinction between amateur and professional sports.

The NCAA may be unable to persuade the district court with this argument, however. And it would not be surprising if they lost at trial. The NCAA relied on these very same procompetitive justifications before this very same court only a few years prior.⁴⁵⁵ The NCAA lost.

The NCAA's best bet will be on appeal when they can restate the procompetitive justifications that were dismissed at summary judgment. Specifically, the NCAA should argue that the district court erroneously refused to consider a compelling procompetitive justification—that of expanding opportunities to all student-athletes:

The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundation principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education.⁴⁵⁶

Indeed, this is exactly what Defendant-MIT did in *Brown* when the district court refused to consider their compelling procompetitive justification.⁴⁵⁷

First, the NCAA should argue that it was erroneous to dismiss the proffered expanding opportunities procompetitive justification at summary judgment. Expert testimony from both parties supported the notion that the NCAA should be considered as a whole—a multi-side market that includes many participants rather than a one-sided market that is constricted to only a few specific sports. At the very least, an issue of fact on the matter exists. The procompetitive justification should have survived summary judgment, becoming an issue for the trier of fact to determine.

Second, the NCAA should rely on *Sullivan* to argue that benefits generated in a closely related market are worthy of consideration. As discussed, *Sullivan* demonstrates that courts must consider procompetitive impacts in closely related markets. This argument is crucial. The relevant market remains the

455. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

456. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *supra* note 354, at *8.

457. See *U.S. v. Brown Univ.*, 5 F.3d 658, 675 (3rd Cir. 1993) (“[MIT claims] the district court erroneously refused to consider compelling social welfare justifications.”).

college education market for FBS football and Division I men's and women's basketball. Thus, the NCAA must argue that benefits outside of this market can be considered, specifically those benefits in a closely related market. The closely related market would be student-athletes participating in non-revenue generating sports. *Sullivan* allows such an argument. And, what's more, the *Sullivan* court relied on Ninth Circuit precedent—*L.A. Memorial Coliseum Commission v. NFL*⁴⁵⁸—to permit the consideration of procompetitive benefits being generated in closely related markets.⁴⁵⁹ *L.A. Memorial Coliseum Commission* is binding precedent on the Ninth Circuit. Thus, the NCAA should argue that the Court not only should consider those procompetitive benefits in the closely related market, per *Sullivan*, but that it must consider them, per *L.A. Memorial Coliseum Commission*.

Finally, with the expanded opportunity justification and non-revenue generating sports being considered, the NCAA should return to *Brown* for support. As mentioned, *Brown* stands for the proposition that equality of educational access and opportunity is a procompetitive justification. Thus, the NCAA's compensation restrictions being made in an attempt to achieve expanded access and opportunity to a quality higher education for all student-athletes are procompetitive.

With these arguments, the NCAA invalidates the plaintiffs' alleged less restrictive alternatives. Recall that those were: (1) to allow conferences to determine compensation packages; or (2) remove compensation restrictions altogether. As discussed, the resulting compensation packages for student-athletes would cause burdensome financial pressure for most schools. Also discussed, many schools would respond by cutting non-revenue generating sports. Because the removal of sports would be the outcome, thereby reducing opportunities for student-athletes, the proposed "alternatives" do not serve the same end of expanding opportunities for student-athletes as the compensation restrictions do.

VII. CONCLUSION

The first recorded intercollegiate sporting event, between Harvard and Yale, occurred over 150 years ago. There is arguably no other institution in the country—including the NCAA itself—with the inextricable links to collegiate athletics that both Harvard and Yale have; they were there from the beginning. Today, both universities compete at the Division I level in all sports, but they

458. 726 F.2d 1381 (9th Cir. 1994).

459. *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1111 (1st Cir. 1994) (citing *L.A. Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1392, 1397, 1399 (9th Cir. 1994)).

do not offer athletic scholarships. Neither school has extravagant athletic facilities, nor do they have coaches that are paid millions of dollars. Rather, these schools rely primarily on their academic values in appealing to prospective Division I caliber student-athletes. These prospective student-athletes need look no further than the Supreme Court Justices;⁴⁶⁰ United States Presidents;⁴⁶¹ Congressmen and Congresswomen,⁴⁶² and business executives⁴⁶³ produced by Harvard and Yale to see the opportunities that await them. Indeed, amateurism in its most pure form can be found at these two institutions, and their graduates are compensated handsomely.

A dollar figure cannot be put on the value of a decent education. Courts should take the opportunity to realize that paying student-athletes in cash, or in kind, comes at a greater cost. Sports will be cut and access to higher education will be restricted for many. Moreover, academic values will be subordinated to short term financial gain. Student-athlete gain in being compensated does not outweigh the resulting losses in educational values. “Basically, my position is that coaches and administrators and the NCAA and everybody else needs to do a better job in educating youngsters about the value of a degree, the value of an education.”⁴⁶⁴ Indeed.

[I]n defending athletics I would not for one moment be understood as excusing that perversion of athletics which would make it the end of life instead of merely a means in life. It is first-class, healthful play, and is useful as such. But play is not business, and it is a very poor business indeed for a college man to learn nothing but sport.

460. Each of the current Supreme Court Justices attended either Harvard or Yale, although Justice Ginsburg ultimately graduated from Columbia after transferring from Harvard. Aaron Steckelberg, *The Current Supreme Court Justices Are All Ivy Leaguers*, WASH. POST., Jan. 26, 2017, <https://www.washingtonpost.com/graphics/politics/scotus-education/>.

461. Harvard and Yale are first and second, respectively, in the ranking of colleges that have graduated the most United States Presidents. *Top Colleges for Presidential Graduates*, BEST COLLEGES, <https://www.bestcolleges.com/features/most-us-presidents/> (last visited Dec. 13, 2018).

462. Harvard and Yale are first and third, respectively, in the ranking of colleges that have produced the most members of Congress. *Colleges That Produced the Most Members of Congress*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2014/02/19/colleges-members-of-congress-alumni_n_4818357.html.

463. Harvard and Yale are third and thirteen, respectively, in the ranking of colleges that have produced the most Fortune 500 CEOs. *Colleges with the Most Fortune 500 CEO Graduates*, BEST COLLEGES, <https://www.bestcolleges.com/features/colleges-with-highest-number-fortune-500-ceo-graduates/> (last visited Dec. 13, 2018).

464. Ronald D. Mott, *Student-Athlete Voices Join Pay-for-Play Debate*, NCAA NEWS, Sept. 19, 1994, at 19, <https://ia801400.us.archive.org/31/items/NCAA-News-19940919/NCAA-News-19940919.pdf> (statement from former Baylor University Athletics Director and Head Coach Grant Teaff).

Play while you play and work while you work, and though play is a mighty good thing, remember that you had better never play at all than to get into a condition of mind where you regard play as the serious business of life, or where you permit it to hamper and interfere with your doing your full duty in the real work of the world.⁴⁶⁵

- President Theodore Roosevelt

465. President Theodore Roosevelt, *supra* note 1. Recall that this statement is made in the period immediately after President Roosevelt initiated the changes that led to creation of the NCAA in his attempt to preserve amateurism and reduce the unsavory violence in collegiate sport. *Id.*