

# *O'Bannon v. NCAA*: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation

Michael Steele

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# **O'BANNON V. NCAA: THE BEGINNING OF THE END OF THE AMATEURISM JUSTIFICATION FOR THE NCAA IN ANTITRUST LITIGATION**

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## I. INTRODUCTION

One of the most controversial issues in collegiate sports today is whether student-athletes should be compensated for their play on the field. This is a particularly hot topic in “big-time” college football and men’s basketball.<sup>1</sup> Pay-for-play is a topic that is discussed on every sports radio show. It is debated on SportsCenter and throughout blogs, comment boards, and newspapers around the country.<sup>2</sup> The argument is

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1. In this Comment, I will refer frequently to “big-time” college sports. For purposes of this Comment, “big-time” college sports will be Division I college basketball and FBS college football.

2. See, e.g., Jay Bilas, *College Athletes Should be Compensated*, N.Y. TIMES: ROOM FOR DEBATE (Mar. 14, 2012, 1:05 PM), <http://www.nytimes.com/roomfordebate/2012/03/13/ncaa-and-the-interests-of-student-athletes/college-athletes-should-be-compensated> [perma.cc/726F-X9CH]; Pat Forde, *Myth of Exploited, Impoverished Athletes*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6779583/college-athletes-far-exploited](http://espn.go.com/college-sports/story/_/id/6779583/college-athletes-far-exploited) [https://perma.cc/N63J-EYPS]; Rodney Fort & Jason Winfree, *Why the Arguments Against NCAA Pay-For-Play Suck*, DEADSPIN (Dec. 12, 2013, 12:40 PM), <http://deadspin.com/why-the-arguments-against-ncaa-pay-for-play-suck-1481854847> [https://perma.cc/ZF65-NHYX]; Marc Tracy & Ben Strauss, *Victory for N.C.A.A. as Panel Strikes Down Pay for College Athletes*,

that the idea of amateurism in these big-time college sports is outdated and nostalgic.<sup>3</sup> And, considering the amount of money that is generated by these sports, it is almost impossible to disagree.<sup>4</sup> Why then hasn't the NCAA gotten with the times and removed its restrictions for compensating players for their performance on the field? The answer is that the courts have consistently ruled that the preservation of amateurism is a procompetitive justification for such rules and restraints.<sup>5</sup> This means that such restraints are not a violation of antitrust law.<sup>6</sup> As such, the NCAA has been able to continue such practices.

However, the marketplace for these sports has dramatically shifted over the last thirty years, and such regulations should be a thing of the past. Big-time college football and basketball are now multi-billion dollar industries, and to pretend that these student-athletes are amateurs is nonsense.<sup>7</sup> Courts have been unwilling to rule against the NCAA, however, when it comes to player compensation. That is until *O'Bannon v. NCAA*<sup>8</sup> was released in 2014.<sup>9</sup> In *O'Bannon*, the district court (and later the Ninth Circuit) put a chink in the armor that is the NCAA's amateurism justification, and began to sway towards compensating players in these big-time sports.<sup>10</sup> This ruling represents a major shift and

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N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html> [perma.cc/FG5U-T9LP].

3. See WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 8–9 (1995).

4. “The NCAA had total revenue of nearly \$1 billion during its 2014 fiscal year.” Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/> [https://perma.cc/Z3AX-TEGA].

5. See, e.g., *Banks v. NCAA*, 977 F.2d 1081, 1093–94 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338, 1343–45 (5th Cir. 1988); *Gaines v. NCAA*, 746 F. Supp. 738, 748 (M.D. Tenn. 1990).

6. See, e.g., *Banks*, 977 F.2d at 1093–94; *McCormack*, 845 F.2d at 1343; *Gaines*, 746 F. Supp. at 748.

7. Berkowitz, *supra* note 4; *Revenue*, NCCA, <http://www.ncaa.org/about/resources/finances/revenue> [http://perma.cc/UK89-WCGR] (last visited Oct. 21, 2015); Cork Gaines, *College Football Reaches Records \$3.4 Billion in Revenue*, BUS. INSIDER (Dec. 17, 2014, 1:30 PM), <http://www.businessinsider.com/college-football-revenue-2014-12> [https://perma.cc/33FLA-9WWN].

8. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

9. *Id.* The Ninth Circuit recently affirmed in part and reversed in part this opinion. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). Although it was reversed in part, it does not alter, or affect, my opinion in this Comment.

10. *O'Bannon*, 7 F. Supp. 3d at 999.

could be the beginning of the end for amateurism as a justification for the anticompetitive NCAA rules prohibiting player compensation.

## II. AMATEURISM AND ITS RELATIONSHIP TO ANTITRUST LAW

### A. History of Amateurism in the NCAA

Since its inception in 1906, the National Collegiate Athletic Association (NCAA) has provided an organized universe of intercollegiate athletic competition.<sup>11</sup> It was founded by sixty-two university presidents for the purpose of setting uniform rules and regulations for intercollegiate football games.<sup>12</sup> Today, it has roughly 1,100 member institutions, each with expansive athletic departments that support a wide variety of men's and women's athletics.<sup>13</sup> From its beginnings to the present, the goal has always been to provide a place where amateur student-athletes can compete while they receive a college education.<sup>14</sup> Because of this, many of the rules and regulations have focused on the fact that these athletes are *students*.<sup>15</sup> In the eyes of the association, they are amateurs.<sup>16</sup> Not professionals.<sup>17</sup> As such, one of the major rules from the beginning is that student-athletes are not to be compensated for their athletic performance.

However, these amateurism rules have been anything but consistent throughout the last century.<sup>18</sup> The initial 1906 bylaws of the NCAA state:

No student shall represent a College or University in an intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession, or emolument as past or present compensation for, or as prior consideration or inducement to play in, or enter any athletic contest, whether the said remuneration be received from, or paid by, or at the instance

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11. BYERS WITH HAMMER, *supra* note 3, at 37, 39; Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS ARCHIVE (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate+on+amateurism+has+evolved+over+time+-+1-3-00.html> [<https://perma.cc/SZR2-UA9B>].

12. *O'Bannon*, 7 F. Supp. 3d at 963.

13. *Id.*; see also *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> [<https://perma.cc/LK2C-8GTT>] (last visited Oct. 23, 2015).

14. See Hawes, *supra* note 11.

15. DIV. I MANUAL art. 2.9 (NCAA 2014); BYERS WITH HAMMER, *supra* note 3, at 69.

16. DIV. I MANUAL at art. 2.9 (NCAA 2014).

17. *Id.* at art. 1.3.1.

18. See Hawes, *supra* note 11.

of any organization, committee or faculty of such College or University, or any individual whatever.<sup>19</sup>

This rule did not allow student-athletes to receive what are known in today's college universe as athletic scholarships.<sup>20</sup> In 1916, a new rule was enacted that defined an amateur as "one who participates in competitive physical sports only for pleasure, and the physical, mental, moral, and social benefits directly derived therefrom."<sup>21</sup> In 1922, it was added that an amateur is someone "to whom sport is nothing more than an avocation."<sup>22</sup>

Throughout these initial years, however, these rules were consistently ignored.<sup>23</sup> For this reason the NCAA created its first enforcement committee in 1952 to monitor its member institutions.<sup>24</sup> Finally, in 1956 the NCAA created its first rule allowing what are now called "grant-in-aid" scholarships to be awarded to student-athletes.<sup>25</sup> These scholarships allow schools to award scholarships that pay for commonly accepted expenses associated with receiving a college education.<sup>26</sup> These include tuition, fees, room and board, books, and incidental expenses.<sup>27</sup> This is in contrast to what is known as "cost of attendance," which is significantly higher.<sup>28</sup>

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19. PROCEEDINGS OF THE SECOND ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASSOCIATION OF THE UNITED STATES app. at art. VII, § 3 (1907) [hereinafter SECOND ANNUAL CONVENTION].

20. See Hawes, *supra* note 11.

21. *O'Bannon*, 7 F. Supp. 3d at 974 (quoting PROCEEDINGS OF THE ELEVENTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, DECEMBER 28, 1916 app. II at art. VI, § b.(2) (1917)).

22. *Id.* (quoting PROCEEDINGS OF THE SIXTEENTH ANNUAL CONVENTION OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, DECEMBER 29, 1921 app. I at art. VII, § 1 (1922)).

23. *Id.*

24. *Id.*

25. *Id.*; 1955–1956 YEARBOOK OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION NCAA app. at 5 (1956) [hereinafter 1955–1956 YEARBOOK OF THE NCAA]; Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Society*, 3 WM. & MARY BUS. L. REV. 203, 219–20 (2012).

26. *O'Bannon*, 7 F. Supp. 3d at 974; 1955–1956 YEARBOOK OF THE NCAA, *supra* note 25, art. III, § 1 O.I.1; Gibson, *supra* note 25, at 209 & n.31.

27. *O'Bannon*, 7 F. Supp. 3d at 974.

28. *Id.* at 971. Cost of attendance is an amount released by each school (using federal regulations) which states an estimate of how much it would cost to attend that school, including all living expenses. *Id.*; DIV. I MANUAL at art. 15.02.2 (NCAA 2014).

The allowance that was given for these scholarships continued to change throughout the next few decades. For example, in 1975 incidental expenses were removed as part of the “grant-in-aid” scholarships.<sup>29</sup> In 2004, students could receive a Federal Pell Grant (currently valued at \$5,775) in addition to their “grant-in-aid.”<sup>30</sup> The rules were again amended in 2013 to permit different levels of compensation in different sports.<sup>31</sup> The NCAA constitution currently reads,

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 in an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>32</sup>

Much of this change has been spurred on by the exponential change in the market demand for intercollegiate athletics.<sup>33</sup> As the marketplace began to evolve, so did the NCAA’s rules for its compensation of “amateur” student-athletes.<sup>34</sup> What was once an event between two schools has become one of the most lucrative and popular sporting competitions in the United States, especially when it comes to FBS<sup>35</sup> football and Men’s Division I basketball. Such a rise in popularity has also given rise to antitrust litigation against the NCAA and its regulations based on protecting amateurism.<sup>36</sup>

### *B. History of Antitrust Litigation Against the NCAA*

To begin, we will look at Section 1 of the Sherman Act and the cases that defined the Rule of Reason, which ultimately has been applied to the NCAA. Section 1 of the Sherman Act states that “[e]very contract,

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29. *O’Bannon*, 7 F. Supp. 3d at 971.

30. *Id.* at 974; *Federal Pell Grants*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/grants-scholarships/pell> [<https://perma.cc/E8H2-RPK3>] (last visited Nov. 5, 2015).

31. *O’Bannon*, 7 F. Supp. 3d at 974.

32. DIV. I MANUAL at art. 2.9 (NCAA 2014).

33. *See O’Bannon*, 7 F. Supp. 3d at 1000; Berkowitz, *supra* note 4.

34. *Compare* DIV. I MANUAL at art. 2.9 (NCAA 2014), *with* SECOND ANNUAL CONVENTION, *supra* note 19, at app. at art. VII, § 3.

35. FBS stands for Football Bowl Subdivision.

36. *See* BYERS WITH HAMMER, *supra* note 3, at 280 (summarizing decision by the Supreme Court discussing NCAA’s efforts to maintain amateurism and finding an anti-trust violation by the NCAA in limiting output of televised games).

combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”<sup>37</sup> Early on, the courts found that certain practices, such as price fixing, were so pervasive that they were deemed per se illegal as a matter of law.<sup>38</sup> Cases such as *United States v. Socony-Vacuum Oil Co.* stated that horizontal price fixing agreements were so dangerous that market power doesn’t even have to be proven to prove a Section 1 violation.<sup>39</sup>

However, the courts also recognized that certain practices could possibly be validated for their procompetitive benefits to the marketplace.<sup>40</sup> In these circumstances, some horizontal agreements<sup>41</sup> are not declared to be Section 1 violations.<sup>42</sup> In these cases, the court will apply the Rule of Reason test.<sup>43</sup> This test is designed to determine whether the procompetitive benefits of an agreement in restraint of trade outweigh the anticompetitive effects of the restraint on the market.<sup>44</sup>

In a Rule of Reason case, the plaintiff must prove that the agreement placed an actual adverse effect on price or quantity in comparison to an unrestrained market, or infer market power by market analysis.<sup>45</sup> If the plaintiff can prove either, then the defendant must prove the restraint has procompetitive benefits or justifications.<sup>46</sup> If this is proven, the burden shifts again to the plaintiff to prove that the restraint is not necessary to achieve the procompetitive benefits, or that they could be achieved in a substantially less restrictive manner.<sup>47</sup> Then, the court will weigh the benefits and anticompetitive effects of the restraint to determine if the

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37. Sherman Act, 15 U.S.C. § 1 (2012).

38. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 211, 218 (1940).

39. *Id.* at 221.

40. See *Nat’l. Soc’y. of Prof’l Eng’rs v. United States*, 435 U.S. 679, 686–87 (1978).

41. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984). “A restraint of trade imposed by agreement between competitors at the same level of distribution. The restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement. — Also termed *horizontal agreement*; *horizontal arrangement*.” *Horizontal Restraint*, BLACK’S LAW DICTIONARY (10th ed. 2014).

42. *Bd. of Regents*, 468 U.S. at 100–01.

43. *Id.* at 100–04.

44. Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 336 (2005).

45. *Id.*

46. *Id.*

47. *Id.*; see also *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d. Cir. 1997) (noting that the plaintiff could satisfy the last burden by showing that the procompetitive benefits could be achieved through less restrictive means).

practice is a violation of Section 1.<sup>48</sup> In cases that apply the Rule of Reason, the court must look to the facts of the case.<sup>49</sup> This requires an extensive inquiry for the plaintiff to prove an actual economic effect on the market, and for the defendant to prove the procompetitive benefits the restraint has in the market.<sup>50</sup>

Throughout the early history of the NCAA, courts refused to apply antitrust law to the NCAA.<sup>51</sup> The first time the NCAA faced serious opposition for violating Section 1 of the Sherman Act was in *NCAA v. Board of Regents of the University of Oklahoma*.<sup>52</sup> This is a seminal case in antitrust law because (1) it applied the Rule of Reason to NCAA regulations, declaring that it was a “unique[]” product that required certain agreements for the product to be available;<sup>53</sup> and (2) it validated the NCAA’s assertion that the preservation of amateurism may be a valid procompetitive justification for its restraints in output markets<sup>54</sup>—an assertion that future courts used to create an almost per se legality for the NCAA’s amateurism and compensation rules.<sup>55</sup>

In *Board of Regents*, members of the College Football Association (CFA)—led by the Universities of Oklahoma and Georgia—challenged the television broadcasting plan that the NCAA was imposing on all member schools.<sup>56</sup> The broadcasting plan limited the output of games broadcast each week and fixed the prices that could be charged for the broadcasting rights to that game.<sup>57</sup> This particularly favored smaller schools since their games were televised at the same price as the bigger games, which tended to draw a bigger audience.<sup>58</sup> The Court stated that

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48. Nagy, *supra* note 44, at 336; *see also Clorox Co.*, 117 F.3d at 56 (noting the shifting burdens of proof in the Rule of Reason test).

49. *See* Nagy, *supra* note 44, at 338.

50. *See id.* (explaining that the factual inquiry includes conditions before and after the restraint was imposed, the history of the restraint, the end sought to be attained, the nature of the restraint, among others).

51. *See Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (ruling that collegiate athletes are students and not businessmen, making the NCAA not subject to the Sherman Act).

52. 468 U.S. 85 (1984).

53. *Id.* at 111–12, 115 n.55.

54. *Id.* at 101 n.23; Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift From Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 3–4 (2000).

55. *See infra* notes 56–71 and accompanying text.

56. *Bd. of Regents*, 468 U.S. at 88, 94–95.

57. *Id.* at 91–94.

58. *Id.* at 92–93 (“[T]he amount that any team receives does not change with the size of



this practice of horizontal price fixing and output limitation was usually considered illegal per se.<sup>59</sup> However the Court found that applying per se illegality to the NCAA was inappropriate because “horizontal restraints on competition are essential if the product is to be available at all.”<sup>60</sup> Thus, the Court ruled that the Rule of Reason should be applied to the NCAA in antitrust litigation.<sup>61</sup>

After applying the Rule of Reason, the Court ruled that the NCAA’s broadcasting plan violated the Sherman Act.<sup>62</sup> This decision was made despite the Court’s “respect for the NCAA’s historic role in the preservation and encouragement of intercollegiate amateur athletics.”<sup>63</sup> This respect for the preservation of the tradition of amateur athletics was not enough for the NCAA to overcome the fact that it did not present enough evidence to prove that such a rule was commercially justifiable.<sup>64</sup>

This ruling should have been important because the court declared that amateurism was not a legitimate justification for the anticompetitive restraints by the NCAA.<sup>65</sup> However, what made it famous is the dicta in the opinion that gives respect to the NCAA’s objective of preserving amateurism.<sup>66</sup> In particular, the Court stated that “[i]n order to preserve the character and quality of the ‘product,’ athletes *must not be paid* . . . .”<sup>67</sup> This dicta should not have been binding on the Court.<sup>68</sup> What should have been binding is that these amateurism rules merited full Rule of Reason analysis, and that amateurism is not always a legitimate

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the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. . . . [T]he ‘ground rules’ provide that carrying networks . . . submit a bid at an essentially fixed price.”). This meant that games such as *San Jose St. v. Fresno St.* were given the same price as *Ohio St. v. Michigan* or *USC v. Notre Dame*. *See id.* And these prices were fixed so that schools weren’t allowed to individually negotiate the price for their own broadcasting rights. *Id.* at 93 n.11.

59. *Id.* at 100.

60. *Id.* at 100–01, 101.

61. *See id.* at 103.

62. *Id.* at 120.

63. *Id.* at 100–01.

64. *Id.*

65. *See Nagy, supra* note 44, at 339–42 (explaining that this decision should have been a seminal case in showing that the NCAA’s amateurism justifications were not enough to overcome the burden of proving the procompetitive benefits to the marketplace).

66. *Id.* at 341–42.

67. *Bd. of Regents*, 468 U.S. at 102 (emphasis added).

68. The Ninth Circuit reinforced the fact that this dicta is not, nor should it be, binding on courts to “conclude that every NCAA rule that somehow relates to amateurism is automatically valid.” *O’Bannon v. NCAA*, 802 F.3d 1049, 1063 (9th Cir. 2015).

justification for the restraints. However, it resulted in a myriad of antitrust litigation in which the courts assumed that amateurism was a valid justification for the NCAA's anticompetitive regulations on student compensation.<sup>69</sup> This pattern of bowing to the dicta in *Board of Regents* made the NCAA's amateurism rules basically per se legal.<sup>70</sup>

This per se legality of the amateurism justification has made it so the NCAA would rarely lose a Section 1 case when the statute is applied to student eligibility and compensation rules.<sup>71</sup> This is true even when the court of public opinion began to turn on the NCAA and its treatment of student-athletes as amateurs over the next few decades.<sup>72</sup> Federal courts were firm and steadfast in their stance that the preservation of amateurism was a valid procompetitive justification for the NCAA's cartel. That is until *O'Bannon* entered the game.

### C. O'Bannon v. NCAA

*O'Bannon v. NCAA* began a new trend<sup>73</sup> that could be the beginning of the end of the court's defense of the NCAA's "preservation of amateurism" argument as a procompetitive justification for its anticompetitive restraints—at least as it pertains to restraints on student-athlete compensation.<sup>74</sup> In 2009, Ed O'Bannon—a former UCLA

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69. See, e.g., *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990).

70. See Chad Pekron, *The Professional Student Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 *HAMLIN L. REV.* 24, 53 (2000) ("Whenever a court of law has discussed amateurism, the court has always simply assumed that it is necessary to produce college athletics. However, the NCAA has never been required to prove that without amateurism, college athletics would be indistinguishable from professional athletics."). Some of the judges in these cases did realize that courts were not applying the Rule of Reason as *Board of Regents* directed, but they were the minority. See, e.g., *Banks*, 977 F. Supp. at 1088–89; *id.* at 1096 (Flaum, J., concurring in part, dissenting in part) (arguing that the court needed to apply the Rule of Reason because *Banks* clearly showed that there was "an anti-competitive effect in a relevant market").

71. Mitten, *supra* note 54, at 5.

72. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1000–01 (N.D. Cal. 2014) (stating that a survey used in the case suggests that public attitudes regarding compensation for student-athletes depends on the level of compensation that the student-athletes would receive).

73. I call it a new precedent because the court in *O'Bannon* did not assume that the NCAA's amateurism justification was per se legal as previous courts had. However, it may be better to say that *O'Bannon* just brought anew the ruling from *Board of Regents* that amateurism alone is not enough to overcome anticompetitive restraints. This assertion was affirmed by the Ninth Circuit. *O'Bannon*, 802 F.3d 1049.

74. *O'Bannon*, 7 F. Supp. 3d at 973–74. This decision has since been affirmed in part and reversed in part by the Ninth Circuit Court of Appeals. *O'Bannon*, 802 F.3d 1049.

basketball player—along with many other current and former student-athletes brought a class action suit against the NCAA claiming that the NCAA rules that restrict compensation of players for use of their name, likeness, and image violate Section 1 of the Sherman Act.<sup>75</sup> The rules prohibit any student-athlete from receiving “financial aid based on athletics ability” that exceeds a full “grant-in-aid.”<sup>76</sup> Additionally, the NCAA prohibits any student-athlete from receiving financial aid in excess of the “cost of attendance” for that school.<sup>77</sup> These rules also prohibit any student-athlete from receiving any compensation for his or her athletic skill from outside sources such as endorsements, gifts, or benefits.<sup>78</sup> In short, the student-athlete may not receive “any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”<sup>79</sup> This includes any compensation for licenses that the NCAA sells for the use of the student-athlete’s name, likeness, or image.<sup>80</sup>

Like in *Board of Regents*, the NCAA argued that the preservation of amateurism was a procompetitive justification for the challenged restriction.<sup>81</sup> The NCAA relied on the historical data, surveys, and witness testimony to provide sufficient evidence to prove this assertion.<sup>82</sup> Part of that argument was that amateurism is one of its “core principles” and has been since the inception of the association.<sup>83</sup> However, unlike the court in *Board of Regents*, the court in *O’Bannon* ruled that this evidence was not “sufficient to justify the challenged restraint.”<sup>84</sup> The court looked at the historical data and found that the NCAA’s inconsistent definition of amateurism significantly weakened its argument.<sup>85</sup> It gibed at this evolution of amateurism in the NCAA and

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75. *O’Bannon*, 7 F. Supp. 3d at 962–63, 980–81.

76. *Id.* at 971.

77. *Id.*

78. *Id.* at 972.

79. *Id.*

80. *Id.* at 971.

81. *Id.* at 973; *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 97 (1984).

82. *O’Bannon*, 7 F. Supp. 3d at 973–982.

83. *See id.* at 1000 (explaining why the NCAA’s argument that it has traditionally been committed to amateurism is unpersuasive).

84. *Id.* at 973.

85. *Id.* at 1000.

declared that “[s]uch inconsistencies are not indicative of ‘core principles.’”<sup>86</sup>

The court also found that survey data provided by the NCAA was not “credible evidence that demand for the NCAA’s product would decrease if student-athletes were permitted . . . to receive a limited share of the revenue generated from the use of [the student-athlete’s] names, images, and likenesses.”<sup>87</sup> However, later in the opinion, the court did suggest that the survey did provide at least *some* evidence that the consumer demand *might* be diminished if student-athletes were ever heavily compensated for their athletic abilities.<sup>88</sup>

The most devastating blow to the future of amateurism in the NCAA was the opinion of the court as to the decision in *Board of Regents*. To the chagrin of the NCAA, *O’Bannon* seems to significantly dilute the strength of the dicta in *Board of Regents*.<sup>89</sup> The NCAA has consistently relied on *Board of Regents* in its defense of its amateurism justification in antitrust litigation.<sup>90</sup> The district court in *O’Bannon* distinguished the case from *Board of Regents* because they dealt with two different markets.<sup>91</sup> It declared that the amateurism justification in *Board of Regents* “does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses.”<sup>92</sup> It went even further by stating that the “suggestion” in *Board of Regents* that student-athletes “must not be paid” so as to preserve the NCAA’s product “was

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86. *Id.* The Ninth Circuit weakened the NCAA’s argument by stating that “[e]ven if the NCAA’s concept of amateurism had been perfectly coherent and consistent . . . [t]he NCAA cannot fully answer the court’s finding that the compensation rules have significant anticompetitive effects simply by pointing out that it has adhered to those rules for a long time.” *O’Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015).

87. *O’Bannon*, 7 F. Supp. 3d at 976.

88. *See id.* at 1001 (concluding that student-athlete compensation plays a limited role in consumer demand for collegiate sports and that it may justify restrictions on large payments to student-athletes but does not justify a strict prohibition).

89. *O’Bannon*, 802 F.3d at 1063 (stating that “*Board of Regents* . . . did not approve the NCAA’s amateurism rules as categorically consistent with the Sherman Act” and “we are not bound by *Board of Regents* to conclude that every NCAA rule that somehow relates to amateurism is automatically valid”); *O’Bannon*, 7 F. Supp. 3d at 1003.

90. *See Mitten, supra* note 54, at 3–4 (stating that courts have frequently rejected anti-trust challenges to NCAA regulations).

91. *See O’Bannon*, 7 F. Supp. 3d at 999 (explaining that *Board of Regents* addressed television broadcasting limits while *O’Bannon* is about compensating student-athletes).

92. *Id.*

not based on any factual findings in the trial record and did not serve to resolve any disputed issues of law.”<sup>93</sup>

The Ninth Circuit subsequently has affirmed this opinion of the dicta in *Board of Regents*.<sup>94</sup> In this appellate opinion, the court refused to acknowledge the view that, in *Board of Regents*, the Supreme Court “blessed” and exempted amateurism rules from antitrust scrutiny.<sup>95</sup> The Ninth Circuit stated that it would use such language as “informative”<sup>96</sup> but that “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 as well.”<sup>97</sup>

Such a denunciation of a seminal case furthers the proposition that “pure” amateurism is dying in the world of college sports. The NCAA has consistently relied on *Board of Regents* to show that the preservation of amateurism is a strong procompetitive justification for any of its regulations in restraint of trade.<sup>98</sup> This justification is hanging by a thread.

However, it must be noted that this opinion did not kill the amateurism justification. The district court did rule that the regulations play a “limited role in driving consumer demand” for college football and basketball.<sup>99</sup> It held that a less restrictive alternative could achieve the same result for the NCAA in the marketplace.<sup>100</sup> Therefore, in its remedy, the district court declared that student-athletes could be paid up to the “cost of attendance;” the NCAA could enact rules that give all student-athletes of the same class an equal share of licensing revenue; and the NCAA could to place a cap on compensation for licensing revenue at \$5,000.<sup>101</sup> This means that student-athlete compensation can basically be capped at cost of attendance plus the extra \$5,000.

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93. *Id.*

94. *O’Bannon*, 802 F.3d at 1061–64.

95. *Id.* at 1064 (“We doubt that was the Court’s intent, and we will not give such an aggressive construction to its words.”).

96. *Id.*

97. *Id.* at 1064. The Ninth Circuit then cites to language in *Board of Regents* to prove its point that “it is nevertheless *well settled* that good motives will not validate an otherwise anticompetitive practice.” *Id.* (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, at 101 n.23 (1984) (emphasis added)).

98. See *Hairston v. Pacific 10 Conf.*, 101 F.3d 1315 (9th Cir. 1996); *McCormack v. NCAA* 845 F.2d 1338, 1343 (5th Cir. 1988).

99. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1001 (N.D. Cal 2014).

100. *Id.* at 1004–07.

101. *Id.* at 1007–08. These payments were expected to take effect August 1, 2015, when schools would begin offering scholarships to players that would enroll by July 1, 2016. Steve

This is the point where the District Court and the Ninth Circuit differed in opinion.<sup>102</sup> The Ninth Circuit affirmed that raising the grant-in-aid cap for scholarships to be full cost of attendance was an acceptable less restrictive alternative, but it found that the district court “clearly erred when it found that allowing students to be paid compensation for their [name, image, and likeness licenses] is virtually as effective as the NCAA’s current amateur-status rule.”<sup>103</sup>

However, this part of the opinion seems to be counterintuitive to the scope of review the Ninth Circuit has in this case.<sup>104</sup> The Ninth Circuit claims that the evidence the district court relied on to make its determination about the cash compensation was insufficient. But, in the same breath, it leans on its own opinions in making its determination, rather than relying solely on the evidence in the record.<sup>105</sup> Further, where the majority does look at the evidence on the record, it looks at each piece of evidence separately as not being enough evidence, rather than showing that the evidence is insufficient as a whole.<sup>106</sup> There were multiple expert testimonies and a survey that the district court accepted as evidence in making its determination about the cash compensation, which it was within its right to do.<sup>107</sup> Yet, the Ninth Circuit decided to overrule the district court because it felt that evidence in the district court’s full bench trial was “meager.”<sup>108</sup>

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Berkowitz, *NCAA Files for Stay of Injunction in O’Bannon Case*, USA TODAY (July 18, 2015, 10:43 AM), <http://www.usatoday.com/story/sports/college/2015/07/17/ncaa-ed-obannon-name-and-likeness-9th-circuit/30300441/> [<https://perma.cc/YR4Y-WXNV>].

102. *O’Bannon*, 802 F.3d at 1076–79.

103. *Id.* at 1074.

104. The Ninth Circuit has de novo review for conclusions of law, but only a “clear error” review of the district court’s findings of fact. *Id.* at 1061.

105. The court states that “the Olympics are not fit analogues to college sports” and that “[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is . . . a quantum leap.” *Id.* at 1077–78. These seem to be the court’s de novo review rather than a “clear error” review of the facts. The dissent points that out by stating that the district court was well within its right to find that “the evidence presented at trial suggests that consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation . . . .” *Id.* at 1082 (Thomas, C.J., concurring in part, dissenting in part).

106. *See id.* at 1076–79.

107. *Id.*; *see also id.* at 1082 (Thomas, C.J., concurring in part, dissenting in part).

108. *Id.* at 1079. There is definitely an argument to be made that the evidence would be preferred. But is that enough to prove that the evidence was insufficient when a full bench trial determined that, contrary to the Ninth Circuit’s “quantum leap” statement, “offering them a small amount of compensation is so minor that it most likely will not impact consumer demand in any meaningful way”? *Id.* at 1078 n.23; *see also* *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 976–

Although this holding included a minor victory for the NCAA,<sup>109</sup> it seems that the tables have turned when it comes to amateurism as a procompetitive justification for its rules and regulations in restraint of trade.<sup>110</sup> Unless something changes in the near future, it is likely that *O'Bannon* will become a banner case for student-athletes bringing Section 1 claims against the NCAA, just as *Board of Regents* was for the NCAA for the past thirty years. And it is about time. The economic realities of FBS Football and Men's Basketball in the twenty-first century are such that there is no longer a viable reason to treat these players as though they are amateurs.<sup>111</sup> They are not. And *O'Bannon* takes the first step towards this new paradigm in college athletics.

### III. APPLYING THE FACTS OF TODAY'S COLLEGE ATHLETICS TO ANTITRUST LAW

As discussed above, there must be an extensive factual inquiry into the situation of the market when a court is presented with an antitrust lawsuit.<sup>112</sup> The plaintiffs must show evidence demonstrating the anticompetitive effects of agreements, and defendants must offer evidence that demonstrates actual procompetitive effects.<sup>113</sup> The court must make its decision based on these facts offered by the parties in the case.<sup>114</sup> In a "classic statement of the [R]ule of [R]eason,"<sup>115</sup> the Supreme Court ruled:

To determine [the legality of the restraint] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or

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77, 983–84, 1000–01 (N.D. Cal. 2014). I think not.

109. The Ninth Circuit opinion is a small victory in that it gave minimal validity to its argument that its amateur status for student-athletes is a part of its product, and to remove it would negatively impact the market.

110. See *supra* notes 50, 65–74 and accompanying text.

111. See *infra* Part III.

112. See *supra* p. 516 and notes 49–50.

113. This means that defendants must show that the agreement actually "enhance[s] competition." See Nagy, *supra* note 44, at 336.

114. See *supra* pp. 516–17.

115. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 n.13 (1982).

the reverse; *but because knowledge of intent may help the court to interpret facts and to predict consequences.*<sup>116</sup>

Until *O'Bannon*, courts did not follow this precedent and continually refused to follow the lead of the court in *Board of Regents* and apply a full Rule of Reason inquiry.<sup>117</sup> This pattern of either overlooking the facts or refusing to make a factual inquiry can be described as the “blind look’ Rule of Reason.”<sup>118</sup> Rather than applying the facts of the case to the regulation, they have turned a blind eye to any amateurism regulation. This section of this Comment makes such a factual inquiry into the business of college football and men’s basketball. The conclusion is that the economic realities of these big-time college athletics are such that it is no longer a procompetitive justification for the amateurism regulations of the NCAA.<sup>119</sup> Future courts should take a closer look at these economic realities when they make decisions regarding the amateurism and compensation rules in the NCAA.<sup>120</sup> This factual inquiry will show ample evidence that (1) there is a market for player compensation, (2) the purposes the NCAA purports for its amateurism rules are no longer a part of today’s big-time college athletics marketplace, and (3) there is no procompetitive economic evidence for restricting this market.

#### A. “Student-Athletes” v. Professionals

In defending its amateurism regulations, the NCAA has consistently maintained that student-athletes are just that—students.<sup>121</sup> The association purports that one of its main goals is the education of its student-athletes and that athletics are just a way to gain such an education.<sup>122</sup> While the fact that education is important to the association

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116. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (emphasis added).

117. *See supra* pp. 512, 516.

118. Nagy, *supra* note 44, at 342–43, 358 (discussing how the courts did not follow precedent and that their treatment of these anticompetitive regulations was sociologically rather than legally based).

119. That is if it ever was a viable procompetitive justification for such rules. If the court had followed the ruling in *Board of Regents*, then it is possible that this issue would have been resolved decades ago. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

120. *See infra* Part III.D.

121. *Money & March Madness: Interview Mark Emmert*, PBS, <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/interviews/mark-emmert.html> [<https://perma.cc/8TBU-KAR9>] (last visited Oct. 22, 2015) (quoting the President of the NCAA) (“[T]hese young men and women are students; they’ve come to our institutions to gain an education and to develop their skills as an athlete . . .”).

122. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 974–75 (N.D. Cal. 2014); Mitten, *supra* note



may be true,<sup>123</sup> neither the institution nor the athletes view them as primarily students.<sup>124</sup> What is more true is to say that “universities sponsoring ‘big-time’ football and basketball programs effectively serve as a farm system for the National Football League and National Basketball Association by providing the training environment and playing field for talented football and basketball players to hone their physical talents.”<sup>125</sup>

This section is not concluding that the NCAA should not regulate academic standards for its athletes. On the contrary, these athletes are all attending academic institutions and such academic standards are expected by all students attending that institution. What this section is concluding is that their status as students at the school does not automatically mean that they are amateurs. On the contrary, many students at universities are already paid professionals, or semi-professionals, in a field that they are studying.<sup>126</sup> The status of these athletes as “students” does not automatically mean they are amateurs.<sup>127</sup> In fact, they most certainly are not, and the facts surrounding big-time college football and basketball support this theory. As such, under the Rule of Reason, the facts presented in this section are evidence against the NCAA’s claim that its amateurism rules are meant to promote an athlete’s status as student first, and athlete second.

For decades, universities have used athletes as tools to help boost their perception as an exceptional institution in the eyes of the public and their peers.<sup>128</sup> They do this by admitting poorly-prepared students—who

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54, at 1.

123. These institutions are, after all, schools.

124. See BYERS WITH HAMMER, *supra* note 3, at ch. 16 (discussing the mutual exploitation between athletes and academic institutions).

125. Mitten, *supra* note 54, at 2.

126. For example, many teachers have assistants that are students who are paid compensation for their time and work with professors and students on campus. Dance students on some campuses are paid to teach dance classes either at the university or at competitive studios. Business students can simultaneously be entrepreneurs, creating and receiving profits from their own businesses.

127. This is contrary to Judge Tauro’s opinion in *Jones v. NCAA*, in which he viewed Jones only as a “student” and “not a businessman.” *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975).

128. See BYERS WITH HAMMER, *supra* note 3, at 45. Ray T. Ellickson, NCAA faculty representative at the University of Oregon in 1966 was quoted as saying, “I am convinced that if a state institution wants equal treatment with another institution in that state, it must present an image of equal stature and, perhaps unfortunately, that image is most easily present in athletics.” *Id.*

are simultaneously highly-recruited high school athletes—and give them the lowest quality course work so that the athlete can maintain minimum eligibility standards.<sup>129</sup> Walter Byers, former Executive Director of the NCAA, once recognized that “college presidents have an inherent urge to engage in public relations exercises. In one speech they ‘view with alarm’ the athletics orgy while in another speech ‘point with pride’ at . . . their own campuses.”<sup>130</sup>

One of the more prominent examples of this is the story of Kevin Ross, a basketball player at Creighton University. Upon completing his four years of eligibility,<sup>131</sup> it became public knowledge that Ross had only a second-grade reading level.<sup>132</sup> In 1989, after years of trying to figure out life after basketball, which included alcohol and drug issues, he sued Creighton, claiming it should have known about his illiteracy and that it failed to teach him adequately.<sup>133</sup> His situation became a national story, and Ross was the talking point of many national articles and talk shows.<sup>134</sup>

Unfortunately, the story of Kevin Ross is not a singularity. This practice of admitting illiterate athletes into higher-education institutions purely for their athletic ability is still very much alive.<sup>135</sup> A CNN investigation in early 2013 revealed that most schools still have 7–18% of their “revenue sport athletes who are reading at an elementary school level.”<sup>136</sup> This is a fact that the NCAA continues to ignore, which seems

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129. *Id.* at 299.

130. *Id.* at 47.

131. DIV. I MANUAL at art. 12.8 (NCAA 2014) (“A student-athlete shall not engage in more than four seasons of intercollegiate competition in any one sport.”). This must be completed within five years from the first semester that the student began attending the institution full-time. *Id.* at art. 12.8.1.

132. Jack Curry, *Suing for 2d Chance to Start Over*, N.Y. TIMES, Jan. 30, 1990, at B9, <http://www.nytimes.com/1990/01/30/sports/suing-for-2d-chance-to-start-over.html?pagewanted=1> [<https://perma.cc/56D3-K55E>].

133. *Id.*; BYERS WITH HAMMER, *supra* note 3, at 299.

134. See Curry, *supra* note 131; see also BYERS WITH HAMMER, *supra* note 3, at 299 (discussing the recognition of Ross’ story); *Outside the Lines: Unable to Read*, ESPN (Mar. 17, 2002), <http://sports.espn.go.com/page2/tvlistings/show103transcript.html> [<https://perma.cc/4K25-4K8W>] (showing the transcript of an episode of *Outside the Lines* in which Ross discusses his struggles at Creighton).

135. See Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html> [<https://perma.cc/8DNP-8HCU>].

136. *Id.* Considering the fact that college textbooks are written at a ninth-grade level, this is an especially daunting situation for many of these athletes. *Id.* A very interesting fact about this investigation by CNN is that many universities alleged to have participated in this practice did not respond when they were contacted. *Id.* Such silence seems more of an

counterintuitive to its “purpose” of providing an education in an environment that includes athletics.

Some institutions have gone even further by creating “false” classes or falsifying academic records so that certain athletes can remain academically ineligible.<sup>137</sup> Most recently, the University of North Carolina at Chapel Hill (UNC) came under investigation for providing “paper classes” for its athletes for over a decade.<sup>138</sup> This situation at UNC is not the only recent allegation of academic fraud.<sup>139</sup> Thirty-seven cases of academic fraud have been reported since 1990.<sup>140</sup> This practice seems to prove the point that “[c]ollege presidents . . . put in jeopardy the

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affirmation of guilt rather than a simple “no comment.” *Id.*

137. *Id.*; see e.g., Jerry Barca, *Rutgers Football Turns a Bad Situation Worse*, FORBES (Sept. 17, 2015, 4:44 PM), <http://www.forbes.com/sites/jerrybarca/2015/09/17/rutgers-football-turns-a-bad-situation-worse/> [https://perma.cc/N8LE-BJAS] (describing a very suspicious situation in which Rutgers head football coach contacted a teacher to discuss one player’s grades and eligibility just after being told that contacting faculty about grades or eligibility violates NCAA regulations); Paul Myerberg, *Report: Auburn Paid Players, Altered Grades Under Gene Chizik*, USA TODAY (Apr. 3, 2013, 9:37 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/04/03/ncaa-football-auburn-violations-gene-chizik/2051041/> [https://perma.cc/9EZZ-DGNW] (reporting that several ex-players from the University of Auburn claim the football program changed the grades of up to nine players to keep them eligible for the 2010 BCS Championship game); Pete Thamel, *Top Grades and No Class Time for Auburn Players*, N.Y. TIMES (July 14, 2006), <http://www.nytimes.com/2006/07/14/sports/ncaaf/14auburn.html?pagewanted=all> [https://perma.cc/8G49-KK9X] (describing the “fake courses” some athletes were taking at the University of Auburn).

138. Sara Ganim, *Lawsuit Claims UNC and NCAA Broke Promises in ‘Spectacular Fashion,’* CNN (Jan. 23, 2015, 7:58 AM), <http://www.cnn.com/2015/01/22/us/unc-paper-classes-lawsuit/index.html> [https://perma.cc/DJ3P-9SDG]; Steve Berkowitz, *North Carolina, NCAA Sued for Academic Scandal*, USA TODAY (Jan. 22, 2015, 9:50 PM), <http://www.usatoday.com/story/sports/college/2015/01/22/lawsuit-filed-against-north-carolina-ncaa-on-academic-scandal/22173755/> [https://perma.cc/2VJX-3DDM]. The two athletes bringing the suit against UNC are also claiming that the NCAA was negligent in its duties as an academic regulator. *Id.* The athletes claim that the NCAA “voluntarily assumed a duty to protect the . . . educational opportunities of student-athletes” and failed to properly execute that duty. *Id.*

139. For example, Auburn University was accused of changing the grades of two of its athletes in 2010 so that they could participate in the 2010 BCS Championship, rather than being deemed “academic[ally] ineligib[le].” Jerry Hinnen, *Auburn Review Denies Allegations of Academic Fraud*, CBS SPORTS (Apr. 22, 2013, 11:06 AM), <http://www.cbssports.com/collegefootball/eye-on-college-football/22115994/auburn-review-denies-allegations-of-academic-fraud> [https://perma.cc/2EZJ-MDYT].

140. Ganim, *supra* note 138 (showing that cases of academic fraud have doubled in the past decade alone).

academic credibility of their universities just so we can have this entertainment industry.”<sup>141</sup>

However, the universities are not entirely to blame for this situation. In many of these situations, “[t]he athlete exploits the college by blaming the college for his or her lack of learning when it is the student who failed to respond because of limited interest. *The exploitation is mutual.*”<sup>142</sup>

If we look deeper into the story of Kevin Ross, we find that he is equally to blame for his lack of education.<sup>143</sup> Creighton paid for extra remedial classes for Ross, transportation to those classes, and even for glasses to help correct an eye problem.<sup>144</sup> He simply missed classes and did not try to utilize the education that Creighton was providing him.<sup>145</sup> Ross was basically skating through school, counting on a future career playing professional basketball.<sup>146</sup>

This is an attitude that many high-profile recruits have entering college.<sup>147</sup> They believe that their career will be in professional sports and that big-time college athletics is the stepping-stone for such a career.<sup>148</sup> This is instilled in them from a young age because many are recruited years before they even graduate from high school.<sup>149</sup> High profile recruits customarily announce their commitment to their chosen university through a televised press conference.<sup>150</sup> Such practices are just more

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141. Ganim, *supra* note 135.

142. BYERS WITH HAMMER, *supra* note 3, at 299 (emphasis added).

143. *See id.* at 300–01 (discussing the Kevin Ross story from Creighton’s point of view).

144. *Id.*

145. *Id.*

146. *Id.*; Curry, *supra* note 131. This was obviously an attitude that Ross had carried with him before he even began his college career. A ninth-grade teacher recalls asking him once to use the library, to which he responded, “I don’t have to, I’m a basketball player.” BYERS WITH HAMMER, *supra* note 3, at 300. It should be noted that these primary and secondary school teachers definitely “dropped the ball” by justifying Ross’ attitude.

147. BYERS WITH HAMMER, *supra* note 3, at 298–99 (discussing Rahilly and Manley’s experience of putting athletic success before academic success as examples of similarly situated people to Ross).

148. *See id.* at 300; Mitten *supra* note 54, at 2.

149. Businesses such as Rivals.com or MaxPreps.com are centered on evaluating and rating the athletic potential of many young high school athletes. MAXPREPS, <http://www.maxpreps.com/> [<https://perma.cc/W9TG-URMR>] (last visited Oct. 23, 2015); RIVALS.COM, <https://www.rivals.com/default.asp> [<https://perma.cc/9XK9-UBWF>] (last visited Oct. 23, 2015).

150. *See, e.g.,* Derek Volner, *National Signing Day: ESPNU to Televisе Marathon Coverage for 10th Straight Year*, ESPN (Jan. 27, 2015), <http://espnmediazone.com/us/press-releases/2015/01/national-signing-day-espnu-televisе-marathon-coverage-10th-straight-year/> [<https://perma.cc/442H-72YU>] (showing that this type of national coverage for recruits has

evidence that athletes—in particular those that are high-profile recruits—view college as a stepping-stone to a professional career.<sup>151</sup> They view the institution as a farm system for their respective sport<sup>152</sup> while, simultaneously, the institution views them as athletes first and students second.<sup>153</sup> And all of these facts put together show that “winning is the aim of [college] sports.”<sup>154</sup> Not education. In the future, courts should consider these facts as they traverse the sacrosanct ground of amateurism rules in antitrust law.

### B. *The Rise of “Big-Time” College Athletics: The Arms Race*

When *Board of Regents* was decided in 1984, the college landscape was already beginning to change significantly. The court already realized that big-time college athletics (what has now become FBS football and D-I men’s basketball) were more of a business than an extra-curricular activity.<sup>155</sup> By that time, amateurism in the NCAA, as it had been defined by the association in its inception in 1906, was on its way out the door.<sup>156</sup>

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been going on for at least the last decade); *Watch 2015 National Signing Day Announcements on TV or Streaming Online*, SB NATION (Feb. 4, 2015, 7:39 AM), <http://www.sbnation.com/college-football-recruiting/2015/2/3/7948215/national-signing-day-2015-tv-schedule-ESPN-ESPNU> [<https://perma.cc/N9AZ-YLK6>] (describing when and where to watch the commitment announcements of some of the top recruits on Signing Day); Woody Wommack, *Ten Biggest Recruiting Reveals*, RIVALS.COM (Jan. 29, 2015), <https://footballrecruiting.rivals.com/content.asp?CID=1730626> [<https://perma.cc/NCE5-D69A>] (describing the ten “biggest splash” announcement ceremonies by high school seniors committing to play at a certain university). Though this type of national attention is primarily for highly touted recruits, local networks consistently will cover press conferences where local high school athletes will announce their commitment to a certain university. *See, e.g., 4-star RB Jordan Scarlett to Announce Commitment Monday on FOXSportsFlorida.com*, FOX SPORTS (Feb. 1, 2015, 4:00 PM), <http://www.foxsports.com/florida/story/jordan-scarlett-recruiting-commitment-announcement-monday-020115> [<https://perma.cc/EN93-WNTX>].

151. This does not suggest that this is the thought of every student-athlete that plays FBS football or D-I men’s basketball. Many of them do graduate and have fruitful careers beyond sports. For example, Hall-of-Fame quarterback Steve Young not only graduated but also has a Juris Doctorate from Brigham Young University, which he received while playing professional football. Mary Waldron, *The Life and Career of Steve Young: Lawyer and Football Player*, LAW CROSSING, <http://www.lawcrossing.com/article/3759/The-MVP-J-D-Steve-Young/> [<https://perma.cc/TYZ4-7HNT>] (last visited Oct. 22, 2015).

152. *See* Mitten, *supra* note 54, at 2.

153. *See supra* pp. 525–26 and notes 120–124.

154. BYERS WITH HAMMER, *supra* note 3, at 304.

155. This is evidenced by the fact that the court held that the preservation amateurism alone was not enough of a procompetitive justification to overcome the anticompetitive effects of the restraint on the marketplace. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 & n.23 (1984).

156. *Id.* at 91–95 (discussing the broadcasting plan negotiated by the NCAA and the

The money universities spent on big-time college athletics began to increase substantially in the mid-twentieth century and has now become an all-out arms race.<sup>157</sup> The purpose of such an arms race: To lure top athletes to commit to play at their institution.

In the early 1940s, Michigan State University wanted to step out of the shadow of its bigger brother (the University of Michigan) and shed its reputation as only an instructional school for tradesmen and farmers.<sup>158</sup> The medium it chose for its rise to stardom: Athletics.<sup>159</sup> John Hannah, who became president of Michigan State in 1941, began to acquire large donations for the university.<sup>160</sup> He put all of the new funds into athletic scholarships (which were unheard of at the time).<sup>161</sup> Within ten years, Hannah's crazy spending worked. In 1949, Michigan State, much to the chagrin of the University of Michigan, was admitted to the Big Nine, now Big Ten, Conference.<sup>162</sup>

The success of Michigan State was unprecedented.<sup>163</sup> Hannah used sports as the driving influence to change the perception and prestige of his university.<sup>164</sup> He decided that "if he was going to get for his institution equal treatment at the hands of the Michigan legislature, he would have to compete effectively with Michigan *on the athletic field*."<sup>165</sup> His theory took the university from an enrollment of 6,000 students and yearly budget of \$4 million,<sup>166</sup> to an enrollment of 40,000 students and a yearly budget of \$100 million.<sup>167</sup>

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exorbitant amount of money in those broadcasting contracts).

157. See Michael Ventre, *Football's Facility Arms Race: Can You Top This?*, NBC SPORTS (June 4, 2012, 5:29 PM), <http://m.nbcsports.com/content/football%E2%80%99s-facility-arms-race-can-you-top> [<https://perma.cc/V9HU-P8LT>] (discussing the amount of money colleges spend on football facilities to gain an upper-hand in recruiting top athletes).

158. See BYERS WITH HAMMER, *supra* note 3, at 41–42 (summarizing changes in the university's stance on athletics after the arrival of John Hannah, who was determined to overtake the University of Michigan).

159. *Id.* at 41 ("Athletics bootstraps are the most convenient ones available in an academic world that has no clear-cut academic standards.").

160. *Id.*

161. *Id.* at 42.

162. *Id.* at 42–43.

163. *Id.* at 45.

164. *Id.* at 41.

165. *Id.* at 45–46 (emphasis added).

166. *Id.* at 41.

167. *Id.* at 44. Add to that the fact that the university had grown to include fifteen colleges and 250 academic programs. *Id.*

This success story became the inspiration for other schools to seek greater notoriety, and thus higher admissions rates and more money, by gaining athletic rather than academic accolades.<sup>168</sup> Thus began what is now affectionately called the NCAA “arms race.”<sup>169</sup> Colleges, in order to increase the overall success of the academic institution, will “weigh heavily in favor of athletics readiness over academic preparedness.”<sup>170</sup>

By the time *Board of Regents* rolled around, the television contracts that the NCAA was negotiating were in the hundreds of millions of dollars.<sup>171</sup> And that was with its own market restraint in both price and output still in place.<sup>172</sup> Once that restraint was removed, it was clear to see that the market demand for big-time college athletics was enormous.<sup>173</sup> Consumers made it clear that the more access they had to these athletic events, the better.<sup>174</sup> Colleges who could gain significant

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168. Byers points to schools such as UCLA, UNLV, Florida State, and the University of Houston who successfully followed the Michigan State model to gain greater respect and prestige and ultimately more money for their institutions using success on the gridiron or basketball court. *Id.* at 46.

169. Brian Goff, *NCAA “Arms Race” Metaphor Gets the Economics Backwards*, FORBES (July 30, 2014, 10:40 AM), <http://www.forbes.com/sites/briangoff/2014/07/30/ncaa-arms-race-metaphor-gets-the-economics-backwards/> [https://perma.cc/X2QE-BPFM] (“One of the most frequently uttered or written phrases in association with college athletics these days is ‘arms race.’”). The theory of the “arms race” is simple: Because NCAA member institutions cannot engage in price competition in the market for collegiate athletes, they engage in non-price competition in the form of “strategic investments” to lure incoming talent to them. Adam Hoffer et al., *The NCAA Athletics Arm Race: Theory and Evidence 2* (W. Va. Univ., Coll. of Bus. & Econ., Working Paper No. 14-29, 2014), [http://www.be.wvu.edu/phd\\_economics/pdf/14-29.pdf](http://www.be.wvu.edu/phd_economics/pdf/14-29.pdf) [https://perma.cc/D4AF-PH4W] (“[A]ny given athletic director knows that his schools odds of having a winning program will go up if it spends a little more than its rivals on coaches and recruiting. But the same calculus is plainly visible to all other schools.”).

170. BYERS WITH HAMMER, *supra* note 3, at 45. This very phrase again seems contradictory for institutions who claim to value academic success as the priority for their “amateur” athletes.

171. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 92–93 nn.9–10, 95 (1984) (discussing the details of the NCAA broadcasting plan that the CFA was challenging.); *see also* BYERS WITH HAMMER, *supra* note 3, at 253–71 (discussing the change in economic realities for NCAA broadcasting rights up to 1984).

172. *See* BYERS WITH HAMMER, *supra* note 3, at 278.

173. *See, e.g., id.* at 253–71 (showing that the CFA was able to gain contracts for its member schools in excess of those in the NCAA plan, and years later that the SEC could gain contracts in excess of even those).

174. This is still the case today. It is hard to find a Saturday during the school year where you are unable to find a college football or basketball game on some broadcasting network. Each weekend has wall-to-wall college sports. ESPN kicks off the men’s basketball season with “Midnight Madness,” in which it airs the first college basketball games of the season for 24-straight hours, with many universities participating. Derek Volner, *ESPN Tips Off the College Basketball Season with Midnight Madness Coverage*, ESPN (Sept. 29, 2014),

prime-time television slots started to put that in their arsenal to lure talent to their athletic programs.<sup>175</sup> And that is only how television broadcasting has affected the arms race.

Throughout the NCAA, colleges are increasing their spending in their athletic department at exorbitant rates to engage in non-price competition for the purpose of attracting the top athletic talents to play for their institution.<sup>176</sup> In this market, if you do not have the right coach or staff, the right facility, or top-of-the-line equipment, you might just slip out of contention.<sup>177</sup> Such a drop is especially costly when you consider the fact that winning games “increases alumni athletic donations, enhances a school’s academic reputation, increases the number of applicants and in-state students, reduces acceptance rates, and raises average incoming SAT scores.”<sup>178</sup> In the minds of these schools and athletic departments, it’s either “we pay and at the least stay as relevant as our rivals” or “we do not and our rivals begin to outpace us in successfully luring top talent.”

There are many examples of how schools are steadily increasing their expenses to better their athletic programs so that they can bring the best athletes to their school.<sup>179</sup> However, the best example of the arms race is

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<http://espnmediazone.com/us/press-releases/2014/09/espn-tips-off-the-college-basketball-season-with-midnight-madness-coverage/> [<https://perma.cc/BE2J-5HD2>]. With the advent of the internet, television is no longer the only way you can view college games. Many games that are not broadcast on television can be streamed online. The point is that the consumer demand for these big-time college athletics has reached astronomical levels.

175. BYERS WITH HAMMER, *supra* note 3, at 279 (discussing how television appearances helped bolster recruiting effectiveness of weaker teams).

176. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables 2* (Nat’l Bureau of Econ. Research, Working Paper No. 18196, 2015), <http://are.berkeley.edu/~mlanderson/pdf/Anderson%20College%20Sports.pdf> [<https://perma.cc/L7EK-YJMM>].

177. Ventre, *supra* note 157 (quoting a high-profile coach as saying, “It does help in recruiting . . . . It helped with last year’s class, just them knowing . . . that they’d be in that building. It does have an impact on recruiting.”).

178. Anderson, *supra* note 176, at 24 (noting that an increase in wins by three games could lead to an increase in donations of 17%, an increase in applications of 3%, a drop in acceptance rate of 1.3%, an increase of in-state enrollment of 1.8%, and a 2.4 point increase of incoming 25th percentile SAT scores (0.2%)).

179. It is not forgotten that NCAA institutions are not-for-profit. Goff, *supra* note 169. That is, what they receive in revenue they also spend. But the increased athletic revenue creates many benefits for the institution as a whole, even if expenses from that revenue mainly stay within the athletic department. *USA Today Sports’ College Athletics Finances*, USA TODAY (May 16, 2012), <http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1> [<https://perma.cc/8DEU-JFLK>] (showing the revenues for athletic departments from 2006–2011). Discussing this increase in spending is



the huge increase in coaching compensation that has occurred over the last few decades.<sup>180</sup> In both football and men's basketball, the highest paid coaches earn over \$7 million.<sup>181</sup> This is in stark contrast to John Wooden's salary of \$32,500 in 1975.<sup>182</sup> This is a testimony of how far the business of big-time college athletics has come in the last forty years. This is a salary increase of about 21,500% for top coaches in just four decades. The average FBS football coach made \$1.75 million in 2014.<sup>183</sup> There are even assistant coaches who make over \$1 million in FBS football.<sup>184</sup> When we look at player compensation, however, we find that their "earnings" have not increased significantly since 1956<sup>185</sup>—tuition, books, room and board, and incidentals.<sup>186</sup>

During this economic revolution, it again became apparent that "winning is the aim of [college] sports."<sup>187</sup> In the early stages of *Board of*

meant to add to the evidence that schools are keeping for themselves what should be given, at least in part, to the athletes who, also in part, earn it for their schools and that to withhold it is an unreasonable restraint of trade.

180. See *NCAA Salaries: 2015 NCAAF Coaches Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> [<https://perma.cc/9GPQ-QVXJ>] (last visited Oct. 22, 2015) (listing the salaries for FBS football coaches in 2014).

181. *Id.* (listing Nick Saban's 2015 salary at \$7,087,481); *An Analysis of Salaries for College Basketball Coaches*, USA TODAY (Mar. 30, 2011, 4:41 PM), <http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-coaches-salary-database.htm> [<https://perma.cc/6922-9U2T>] (listing Rick Pitino's 2011 salary at \$8,931,378.). Unfortunately, the most recent numbers in men's basketball coaching salaries I could find were those from the 2011 season. *Id.*

182. BYERS WITH HAMMER, *supra* note 3, at 9. John Wooden is widely considered one of the greatest basketball coaches of all time. *Wooden Dies at Age 99*, ESPN (June 6, 2010), <http://sports.espn.go.com/losangeles/news/story?id=5253601> [<https://perma.cc/3MS8-FL28>]. He built a dynasty at UCLA that included ten National Championships, four 30–0 records, and an 88-game winning streak. Frank Litsky and John Branch, *John Wooden, Who Built Incomparable Dynasty at U.C.L.A., Dies at 99*, N.Y. TIMES (June 4, 2010), [http://www.nytimes.com/2010/06/05/sports/ncaabasketball/05wooden.html?\\_r=0](http://www.nytimes.com/2010/06/05/sports/ncaabasketball/05wooden.html?_r=0) [<https://perma.cc/Y9HL-SD4X>]. Wooden retired after the 1975 season, making the salary quoted above the salary he received during his final year as a coach. *Id.*

183. Jim Baumbach, *Special Report: College Football Coaches' Salaries and Perks Are Soaring*, NEWSDAY (Oct. 4, 2014, 6:25 PM), <http://www.newsday.com/sports/college/college-football/fbs-college-football-coaches-salaries-are-perks-are-soaring-newsday-special-report-1.9461669> [<https://perma.cc/3V2E-YSQR>].

184. *NCAA Salaries: 2014 NCAAF Assistant Coaches Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/assistant> [<https://perma.cc/LUK4-5ZQE>] (last visited Oct. 2, 2015) (showing that the top five assistant coaches in FBS are paid over \$1 million).

185. BYERS WITH HAMMER, *supra* note 3, at 10. That is until the *O'Bannon* decision was handed down last year.

186. *Id.*

187. *Id.* at 304.

*Regents*, the presidents of two major universities testified that “amateur collegiate sports were dead.”<sup>188</sup> This arms race is just another fact showing how that true amateur in college athletics is a bygone notion. This is an \$11 billion industry.<sup>189</sup> The fact that revenue and expenses—especially in coaches salary—have increased so significantly while player compensation has not is a rather condemning fact, considering the fact that, in reality, the NCAA institutions no longer truly consider their players as amateurs.<sup>190</sup>

On the one hand, this arms race is important to athletes because having top-of-the-line equipment and training helps further their goal of eventually reaching the level of the National Football League (NFL) or National Basketball Association (NBA). However, it is unfortunate that there is no real competition for their talents as there would be in an unrestrained market. These facts of an apparent arms race in big-time college athletics show that there is a very real market for compensating players which is currently being met through non-price competition rather than actual compensation. This factual inquiry again shows that courts should continue to follow the lead of *O’Bannon* by refusing to allow the NCAA to unreasonably restrain the market for player compensation.

### C. *The BCS, CFP, and Power Five Autonomy*

Another justification that the NCAA gives for its amateurism rules is that it promotes competitive balance among its member institutions.<sup>191</sup> The courts have, until *O’Bannon*, found that such restrictions are “directly related to the NCAA objective[] of . . . promoting fair competition.”<sup>192</sup> In *Hennessey v. NCAA*,<sup>193</sup> the court held that

Bylaw [12.1] was, with other rules adopted at the same time, intended to be an “economy measure”. In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve *and foster competition in intercollegiate athletics—by curtailing, as it were,*

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188. *Id.* at 8.

189. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 61 (2013) (noting that college sports as an \$11 billion industry).

190. *See id.* at 68; *supra* p. 526.

191. *See O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

192. *Justice v. NCAA*, 577 F. Supp. 356, 382 (D. Ariz. 1983).

193. 564 F.2d 1136 (5th Cir. 1977).

*potentially monopolistic practices by the more powerful*—and to reorient the programs into their traditional role as amateur sports operating as part of the educational process.<sup>194</sup>

This justification is no longer relevant in today's big-time college market because the "more powerful" have gained most of the control throughout both FBS football and men's basketball.<sup>195</sup>

In 1998, FBS football saw the advent of the Bowl Championship Series (BCS).<sup>196</sup> This organization was a coalition of the six major football conferences in the NCAA—the ACC, Big East, Big Ten, Big 12, Pac-10, and SEC, along with the University of Notre Dame (Notre Dame).<sup>197</sup> In the original agreement, it was decided that four of the biggest bowl games (Rose, Sugar, Orange, and Fiesta) would be played by members of these six conferences and Notre Dame.<sup>198</sup> The six conference winners would automatically qualify, as would Notre Dame if it finished in the top 10 in the BCS standings.<sup>199</sup> These Automatic Qualifying (AQ) conferences dominated the BCS landscape for years.<sup>200</sup> Because of this, these six conferences also dominated in bowl revenue since the BCS bowls were the highest paying by far.<sup>201</sup> And because of the prestige associated with these games, the highest television revenue also went to these conferences.<sup>202</sup>

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194. *Id.* at 1153 (emphasis added).

195. See Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014, 1:22 PM), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences) [https://perma.cc/X2FV-XCN6].

196. *The Bowl Championship Series: A Golden Era*, BCS (Dec. 20, 2013), <http://www.bcsfootball.org/news/story?id=10172026> [https://perma.cc/ES83-6Z2V].

197. *BCS Chronology*, BCS (Oct. 8, 2013, 3:39 PM), <http://www.bcsfootball.org/news/story?id=4819366> [https://perma.cc/P4YH-WJQU].

198. *Id.* Other schools were also allowed to qualify for one of the four games if they finished the season in the top six in the BCS standings. *Id.*

199. *Id.*

200. See *BCS Selections History*, BCS (Oct. 7, 2013, 8:00 PM) <http://www.bcsfootball.org/news/story?id=5528971> [https://perma.cc/Y3EW-8VTU].

201. See, e.g., Thomas O'Toole, *\$17M BCS Payouts Sound Great, But . . . – League, Bowl Rules Skew Schools' Cuts*, USA TODAY, Dec. 6, 2006, at 1C (listing the bowl payouts for each bowl game of the 2006 season); David Wharton, *Big-Time Bowl Games Can Create Big-Time Financial Issues for Some Schools*, L.A. TIMES (Dec. 30, 2012), <http://articles.latimes.com/2012/dec/30/sports/la-sp-1231-bcs-payouts-20121231> [https://perma.cc/6BLW-724G] (explaining that the six AQ conferences receive \$25 million each, plus another \$6 million for any additional at-large bid).

202. Wharton, *supra* note 201.

This absolutely created an enormous gap between those teams considered part of the AQ conferences and those outside of them.<sup>203</sup> During the tenure of the BCS, only eight teams outside of the AQ conferences were selected to play in a BCS game<sup>204</sup> (none until the University of Utah in 2005<sup>205</sup>), and not one of them played for the BCS National Championship.<sup>206</sup> Amateurism rules did not stop these AQ conferences from seizing the power in major college football through the BCS.<sup>207</sup>

This past year, the BCS was replaced with the College Football Playoff.<sup>208</sup> In this new format, the “Power Five” (the six AQ conferences from the BCS except the Big East since it no longer is a football conference) still hold most of the power and prestige.<sup>209</sup> Amateurism rules have not kept the Power Five from keeping power, even in a playoff system.

On August 7, 2014, the NCAA board of directors voted to allow these Power Five conferences to write some of their own rules.<sup>210</sup> This allowance of autonomy for the “five richest leagues” is absolutely in contradiction of the NCAA’s own argument that its amateurism rules are

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203. *Id.* (discussing the fact that non-AQ teams do not get the same payout as AQ teams even if they were selected for a BCS game).

204. *The Bowl Championship Series: A Golden Era*, *supra* note 196.

205. *Id.*

206. *Id.*

207. Since Brigham Young University (BYU) is the only university to win a National Championship outside of those conferences in the modern era (since 1936), it can be argued that the gap began long before the formation of the BCS. See *Football Championship History*, NCAA, <http://www.ncaa.com/history/football/fbs> [<https://perma.cc/62CE-HVB2>] (last visited Nov. 7, 2015).

208. See Tony Barnhart, *Before BCS Ends, the Whens, Wheres, Whys of College Football Playoff*, CBS SPORTS (Jan. 6, 2014, 10:01 AM), <http://www.cbssports.com/collegefootball/writer/tony-barnhart/24400200/before-bcs-ends-the-whens-where-and-whys-of-college-football-playoff> [<https://perma.cc/6TXA-9WZA>]; *College Football Playoff: Overview*, CFP, <http://www.collegefootballplayoff.com/overview> [<https://perma.cc/T5D8-CNVJ>] (last visited Jan. 30, 2015).

209. See George Schroeder, *Power Five’s College Football Playoff Revenues Will Double What BCS Paid*, USA TODAY (July 16, 2014, 5:57 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/12734897/> [<https://perma.cc/QL9R-S5WL>] (showing that the financial distributions still heavily favor those conferences that have come to dominate the landscape of FBS football).

210. Bennett, *supra* note 195. This will allow them to decide on rules such as cost-of-attendance stipends, insurance benefits for players, staff sizes, recruiting rules, and mandatory hours on individual sports. *Id.*

meant to curtail.<sup>211</sup> What is even more curious is that the vote for Power Five autonomy was overwhelming.<sup>212</sup>

This history is just a small example of how these amateurism rules do not serve their purpose in today's market for big-time college athletics. The procompetitive effect that it was supposed to have on the product—competitive balance—was all but lost once the NCAA decided that the Power Five had obtained an irreversible advantage over those not a part of that elite group.

#### *D. Lack of Any Other Procompetitive Evidence in Favor of Amateurism*

As stated above, a procompetitive justification for a challenged restraint must “actually *enhance competition*.”<sup>213</sup> “[T]he Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason.”<sup>214</sup> Throughout this factual inquiry, we have seen that there is no actual procompetitive economic justification for these amateurism rules.

However, the court in *O'Bannon* did recognize a survey as evidence that there is a procompetitive economic effect of these rules.<sup>215</sup> The court found that the survey by Dr. Dennis did provide evidence “that the public's attitudes toward student-athlete compensation depend heavily on the level of compensation.”<sup>216</sup> This is strange since earlier in the opinion the court found that the survey “[did] not provide credible evidence that demand for the NCAA's product would decrease if student-athletes were permitted . . . to receive a limited share of the revenue . . . .”<sup>217</sup>

The court, however, erred in finding that this provided enough evidence that such a rule prohibiting compensation enhances

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211. *Id.*; see also *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1003–04 (N.D. Cal. 2014).

212. Bennett, *supra* note 195 (noting that the vote was 16–2 in favor of autonomy).

213. Nagy, *supra* note 44, at 336.

214. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688–90 (1978) (“[B]y indulging in general reasoning as to the expediency or non-expediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made.” (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911))).

215. *O'Bannon*, 7 F. Supp. 3d at 1000–01.

216. *Id.* The Ninth Circuit affirmed the District Court's determination that this proved a procompetitive economic effect. *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

217. *O'Bannon*, 7 F. Supp. 3d at 976 (discussing the reasons for why the court does not believe that the survey was credible evidence).

competition.<sup>218</sup> First, as already discussed, the court had previously discredited the evidence.<sup>219</sup> Second, this provides no definitive proof that the consumer's behavior would change if players were to be compensated above their current scholarships. Exorbitant player salaries in professional leagues have not deterred consumption of their product.<sup>220</sup> Nor has the addition of professional players into the Olympics.<sup>221</sup> And,

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218. *Id.* at 996–97. This argument differs from the Ninth Circuit argument that there was insufficient evidence that the cash compensation represented a less restrictive alternative. Here, I am arguing that the evidence was insufficient to prove a procompetitive economic effect of the rule on the marketplace or consumer demand.

219. *O'Bannon*, 7 F. Supp. 3d at 976. If the court did want credible evidence, it could possibly look to a poll conducted by the Washington Post and ABC News. See Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, *Washington Post-ABC News Poll Finds*, WASH. POST (Mar. 23, 2014), [http://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](http://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) [https://perma.cc/9JTN-EUCT]. This poll found that 64% of the public opposes compensation of student-athletes beyond current scholarships. *Id.* However, what this poll does not suggest is that the consumer would actually change his or her behavior if players were compensated for their play on the field. Such evidence would be necessary for the NCAA to prove that its restrictions actually *enhance* competition. It would also behoove future opponents to the NCAA to include a poll such as that conducted by YouGov and the Huffington Post. Travis Waldron, *Most College Sports Fans Won't Stop Watching If Athletes Are Paid*, *Poll Finds*, HUFFINGTON POST (Oct. 10, 2015), [http://www.huffingtonpost.com/entry/college-sports-pay-players-poll\\_5630e7dbe4b00aa54a4c0b43](http://www.huffingtonpost.com/entry/college-sports-pay-players-poll_5630e7dbe4b00aa54a4c0b43) [https://perma.cc/685E-ZKCH]. This poll shows that only 16% of the market would be less interested in college sports if they were given \$5,000 compensation for their names, images, and likenesses. *Id.* Of that 16%, only 41% of them would stop watching altogether. *Id.* That equates to about 7% of those that said they watch college sports occasionally. *Id.* Such evidence would be vital for opponents of the NCAA in proving that removal of these amateurism restrictions would not significantly change market demand.

220. See *Average NFL Player*, BLOOMBERG (Jan. 27, 2011), [http://www.bloomberg.com/bw/magazine/content/11\\_06/b4214058615722.htm](http://www.bloomberg.com/bw/magazine/content/11_06/b4214058615722.htm) [https://perma.cc/c7LQK-KX4F]; *Average N.F.L. Salary is \$90,102*, *Survey Says*, N.Y. TIMES, Jan. 29, 1982, at A22, <http://www.nytimes.com/1982/01/29/sports/average-nfl-salary-is-90102-survey-says.html?pagewanted=print> [https://perma.cc/7KF8-RP4T]; Daniel Kaplan, *NFL Projecting Revenue Increase of \$1B over 2014*, SPORTS BUS. J. (Mar. 9, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/09/Leagues-and-Governing-Bodies/NFL-revenue.aspx> [https://perma.cc/D66Z-GDE7]; *NBA Player Salaries - 1999–2000*, ESPN, <http://espn.go.com/nba/salaries> [https://perma.cc/XT4Q-AZ2B] (last visited Oct. 22, 2015); *Stern Estimates NBA Revenue Up 20 Percent to \$5B*, NBA (Nov. 13, 2012, 6:48 PM), <http://www.nba.com/2012/news/11/13/stern-nba-revenue.ap/> [https://perma.cc/K5FP-ERG6]; The NESN Staff, *Some Athletes Were Legendary, but Their Salaries Weren't*, NESN (May 23, 2010, 9:51 AM), <http://nesn.com/2010/05/sports-legends-salaries-may-surprise-you/> [https://perma.cc/RS4Y-KYDM].

221. See Neil Best, *NBC Releases Winter Olympics Ratings Data*, NEWSDAY (Feb. 25, 2014, 4:42 PM), <http://www.newsday.com/sports/olympics/nbc-releases-sochi-winter-olympics->

considering revenue for college sports is still much lower than those professional teams receive, any compensation for players would not be anywhere near the professional level if athletes were allowed to be compensated in college. There is no evidence supporting the assertion that the market will not balance itself out.

Unless better evidence is released, the NCAA amateurism rules should be found in violation of the Sherman Act because they do not provide a procompetitive justification that they enhance competition.

#### IV. CONCLUSION

In 1985, Walter Byers urged the NCAA to allow for player compensation outside of the current athletic scholarships.<sup>222</sup> The NCAA has not heeded his call since it was made nearly thirty years ago. The NCAA has enjoyed exemption from antitrust law since courts decided to follow the dicta of *Board of Regents* rather than its ruling. *O'Bannon* has finally put us back on the right track in making the NCAA responsible for its unreasonable restraint of trade in the market for player compensation. This ruling should remind the courts that they must do a full factual inquiry when it comes to the NCAA's amateurism rules. For preservation of amateurism alone is not enough to prove that these rules enhance competition.<sup>223</sup> It is time that "[f]ree-market competition [is] restored to this industry."<sup>224</sup>

MICHAEL STEELE

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ratings-data-1.7204742 [https://perma.cc/HT5B-YECA] (stating that viewership for the 2014 Winter Olympics was up 6% from the previous European Olympics in 2006).

222. BYERS WITH HAMMER, *supra* note 3, at 13.

223. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984).

224. BYERS WITH HAMMER, *supra* note 3, at 293.