

NOTE

Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model

*Alex Moyer**

ABSTRACT

With annual revenues exceeding twelve billion dollars, the college sports industry is the highest-grossing sports enterprise in the United States, consistently outpacing professional leagues like the NFL and NBA. This highly commercialized environment helps to line the coffers of the NCAA, athletic conferences, and universities, while making millionaires out of many coaches and administrators. There is, however, one constituency that is unable to share in the profits generated by college sports: the college players on whose backs this endeavor is built. This inequity exists because the NCAA and its member institutions, the same conferences and universities that reap the rewards of growing revenues, have joined together to declare the players "amateurs." Through the NCAA-enforced amateurism rules, "student-athletes" are denied the opportunity to be compensated for their labor, both directly and indirectly, beyond the cost of their minimal academic scholarships. Despite numerous past and ongoing challenges to these anticompetitive restraints, in-

* J.D., expected May 2015, The George Washington University Law School; B.A., 2010, University of Michigan. Thank you to Whitney Hermendorfer and *The George Washington Law Review* editorial staff for their excellent work throughout this process, and to Professor William Kovacic for his invaluable guidance. I would also like to thank my parents, Gayle and Bruce Moyer, and my brother, Justin, for their unconditional support. Finally, I want to thank my fiancé, Elyse Schoenfeld, without whose love, encouragement, and editorial skills this Note would not have been possible.

cluding the recently decided *O'Bannon v. NCAA* lawsuit, the amateurism regime remains largely intact due to courts' deference to the NCAA's amateurism ideals.

To solve this problem, this Note examines and applies the Section 1 analysis of the anticompetitive amateurism regime and proposes new compensation rules to be implemented by Congress, although the courts or the NCAA could also take the lead. The proposed rules, modeled on the Olympic amateurism model, would guarantee student-athletes scholarships that cover the actual cost of attendance, as well as grant access to the commercial free market, allowing student-athletes to secure endorsement deals and get paid for signing autographs, among other things. Such a proposal would not only remedy the anticompetitive effects of the amateurism regime, but would also bring justice to the beloved pastime of college sports.

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INTRODUCTION

During the summer of 2013, Johnny Manziel, Texas A&M University's starting quarterback and 2012 Heisman Trophy Winner, was investigated and suspended for signing 4,400 pieces of memorabilia.¹

¹ Darren Rovell & Justine Gubar, *Sources: Two More Manziel Signings*, ESPN, http://espn.go.com/espn/otl/story/_/id/9562044/texas-aggies-qb-johnny-manziel-signed-two-more-sessions-sources (last updated Aug. 13, 2013, 1:32 PM).

During one signing, a memorabilia broker paid Manziel a reported \$7,500 for signing 300 items.² Though that appears excessive for a student-athlete's signature, it is a fraction of Manziel's market value and pales in comparison to the amount of money Texas A&M, the National Collegiate Athletics Association ("NCAA"), and others made from Manziel's popularity. For example, Manziel winning the Heisman—the award given to college football's most valuable player—and leading Texas A&M to a bowl game victory generated thirty-seven million dollars in media exposure for Texas A&M in just two months.³ Although Manziel was punished for profiting from his signature—and he is far from the only student-athlete to be punished for doing so⁴—countless others associated with college sports do so rampantly, with the permission of Texas A&M and the NCAA. In one instance, a memorabilia dealer auctioned a helmet signed by Manziel and another Texas A&M Heisman Trophy winner for \$81,000.⁵

Although some student-athletes, like Manziel, will go on to become millionaire professional athletes, only about one percent succeed in their dream of reaching the professional leagues.⁶ Further, while in college, many athletes spend up to forty hours per week at practice,⁷ a time commitment that, coupled with rules limiting free-

² *Id.*

³ Rachel Bachman & Ben Cohen, *Johnny Manziel: A Tipping Point for NCAA Change?*, WALL ST. J., <http://online.wsj.com/news/articles/SB10001424127887324653004578650312328142282> (last updated Aug. 5, 2013, 7:54 PM).

⁴ See, e.g., Mark Schlachach, *Gurley Injury Shows NCAA's Flaws*, ESPN (Nov. 17, 2014), http://espn.go.com/college-football/story/_/id/11891535/injury-georgia-bulldogs-running-back-todd-gurley-spur-change (noting four-game suspension of University of Georgia running back Todd Gurley, considered a favorite for the 2014 Heisman, for allegedly receiving \$3,000 over two years for signing memorabilia). Notably, Gurley suffered a torn ACL in his first game back from suspension, ending his season and college career, as well as harming his high presuspension draft value. *Id.* One observer commented that Gurley may "become the poster child for what's wrong with the NCAA's archaic rules that prohibit student-athletes from profiting from their own names and stardom." *Id.*

⁵ Darren Rovell & Justine Gubar, *Sources: NCAA Investigating Manziel*, ESPN, http://espn.go.com/espn/otl/story/_/id/9537999/otl-ncaa-investigating-johnny-manziel-profiting-auto-graphs (last updated Aug. 6, 2013, 11:50 AM).

⁶ Stacy A. Teicher, *College Athletes Tackle Their Financial Future*, CHRISTIAN SCI. MONITOR (Oct. 3, 2005), <http://www.csmonitor.com/2005/1003/p13s02-legn.html>; see also *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NAT'L COLLEGIATE ATHLETIC ASS'N RES., http://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update20123.pdf (last updated Sept. 17, 2012).

⁷ NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE, FARA ANNUAL MEETING AND SYMPOSIUM 17 (2011) [hereinafter 2010 GOALS STUDY], available at http://ncaastg.prod.acquia-sites.com/sites/default/files/DI_GOALS_FARA_final.pdf.

dom to work outside jobs,⁸ leaves many athletes struggling financially. Currently, NCAA rules limit compensation of student-athletes by schools to scholarships covering the “total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”⁹ These limitations currently result in a \$3,222 average annual shortfall due to out-of-pocket expenses, leaving eighty-five percent of student-athletes below the poverty line.¹⁰ However, student-athletes receiving compensation beyond their scholarship risk losing their amateur status, and thus their eligibility to compete, as student-athletes are deemed ineligible if they are paid for their play¹¹ or the use of their likeness.¹²

While these student-athletes struggle financially, their work on and off the field helps generate more than \$12 billion in annual revenue, making college sports more profitable than any professional sports league.¹³ College sports have undoubtedly become a commercial endeavor, but the NCAA’s amateurism rules¹⁴ prevent student-athletes from sharing in the astronomical profits they help generate.

These rules place anticompetitive limits on the compensation that student-athletes earn for their contributions to college sports. Despite the NCAA’s assertion that its amateurism regime is essential to the popularity of college sports,¹⁵ its claims are both unsupported and insufficient to justify the anticompetitive amateurism rules under antitrust law. Several antitrust challenges have been brought to strike down these restrictions,¹⁶ and in August 2014, the Northern District of

8 See NAT’L COLLEGIATE ATHLETIC ASS’N, 2014–2015 NCAA DIVISION I MANUAL Bylaw 12.4, at 67–68 (2014) [hereinafter NCAA MANUAL], available at <http://www.ncaa.com/publications.com/productdownloads/D115.pdf>.

9 *Id.* Bylaw 15.02.2, at 188.

10 RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLLEGE PLAYERS ASS’N, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT 4, 19 (2011), available at <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

11 See NCAA MANUAL, *supra* note 8, Bylaw 12.1.2, at 59.

12 See *id.* Bylaw 12.5.2.1, at 71.

13 See James Monks, *Revenue Shares and Monopsonistic Behavior in Intercollegiate Athletics* 1 (Cornell Higher Educ. Research Inst., Working Paper No. 155, 2013), available at <https://www.ilr.cornell.edu/sites/ilr.cornell.edu/files/WP155.pdf>. The licensing revenue for merchandise alone was estimated at \$4.62 billion in 2012. Press Release, College Licensing Co., College Licensing Company Names Top Selling Universities and Manufacturers for 2012–13 (Aug. 12, 2013), <http://www.clc.com/News/Archived-Rankings/Rankings-Annual-2012-13-rankings-section.aspx>.

14 See NCAA MANUAL, *supra* note 8, art. 12, at 57–86.

15 See *infra* Parts III.B–C, IV.A.2.

16 See generally, e.g., *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Anti-trust Litig.*, No. 4:14-md-02541-CW (N.D. Cal. filed on June 13, 2014); *In re NCAA Student-*

California in the highly publicized *O'Bannon v. NCAA*¹⁷ case granted an injunction against certain restrictions.¹⁸ Although the district court's decision has been heralded as a victory for student-athletes, it does not go far enough towards ending the NCAA's anticompetitive amateurism regime due to issues with its antitrust analysis and narrow remedy.¹⁹ This Note analyzes these issues and proposes a new regime that Congress should implement.

Part I of this Note provides background on the NCAA and the business of major college sports,²⁰ and introduces the amateurism ideal and the NCAA's amateurism regime. Because the amateurism regime frequently conflicts with antitrust law, Part II introduces the framework for analyzing claims under section 1 of the Sherman Antitrust Act ("Section 1").²¹ Part III describes relevant NCAA Section 1 caselaw. Part IV introduces the *O'Bannon* case and discusses district court Judge Claudia Wilken's recent decision, which granted an injunction against certain aspects of the amateurism rules. Part V analyzes Judge Wilken's Section 1 analysis and remedy, and concludes that Judge Wilken's approach, while exhaustive, made several missteps that led to a narrow and insufficient remedy. To combat the shortcomings of the *O'Bannon* decision, Part VI analyzes who can implement the comprehensive reform needed and proposes that Congress replace the anticompetitive amateurism regime with one based on the Olympic model of amateurism, which would allow student-athletes like Manziel to profit from their names and likenesses.

Athlete Name & Likeness Licensing Litig., No. C 4:09-cv-01967-CW (N.D. Cal. filed on Dec. 14, 2011).

¹⁷ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

¹⁸ *Id.* at 1007.

¹⁹ See *infra* Part V.

²⁰ Throughout this Note, discussion of "college sports" refers to NCAA Division I men's basketball and Division I Football Bowl Subdivision ("FBS") football. This is not intended to ignore or denigrate other sports and divisions; rather, these two sports are the only college sports, with limited exceptions, that have proven financially profitable. As a result, these are the sports that primarily implicate antitrust concerns. Furthermore, there is little doubt that these two sports drive both revenue and decisions, especially at elite programs. So while it is important to recognize that many schools' athletic programs are not profitable, see JEFF BENEDICT & ARMEN KETEYAN, *THE SYSTEM: THE GLORY AND SCANDAL OF BIG-TIME COLLEGE FOOTBALL* 44 (2013) (noting that only twenty-two of the top 120 FBS schools were profitable in 2010–2011), it is still reasonable to focus this Note's discussion on the antitrust implications related to these two sports.

²¹ Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2012).

I. LANDSCAPE OF MAJOR COLLEGIATE ATHLETICS

In order to contextualize the shaky foundation on which the NCAA's amateurism regime sits, this Part provides an overview of major college sports. It begins by introducing the NCAA and describing the multibillion-dollar business surrounding college sports. This Part then introduces the amateurism ideal, including its historical roots and current application under NCAA rules, before discussing the realities of modern "amateur" student-athletes.

A. *The History and Role of the NCAA*²²

In 1905, there were more than eighteen deaths and 150 serious injuries in unregulated intercollegiate football.²³ In an effort to save the sport he loved, President (and avid sportsman) Theodore Roosevelt called to the White House a contingent of university athletic directors to discuss establishing rules to make football safer.²⁴ In 1906, a governing body was established, dedicated solely to regulating safety.²⁵ Over time, that body, which came to be known as the NCAA, expanded its rulemaking power to a variety of areas, including eligibility and amateurism requirements.²⁶

For the first fifty years of its existence, the NCAA had no real authority and no power to enforce its amateurism rules.²⁷ The 1929 Carnegie Report surveyed 112 schools and found that eighty-one essentially ignored these rules, offering benefits to students "ranging from open payrolls and disguised booster funds to no-show jobs."²⁸ The NCAA remained powerless until 1951, when it hired as its first Executive Director, young Walter Byers, who, taking advantage of a confluence of scandals, immediately sought to gain control over inter-

²² Please note that this is an abbreviated account of the NCAA's founding. For a comprehensive overview of the early years of the NCAA, see generally W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211 (2006); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9 (2000). For a Pulitzer Prize-winning historian's critical and in-depth look at the NCAA from its founding to present, see Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, at 80. If you would rather watch a compelling documentary, see SCHOOLED: THE PRICE OF COLLEGE SPORTS (Makuhari Media 2013).

²³ Carter, *supra* note 22, at 215.

²⁴ *Id.*

²⁵ See *id.* at 216; Smith, *supra* note 22, at 12.

²⁶ See Carter, *supra* note 22, at 216–18; Smith, *supra* note 22, at 12.

²⁷ Branch, *supra* note 22, at 84.

²⁸ *Id.*

collegiate athletics.²⁹ Byers's decisive handling of the scandals "created an aura of centralized command," which Byers further cultivated through his strong-armed negotiation over television rights.³⁰ As a result of Byers's victory, in 1952, the NCAA negotiated its first television contract—worth \$1.14 million for one year—which limited the number of games broadcasted to ensure that fans would continue attending games, and ensured that the proceeds from these television rights funneled through the NCAA.³¹ Although this television arrangement was invalidated for violating antitrust law in 1984,³² it set the stage for a powerful and profitable NCAA regime.

Today, the NCAA has more than 1,200 member institutions, including universities, regional sports conferences, and affiliate organizations across the United States and Canada.³³ The NCAA has adopted and promulgated rules governing play, the size of teams and coaching staffs, and athlete recruitment, as well as academic and amateur eligibility standards.³⁴ Additionally, the NCAA organizes and awards eighty-nine national championships in twenty-three sports across three different divisions.³⁵ The most competitive of the divisions is Division I, which for football is subdivided into Football Bowl Subdivision ("FBS") and Football Championship Subdivision ("FCS").³⁶ The FBS, comprised of more than 120 schools, is considered the highest level of competition and provides the majority of the business of major college athletics.³⁷

B. *The Business of Major College Athletics*

While the NCAA is a nonprofit organization, it still makes a great deal of money. For the 2009–2010 fiscal year, the NCAA reported revenues approaching \$750 million, with 86%, or more than \$642 mil-

²⁹ See *id.*

³⁰ *Id.* In 1952, the University of Pennsylvania and Notre Dame sought to enter individual agreements to broadcast their games, but Byers threatened to sanction any team that played either school, unless the schools joined an NCAA-wide television contract. *Id.* Byers's bluff worked, and the schools relented. *Id.*

³¹ *Id.*

³² See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla. (Bd. of Regents)*, 468 U.S. 85, 120 (1984).

³³ *Membership*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/who-we-are/membership> (last visited Feb. 13, 2015).

³⁴ *Bd. of Regents*, 468 U.S. at 88.

³⁵ *Championships*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/what-we-do/championships> (last visited Feb. 13, 2015).

³⁶ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 963–64 (N.D. Cal. 2014).

³⁷ See *id.*

lion, coming from television and marketing licenses.³⁸ As television revenues grow, so too do the NCAA's revenues. In 2010, the NCAA agreed to a fourteen-year, \$10.8 billion contract with CBS and Turner Sports for the exclusive right to broadcast the NCAA Men's Basketball Championship Tournament, known as March Madness.³⁹ Furthermore, ESPN agreed to pay \$7.3 billion over twelve years to broadcast the College Football Playoff, beginning with its inaugural 2014 season.⁴⁰ Television revenues have made the nonprofit NCAA highly profitable, as it generated \$42.6 million in net profits in FY 2009–2010, without its ESPN contract.⁴¹

Conferences and universities not only receive shares of the NCAA's television revenues,⁴² but they also profit from college sports on their own. Conferences have started to capitalize on their popularity by licensing their television rights to networks, with a few even forming their own television networks.⁴³ The Big Ten Conference is "the richest football conference" in the country,⁴⁴ with combined revenues from the Big Ten Network and its other television contracts averaging \$248.2 million annually.⁴⁵ The Big Ten distributed more than \$26 million to each member school in 2013, and that figure is expected to rise to \$35 million per school for the 2016–2017 season.⁴⁶

³⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, 2009–2010 NCAA MEMBERSHIP REPORT 26 (2010) [hereinafter NCAA MEMBERSHIP REPORT], available at <http://catalog.proemags.com/publication/0affe96d>.

³⁹ Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 109 n.1 (2012).

⁴⁰ James Andrew Miller, Steve Eder & Richard Sandomir, *College Football's Biggest Player? ESPN*, N.Y. TIMES, Aug. 25, 2013, at A1, available at <http://www.nytimes.com/2013/08/25/sports/ncaafotball/college-footballs-most-dominant-player-its-espn.html>.

⁴¹ NCAA MEMBERSHIP REPORT, *supra* note 38, at 54. The largest of all of the NCAA's expenses, making up 61%, or \$433.3 million, of expenditures in FY 2009–2010, is the distributions it makes to Division I members. *Id.* These distributions are made through a variety of measures including the Basketball Fund (based on each conference's success in March Madness) and grants-in-aid. *Id.* at 35.

⁴² See *supra* note 41.

⁴³ See Karcher, *supra* note 39, at 109 n.1 (detailing conferences' television contracts and networks).

⁴⁴ Brian Bennett, *Big Ten's Revenue Keeps Climbing*, ESPN (May 6, 2013, 2:00 PM), http://espn.go.com/blog/bigten/post/_id/76205/big-tens-tv-revenue-keeps-climbing.

⁴⁵ Kristi Dosh, *A Comparison: Conference Television Deals*, ESPN (Mar. 19, 2013, 5:15 PM), http://espn.go.com/blog/playbook/dollars/post/_id/3163/a-comparison-conference-television-deals; see also Karcher, *supra* note 39, at 109 n.1 ("The Big Ten signed a \$1 billion, ten-year television deal with ESPN/ABC in June 2006; and a \$72 million, six-year deal with CBS for basketball only in June 2011. The Big Ten even has its own network, which the conference jointly owns with News Corp., and the television contract signed in August 2006 was a \$2.8 billion, twenty-five-year deal.").

⁴⁶ Chris Smith, *How Massive Conference Payouts Are Changing the Face of College Sports*,

Additionally, schools with successful athletic programs receive significant supplementary revenue from direct sources (such as ticket sales and licensing) and indirect sources (including alumni donations and increased enrollment).⁴⁷ In 2012, the University of Texas (“UT”) had the highest total annual revenue of all schools at \$163.3 million, of which the football and men’s basketball teams accounted for almost seventy percent.⁴⁸ Of this \$163.3 million, \$59.2 million (or 36%) came from ticket sales, while another one-third (\$53.9 million) was attributed to rights and licensing deals.⁴⁹ The indirect benefit to universities is largely measured in donor contributions, which accounted for one-fourth of UT’s revenue, or \$40.7 million, in 2012.⁵⁰ The success of a school’s athletic program also has other ancillary benefits, as the academic quality of the school measurably improves following on-the-field success due to the increased number and quality of applicants the publicity brings.⁵¹

Individuals charged with implementing this system, such as school administrators, also benefit handsomely from this system, but none more so than coaches, whose occupation has become highly professionalized.⁵² In 2012, UT spent \$53.5 million, representing one-third of its revenue, on coaches and staff salaries.⁵³ Across college football, seventy-two head coaches earned over one million dollars in annual

FORBES (Dec. 26, 2013, 12:25 PM), <http://www.forbes.com/sites/chris-smith/2013/12/26/how-massive-conference-payouts-are-changing-the-face-of-college-sports/>.

⁴⁷ Amy Christian McCormick & Robert A. McCormick, *The Emperor’s New Clothes: Lifting the NCAA’s Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 520–27 (2008).

⁴⁸ Steve Berkowitz et al., *NCAA Finances*, USA TODAY, <http://www.usatoday.com/sports/college/schools/finances/> (last visited Feb. 13, 2015); Cork Gaines, *Texas Longhorns: How the Richest School in College Sports Makes and Spends Its Millions*, BUS. INSIDER (Sept. 17, 2013, 4:11 PM), <http://www.businessinsider.com/texas-longhorns-how-the-richest-school-in-college-sports-makes-and-spends-its-millions-2013-9?op=1>.

⁴⁹ Gaines, *supra* note 48.

⁵⁰ *Id.*

⁵¹ See KRISTI DOSH, SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES 3 (2013) (noting that Boise State University’s football success translated to a jump from 13.5% to 34% out-of-state enrollment, which translates into millions of dollars and that Boise State’s selectivity increased from 70% admittance in 2006 to 54% in 2011, where the “percentage of students who scored in the top quarter on their ACTs grew from 28[%] to 40[%] over the same five-year period”). See generally Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, 32 MARKETING SCI. 679 (2013).

⁵² McCormick & McCormick, *supra* note 47, at 527–28 (noting that college coaches are commonly represented by agents who negotiate “lucrative” contracts with both universities and sponsors).

⁵³ Gaines, *supra* note 48.

salary in 2014, with nearly thirty eclipsing three-million-dollars.⁵⁴ While market realities undoubtedly drive these ever-increasing salaries,⁵⁵ these numbers represent but one example of the large expenditures made to sustain a successful program.

While the NCAA, conferences, schools, and coaches reap the rewards of college sports' success, the student-athletes, who play a measurably large role in that success, do not. Studies quantifying the value of individual players to their schools have found that, on average, a draft-quality football player is worth at least \$406,000 annually and a draft-quality basketball player is worth a stunning \$1.194 million.⁵⁶ Star players can be worth even more to their schools.⁵⁷ Despite this, schools do not share that value with their student-athletes; for example, although UT spent 33% of its \$163.3 million revenue on coaches' salaries, it only spent 5.7%, or \$9.4 million, on scholarships for student-athletes across all sports.⁵⁸ The college sports industry generates the highest revenue of any major American sport—an estimated \$12.6 billion in the 2011-2012 academic year⁵⁹—but that revenue is shared with its players at a substantially lower percentage than all other major American sports.⁶⁰ While the NBA, NFL, MLB, and NHL all have salary shares⁶¹ between fifty and sixty percent of revenue,⁶² the scholarship share⁶³ from 2004 to 2011 in collegiate sports was significantly lower: between twenty-one and twenty-three percent.⁶⁴

⁵⁴ Steve Berkowitz et al., *NCAA Salaries, NCAAF Coaches*, USA TODAY, <http://www.usatoday.com/sports/college/salaries/ncaaf/coach/> (last visited Jan. 17, 2015).

⁵⁵ See, e.g., Chris Smith, *Why Nick Saban Is Worth \$7 Million per Year*, FORBES (Dec. 16, 2013, 11:23 AM), <http://www.forbes.com/sites/chris-smith/2013/12/16/is-nick-saban-worth-7-million-per-year-absolutely/> (reporting that even at \$7 million per year in salary, Alabama head coach Nick Saban continues to bring financial prosperity to the University).

⁵⁶ Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, SPORT J. (Jan. 3, 2012), <http://www.thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation>.

⁵⁷ See, e.g., Bachman & Cohen, *supra* note 3 (noting Manziel winning the Heisman and leading Texas A&M to a bowl game victory generated thirty-seven million dollars in media exposure for Texas A&M in the span of just two months).

⁵⁸ Gaines, *supra* note 48.

⁵⁹ Monks, *supra* note 13, at 1.

⁶⁰ *Id.* at 10–11.

⁶¹ Calculated as the percentage of sport-related revenue “returned to the players in the form of salary.” *Id.* at 10.

⁶² *Id.*

⁶³ Calculated as the “percent[age] of athletic revenue earned by the institutions transferred to athletes in the form of athletic scholarships.” *Id.* at 11.

⁶⁴ *Id.*

C. *Amateurism*

These staggering revenues are not shared with student-athletes because the NCAA and its institutions adhere to its Principle of Amateurism,⁶⁵ which requires all student-athletes to forego payment of any kind to be eligible to compete.⁶⁶ To understand amateurism in the context of college sports, it is important to understand (1) its historical foundation and adaption to collegiate athletics, (2) the current status of NCAA amateurism rules, and (3) the realities of modern student-athletes.

1. *Amateurism's Historical Foundation*

Collegiate athletics began in the Ivy League universities as early as 1852.⁶⁷ These universities borrowed the contemporary Victorian English tradition of the “gentlemen-amateur,”⁶⁸ under which it was considered “despicable” and beneath a gentleman to make money playing sports.⁶⁹ Seeing their mission to be “raising gentlemen,” the elite institutions that shaped collegiate athletics viewed amateurism as both “the very essence of gentlemanly behavior in athletics” and “the key ingredient that linked education to athletics.”⁷⁰ The adoption and tradition of amateurism raises several red flags, but there are two that are pertinent to understanding amateurism’s faulty foundation.

First, the gentlemen-amateur tradition is inherently classist.⁷¹ The upper- and middle-classes, creators of this tradition, could afford to play merely for fun, but athletes from the lower socioeconomic class relied on compensation to earn a living.⁷² Thus, scholars agree

⁶⁵ The NCAA outlines its Principle of Amateurism in its Constitution, describing student-athletes’ participation in sports as an “avocation” that “should be motivated primarily by education and by the physical, mental and social benefits to be derived.” NCAA MANUAL, *supra* note 8, Const. art. 2, § 2.9, at 4.

⁶⁶ See *id.* Bylaw 12.1.2, at 59.

⁶⁷ See W. Burlette Carter, *Responding to the Perversion of in Loco Parentis: Using a Non-profit Organization to Support Student-Athletes*, 35 IND. L. REV. 851, 861 (2002) (noting that the first intercollegiate athletic event is generally considered a 1852 crew competition between students at Harvard and Yale).

⁶⁸ *Id.* at 862.

⁶⁹ *Id.*; Carter, *supra* note 22, at 232.

⁷⁰ Carter, *supra* note 67, at 862.

⁷¹ Carter, *supra* note 22, at 233. Early English amateurism rules made their class-based bias patently clear, as they “specifically banned participation by those who performed any kind of manual labor” based on the justification that “‘lower orders’ were incapable of acts of fair play and good sportsmanship.” ALLEN GUTTMANN, *THE OLYMPICS: A HISTORY OF THE MODERN GAMES* 12 (2d ed. 2002).

⁷² See Carter, *supra* note 22, at 230, 233 (noting an amateur “derived his pleasure from the game itself and not external factors such as fame or fortune”).

that the purpose of the gentlemen-amateur tradition, and its exclusion of paid athletes, was “to insulate the aristocracy from working-class competitors”⁷³ and increase the aristocrats’ chances of winning.⁷⁴

Second, amateurism is a paternalistic principle that views student-athletes as needing protection.⁷⁵ This view corresponds with early applications of the *in loco parentis* doctrine, whereby colleges “act[ed] much like a parent with respect to their students.”⁷⁶ Although colleges no longer abide by this doctrine for their general student body, the NCAA amateurism regime keeps paternalism alive for student-athletes.⁷⁷

2. NCAA’s Amateurism Regime

According to the NCAA, collegiate athletics are “designed to be an integral part of the educational program.”⁷⁸ To this end, the NCAA considers student-athletes to be “an integral part of the student body,” and seeks to “maintain[] a clear line of demarcation between college athletics and professional sports.”⁷⁹ Through its amateurism regime, the NCAA purports to protect student-athletes “from exploitation by professional and commercial enterprises.”⁸⁰

In the seminal 1984 antitrust case, *NCAA v. Board of Regents of the University of Oklahoma* (“*Board of Regents*”),⁸¹ the Supreme Court noted in dicta that “[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports . . . [and] it needs ample latitude to play that role,”⁸² which includes making “rules defining . . . the eligibility of participants.”⁸³ Despite the Court not being called upon to consider the NCAA’s eligibility rules and amateurism regime,⁸⁴ those arguing on behalf of the amateurism

⁷³ JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 135 (2d ed. 2004); see also GUTTMANN, *supra* note 71, at 12.

⁷⁴ DAVID C. YOUNG, *A BRIEF HISTORY OF THE OLYMPIC GAMES* 94 (2004).

⁷⁵ See Carter, *supra* note 67, at 855–59; see also Branch, *supra* note 22, at 83 (“[A] more apt metaphor is colonialism: college sports, as overseen by the NCAA, is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized.”).

⁷⁶ Carter, *supra* note 67, at 856.

⁷⁷ See *id.* at 855–59.

⁷⁸ NCAA MANUAL, *supra* note 8, Bylaw 12.01.2, at 57.

⁷⁹ *Id.*

⁸⁰ *Id.* Const. art. 2, § 2.9, at 4.

⁸¹ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

⁸² *Id.* at 120.

⁸³ *Id.* at 117.

⁸⁴ The NCAA action at issue in *Board of Regents* was an economic one—an NCAA rule

rules prohibiting student-athlete compensation consistently rely on the following dicta from *Board of Regents*: “In order to preserve the character and quality of the [NCAA’s] ‘product,’ athletes must not be paid, must be required to attend class, and the like.”⁸⁵

To fulfill the role seemingly endorsed by the Court, the NCAA has promulgated a complex structure of eligibility rules,⁸⁶ with those dedicated to amateurism located in Article 12.⁸⁷ The amateurism rules police a broad range of conduct for current and prospective student-athletes, including contact with professional teams⁸⁸ and agents,⁸⁹ the ability to maintain outside employment;⁹⁰ and from whom student-athletes may receive money for necessities such as food or clothes.⁹¹ This Note focuses on the three specific provisions that work to limit student-athlete compensation in the name of amateurism.

The amateurism regime’s compensation-limiting provisions are: Bylaw 15, which limits financial aid to the “cost of attendance,”⁹² calculated as the “total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution”;⁹³ Bylaw 12.5.2, which prohibits student-athletes from receiving remuneration for the use of their likenesses to advertise any product or service;⁹⁴ and Bylaw 12.1.2, which dictates that athletes loses their amateur status and are ineligible if they receive or are promised any pay for their play.⁹⁵ By denying compensation beyond limited scholarship values, these Bylaws maintain the amateurism ideal and establish the regime under which student-athletes live.

limiting the number of football games a school may have televised in a year—which the Court struck down as an unreasonable horizontal restraint on trade, in violation of the Sherman Act. *Id.* at 91–94, 120; *see also infra* Part III.A.

⁸⁵ *Bd. of Regents*, 468 U.S. at 102; *see, e.g., McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344–45 (5th Cir. 1988) (“The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures.” (citing *Bd. of Regents*, 468 U.S. at 102)).

⁸⁶ *See* NCAA MANUAL, *supra* note 8, Bylaws 12, 14–16, at 57–86, 147–221.

⁸⁷ *Id.* Bylaw 12, at 57–86.

⁸⁸ *Id.* Bylaw 12.2, at 63–66.

⁸⁹ *Id.* Bylaw 12.3, at 66–67.

⁹⁰ *Id.* Bylaw 12.4, at 67–68.

⁹¹ *E.g., id.* Bylaw 12.1.2.1.4, at 60–61.

⁹² *Id.* Bylaw 15.01.6, at 187.

⁹³ *Id.* Bylaw 15.02.2, at 188.

⁹⁴ *See id.* Bylaw 12.5.2.1, at 71.

⁹⁵ *Id.* Bylaw 12.1.2, at 59.

3. *Realities of Modern Student-Athletes*

The NCAA claims that amateurism is designed to protect student-athletes “from exploitation by professional and commercial enterprises.”⁹⁶ However, “sentiment [should not] blind[] us to what’s before our eyes”⁹⁷; major college sports have become fully commercialized, at the expense of the athletes. The modern “student-athlete” in a big-time athletic program has become an athlete first and a student a distant second.

A 2010 survey of college athletes found that football players at FBS schools spent an average of 43.3 hours per week on athletic activities during the season and Division I men’s basketball players averaged 39.2 hours per week;⁹⁸ put another way, if these athletes were hourly employees, many would qualify for overtime pay.⁹⁹ Comparatively, these same students spent 38 and 37.3 hours on academic activity, respectively.¹⁰⁰ The athletics-first mentality is reinforced when athletes are often required to miss class.¹⁰¹ The full-time nature of athletics is not limited to the season; roughly seventy percent of football and basketball players reported spending as much or more time on athletic activities during the off-season than in-season.¹⁰² Exemplifying this reality, eighty percent of student-athletes self-identified as “athletes” in the survey, while only sixty percent self-identified as “students.”¹⁰³

⁹⁶ *Id.* Const. art. 2, § 2.9, at 4.

⁹⁷ Branch, *supra* note 22, at 83.

⁹⁸ 2010 GOALS STUDY, *supra* note 7, at 17. These figures likely do not include the other time commitments related to athletes’ team membership, such as required study hall and tutoring, “training table” (meals eaten with the team), media interviews, and team events, because they are not classified as “athletic activities.” See NCAA MANUAL, *supra* note 8, Bylaw 17.02.1, at 223 (defining “Countable Athletically Related Activities” narrowly as “any required activity with an athletics purpose” performed “at the direction of, or supervised by, one or more of an institution’s coaching staff,” whereas “[a]dministrative activities (e.g., academic meetings, compliance meetings) shall not be considered as countable athletically related activities”).

⁹⁹ See 29 U.S.C. § 207(a)(1) (2012).

¹⁰⁰ 2010 GOALS STUDY, *supra* note 7, at 18.

¹⁰¹ For example, in January 2014, the members of three basketball teams missed the first day of their universities’ classes to play in games that were televised nationally on ESPN. See Marc Edelman, *As the NCAA Argues Non-Commercial Status, Three Men’s Basketball Teams Miss the First Day of Class to Play on ESPN*, FORBES (Jan. 13, 2014, 12:00 PM), <http://www.forbes.com/sites/marcedelman/2014/01/13/as-the-ncaa-argues-lack-of-commercialism-in-court-three-division-i-mens-basketball-teams-miss-the-first-day-of-classes-to-accomodate-espn/>; see also 2010 GOALS STUDY, *supra* note 7, at 22–23 (providing statistics demonstrating average number of classes missed for athletic activities).

¹⁰² 2010 GOALS STUDY, *supra* note 7, at 21.

¹⁰³ *Id.* at 30.

With billions of dollars at stake for the NCAA, conferences, universities, administrators, coaches, and advertisers, the economic interests tied to athletics have taken precedence over scholastic ideals. Some claim the NCAA has contributed to the problem of student-athlete exploitation by “hypocritically speaking of the importance of academics over money while [its] actions are in stark contrast to this message.”¹⁰⁴ Even the frequently used “student-athlete” terminology, the NCAA’s “signature term,”¹⁰⁵ demonstrates this hypocritical illusion. The term “is meant to conjure the nobility of amateurism, and the precedence of scholarship over athletic endeavor,”¹⁰⁶ but in reality, the term was manufactured in the 1950s by then-NCAA Executive Director Walter Byers in response to the threat that NCAA athletes could be identified as employees, which would make schools liable for worker-compensation claims by injured athletes.¹⁰⁷ The intentionally ambiguous term¹⁰⁸ and the image it conveys have successfully been used as a shield against such liability,¹⁰⁹ while also providing the NCAA with a perceived moral authority as it reaps the financial benefits of the illusion it created.¹¹⁰

Beyond economic exploitation, maintaining the amateurism regime leads to countless ancillary issues, especially considering student-athletes’ backgrounds.¹¹¹ With many student-athletes coming from lower socioeconomic backgrounds, there is a temptation to accept im-

¹⁰⁴ Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 256 (2004).

¹⁰⁵ Branch, *supra* note 22, at 88.

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*; see also WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69 (1995) (describing the circumstances surrounding the creation of the term “student-athlete,” which “was embedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes”).

¹⁰⁸ See Branch, *supra* note 22, at 88 (“The term *student-athlete* was deliberately ambiguous. College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals).”).

¹⁰⁹ Cf. *Waldrep v. Tex. Emp’rs Ins. Ass’n*, 21 S.W.3d 692, 692 (Tex. App. 2000) (upholding jury’s finding that TCU scholarship football player “was not an employee of private university at time of paralyzing football injury,” and thus not eligible for workers-compensation benefits). But cf. *Northwestern Univ.*, No. 13-RC-121359, slip op. at 2 (N.L.R.B. Mar. 26, 2014), available at <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f> (finding, in NLRB unionization hearing, that scholarship football players at Northwestern University are “employees” of the university).

¹¹⁰ See Branch, *supra* note 22, at 88–89; see also BYERS, *supra* note 107, at 376.

¹¹¹ See Robert John Givens, Comment, “*Capitamateurism*”: An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association, 82 UMKC L. REV. 205, 206 (2013).

permissible benefits.¹¹² Placing student-athletes, poor or otherwise, in a situation rife with temptation and hypocrisy leads to countless scandals¹¹³ and “breads [sic] disrespect for educational institutions and societal values.”¹¹⁴ These problems are exacerbated by professional leagues’ rules, crafted in concert with the NCAA, which substantially limit eligibility for professional careers for athletes who do not attend colleges.¹¹⁵ Talented young athletes hoping to play professionally have virtually no option but to subject themselves to the NCAA’s amateurism regime.¹¹⁶

Closer examination of amateurism’s historical foundation and the reality facing modern student-athletes reveals that the normative justifications for amateurism are suspect at best. The amateurism regime also implicates an array of legal issues,¹¹⁷ the most pressing of which is its frequent conflict with antitrust laws, specifically Section 1.

II. ANTITRUST ANALYSIS UNDER SECTION 1

Section 1 declares illegal “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.”¹¹⁸ Because all contracts constitute a restraint on trade, the Supreme Court has interpreted Section 1 to prohibit only “unreasonable restraints of trade.”¹¹⁹ There are two threshold issues that determine whether Section 1 applies to the challenged conduct: first, the conduct must constitute con-

¹¹² See Parent, *supra* note 104, at 234 (noting that “[m]any players are recruited from impoverished families” and the NCAA amateurism rules “prohibiting reasonable financial compensation render such players vulnerable to inducements, benefits, and other types of compensation” that the NCAA rules have defined as “illicit”).

¹¹³ See, e.g., Pat Forde et al., *Cash Sought for Cam Newton*, ESPN, <http://sports.espn.go.com/ncf/news/story?id=5765214> (last updated Nov. 5, 2010, 4:14 PM) (describing scandal involving six-figure payment sought by individuals associated with Auburn University quarterback, and later Heisman Trophy-winner, Cam Newton).

¹¹⁴ Givens, *supra* note 111, at 225.

¹¹⁵ See Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 557.

¹¹⁶ See *id.*

¹¹⁷ See, e.g., Sean Hanlon & Ray Yasser, Comment, “J.J. Morrison” and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 266–76, 297 (2008) (arguing that select NCAA licensing practices violate student-athletes’ right of publicity); *id.* at 243 (arguing that athletic scholarship agreement is an unconscionable contract of adhesion); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 95–97 (2006) (arguing that student-athletes are actually “employees” entitled to protection of labor and employment laws).

¹¹⁸ *Id.*

¹¹⁹ See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984).

certed joint action, rather than unilateral action,¹²⁰ and second, the transactions or activity affected must be commercial in nature.¹²¹

Once these threshold elements are satisfied and Section 1 applies to the challenged conduct, a plaintiff generally must show that the defendant “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market” in order to succeed on its Section 1 claim.¹²² After demonstrating an effective agreement, the remaining analysis—whether the agreement unreasonably restrained trade in the relevant market—considers the agreement’s “impact on competitive conditions”¹²³ to answer the central inquiry under Section 1: “whether or not the challenged restraint enhances competition.”¹²⁴

There are multiple analytical approaches used to conduct this inquiry, the choice of which is based on the nature of the challenged restraint and the surrounding circumstances.¹²⁵ This Part introduces those approaches, before focusing on the burden-shifting Rule of Reason analysis.

A. *Approaches to the Section 1 Reasonableness Inquiry*

The analysis of the reasonableness of a restraint has evolved significantly in the 125 years since the Sherman Antitrust Act was passed in 1890.¹²⁶ For much of that time, the antitrust landscape was considered to be “bipolar,” with the unflinching per se rule on one end and the comprehensive Rule of Reason analysis on the other.¹²⁷ Ultimately, the bipolar model proved inadequate to address the complexities of antitrust regulation.¹²⁸ Subsequently, the Court “embrace[d] a continuum model, which [it] likened to a ‘sliding scale’ approach.”¹²⁹ As a part of this shift towards a continuum model, the Court developed a third, middle-ground approach known as the “quick-look”

¹²⁰ See *Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55, 70 (2d Cir. 1988).

¹²¹ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492–93 (1940); *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 340 (7th Cir. 2012) (“[T]he Sherman Act applies to commercial transactions, and the modern definition of commerce includes almost every activity from which an actor anticipates economic gain.” (internal quotation marks and alteration omitted)).

¹²² *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

¹²³ *Nat’l Soc’y of Prof’l Eng’rs v. United States (NSPE)*, 435 U.S. 679, 690 (1978).

¹²⁴ *Bd. of Regents*, 468 U.S. at 104.

¹²⁵ See *NSPE*, 435 U.S. at 690.

¹²⁶ See generally Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012) (tracking the development of antitrust caselaw and the Rule of Reason).

¹²⁷ See *id.* at 744–51.

¹²⁸ *Id.* at 751–53.

¹²⁹ *Id.* at 759 (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 780 (1999)).

Rule of Reason.¹³⁰ This Section introduces the three recognized analytical approaches used to determine whether a restraint is unreasonable: (1) the Rule of Reason, (2) the *per se* rule, and (3) the “quick-look” Rule of Reason.¹³¹

1. *Rule of Reason*

The most common approach is the Rule of Reason, which courts presumptively apply to Section 1 claims.¹³² The goal of the Rule of Reason is to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”¹³³ Thus, a challenged restraint is deemed unlawful under the Rule of Reason if plaintiffs can prove that it is anticompetitive and unreasonable.¹³⁴ In determining whether the challenged restraint is unreasonable, the factfinder must consider a variety of factors, “including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect,”¹³⁵ as well as whether the defendant has market power.¹³⁶

Under the Rule of Reason, the determination of whether a restraint is unreasonable

comprises three steps involving shifting burdens of proof:

- (1) The plaintiff shows that the agreement has a substantially adverse effect on competition.
- (2) The defendant must then show that the challenged conduct promotes a sufficiently procompetitive objective.

¹³⁰ See *Cal. Dental*, 526 U.S. at 770–71; *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109–10 (1984); *NSPE*, 435 U.S. at 692–94; see also Gavil, *supra* note 126, at 751–59.

¹³¹ It is important to note that the categories of analysis are not fixed, but rather are more like reference points on a spectrum. See *Cal. Dental*, 526 U.S. at 779 (“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘*per se*,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.”); *Bd. of Regents*, 468 U.S. at 104 n.26 (“[T]here is often no bright line separating *per se* from Rule of Reason analysis.”).

¹³² See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

¹³³ *Leegin*, 551 U.S. at 886.

¹³⁴ *Dagher*, 547 U.S. at 5; *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335 (7th Cir. 2012).

¹³⁵ *Khan*, 522 U.S. at 10; see also *Bd. of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918) (announcing the Rule of Reason and the factors courts are to consider).

¹³⁶ *Leegin*, 551 U.S. at 885–86.

(3) In rebuttal, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.¹³⁷

This three-step burden-shifting Rule of Reason framework will be discussed in further detail below in Part II.B.

2. *Per Se Rule*

While the default Rule of Reason analysis involves a searching inquiry into the reasonableness of the challenged restraint, there are certain restraints that are presumed unreasonable “because of their pernicious effect on competition and lack of any redeeming virtue.”¹³⁸ Courts thus find such restraints to be illegal *per se* “without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”¹³⁹ The *per se* rule’s benefits include providing certainty as to what types of restraints are prohibited and avoiding the Rule of Reason’s complicated, and at times problematic, reasonableness inquiry.¹⁴⁰

Because of the Court’s “expressed reluctance to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious,”¹⁴¹ the *per se* rule is thus “appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the [R]ule of [R]eason.”¹⁴² Thus, the *per se* rule is reserved for certain categories of restraints that a court can confidently say “would always or almost always tend to restrict competition and decrease output.”¹⁴³ The categories of restraints that courts have deemed to be unreasonable *per se*, and thus unlawful, are price fixing,¹⁴⁴ division of markets,¹⁴⁵ and

¹³⁷ Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 336 (2005).

¹³⁸ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (internal quotation marks omitted); *see also* *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) (“[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect.”).

¹⁴² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (citations omitted).

¹⁴³ *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

¹⁴⁴ *See, e.g., Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (BMI)*, 441 U.S. 1, 8 (1979); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210–11 (1940).

¹⁴⁵ *See, e.g., Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (*per curiam*); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff’d*, 175 U.S. 211 (1899).

group boycotts.¹⁴⁶ Even with the per se rule limited to these distinct categories, the Court has slowly been narrowing its application, even for previously circumscribed conduct.¹⁴⁷

3. “Quick-Look” Rule of Reason

The choice between the uncompromising per se rule and the involved Rule of Reason was especially problematic when a challenged restraint had obvious anticompetitive effects but the per se framework was inappropriate for some reason.¹⁴⁸ The reasons the Court has declined to apply the per se rule to conduct ordinarily held to be per se unreasonable include judicial inexperience with the particular restraint¹⁴⁹ and the necessity for the restraint “if the product is to be available at all.”¹⁵⁰ Thus, to confront situations in which the per se rule is inappropriate but the anticompetitive effects of a challenged restraint are so obvious that “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,”¹⁵¹ courts have adopted a “quick-look” approach to the Rule of Reason.¹⁵²

Under the quick-look approach, anticompetitive effects of an agreement may be established, without a detailed market analysis, when it is “an agreement not to compete in terms of price or out-

¹⁴⁶ See, e.g., *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467–68 (1941).

¹⁴⁷ See, e.g., *Leegin*, 551 U.S. at 887–99 (holding that the Rule of Reason, not the per se rule, applies to vertical price restraints), *overruling* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31–46 (2006) (holding that tying arrangements were no longer per se unreasonable), *overruling* *Int'l Salt Co. v. United States*, 332 U.S. 392 (1947).

¹⁴⁸ See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–01 (1984).

¹⁴⁹ See, e.g., *BMI*, 441 U.S. at 9–10.

¹⁵⁰ *Bd. of Regents*, 468 U.S. at 101.

¹⁵¹ *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (noting the quick-look doctrine applies “to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability”).

¹⁵² See, e.g., *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (applying quick-look Rule of Reason analysis to NCAA rule limiting the compensation of college basketball coaches). The Federal Trade Commission has adopted, for its reviews, a similar approach that, like the quick-look approach, applies a rebuttable presumption of illegality to “inherently suspect” restraints, which are those that, based on judicial experience, economics, and the challenged restraint’s similarity to a previously condemned restraint, are likely to harm consumers. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36–37 (D.C. Cir. 2005).

put.”¹⁵³ Rather than engage in an analysis of the relevant market to establish anticompetitive effects under the initial step of the Rule of Reason,¹⁵⁴ such effects are established when there is an effective horizontal agreement to fix prices or output levels more favorable to the defendant than would have resulted in the free market.¹⁵⁵ Upon establishing the restraint’s “obvious anticompetitive effects,” the quick-look approach proceeds directly to an analysis of the procompetitive justifications offered for the restraint,¹⁵⁶ the second step of the Rule of Reason analysis, followed by an analysis of whether the restraint is reasonable necessary to achieving the asserted objective, the third step of the Rule of Reason analysis.¹⁵⁷

B. *Burden-Shifting Rule of Reason Analysis*

The determination of whether a rule is an unreasonable restraint under the full-blown Rule of Reason involves a three-step burden-shifting analysis.¹⁵⁸ The plaintiff must first show the challenged restraint had substantial anticompetitive effects on the relevant market.¹⁵⁹ Next, the burden shifts to the defendant to show the restraint is justified because it promotes a legitimate procompetitive objective.¹⁶⁰ If the defendant establishes one or more cognizable procompetitive justifications, the burden generally shifts back to the plaintiff to prove that the anticompetitive restraint is not reasonably necessary to achieve the stated objective(s).¹⁶¹ If these steps are satisfied and evidence of both pro- and anticompetitive justifications is adduced, some courts analyze whether the restriction is unreasonable by balancing its harms and benefits.¹⁶²

¹⁵³ *Bd. of Regents*, 468 U.S. at 109; *see also* Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 692 (1978) (noting that “no elaborate industry analysis is required to demonstrate the anticompetitive character” of a professional society’s ethical rules that effectively prohibit its members from engaging in price competition). Because a detailed market analysis is unnecessary under the quick-look approach, courts applying it allow plaintiffs to forgo a specific definition of the relevant market. *See* Agnew v. Nat’l Collegiate Athletic Ass’n, 683 F.3d 328, 336–37 (7th Cir. 2012); *Law*, 134 F.3d at 1020.

¹⁵⁴ *See infra* Part II.B.1.

¹⁵⁵ *Law*, 134 F.3d at 1020.

¹⁵⁶ *Id.*; *see also Bd. of Regents*, 468 U.S. at 110 (finding that a “naked restraint on price and output requires some competitive justification”).

¹⁵⁷ *See infra* Part II.B.2. The approach’s quick look at the anticompetitive effects step of the Rule of Reason is precisely why it is referred to as the “quick-look” Rule of Reason.

¹⁵⁸ Nagy, *supra* note 137, at 336; *see also supra* text accompanying note 137.

¹⁵⁹ Nagy, *supra* note 137, at 336; *Law*, 134 F.3d at 1019.

¹⁶⁰ Nagy, *supra* note 137, at 336; *Law*, 134 F.3d at 1019.

¹⁶¹ Nagy, *supra* note 137, at 336; *Law*, 134 F.3d at 1019.

¹⁶² *See Law*, 134 F.3d at 1019; Gavil, *supra* note 126, at 761; *see also* ANDREW I. GAVIL,

1. Step 1: Anticompetitive Effects

There are three recognized methods by which the plaintiff can satisfy its burden to establish the challenged restraint's anticompetitive effects.¹⁶³ The first, and most common, is to create a presumption of anticompetitive effects using circumstantial evidence—i.e., proving that the defendant has “market power.”¹⁶⁴ Market power is generally defined as the ability to significantly affect prices or output in the relevant market.¹⁶⁵ Thus, to prove market power, the plaintiff must define the relevant market,¹⁶⁶ which involves both a geographic market and a product market.¹⁶⁷ The geographic market is “the area of effective competition where buyers can turn for alternative sources of supply.”¹⁶⁸ Thus, depending on industry at issue, the geographic market may be as small as a single metropolitan area or as big as the entire nation.¹⁶⁹ The product market considers the uses of the defendant's product and “the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”¹⁷⁰ Thus, taking into account available substitutes in the geographic market, if the defendant retains a “predominant share” of the relevant

WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 207–08 (2d ed. 2008) (“[T]he *Law* framework suggests that in cases where both plaintiffs and defendants have met their respective burdens of production, courts, and presumably juries, should ‘balance’ the relative negative effects and benefits.”). It is worth noting, however, that “[i]n practice, rule of reason balancing rarely, if ever, occurs.” Gavil, *supra* note 126, at 761. “Instead, most cases turn on the strength and weight of the evidence of effects or efficiencies.” GAVIL ET AL., *supra*, at 207–08.

¹⁶³ See Gavil, *supra* note 126, at 762.

¹⁶⁴ *Id.* (noting that anticompetitive effects may be presumed based on circumstantial proof “of market power, typically via definition of a relevant market, calculation of a market share, the inference of market power from a sufficiently high share, and finally, the inference of anticompetitive effects from market power”).

¹⁶⁵ See, e.g., *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business”).

¹⁶⁶ See Gavil, *supra* note 126, at 762; see also *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (“Plaintiffs bear the burden of defining the relevant market.” (citing *Tanaka v. Nat’l Collegiate Athletic Ass’n*, 252 F.3d 1059, 1063 (9th Cir. 2001))).

¹⁶⁷ See *Tanaka*, 252 F.3d at 1063.

¹⁶⁸ *Id.* (internal quotation marks and alteration omitted).

¹⁶⁹ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962) (discussing selection of geographic market in the context of section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18 (1914)).

¹⁷⁰ *Id.* at 325; see also, e.g., *Ky. Speedway, LLC v. Nat’l Ass’n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 916–17 (6th Cir. 2009) (applying *Brown Shoe* analysis of product market to a Section 1 case).

market, the court may infer market power,¹⁷¹ and in turn, anticompetitive effects.¹⁷²

Using the second method, plaintiffs can meet their burden by producing direct evidence of anticompetitive effects—i.e., higher prices, reduced output, or diminished quality—as such evidence “obviates the need for an inquiry into market power.”¹⁷³ While the first method creates a presumption of anticompetitive effects, using direct evidence under the second method does not result in a presumption, as it establishes actual anticompetitive effects.¹⁷⁴ Like the first, the third method also creates a presumption of anticompetitive effects, but does so by applying the quick-look approach when the anticompetitive effects of the restraint are sufficiently obvious that a detailed analysis of the market is unnecessary.¹⁷⁵

Once the plaintiff has established the anticompetitive effects of the challenged restraint through one of these three methods, the burden shifts to the defendant to provide procompetitive justifications for the restraint.¹⁷⁶

2. Step 2: Procompetitive Justifications

An anticompetitive restraint can only be upheld under the Rule of Reason if it is procompetitive “on balance.”¹⁷⁷ Thus, the second step requires the defendant to establish a legitimate procompetitive justification for the restraint.¹⁷⁸ Offering a procompetitive justification is an affirmative defense and the defendant has a “heavy burden” to establish that the restraint justifies deviation from the free market.¹⁷⁹ To meet its burden, the defendant cannot simply point to a post-hoc rationalization; rather, the defendant must (1) proffer a “le-

¹⁷¹ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992).

¹⁷² *See supra* note 164.

¹⁷³ *GAVIL ET AL.*, *supra* note 162, at 186; *see also* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460–61 (1986) (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.” (internal quotation marks omitted)).

¹⁷⁴ *See Gavil*, *supra* note 126, at 762 (“Actual effects evidence . . . is not properly understood as based on any presumption. Presumptions would be used in the absence of actual effects evidence.”).

¹⁷⁵ *See id.* For a discussion of when the quick-look approach applies, *see supra* Part II.A.3.

¹⁷⁶ *See supra* note 160 and accompanying text.

¹⁷⁷ *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335–36 (7th Cir. 2012).

¹⁷⁸ *See Nagy*, *supra* note 137, at 338.

¹⁷⁹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984).

gally cognizable” procompetitive objective that the restraint seeks to achieve and (2) provide proof that the restraint actually promotes that objective.¹⁸⁰

Legally cognizable procompetitive objectives are generally those producing competitive efficiencies, such as “preventing free riding, lowering transaction costs, and facilitating other output-promoting transactions.”¹⁸¹ Objectives that do not create economic efficiencies, but rather serve noncommercial objectives, are most commonly held not to be legally cognizable justifications for anticompetitive actions.¹⁸² Rather, the Court has made clear that the purpose of the Rule of Reason “is to form a judgment about the competitive significance of [a] restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.”¹⁸³ As a result, the Court has rejected justifications that rely on the reasonableness of a fixed price¹⁸⁴ or argue that competition is against the interest of the consumers.¹⁸⁵ Ultimately, the rare instances where courts have allowed noneconomic objectives to prevail generally do not involve “simple price restrictions.”¹⁸⁶

¹⁸⁰ See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1502, at 345 (2d ed. 2003).

¹⁸¹ *GAVIL ET AL.*, *supra* note 162, at 988; see also, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21 (1979) (finding that the defendants’ creation of a blanket license for music sold to television networks substantially lowers costs due to efficiencies created in sales and enforcement, and that such a license “is a necessary consequence of the integration necessary to achieve these efficiencies” that ultimately benefit both buyer and sellers); *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–55 (1977) (crediting the “redeeming virtues” of “[v]ertical restrictions [that] promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products,” such as “induc[ing] retailers to engage in promotional activities or to provide service and repair facilities,” that would not otherwise not exist due to the “free rider” effect); FTC & U.S. DEP’T OF JUSTICE, *ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS* § 2.1, at 5–6 (2000).

¹⁸² Nagy, *supra* note 137, at 336.

¹⁸³ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978); see also *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”).

¹⁸⁴ See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam).

¹⁸⁵ See, e.g., *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 351–54 (1982) (rejecting group of doctors’ argument “that their fee schedules are procompetitive because they make it possible to provide consumers of health care with a uniquely desirable form of insurance coverage that could not otherwise exist”); *NSPE*, 435 U.S. at 681 (rejecting justification for “association’s canon of ethics prohibiting competitive bidding by its members” that claimed canon’s purpose was “minimizing the risk that competition would produce inferior engineering work endangering the public safety”).

¹⁸⁶ See Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 29 (2000).

In addition to being legally cognizable, defendants must also establish that their procompetitive justifications are “verifiable” by actual evidence, as “[s]peculative, unsubstantiated, or uncertain claims of efficiency generally will be deemed insufficient to refute evidence of anticompetitive effects.”¹⁸⁷ Importantly, because “[t]here is always something of a sliding scale in appraising reasonableness,” “the quality of proof required should vary with the circumstances.”¹⁸⁸ Recognizing this, the Court famously said: “What is required . . . is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.”¹⁸⁹ Thus, when the challenged restraint is particularly restrictive or the proffered justifications potentially suspect, it follows that a court can and should require stronger evidence supporting the validity of the objective and whether the restraint actually serves that objective.

If the defendant satisfies its burden by presenting a cognizable procompetitive justification substantiated by sufficient evidence, the court then proceeds to the final step of the analysis.

3. *Step 3: Reasonably Necessary to Achieve the Legitimate Objective*

Under the third step, courts consider whether the anticompetitive restraint is reasonably necessary to achieve the defendant’s proffered legitimate objectives; if it is not reasonably necessary, the restraint is unreasonable.¹⁹⁰ “To determine if a restraint is reasonably necessary, courts must examine first whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through a substantially less restrictive alternative.”¹⁹¹ Courts differ as to which party the burden should be allocated,¹⁹² and apply this test in vastly different ways.¹⁹³

The second prong, which asks courts to search for less restrictive alternatives, has faced criticism, as “[t]he inquiry adds multiple levels

¹⁸⁷ GAVIL ET AL., *supra* note 162, at 996; *see also* FTC & U.S. DEP’T OF JUSTICE, *supra* note 181, § 3.36(a), at 24.

¹⁸⁸ 7 AREEDA & HOVENKAMP, *supra* note 180, ¶ 1507f, at 390.

¹⁸⁹ Cal. Dental Ass’n v. FTC, 526 U.S. 756, 781 (1999).

¹⁹⁰ United States v. Brown Univ., 5 F.3d 658, 678–79 (3d Cir. 1993); 7 AREEDA & HOVENKAMP, *supra* note 180, ¶ 1505, at 370.

¹⁹¹ Brown Univ., 5 F.3d at 679; *see also* 7 AREEDA & HOVENKAMP, *supra* note 180, ¶ 1505, at 370.

¹⁹² *See* GAVIL ET AL., *supra* note 162, at 170.

¹⁹³ Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 583 (2009).

of complex analysis to an already complicated test.”¹⁹⁴ Despite the difficulties that judges have identifying the effects of actual restraints, the less restrictive alternative prong “asks judges to identify with accuracy the relative competitive effects of hypothetical restraints,” leading to “unpredictable results, a higher rate of judicial error, increased administrative costs, and the deterrence of procompetitive behavior.”¹⁹⁵ As a result, courts correctly examined the less restrictive alternative prong in only forty-three percent of cases surveyed.¹⁹⁶

To address these issues, some have called for the less restrictive alternatives prong to be abandoned, instead requiring courts to determine only “whether a defendant is pursuing legitimate procompetitive objectives” and “whether a particular restraint is sufficiently connected to the goal to be ‘reasonably necessary.’”¹⁹⁷ The reasonably necessary prong of the test is preferable because not only is it supported by caselaw,¹⁹⁸ but it is also demonstrably easier for courts to apply—in contrast to the less restrictive alternatives prong, courts conducted the reasonably necessary analysis correctly in one-hundred percent of cases surveyed.¹⁹⁹

No matter which test is applied, the plaintiff will prevail and the restraint will be deemed unreasonable if the restraint is not reasonably necessary to achieve the proffered procompetitive objective.²⁰⁰

III. ANTITRUST TREATMENT OF NCAA ACTIONS FROM BOARD OF REGENTS TO PRESENT

As stated above, there are a few prerequisites to the applicability of Section 1, including the presence of concerted joint action and an affected market that is commercial in nature.²⁰¹ NCAA actions are a result of concerted joint action because the NCAA is not a single entity, but rather an association of schools and conferences that compete against each other in a number of areas, including the recruitment of

¹⁹⁴ *Id.* at 599.

¹⁹⁵ *Id.*

¹⁹⁶ Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1359.

¹⁹⁷ *Id.* at 1342.

¹⁹⁸ See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979) (asking whether the restraint is “necessary to market the product at all”); *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 336 (7th Cir. 2012) (noting that a plaintiff can “show that the restraint in question is not reasonably necessary to achieve the procompetitive objective”).

¹⁹⁹ Carrier, *supra* note 196, at 1358.

²⁰⁰ See *Agnew*, 683 F.3d at 335–36.

²⁰¹ See *supra* notes 120–21 and accompanying text.

student-athletes.²⁰² The commercial nature of the market impacted by the NCAA's rules, specifically those related to eligibility, has been more contentious, as some courts have found that Section 1 does not apply to the NCAA's eligibility rules because they are not related to the NCAA's commercial interests.²⁰³ However, that view is in a growing minority, as courts have increasingly begun to recognize that, in the highly commercialized college sports landscape, the relationships between schools and student-athletes are "commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act."²⁰⁴ Thus, Section 1 presumably applies to all NCAA bylaws, rules, regulations, and actions, including those related to the amateur status and eligibility of student-athletes.²⁰⁵

To find that an NCAA bylaw or rule violates Section 1, a plaintiff challenging the bylaw must show that the NCAA and its member institutions "(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market."²⁰⁶ Because all NCAA member schools have agreed to abide by the Bylaws, which contain the rules promulgated by representatives from NCAA member institutions, the first element of an agreement or contract is always met when it comes to NCAA rules.²⁰⁷ Thus, the analysis of NCAA rules focuses on the second element—whether the restriction is an unreasonable restraint on the relevant market. As discussed above, the analysis of this question depends on the choice of analytical approach.²⁰⁸

²⁰² See *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1147 (5th Cir. 1977) (finding that "the adoption and execution of [an] NCAA Bylaw can be seen as [an] agreement and concert of action of" NCAA member institutions, and thus the NCAA is subject to Section 1); *Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n*, 337 F. Supp. 2d 563, 570 (S.D.N.Y. 2004) (reaffirming that the NCAA is not a single entity).

²⁰³ See *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185–86 (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999). But see *Agnew*, 683 F.3d at 339 (noting that the Court's discussion of procompetitive justifications for eligibility rules in *Board of Regents* "implies that *all* regulations passed by the NCAA are subject to the Sherman Act" "since no procompetitive justifications would be necessary for noncommercial activity to which the Sherman Act does not apply" (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984))).

²⁰⁴ *Agnew*, 683 F.3d at 341.

²⁰⁵ See *id.* at 339.

²⁰⁶ *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

²⁰⁷ See *Agnew*, 683 F.3d at 335 ("There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first showing of an agreement or contract is therefore not at issue in this case.").

²⁰⁸ See *supra* notes 123–25 and accompanying text.

Thus, to provide context for a Section 1 analysis of the NCAA's amateurism rules and the *O'Bannon* decision, this Part introduces relevant Section 1 cases against the NCAA.

A. *The Supreme Court's Decision in NCAA v. Board of Regents*

Any discussion of NCAA Section 1 caselaw must begin with the decision that underlies the entire NCAA antitrust landscape—the Supreme Court's 1984 ruling in *Board of Regents*.²⁰⁹ That case involved a challenge to a 1981 plan for televising college football games that limited the number of games that any one college could televise, as well as the overall total amount of televised games, and prohibited schools from selling their television rights except in accordance with the plan.²¹⁰

In *Board of Regents*, the Court declined to apply the per se approach, despite noting that the television plan created an anticompetitive horizontal restraint and limitation on output and was the type of restraint that “has often been held to be unreasonable as a matter of law.”²¹¹ The Court found that the per se rule was inappropriate because college football is “an industry in which horizontal restraints on competition are essential if the product is to be available at all.”²¹² Thus, the Court opted to apply the Rule of Reason,²¹³ although it found that “‘no elaborate industry analysis [was] required to demonstrate the anticompetitive character’” of an agreement not to compete in terms of price or output.²¹⁴ In doing so, the Court seemingly endorsed the nascent quick-look approach.²¹⁵

Upon examining the anticompetitive character of the television plan, the Court easily found it to be a naked restraint on price and output with obvious anticompetitive effects.²¹⁶ Consequently, the ultimate determination centered on the NCAA's procompetitive justifications.²¹⁷ The NCAA offered three justifications for its television plan:

²⁰⁹ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

²¹⁰ *Id.* at 94–95.

²¹¹ *Id.* at 99, 104–07.

²¹² *Id.* at 99–101.

²¹³ *Id.* at 103–04.

²¹⁴ *Id.* at 109–10 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

²¹⁵ See *id.* at 109 n.39; see also Gavil, *supra* note 126, at 753–56; *supra* Part II.A.3.

²¹⁶ *Bd. of Regents*, 468 U.S. at 106–13.

²¹⁷ *Id.* at 113 (noting that the NCAA has “a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market”).

(1) cooperation is necessary to market broadcast rights,²¹⁸ (2) prevention of adverse effects on ticket sales,²¹⁹ and (3) competitive balance.²²⁰ After examining these justifications, the Court ultimately rejected all three²²¹ en route to invalidating the television plan under Section 1.²²²

B. Board of Regents's Implications

Board of Regents was a foundational case for a number of reasons beyond its holding—which freed up the market for television rights and paved the way for the multibillion-dollar college sports industry we have today.²²³ Because it represented an early endorsement of the quick-look approach, scholars treat it as a seminal case in the progression of Section 1 jurisprudence.²²⁴ Lower courts routinely follow the Court's choice to apply the Rule of Reason over the per se rule in their analysis of challenged NCAA rules and actions.²²⁵ However, arguably the most influential remnant of *Board of Regents* as it relates to courts' subsequent treatment of the NCAA's eligibility rules are the many statements the Court made, largely in dicta, that relate to the nature of amateurism and the NCAA's role in maintaining it.

Early in the majority opinion, Justice Stevens engaged in an impromptu discussion of the “particular brand of football” that the NCAA seeks to market—college football—noting that “[t]he identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable.”²²⁶ The character of this product depends, according to Justice Stevens, on a number of factors, including that “athletes must not be paid.”²²⁷ Justice Stevens deemed procompetitive the NCAA's actions to preserve that character because it “enables a product to be marketed which might otherwise be unavailable.”²²⁸ Further implicating amateurism, later dicta stated

²¹⁸ *Id.*

²¹⁹ *Id.* at 115.

²²⁰ *Id.* at 117–18.

²²¹ *See id.* at 113–20. The Court recognized that the NCAA has a legitimate interest in maintaining competitive balance among teams, but held that the joint television plan did not “foster[] competition” nor “enhance public interest in intercollegiate athletics.” *Id.* at 117.

²²² *Id.* at 88.

²²³ *See supra* Part I.B.

²²⁴ *See, e.g.,* Gavil, *supra* note 126, at 753–56.

²²⁵ *See, e.g.,* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1017–19 (10th Cir. 1998).

²²⁶ *Bd. of Regents*, 468 U.S. at 101–02.

²²⁷ *Id.* at 102.

²²⁸ *Id.*

that the NCAA “needs ample latitude” to play its “critical role in the maintenance of a revered tradition of amateurism in college sports.”²²⁹

Some courts have interpreted this dicta, together with the unsubstantiated claim that “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive,”²³⁰ to imply that the NCAA is entitled to a deferential procompetitive presumption in favor of its eligibility rules.²³¹ The Seventh Circuit recently examined the scope of this supposed presumption in *Agnew v. NCAA*,²³² ultimately finding that courts applying this presumption assume an NCAA bylaw is procompetitive “when [it] is clearly meant to help maintain the ‘revered tradition of amateurism in college sports’ or the ‘preservation of the student-athlete in higher education.’”²³³ Thus, this presumption is frequently applied to NCAA eligibility rules limiting athlete compensation beyond educational expenses,²³⁴ but not to rules limiting the number or value of scholarships available.²³⁵ In drawing this distinction, the Seventh Circuit defined the term “eligibility” narrowly, finding the presumption applied only to rules that directly relate to the “preservation of amateurism” or the NCAA’s survival.²³⁶

Notably, early in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*,²³⁷ Judge Wilken refused to apply the procompeti-

²²⁹ *Id.* at 120.

²³⁰ *Id.* at 117.

²³¹ See, e.g., *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (assuming, based on *Board of Regents* dicta, that eligibility rules prohibiting compensation beyond scholarships were procompetitive).

²³² *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328 (7th Cir. 2012).

²³³ *Id.* at 342–43 (quoting *Bd. of Regents*, 468 U.S. at 120).

²³⁴ *Id.* at 344–45; see also Kyle R. Wood, Note, *NCAA Student-Athlete Health Care: Antitrust Concerns Regarding the Insurance Coverage Certification Requirement*, 10 IND. HEALTH L. REV. 561, 606–08 (2013) (examining courts’ application of the procompetitive presumption to eligibility rules).

²³⁵ *Agnew*, 683 F.3d at 345 (refusing to apply procompetitive presumption to scholarship rules because they “do not always assist in the preservation of amateurism or the existence of student-athletes” and “cannot be presumptively procompetitive simply because they relate to financial aid”); see also *Rock v. Nat’l Collegiate Athletic Ass’n*, 928 F. Supp. 2d 1010, 1017 (S.D. Ind. 2013) (“[U]nlike eligibility rules, financial aid rules are not deserving of a procompetitive presumption.”).

²³⁶ See *Agnew*, 683 F.3d at 345; Justin M. Hannan, Case Comment, *Antitrust Law—Seventh Circuit Sees Through Façade, Exposes NCAA Scholarship Limits to Sherman Antitrust Scrutiny—Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), 18 SUFFOLK J. TRIAL & APP. ADVOC. 345, 354 (2013).

²³⁷ *In re NCAA Student-Athlete Name & Likeness Licensing Litig. (Licensing Litigation)*, 990 F. Supp. 2d 996 (N.D. Cal. 2013). This consolidated litigation includes the *O’Bannon* case, and is introduced below. See *infra* notes 281–85 and accompanying text.

tive presumption to rules prohibiting players from receiving payment for their names, images, and likenesses,²³⁸ opting instead to join courts that have construed the *Board of Regents* dicta narrowly,²³⁹ especially as it relates to student-athlete compensation.²⁴⁰ Judge Wilken noted that “*Board of Regents* focused on a different set of competitive restraints,” and that “the Court never examined whether or not the ban on student-athlete compensation actually had a procompetitive effect on the college sports market,” despite its statements announcing the heavy burden necessary for procompetitive justifications.²⁴¹ Thus, the court held that the *Board of Regents* dicta “do[] not stand for the sweeping proposition that student-athletes must be barred . . . from receiving any monetary compensation for the commercial use of their names, images, and likenesses.”²⁴² Following this narrow interpretation, the NCAA’s procompetitive presumption “authorizes only a limited range of restraints on competition—specifically, restraints necessary to ensure that college sports remains a viable product.”²⁴³

Courts applying this presumption simply have *assumed* that the amateurism rules are necessary to the availability and success of college athletics as a product, blindly relying on the unsubstantiated dicta in *Board of Regents*.²⁴⁴ Proof has never been required of the procompetitive justifications that underlie the presumption.²⁴⁵ However, a comprehensive analysis of the amateurism rules under the Rule of Reason requires a critical analysis of their procompetitive justifications, which this Note conducts in Part V.A.2.a.

C. Section 1 Challenges Against NCAA Since Board of Regents

The NCAA has faced countless lawsuits alleging antitrust violations since *Board of Regents*, challenging rules related to a variety of

²³⁸ *Id.* at 1005.

²³⁹ See, e.g., *Metro. Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 337 F. Supp. 2d 563, 571 (S.D.N.Y. 2004); *Law v. Nat’l Collegiate Athletic Ass’n*, 902 F. Supp. 1394, 1404 (D. Kan. 1995) (rejecting the idea “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).

²⁴⁰ See, e.g., *Agnew*, 683 F.3d at 345–46; *Rock v. Nat’l Collegiate Athletic Ass’n*, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, *14 (S.D. Ind. Aug. 16, 2013); *In re NCAA I–A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005).

²⁴¹ *Licensing Litigation*, 990 F. Supp. 2d at 1002–03.

²⁴² *Id.* at 1005.

²⁴³ *Id.* at 1003.

²⁴⁴ Nagy, *supra* note 137, at 341–42; see Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 357 (2007).

²⁴⁵ See Nagy, *supra* note 137, at 341, 354.

issues, such as limitations regarding appearances in non-NCAA tournaments,²⁴⁶ restrictions on the salaries of select basketball coaches,²⁴⁷ and sanctions against universities.²⁴⁸ There are two lines of caselaw that affect the analysis of the amateurism regime: (1) cases challenging the NCAA eligibility rules and (2) cases challenging the number and value of the scholarships offered.

1. Challenges to Eligibility Rules

Cases challenging eligibility rules include challenges to the “no-draft” rule,²⁴⁹ the “no-agent” rule,²⁵⁰ and academic eligibility rules.²⁵¹ Perhaps the eligibility-rule challenge most pertinent to the issue of amateurism is *McCormack v. NCAA*,²⁵² which stemmed from the NCAA’s suspension of the entire Southern Methodist University football program for the 1987 season due to SMU’s widespread practice of providing players with impermissible benefits beyond their scholarships.²⁵³ In *McCormack*, SMU football players, among others associated with the program, alleged that “restrictions on compensation to football players constitute illegal price-fixing.”²⁵⁴ The basis of the claim was that student-athletes effectively sell their labor to colleges, and NCAA rules restricting the amount that competing schools can

²⁴⁶ See generally *Metro. Intercollegiate Basketball Ass’n v. Nat’l Collegiate Athletic Ass’n*, 337 F. Supp. 2d 563 (S.D.N.Y. 2004) (challenging NCAA rules limiting participation by Division I men’s college basketball teams in, and timing of, preseason and postseason non-NCAA sponsored tournaments).

²⁴⁷ See *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1022–24 (10th Cir. 1998) (challenging, successfully, rule limiting salaries of certain assistant basketball coaches).

²⁴⁸ See *Pennsylvania v. Nat’l Collegiate Athletic Ass’n*, 948 F. Supp. 2d 416, 422–34 (M.D. Pa. 2013) (challenging, unsuccessfully, sanctions stemming from Jerry Sandusky child sexual abuse scandal).

²⁴⁹ NCAA MANUAL, *supra* note 8, Bylaw 12.2.4.2, at 65; see, e.g., *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738, 738–39 (M.D. Tenn. 1990) (challenging, unsuccessfully, “no-draft” rule denying eligibility to otherwise-eligible college football players after an unsuccessful bid in the NFL draft).

²⁵⁰ NCAA MANUAL, *supra* note 8, Bylaw 12.3.1, at 66; see, e.g., *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1081–82 (7th Cir. 1992) (challenging, unsuccessfully, “no-agent” rule, which prohibits student-athletes from agreeing to be represented by an agent).

²⁵¹ NCAA MANUAL, *supra* note 8, Bylaw 14.01, at 147; see, e.g., *Bowers v. Nat’l Collegiate Athletic Ass’n*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998) (holding that “the Sherman Act does not apply to the NCAA’s promulgation of [academic] eligibility requirements” because they “are not related to the NCAA’s commercial or business activities” (internal quotation marks omitted)).

²⁵² *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988).

²⁵³ *Id.* at 1340.

²⁵⁴ *Id.*

pay prevents student-athletes from offering their services to the highest bidder.²⁵⁵

Relying on the dicta in *Board of Regents*,²⁵⁶ the Fifth Circuit concluded that the eligibility rules enhanced competition because they create the product the NCAA seeks to market, one “distinct from professional football,” and “allow its survival in the face of commercializing pressures.”²⁵⁷ Thus, applying the Rule of Reason, the court held that the eligibility rules restricting compensation were reasonable and permissible under Section 1.²⁵⁸ The court, however, failed to cite any evidence in support of its conclusion that the eligibility rules were procompetitive; rather, the court simply accepted Justice Stevens’s assertions, marking the first application of the procompetitive presumption.²⁵⁹

2. *Challenges to Number, Duration, and Value of Scholarships*

The second line of relevant caselaw revolves around frequent challenges to NCAA scholarship limits. For example, there have been multiple recent cases seeking to overturn the caps on the number of scholarships,²⁶⁰ with some also including the recently rescinded prohibition on multiyear scholarships.²⁶¹ Although there are a number of pending²⁶² and recently filed²⁶³ cases—so many that seven cases challenging various scholarship restrictions were recently consolidated²⁶⁴—no case has yet been successful in overturning the rules

²⁵⁵ *Id.* at 1342.

²⁵⁶ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02, 117 (1984); *supra* notes 226–28, 230 and accompanying text.

²⁵⁷ *McCormack*, 845 F.2d at 1344–45.

²⁵⁸ See *id.*

²⁵⁹ See *id.*; *supra* Part III.B.

²⁶⁰ See, e.g., *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1146–47 (W.D. Wash. 2005) (challenging NCAA regulation restricting the number of football scholarships available at each school).

²⁶¹ See, e.g., *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 332 (7th Cir. 2012) (challenging two NCAA regulations: the cap on the number of scholarships given per team and the prohibition of multiyear scholarships); *Rock v. Nat’l Collegiate Athletic Ass’n*, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *2–3, *3 n.2 (S.D. Ind. Aug. 16, 2013) (challenging three NCAA regulations as they relate to the market for the labor of student-athletes: the cap on the number of scholarships given per team, the prohibition of multi-year scholarships, and the prohibition against Division III athletics-based scholarships).

²⁶² See *Rock*, 2013 WL 4479815, at *16 (denying NCAA’s motion to dismiss Second Amended Complaint).

²⁶³ See, e.g., *Class Action Complaint*, *Chamorro v. Nat’l Collegiate Athletic Ass’n*, No. 1:14-cv-01421-RLY-DML (S.D. Ind. Aug. 28, 2014).

²⁶⁴ See *Docket*, *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-In-Aid Cap Antitrust Litig.*, No. 4:14-md-02541-CW (N.D. Cal filed June 13, 2014).

restricting the number of scholarships a team may offer.²⁶⁵ While the holdings regarding restrictions on scholarship numbers are not directly related to the analysis of the amateurism regime, the courts' opinions contain reasoning that bears on the issue of whether the amateurism rules violate antitrust laws.²⁶⁶

The scholarship-restriction cases most related to the amateurism regime are those directly challenging the limitation on the value of athletics scholarships as enforced by Bylaw 15.1.²⁶⁷ Cases such as *White v. NCAA*²⁶⁸ allege the scholarship-value limitation unreasonably restrains schools' competition to recruit student-athletes²⁶⁹ because, without the limitation, "schools competing to get the best athletes would increase financial aid to cover" the full cost-of-attendance.²⁷⁰ Although the district court denied the NCAA's motion to dismiss in *White*,²⁷¹ the parties settled before trial,²⁷² and the issue of whether the scholarship-value limitation violates Section 1 went unresolved. The issue has been rekindled lately, however, by a number of recent challenges,²⁷³ many of which have been consolidated and transferred to Judge Wilken, the judge responsible for the consolidated *O'Bannon* action.²⁷⁴

²⁶⁵ See, e.g., *Agnew v. Nat'l Collegiate Athletic Ass'n*, No. 1:11-cv-0293-JMS-MJD, 2011 WL 3878200, at *1, *10 (S.D. Ind. Sept. 1, 2011) (dismissing plaintiffs' claims with prejudice), *aff'd*, 683 F.3d 328.

²⁶⁶ See, e.g., *Agnew*, 683 F.3d at 336–37 (seemingly endorsing the application of the "quick-look" Rule of Reason approach); *id.* at 342–43 (defining narrowly the scope of the procompetitive presumption for NCAA bylaws).

²⁶⁷ NCAA MANUAL, *supra* note 8, Bylaw 15.1, at 190 (limiting scholarship values to the "cost of attendance").

²⁶⁸ *White v. Nat'l Collegiate Athletic Ass'n*, No. CV 06-999-RGK (MANx), 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006).

²⁶⁹ *Id.* at *1, *3.

²⁷⁰ Ron Zapata, *NCAA, Athletes End Antitrust Suit with \$18.9M Deal*, LAW360 (Jan. 30, 2008, 12:00 AM), <http://www.law360.com/articles/45673/ncaa-athletes-end-antitrust-suit-with-18-9m-deal>. In particular, the plaintiffs claimed their scholarships "didn't cover supplies, laundry expenses, health insurance, travel costs and incidental expenses, which c[a]me to about \$2,500 a year." *Id.*

²⁷¹ *White*, 2006 WL 8066802, at *4.

²⁷² See Stipulation & Agreement of Settlement Between Plaintiffs & Defendant Nat'l Collegiate Athletic Ass'n, *White v. Nat'l Collegiate Athletic Ass'n*, No. 2:06-cv-00999-VBF (MANx) (C.D. Cal. Jan. 29, 2008), ECF No. 254, *available at* <http://i.usatoday.net/sports/college/2008-01-29-ncaa-settlement.pdf>. The NCAA agreed to pay ten million dollars to the plaintiffs and establish the \$218 million Student-Athlete Opportunity fund to help future athletes. *Id.* at 10.

²⁷³ See, e.g., Complaint, *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-cv-01011-EDL (N.D. Cal. Mar. 5, 2014).

²⁷⁴ See Docket, *supra* note 264.

Among those consolidated cases is *Jenkins v. NCAA*,²⁷⁵ which has been billed as “the most direct challenge yet to the NCAA’s long-standing economic model.”²⁷⁶ Unlike the previous challenges which focused on one or two specific rules, *Jenkins*’s complaint lists nineteen different NCAA bylaws that it alleges individually and as applied together “prohibit, cap, or otherwise limit the remuneration that players . . . may receive.”²⁷⁷ *Jenkins* also drew early attention in part because of the involvement of high-profile sports labor attorney Jeffery Kessler, who was part of the successful effort to bring free agency to the NFL.²⁷⁸ As if the broad scope of the challenge did not make the goal clear, Kessler has said it himself: “We’re looking to change the system.”²⁷⁹

The NCAA and its amateurism regime are under siege from a variety of antitrust attacks. With an understanding of the Section 1 caselaw that bears on the analysis of the NCAA amateurism regime, the following Part discusses the most pressing of those challenges, *O’Bannon v. NCAA*,²⁸⁰ and its recent district court decision.

IV. THE DISTRICT COURT’S DECISION IN *O’BANNON V. NCAA*

In arguably the most important case against the NCAA since *Board of Regents, In re NCAA Student-Athlete Name & Likeness Licensing Litigation*²⁸¹ effectively challenges Bylaw 12.5.2’s prohibition against student-athletes receiving compensation for the use of their likenesses.²⁸² This case is a consolidation of several class actions challenging the likeness-compensation restrictions under differing legal theories.²⁸³ The most relevant and highly publicized of these cases is

²⁷⁵ Complaint at 1–4, *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 4:14-cv-02758-CW (N.D. Cal. Mar. 17, 2014).

²⁷⁶ Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN, http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model (last updated Mar. 18, 2014, 6:09 PM).

²⁷⁷ Complaint, *supra* note 275, at 12.

²⁷⁸ Farrey, *supra* note 276.

²⁷⁹ *Id.*

²⁸⁰ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

²⁸¹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.* 990 F. Supp. 2d 996 (N.D. Cal. 2013).

²⁸² See NCAA MANUAL, *supra* note 8, Bylaw 12.5.2.1(a), at 71.

²⁸³ One notable case was *Keller v. Electronic Arts Inc.*, No. 4:09-cv-01967-CW (N.D. Cal. filed May 5, 2009), one of several cases alleging the use of student-athletes’ likenesses in Electronic Arts’ *NCAA Football* videogame franchise violated their right of publicity. Third Consolidated Amended Class Action Complaint, ¶¶ 2, 5–6, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-01967-CW, 2013 WL 3772677 (N.D. Cal. July 18, 2013) [hereinafter 3CAC]. While the *Keller* case is outside the scope of this Note, it is important to

O'Bannon v. NCAA, which alleges antitrust violations.²⁸⁴ The plaintiffs in the *O'Bannon* case are twenty-one current and former student-athletes who played for NCAA Division I football and men's basketball teams between 1953 and the present (collectively, "Plaintiffs").²⁸⁵

The Plaintiffs allege that the NCAA, its member schools and conferences, and its business partners, conspire to license and sell the names, images, and likenesses ("NILs") of current and former student-athletes without compensating those student-athletes, "under the guise of 'amateurism.'" ²⁸⁶ The Plaintiffs claim that NCAA rules prohibiting schools from offering compensation to recruits for their labor or the commercial use of their NILs restrain competition in the market for the recruitment of Division I student-athletes and set student-athlete compensation at a level below that of a competitive market.²⁸⁷

After years of discovery, consolidations, and pretrial motions, Judge Claudia Wilken presided over a bench trial in the U.S. District Court for the Northern District of California in June 2014. Judge Wilken, in an extensive Findings of Fact and Conclusions of Law issued on August 8, 2014,²⁸⁸ found that "the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools," and that the NCAA's procompetitive objectives "do not justify this restraint and could be achieved through less restrictive means."²⁸⁹ Thus, the court

mention that, as of June 9, 2014, all defendants, including the NCAA, had reached preliminary settlements with the plaintiffs, with a total of \$60 million in compensation. See Jon Solomon, *EA and NCAA Video Game Settlements Have \$5,000-a-Year Cap*, CBSSPORTS (June 30, 2014, 2:27 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24601765/ea-and-ncaa-video-game-settlements-have-5000-a-year-cap>.

²⁸⁴ See 3CAC, *supra* note 283, ¶¶ 3, 7–17.

²⁸⁵ *Id.* ¶¶ 29–36. The Plaintiffs are represented by Ed O'Bannon, who played for the UCLA men's basketball team from 1991 to 1995 and was recognized as the nation's most outstanding men's basketball player for the 1994–1995 season when he led UCLA to a national championship. *Id.* ¶ 30.

²⁸⁶ *Id.* ¶ 7. Specifically, the Plaintiffs identify a number of sources of billions of dollars in revenue that the co-conspirators have taken advantage of, including "the license and sale of game footage (including games and clips used in television broadcasts and rebroadcasts, DVDs, on-demand streaming, and 'stock footage'), video games, photographs, jerseys and other apparel, trading cards, and other memorabilia containing the names, images, and likenesses of current and former student-athletes." *Id.* ¶ 9.

²⁸⁷ *Id.* ¶¶ 397–398.

²⁸⁸ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

²⁸⁹ *Id.* at 963.

entered a “permanent injunction prohibiting certain overly restrictive restraints.”²⁹⁰

To understand the decision and its impact on the future of college sports, this Part examines Judge Wilken’s analysis and remedy.

A. Judge Wilken’s Rule of Reason Analysis

In the threshold decision of what analytical approach to use, Judge Wilken chose the Rule of Reason over both the per se and quick-look approaches, relying on the Supreme Court’s declared presumption for applying the Rule of Reason.²⁹¹ This Section examines Judge Wilken’s Rule of Reason analysis under the three-step burden-shifting Rule of Reason framework.

1. Step 1: Anticompetitive Effects on the Relevant Markets

Recall that in the first step, the plaintiff generally must establish that the challenged restraint has anticompetitive effects on the relevant market.²⁹² Because Judge Wilken rejected the quick-look approach and actual anticompetitive effects are difficult to establish in a case like this where the challenged restraint has been in effect for a long time, the search for anticompetitive effects employed the circumstantial-evidence method, under which circumstantial evidence of market power creates a presumption of anticompetitive effects.²⁹³ Thus, her analysis began with a definition of each relevant market, and once market power could be inferred, continued to determine whether the challenged restraint harmed competition in that market.²⁹⁴ The Plaintiffs proposed two nationwide markets: (1) the “college education market” and (2) the “group licensing market.”²⁹⁵ The court ultimately accepted both of the Plaintiffs’ proposed markets, but found that the NCAA rules only restrained competition in the college education market.²⁹⁶

a. The College Education Market

The college education market is the market in which FBS football and Division I basketball “schools compete to sell unique bundles of

²⁹⁰ *Id.*

²⁹¹ *Id.* at 985; *see also In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1136-37 (N.D. Cal. 2014).

²⁹² *See supra* note 159 and accompanying text; *supra* Part II.B.1.

²⁹³ *See supra* notes 164–72 and accompanying text.

²⁹⁴ *See O’Bannon*, 7 F. Supp. 3d at 965–73, 986–99.

²⁹⁵ *Id.* at 965.

²⁹⁶ *Id.* at 993, 998.

goods and services to elite football and basketball recruits.”²⁹⁷ These unique bundles include “scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services,” as well as “access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.”²⁹⁸

In analyzing this market, the court examined NCAA-proposed substitutes to the bundles offered by FBS and Division I schools, including “opportunities offered by schools in other divisions, collegiate athletics associations, or minor and foreign professional sports leagues.”²⁹⁹ The court rejected these substitutes because none provided a comparable combination of educational and competitive opportunities.³⁰⁰ Because “FBS football and Division I basketball schools are the only suppliers” in the college education market,³⁰¹ the court held that NCAA schools had the market power necessary to fix prices in the college education market.³⁰²

The court thus recognized that the schools “exercise[d] this power by forming an agreement to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer.”³⁰³ That fixed price that the student-athlete must “pay” to the school is that of his “athletic services along with the use of his name, image, and likeness while he is in school,” and “[i]f any school seeks to lower this fixed price—by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA.”³⁰⁴ Ultimately, the court concluded that this price-fixing agreement was a restraint of trade because, “in the absence of this agreement, certain schools would compete for recruits by offering them a lower price.”³⁰⁵ In other words, the court relied on circumstantial evidence of schools’ market power to presume that the restraint had anticompetitive effects on the college education market.

²⁹⁷ *Id.* at 965; *see also id.* at 986.

²⁹⁸ *Id.* at 965–66.

²⁹⁹ *Id.* at 966–67.

³⁰⁰ *Id.* at 966–68, 986–88.

³⁰¹ *Id.* at 966.

³⁰² *Id.* at 988.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

The court also addressed the Plaintiffs' alternative argument, raised in their post-trial brief, that describes a monopsony market with the schools as buyers of student-athletes' services and licensing rights, rather than sellers of the unique bundles discussed above.³⁰⁶ Recognizing that multiple courts have held that such monopsonistic practices, including in labor markets generally and markets for athletic services specifically, may provide a sufficient basis to find a Section 1 violation,³⁰⁷ the court held that the Plaintiffs established anticompetitive effects under either theory of the market encompassing the relationship between schools and student-athletes.³⁰⁸

b. The Group Licensing Market

The court also found that a group licensing market exists in which, absent NCAA's compensation restrictions, "members of certain FBS football and Division I basketball teams would be able to join together to offer group licenses, which they would then be able to sell" to any buyer interested in using student-athletes' NILs.³⁰⁹ Furthermore, the court accepted the Plaintiffs' claim that the group licensing market is made up of three submarkets: (1) a live telecast submarket, (2) a videogame submarket, and (3) an archival footage submarket.³¹⁰ However, because Judge Wilken reasoned that neither the buyers nor sellers in these submarkets would have incentive to compete against each other, due to the group-nature of the licenses, the court found that the Plaintiffs failed to show that the challenged restraints harmed competition in any submarket.³¹¹ The court recognized that the Plaintiffs established that they were injured by the NCAA's rules, but explained that "injury to an antitrust plaintiff is not enough to prove injury to competition."³¹² Thus, the court found no harm to competition in the group licensing market,³¹³ ending the analysis for that market and the Plaintiffs' hopes of winning a share of the multibillion-dollar licensing revenues.

³⁰⁶ *Id.* at 991–93.

³⁰⁷ *See id.* at 992–93 (citing, e.g., *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 346 (7th Cir. 2012); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1015 (10th Cir. 1998)).

³⁰⁸ *Id.* at 993.

³⁰⁹ *Id.* at 968.

³¹⁰ *Id.* at 968–71; *see also id.* at 993–99.

³¹¹ *See id.* at 996–99.

³¹² *Id.* at 997 (internal quotation marks and alteration omitted).

³¹³ *Id.* at 996–99.

2. Step 2: Procompetitive Justifications

Because the Plaintiffs established the NCAA rules' anticompetitive effect on the college education market, the court proceeded to consider the procompetitive justifications of the rules to determine "whether the anticompetitive aspects of the challenged practice outweigh its procompetitive effects."³¹⁴ Specifically, the NCAA offered four procompetitive justifications for its rules prohibiting compensating student-athletes for their NILs: (1) the preservation of amateurism, (2) promoting competitive balance, (3) the integration of academics and athletics, and (4) increased output.³¹⁵ The court easily rejected the competitive balance³¹⁶ and increased output³¹⁷ justifications, but the other two justifications were closer calls.

The NCAA's "integration" justification argues that the restrictions "help educate student-athletes and integrate them into their schools' academic communities," and that this integration "improve[s] the quality of educational services provided to student-athletes."³¹⁸ The court noted "improving product quality" may be a legitimate procompetitive justification,³¹⁹ and that the NCAA presented evidence that integration actually improves the quality of services student-athletes enjoy.³²⁰ However, the court found that the NCAA failed to prove that the challenged restraints "are necessary to achieve these benefits," as many would be provided regardless of whether student-athletes received compensation for the use of their NILs.³²¹ Thus, the only way prohibiting compensation could improve integra-

³¹⁴ *Id.* at 999 (internal quotation marks omitted).

³¹⁵ *Id.*

³¹⁶ *Id.* at 1001–02. The competitive balance justification relies on the hypothesis "that equal competition will maximize consumer demand for the product." *Id.* at 1001 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 119–20 (1984)). Thus, while a sports league may try "to achieve the optimal competitive balance among its teams" if such balance "increases demand for the league's product," *id.*, testimony from multiple sports economists demonstrated the restraints did not "have any effect on competitive balance, let alone produce an optimal level of competitive balance," *id.*, nor did competitive balance affect consumer demand, *id.* at 1002.

³¹⁷ *Id.* at 1003–04. Although "increased output may be a legitimate procompetitive justification," *id.* at 1003, the court was unmoved by the NCAA's argument that "its restrictions on student-athlete compensation increase the number of opportunities for schools and student-athletes to participate in Division I sports," *id.* (citing *Bd. of Regents*, 468 U.S. at 114; *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998)).

³¹⁸ *Id.* at 1002.

³¹⁹ *Id.* at 1003 (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001); *Law*, 134 F.3d at 1023).

³²⁰ *Id.*

³²¹ *Id.*

tion is by “preventing student-athletes from being cut off from the broader campus community” as a result of their compensation.³²² Judge Wilken was skeptical of these claims because they are not unique to student-athletes. In fact, “other wealthy students—such as those who come from rich families or start successful businesses during school—raise all of the same problems for campus relations.”³²³ Judge Wilken thus held that, while “[l]imited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal[,] . . . the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation” for NILs.³²⁴

The NCAA’s “amateurism” justification—the primary justification offered by the NCAA in defense of its rules prohibiting student-athlete compensation—argues that its amateurism rules “are necessary to preserve the amateur tradition and identity of college sports,” which “contribute to the popularity of college sports and help distinguish them from professional sports and other forms of entertainment in the marketplace.”³²⁵ The court examined the evidence the NCAA offered in support of its claims, starting with the “historical evidence of its commitment to amateurism.”³²⁶ The court found no such commitment, instead pointing out the NCAA’s numerous—and sometimes significant and contradictory—revisions to its student-athlete compensation rules over the years, thus demonstrating the NCAA’s “malleable” definition of amateurism that even persists today.³²⁷

Because the restrictions “may still serve a limited procompetitive purpose if they are necessary to maintain the popularity” of the sports at issue, the court asked “[i]f the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA’s products.”³²⁸ To answer the question, the NCAA pointed to an opinion survey (the “Dennis Survey”) performed by its expert, Dr. J.

³²² *Id.*; see also *id.* at 980 (discussing “testimony of university administrators, who asserted that paying student-athletes large sums of money would potentially create a wedge between student-athletes and others on campus” and might encourage student-athletes “to separate themselves from the broader campus community by living and socializing off campus” (internal quotation marks omitted)).

³²³ *Id.* at 980.

³²⁴ *Id.* at 1003.

³²⁵ *Id.* at 999.

³²⁶ See *id.*; see also *id.* at 973–75 (detailing factual findings regarding historical evidence).

³²⁷ *Id.* at 1000; see also *id.* at 973–75 (detailing revisions to the amateurism rules and noting current “conception of amateurism stands in stark contrast to the definitions set forth in the NCAA’s early bylaws”).

³²⁸ *Id.* at 1000.

Michael Dennis, but the court found the Dennis Survey failed to provide reliable evidence tying consumer interest to the current restrictions,³²⁹ and agreed “such surveys are inevitably a poor tool for accurately predicting consumer behavior.”³³⁰ Despite not giving the Dennis Survey “any significant weight,” the court nonetheless relied on the survey to suggest “that the public’s attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive.”³³¹

Ultimately, the court found that consumer demand for the NCAA’s products “is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography.”³³² Despite this finding, and the rejection of the Dennis Survey, the court concluded the NCAA’s restrictions “play a limited role in driving consumer demand.”³³³ Thus, the court held that, while the amateurism rationale “might justify a restriction on large payments to student-athletes while in school,” it cannot “justify the rigid prohibition on compensating student-athletes, in the present or in the future, with any share of licensing revenue generated from the use of their [NILs].”³³⁴

3. Step 3: Less Restrictive Alternatives

Despite finding that neither the amateurism nor integration rationales justify the “sweeping” and “rigid” prohibitions against any student-athlete compensation from licensing revenue paid now or in the future,³³⁵ Judge Wilken continued on to analyze whether those goals could be achieved using less restrictive alternatives,³³⁶ placing the burden on the Plaintiffs to prove their existence.³³⁷ Specifically, the court asked for alternatives that were “substantially” less restrictive and

³²⁹ *Id.* The court found the Dennis Survey unreliable because it “contained several methodological flaws and did not ask respondents about the specific restraints challenged in this case.” *Id.*; see also *id.* at 975–76 (detailing factual findings regarding Dennis Survey and its shortcomings).

³³⁰ *Id.* at 1000.

³³¹ *Id.* at 1000–01.

³³² *Id.* at 1001. Christine Plonsky, associate athletic director at the University of Texas (UT), “noted that popular interest in college sports was driven principally by the loyalty of local fans and alumni. She testified, ‘I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university.’” *Id.* (alteration in original).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ See *id.* at 999–1001, 1002–03.

³³⁶ *Id.* at 1004–07.

³³⁷ *Id.* at 1004–05.

“virtually as effective” at preserving the popularity of college sports and improving the educational opportunities “without significantly increased cost.”³³⁸ Notably, the court did not ask whether the rules at issue are *reasonably necessary* for these objectives.³³⁹

The Plaintiffs thus offered three modifications to the compensation rules: (1) raise the grant-in-aid limit to allow schools to pay student-athletes stipends from licensing revenue, (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes to collect when their eligibility expires, or (3) permit student-athletes to be compensated from third-party endorsements approved by their schools.³⁴⁰ The court found the first and second proposals—paying stipends covering the full cost-of-attendance and holding a share of licensing revenue in a trust—to be legitimate alternatives.³⁴¹ However, Judge Wilken rejected the third alternative on the grounds that allowing student-athletes to receive money for endorsements “would undermine the efforts of both the NCAA and its member schools to protect against the ‘commercial exploitation’ of student-athletes.”³⁴² Thus, the court found this alternative not to be a “viable means of achieving [the NCAA’s] stated goals.”³⁴³

After analyzing the two alternatives deemed legitimate, Judge Wilken concluded that “[p]ermitting schools to award these stipends and deferred payments would increase price competition . . . in the college education market . . . without undermining the NCAA’s stated procompetitive objectives,”³⁴⁴ and thus were “less restrictive means of achieving the NCAA’s stated procompetitive goals.”³⁴⁵ Therefore, because viable less restrictive alternatives exist, Judge Wilken concluded that the NCAA’s rules prohibiting compensation for student-athletes’ NILs “unreasonably restrain trade in violation of § 1 of the Sherman Act.”³⁴⁶

³³⁸ *Id.* at 1005 (emphasis omitted).

³³⁹ *See generally id.* at 1004–07.

³⁴⁰ *Id.* at 982.

³⁴¹ *Id.* at 982–84; *id.* at 1005–06.

³⁴² *Id.* at 984.

³⁴³ *Id.*

³⁴⁴ *Id.* at 1005–06.

³⁴⁵ *Id.* at 1007.

³⁴⁶ *Id.*

B. Judge Wilken's Remedy

Although earlier in the litigation the Plaintiffs sought both an injunction and monetary damages,³⁴⁷ Judge Wilken's ruling certifying the injunctive relief class but not the damages class³⁴⁸ left the Plaintiffs able only to seek "an injunction barring the NCAA from enforcing any rules, bylaws, or organizational policies that prohibit current and former student-athletes from seeking compensation for the commercial use of their [NILs]."³⁴⁹

Because the court found the challenged restraint to be unreasonable, the court granted the requested injunction, albeit with specific requirements that sought to enact the proffered less restrictive alternatives and allow the NCAA to pursue the procompetitive justifications the court deemed legitimate.³⁵⁰ Thus, the court held that NCAA rules cannot prevent schools or conferences from offering recruits a "limited share" of the revenues generated by the use of their NILs, in addition to a full grant-in-aid.³⁵¹ Although the injunction allows the NCAA to cap the amount of compensation student-athletes may receive *while* they are in school, it requires that cap to be no lower than the actual cost-of-attendance.³⁵²

The injunction also allows schools to establish trusts for student-athletes that they may collect when their eligibility expires, into which a limited share of licensing revenues can be deposited.³⁵³ However, the NCAA is permitted to set a cap on the amount deposited, provided that the cap is at least five thousand dollars (in 2014 dollars) for every year the student-athlete is academically eligible to compete.³⁵⁴ Furthermore, the NCAA is allowed to require schools to offer recruits from the same class on the same team equivalent amounts of money to be deposited in their trusts, although schools can vary that amount from year to year.³⁵⁵ While schools are not required to offer the full amount of permissible deferred compensation (they can also choose

³⁴⁷ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 999 (N.D. Cal. 2013).

³⁴⁸ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C4:09-cv-01967-CW, 2013 WL 5979327, *7–10 (N.D. Cal. Nov. 8, 2013).

³⁴⁹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1134 (N.D. Cal. 2014).

³⁵⁰ *O'Bannon*, 7 F. Supp. 3d at 1007–08.

³⁵¹ *Id.* at 1008.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

to offer no deferred compensation), schools “may not unlawfully conspire” in the amount of deferred compensation each school will offer.³⁵⁶

Judge Wilken made clear that the injunction allows the NCAA to continue to enforce its other amateurism rules, including those setting academic eligibility requirements, prohibiting athlete-only dorms, limiting practice hours, and, most importantly, “prohibiting student-athletes from endorsing commercial products,”³⁵⁷ as well as its limits on the number of scholarships schools offer.³⁵⁸ Not addressed in the injunction, and thus also allowed to continue, is the NCAA’s policy of prohibiting student-athletes from profiting from their own individual NILs, such as by signing autographs.³⁵⁹

After announcing the injunction, the court boldly stated that the injunction cannot be stayed pending appeals, but that it would not take effect until the start of the next recruiting cycle,³⁶⁰ which Judge Wilken clarified begins August 1, 2015, “the date on which written offer letters can first be sent to student-athletes enrolling in college after July 1, 2016.”³⁶¹ Furthermore, the injunction’s impact on benefits for current and prospective student-athletes takes effect July 1, 2016.³⁶² Thus, the injunction designed to remedy the NCAA’s unreasonable restraints will not take effect until the 2016–2017 season.³⁶³

V. ISSUES WITH JUDGE WILKEN’S ANALYSIS AND REMEDY

The court’s ruling in *O’Bannon* has undoubtedly been regarded as a victory for the Plaintiffs, and a major development in NCAA jurisprudence, largely due to Judge Wilken’s sharp criticism of amateurism and its connection to the popularity of college sports.³⁶⁴ Considering Judge Wilken’s “[s]weeping rhetoric,” however, the in-

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *See id.*

³⁶⁰ *Id.*

³⁶¹ Order Granting Defendant NCAA’s Admin. Motion for Clarification of Timing of Injunction at 2, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 4:09-cv-03329-CW (N.D. Cal. Aug. 19, 2014), available at <http://www.ncaa.org/sites/default/files/CF%20298%20-%202014-08-19%20Order%20Granting%20NCAA%20Motion%20for%20Clarification%20of%20Timi...pdf>.

³⁶² *Id.*

³⁶³ *See id.*

³⁶⁴ *See, e.g.,* Michael McCann, *What Ed O’Bannon’s Victory over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED, <http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (last updated Aug. 10, 2014).

junction is “almost tepid by comparison.”³⁶⁵ Coupled with the limited nature of the remedy for the NCAA’s anticompetitive restraint on the college education market, her finding that the restraints did not harm the group licensing market precluded a finding that student-athletes are entitled to a share of the multibillion-dollar television licensing revenues. This Part analyzes the issues with Judge Wilken’s analysis and remedy that contributed to the relatively restrained victory in the larger fight to overturn the anticompetitive amateurism regime.

A. Analytical Issues

Judge Wilken’s Section 1 analysis led directly to the limited remedy; thus, her findings and conclusions that narrowed that analysis ultimately narrowed the remedy. Judge Wilken certainly made a number of important findings and reached many well-reasoned conclusions, but she also improperly applied several key aspects of her Section 1 analysis. This Section examines some of the missteps in her analysis that may have affected the outcome of the case.

1. Improperly Rejected Quick-Look Approach

One glaring issue with Judge Wilken’s analysis was her refusal to apply the quick-look approach.³⁶⁶ Because, as Judge Wilken acknowledged, “schools have fixed the price of their product,”³⁶⁷ this case presents a textbook opportunity to apply the quick-look approach.³⁶⁸ Judge Wilken’s refusal did not ultimately affect the analysis of the college education market, as she still found anticompetitive effects in that market.³⁶⁹ However, it did impact the analysis regarding the group

³⁶⁵ *Id.*; see also Patrick Hruby, *Nothing and Everything Has Changed*, SPORTS ON EARTH (Aug. 11, 2014), <http://www.sportsonearth.com/article/89036154/historic-obannon-ncaa-lawsuit-decision-changes-everything-and-nothing> (“Wilken’s injunction is only half the story. Actually, not even half. More like a footnote. The real news is in her decision, and the headline is as follows: as a legal defense theory, amateurism is now about as useful as Zoroastrianism.”); Bradley Tennis, *O’Bannon v. NCAA: A Modest Victory for the Student Athlete*, CONNECT (Aug. 29, 2014, 5:05 PM), <http://connect.abaantitrust.org/blogs/bradley-tennis/2014/08/29/obannon> (“While the order opens the door to more significant changes to the NCAA’s authority to regulate student athlete compensation, the specific remedy entered by the court amounts to a fairly small step.”).

³⁶⁶ See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

³⁶⁷ *Id.* at 989; see also *id.* at 990 (noting that the agreement at issue “eliminates one form of price competition” and that “[a]n agreement to eliminate price competition from the market is the essence of price fixing” (quoting *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring))).

³⁶⁸ See *supra* Part II.A.3.

³⁶⁹ See *O’Bannon*, 7 F. Supp. 3d at 988–93.

licensing market, which the court found was not harmed by the restraints.³⁷⁰ Had the court applied the quick-look approach, such harm would have been presumed upon a finding that the restraint at issue was of the type generally analyzed under the per se rule, but for the presence of procompetitive justifications.³⁷¹

The restraints in this case prevent student-athletes from entering and taking part in the group licensing market, as student-athletes cannot negotiate licenses for their NILs, such as with the NCAA or third-parties. This situation, where the parties already in the market agree not to do business with another party in or attempting to enter the market, is referred to as an “exclusionary group boycott” or a “refusal to deal.”³⁷² The Court has long held that these arrangements “are so likely to restrict competition without any offsetting efficiency gains” that they are frequently considered for per se invalidation.³⁷³ Claims alleging group boycotts generally may still succeed even without a showing of fixed prices, limited output, or deterioration of quality.³⁷⁴ Instead, the evidence of anticompetitive effects under a group boycott theory centers on the “exclusionary effect of the refusal to deal.”³⁷⁵

Because student-athletes have been excluded from the group licensing market, absent a procompetitive justification for their exclusion, there is a sufficient basis to presume anticompetitive effects under the quick-look approach. Thus, Judge Wilken improperly ended the analysis of the group licensing market and not examining its proffered procompetitive justifications.

2. *Improperly Credited NCAA’s Procompetitive Justifications*

As discussed above, to satisfy its burden under the second step of the Section 1 analysis, the NCAA must have proffered a legally cognizable procompetitive objective, as well as proof that the restraint actually promotes that objective.³⁷⁶ To this end, the NCAA offered four procompetitive justifications: competitive balance, increased output, integration, and amateurism.³⁷⁷ Although competitive balance and in-

³⁷⁰ See *id.* at 993–99.

³⁷¹ See *supra* Part II.A.3.

³⁷² See GAVIL ET AL., *supra* note 162, at 139.

³⁷³ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 290 (1985); see *supra* note 146.

³⁷⁴ See *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

³⁷⁵ GAVIL ET AL., *supra* note 162, at 139.

³⁷⁶ See *supra* note 180 and accompanying text.

³⁷⁷ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).

creased output may be cognizable objectives,³⁷⁸ the court correctly rejected both of these justifications because the evidence of their relationship to the restraint was lacking.³⁷⁹ The court also found the objectives associated with the amateurism and integration justifications—maximizing consumer demand and improving product quality, respectively—to be legitimate; however, Judge Wilken was rightfully critical of the evidence supporting the attenuated connection between these objectives and the amateurism rules, ultimately finding they did not justify the restraints at issue.³⁸⁰ Despite this, the court improperly credited both amateurism and integration as valid procompetitive justifications for some limited restraints.³⁸¹

a. Integration Justification

The court correctly acknowledged that the NCAA's integration objective—improving the quality of its educational product—may be legitimate.³⁸² However, schools' attempts to improve their product can only serve as an objective if the schools act as sellers in the market. The affected market in this case is better viewed as a monopsony, with schools acting as the only purchaser of student-athletes' services.³⁸³ While schools improve their educational product in part to compete to recruit the best athletes to their school, the schools do not “sell” their educational product. Rather, the exchange of services occurs when a recruit gets to campus to play his sport and signs away his NIL rights, which the school “buys” with a scholarship and academic services. This is indistinguishable from a labor market, where employers entice potential employees with the unique features of their firm,

378 See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984) (recognizing that “the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important”); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–23 (1979) (recognizing a joint selling arrangement seeking to create efficiencies that could result in increased aggregate output as procompetitive).

379 See *O'Bannon*, 7 F. Supp. 3d at 1001–02, 1003–04; *supra* notes 316–17.

380 See *id.* at 999–1001, 1002–03.

381 See *id.*

382 See *id.* at 1002–03; *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1160 (9th Cir. 2001) (recognizing that improving product quality may be a legitimate procompetitive justification).

383 See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 337 n.3 (7th Cir. 2012) (“This appears to be a clear monopsony case, since the NCAA is the only purchaser of student athletic labor.”); Richard Posner, *Monopsony in College Athletics*, BECKER-POSNER BLOG (Apr. 3, 2011, 6:02 PM), <http://www.becker-posner-blog.com/2011/04/monopsony-in-college-athletic-sposner.html> (describing the mechanics of a monopsonistic cartel and arguing that the NCAA “behaves monopsonistically in forbidding its member colleges and universities to pay its athletes”).

then provide salary and benefits in exchange for the employees' services. The court correctly analyzed this alternative market and, because the same legal standards apply to monopolies and monopsonies,³⁸⁴ found anticompetitive effects in that market as well.³⁸⁵ Thus, in the monopsony labor market, there is no product which the schools, acting as buyers, can improve, so the integration objective cannot be a cognizable goal.

Even analyzing the integration justification under the monopoly market, the amateurism rules do not actually serve the objective of integrating students or improving product quality. While the court found that integration of student-athletes does improve the quality of the academic services, it was rightfully unconvinced that the amateurism rules are necessary to accomplish the integration goal.³⁸⁶ Furthermore, the court noted that the only way that the amateurism rules could possibly improve the educational product is by preventing student-athletes from being cut off from the rest of the student-body.³⁸⁷ However, the rules have not, and cannot, achieve that near-impossible task; rather, student-athletes are very much differentiated on most campuses, because of both their near-celebrity status on campus and their demanding schedules.³⁸⁸ Even student-athletes do not consider themselves to be ordinary students, as most of those surveyed self-identified as athletes first and students second.³⁸⁹ Thus, the amateurism rules not only are unnecessary to improve educational services that would be provided anyway, as the court found, but also are ineffective at actually achieving that goal.

Ultimately, regardless of the market configuration, the NCAA's integration justification does not satisfy the NCAA's burden.

b. Amateurism Justification

The goal underlying the amateurism justification is the "maintenance of a revered tradition of amateurism,"³⁹⁰ despite amateurism's

³⁸⁴ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007).

³⁸⁵ *See O'Bannon*, 7 F. Supp. 3d at 991–93.

³⁸⁶ *See id.* at 1002–03 (finding that "student-athletes would receive many of the same educational benefits," such as scholarships, tutoring, and other academic services, "regardless of whether or not the NCAA permitted them to receive compensation").

³⁸⁷ *Id.*

³⁸⁸ *See supra* notes 98–102 and accompanying text.

³⁸⁹ *See supra* note 103 and accompanying text.

³⁹⁰ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 120 (1984).

troublesome foundation.³⁹¹ However, noncommercial objectives like this generally are not cognizable, and the instances where courts have allowed noneconomic justifications to prevail generally do not involve “simple price restrictions” like those imposed by the amateurism rules.³⁹² Thus, to create a cognizable justification, the NCAA re-framed its amateurism justification, based on the Court’s *Board of Regents* dicta,³⁹³ emphasizing the differentiation between college and professional sports.³⁹⁴ This justification asserts that “[t]he NCAA markets college football as a product distinct from professional football”³⁹⁵ and the amateurism rules “are essential if [this] product is to be available at all.”³⁹⁶ Even with courts’ reliance on the amateurism justification—some even presume the amateurism rules are procompetitive³⁹⁷—the basis for the justification has gone largely unchallenged by courts and unsubstantiated by the NCAA.³⁹⁸ Therefore, the amateurism justification should not be considered legally cognizable.

However, if accepted as cognizable, a detailed analysis of the evidence purporting to establish a connection between amateurism and the popularity of college sports must be conducted. Furthermore, because of the suspect nature of the justification and the strong evidence of anticompetitive effects, the court should seek similarly strong evidence of that connection under the sliding evidentiary scale recognized in antitrust analysis.³⁹⁹ Judge Wilken undoubtedly performed a searching analysis, correctly rejecting the NCAA’s argument regarding its supposed historical commitment to amateurism,⁴⁰⁰ but she relied on evidence that even she found to be problematic—the Dennis Survey—when it came to the consumer demand issue.⁴⁰¹ Even after rightfully finding that the Dennis Survey should not be given “any significant weight” because of its many methodological flaws and its

³⁹¹ See *supra* Part I.C.1.

³⁹² See *supra* notes 181–186 and accompanying text.

³⁹³ See *Bd. of Regents*, 468 U.S. at 101–02; *supra* notes 226–30 and accompanying text.

³⁹⁴ See *supra* note 325 and accompanying text.

³⁹⁵ *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344 (5th Cir. 1988).

³⁹⁶ *Bd. of Regents*, 468 U.S. at 101; see also *McCormack*, 845 F.2d at 1345 (finding the amateurism rules “create the [NCAA’s] product and allow its survival in the face of commercializing pressures”).

³⁹⁷ See *supra* Part III.B.

³⁹⁸ See Nagy, *supra* note 137, at 341.

³⁹⁹ See 7 AREEDA & HOVENKAMP, *supra* note 180, ¶ 1507f, at 390 (recognizing “[t]here is always something of a sliding scale in appraising reasonableness,” such that “the quality of proof required should vary with the circumstances”); *supra* notes 188–89 and accompanying text.

⁴⁰⁰ See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 973–75, 1000 (N.D. Cal. 2014).

⁴⁰¹ See *id.* at 975–78, 1000–01.

shortcomings as an indicator of consumer behavior, the court still relied heavily on the survey to support the claim that some arbitrary level of compensation of student-athletes would affect consumer demand.⁴⁰² Ultimately, the NCAA did not present any convincing or reliable evidence that the popularity of college sports is dependent on the student-athletes' status as amateurs, and that is because no such evidence exists.⁴⁰³

Therefore, the court should not have credited either the amateurism or integration justifications. Although Judge Wilken properly held that neither amateurism nor integration justified the restraints at issue,⁴⁰⁴ her finding that the NCAA's evidence supported an *inference* that *some* restrictions on compensation *may* yield procompetitive benefits⁴⁰⁵ was too deferential and thus improper in light of the *heavy burden* associated with sustaining procompetitive justifications.⁴⁰⁶

3. *Improperly Relied upon Less Restrictive Alternatives*

Judge Wilken recognized that the analysis did not need to proceed to the third step when the defendant fails to establish "sufficient procompetitive benefits,"⁴⁰⁷ but her deference to the NCAA's justifications led her to find the noneconomic, hypothetical, and unproven benefits sufficient to continue. Generally, this third step involves a determination of whether the anticompetitive restraint is reasonably necessary to achieve the defendant's objectives, assuming they are found to be legitimate.⁴⁰⁸ One part of the reasonably necessary inquiry can be whether a less restrictive alternative offers comparable benefits,⁴⁰⁹ but Judge Wilken treated the search for such an alternative as the entire inquiry, failing to once mention the phrase "reasonably necessary."⁴¹⁰ Furthermore, her heavy reliance on the less restrictive

⁴⁰² See *id.*

⁴⁰³ See Nagy, *supra* note 137, at 360 ("[T]here is no evidence that suggests that the viewing public would consider college football to be a different, less desirable product if college athletes were paid higher stipends by their schools."); see also *O'Bannon*, 7 F. Supp. 3d at 977–78, 1001 (finding that "the NCAA's restrictions on student-athlete compensation are not the driving force behind consumer demand" because "the popularity of college sports is driven by feelings of loyalty to the school, which are shared by both alumni and people who live in the region or the conference" (internal quotation marks omitted)).

⁴⁰⁴ See *O'Bannon*, 7 F. Supp. 3d at 999–1001, 1002–03.

⁴⁰⁵ *Id.* at 1004.

⁴⁰⁶ See *supra* note 179 and accompanying text.

⁴⁰⁷ *O'Bannon*, 7 F. Supp. 3d at 1005 (quoting *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 n.16 (10th Cir. 1998)).

⁴⁰⁸ See *supra* note 190 and accompanying text.

⁴⁰⁹ See *supra* note 191 and accompanying text.

⁴¹⁰ See *O'Bannon*, 7 F. Supp. 3d at 1004–07.

alternatives inquiry is problematic in light of its numerous theoretical and practical problems.⁴¹¹ Ultimately, even if one relies on less restrictive alternatives, they should be merely a tool in the reasonably necessary analysis—if there are less restrictive alternatives, the restraint is not reasonably necessary, and therefore is unreasonable—not options for the court to implement.

This Section first analyzes whether the amateurism rules, including those against compensating student-athletes for their NILs at issue, are reasonably necessary to the popularity of college sports,⁴¹² and then critiques Judge Wilken’s denial of the less restrictive alternative that would allow student-athletes to profit from their individual NILs.

a. Amateurism Rules Are Not Reasonably Necessary to the College Sports Product

For the amateurism justification to sustain the amateurism rules, the rules must be reasonably necessary to delivering the college sports product.⁴¹³ According to *Board of Regents*, the NCAA bears the burden of proving its amateurism rules are *necessary* or *essential* to the success and availability of college sports,⁴¹⁴ meaning that the NCAA must demonstrate that “amateurism is a main reason for the success of college athletics.”⁴¹⁵ It would not be sufficient if amateurism were only partially responsible for the popularity of college sports, as the NCAA’s amateurism rules would not be adequately tailored to be reasonably necessary to promote the NCAA’s product.⁴¹⁶ Ultimately, because college sports can be successful without the limits on the compensation of the players that make up the amateurism rules, the ama-

⁴¹¹ See *supra* notes 194–96 and accompanying text.

⁴¹² This Section does not consider whether the restraints are reasonably necessary to the integration justification, beyond the discussion in Part V.A.2.a., *supra*, because it is not reasonable to expect student-athletes to be integrated into the student body for a number of reasons, such as their intense practice schedules. See *supra* notes 98–103, 388–89 and accompanying text. Even if integration were possible, there are a number of rules already in place that are more reasonably tailored to the goal of integrating and educating student-athletes, including rules requiring them to go to class and study halls, as well as prohibiting athlete-only dorms. See *O’Bannon*, 7 F. Supp. 3d at 980, 1008.

⁴¹³ See *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335–36 (7th Cir. 2012); *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

⁴¹⁴ See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101, 114 (1984) (analyzing whether the television agreement was “necessary to market the product” and “essential if the product is to be available at all”); Nagy, *supra* note 137, at 340–41.

⁴¹⁵ Pekron, *supra* note 186, at 55.

⁴¹⁶ *Id.* at 55 n.247 (citing *United States v. Brown Univ.*, 5 F.3d 658, 678–79 (3d Cir. 1993)).

teurism justification cannot sustain the anticompetitive amateurism rules.⁴¹⁷

Simply put, there is no evidence that college sports' popularity is entirely dependent on the student-athletes' status as amateurs.⁴¹⁸ The NCAA relied on the Dennis Survey, conducted of 2,455 respondents in Fall 2013, to say that the restrictions increase consumer interest in college sports.⁴¹⁹ Specifically, the NCAA pointed to the fact that sixty-nine percent of respondents were opposed to paying money to student-athletes, in addition to covering their expenses, as evidence that consumers would have less interest in college sports if student-athletes were paid.⁴²⁰ Ignoring the issues with the Dennis Survey,⁴²¹ that conclusion may be correct in certain circumstances, but this evidence is not sufficient to meet the requirement that the amateurism rules be "essential" if college sports are "to be available at all."⁴²²

Although amateurism may be a contributing factor to the success of college sports, it is neither *necessary* nor *essential* to its success in light of other significant factors, as the court recognized.⁴²³ The product of college sports, and its success, relies on its differentiation from professional sports.⁴²⁴ While amateurism is a "clear line of demarcation between intercollegiate athletics and professional sports,"⁴²⁵ it is far from the only differentiation between them. Other key elements of college sports distinguish the NCAA's product, "including loyalty to one's alma mater, instate and conference rivalries, and school spirit."⁴²⁶ Furthermore, teams are associated with universities and the communities they occupy; thus, there is a built-in demand from stu-

⁴¹⁷ *Id.* at 54.

⁴¹⁸ See Nagy, *supra* note 137, at 360; *supra* note 403.

⁴¹⁹ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 975–76 (N.D. Cal. 2014).

⁴²⁰ *Id.* at 975.

⁴²¹ See *supra* notes 329–30 and accompanying text.

⁴²² See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984).

⁴²³ See *O'Bannon*, 7 F. Supp. 3d at 977–78, 1001 (finding "the NCAA's restrictions on student-athlete compensation are not the driving force behind consumer demand" because "the evidence presented at trial suggests that consumers are interested in college sports for other reasons").

⁴²⁴ *Bd. of Regents*, 468 U.S. at 101–02.

⁴²⁵ NCAA MANUAL, *supra* note 8, Const. art. 1, § 1.3.1, at 1.

⁴²⁶ Pekron, *supra* note 186, at 55; see also Ethan Lock, *Unreasonable NCAA Eligibility Rules Send Braxton Banks Truckin'*, 20 CAP. U. L. REV. 643, 649 (1991) ("[T]he distinction between professional and intercollegiate sports is related to things like one's alma mater, instate and conference rivalries, school spirit, and probably some romantic ideal that has nothing at all to do with the status of individual student-athletes.").

dents, alumni, and local fans for an athletic team to represent their university and community.⁴²⁷ The unique connection that college sports fans feel towards their teams makes it unlikely that allowing athlete compensation, especially indirect compensation via endorsements, would result in the kind of mass exodus of fans required for a finding that amateur status is a necessary component of the college sports product.⁴²⁸ In light of the other factors that significantly contribute to the success of the college sports product, the amateurism rules are not reasonably necessary to achieve that success.

It is also unlikely that the popularity of college sports is tied to the belief that the players on the field are typical students, such that their compensation would harm the popularity of college sports. It is well-known that student-athletes in major college sports programs spend more time on the practice field than in the classroom,⁴²⁹ and the frequently publicized scandals exposing academic fraud⁴³⁰ solidify the perception that student-athletes are not typical students.⁴³¹ Furthermore, it is widely known that players often receive impermissible benefits,⁴³² as frequent scandals publicize these practices.⁴³³ Despite the

427 See Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (Jul. 25, 2012, 8:01 AM), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/> (noting that “the college product is connected to locale” and “[a]lums will still care about their team regardless of [sic] they are amateur or professional”); see also *O’Bannon*, 7 F. Supp. 3d at 977–78, 1001 (citing “school loyalty” and “geography” as driving forces for consumer interest in college sports); Memorandum of Points and Authorities in Support of Motion by Antitrust Plaintiffs for Summary Judgment at 11, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-01967-CW, 2013 WL 6149252 (N.D. Cal. Nov. 15, 2013) [hereinafter *O’Bannon* SJ Motion] (“[O]ne obvious reason that [the University of Michigan’s (“UoM”)] football team sells more tickets than the Detroit Lions is that the UoM graduates thousands of students every year, many of whom enter adulthood with an inherent interest in UoM sports.”).

428 See *O’Bannon* SJ Memo, *supra* note 427, at 11 (arguing that the NCAA “has done nothing to show that the Big House [(UoM’s football stadium)] would fall silent if fans knew that the [student-athletes] providing the entertainment were receiving something more than a subsistence allowance”); see also Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2659 (1996) (doubting that “football consumers, who greatly enjoy games played by professionals over twenty-two years of age, will be much less attracted to games played by eighteen- to twenty-two-year-old athletes because they are paid a salary”).

429 See *supra* notes 98–101 and accompanying text.

430 See, e.g., Sarah Lyall, *U.N.C. Says Athletes Took Fake Classes*, N.Y. TIMES, Oct. 23, 2014, at B12 (detailing eighteen-year pattern of sham classes and academic fraud affecting 3,100 students, nearly half of them athletes, at the University of North Carolina at Chapel Hill).

431 See Roberts, *supra* note 428, at 2659 (noting that it is “unlikely that many in the public who ‘consume’ intercollegiate athletics do so because they seriously believe it is a contest between ‘real’ or typical students”).

432 Lock, *supra* note 426, at 649 (“There is not a fan of college sports who has not known for years that star players at major universities often receive large sums of money from boosters

common knowledge about the realities of modern student-athletes, the popularity of college sports only continues to grow,⁴³⁴ showing that the image of the amateur student-athlete is neither necessary nor essential to college sports' success.

Amateurism is not the main reason for the success of college athletics, as college sports would still remain viable and differentiated from professional sports even without the amateurism rules.⁴³⁵ Thus, as the NCAA failed to meet the heavy burden of showing that amateurism is reasonably necessary to its product, the amateurism justification cannot sustain the amateurism rules.

b. Allowing Student-Athletes to Sell Their Likenesses Would Be a Less Restrictive Alternative

As discussed above, Judge Wilken rejected the third proposed less restrictive alternative, which proposed allowing student-athletes to receive money for endorsements.⁴³⁶ Judge Wilken offered little explanation for the rejection, other than that allowing endorsement payments "would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes."⁴³⁷ Judge Wilken, and NCAA President Mark Emmert, acknowledged that the NCAA has often failed to protect student-athletes from exploitation,⁴³⁸ but neither would acknowledge that much of that exploitation was at the hands of the NCAA and its amateurism regime. Thus, Judge Wilken declined to allow such endorsements as a less restrictive alternative, in part because the Plaintiffs did not challenge the rules against endorsements in the case, saying that such an option "does not offer the NCAA a viable means of achieving its stated goals."⁴³⁹

and alumni, if not from college coaches, to participate in intercollegiate athletics at particular institutions.").

⁴³³ See, e.g., Rovell & Gubar, *supra* note 1; Forde et al., *supra* note 113.

⁴³⁴ See Eben Novy-Williams, *NCAA Revenue Grows 14th Consecutive Year As Changes Loom*, BLOOMBERGBUSINESS (Jan. 15, 2015, 8:13 PM), <http://www.bloomberg.com/news/2015-01-16/ncaa-revenue-grows-14th-consecutive-year-as-changes-loom.html>.

⁴³⁵ In fact, some have even argued that ending amateurism may result in an increase in the popularity of college sports. See Hruby, *supra* note 427 ("Eliminate amateurism tomorrow, and big-time college football and basketball fans . . . might like NCAA sports more, given that hypocrisy and corruption will no longer be core components of the exercise.").

⁴³⁶ See *supra* notes 342–44 and accompanying text.

⁴³⁷ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014).

⁴³⁸ *Id.*

⁴³⁹ *Id.*

What Judge Wilken did not do, however, was examine whether those goals were legitimate. The oft-repeated goal for denying student-athletes compensation specifically for endorsements, or more generally for the use of their individual NILs, is to protect student-athletes from commercial exploitation.⁴⁴⁰ This goal is precisely the type of noncommercial, social-welfare objective generally held not to be cognizable.⁴⁴¹ Furthermore, denying student-athletes the opportunity to profit in the free market from the value of their NILs is paternalistic at best and exploitative at worst,⁴⁴² especially considering the millions of dollars made by the NCAA and others based on that value.⁴⁴³

If the court had properly considered this less restrictive alternative, it would have found it to be satisfactory, as allowing student-athletes to receive money from third-parties for endorsements, or for other purposes related to their NILs, would not harm popularity of the NCAA's product. The product would still remain differentiated from professional sports, as schools would not be paying athletes for their performance and turning them into professionals playing for a paycheck. Rather, student-athletes would be receiving payments from third-parties, which is already known to occur frequently under the table.⁴⁴⁴

Furthermore, such a system that allows endorsements is very similar to that of the Olympics, under which athletes have access to the commercial free market, allowing athletes to secure endorsement deals or get paid for signing autographs, among other things.⁴⁴⁵ It is important to note that the Olympic athletes are not paid for their participation, but rather are just not forbidden from profiting from the attention their participation brings them.⁴⁴⁶ The system came about recently, after a transition away from an amateurism regime even stricter than the NCAA's,⁴⁴⁷ and the transfer did not harm the Olympics' product. Fans did not object to the change or refuse to watch the Olympics; rather they seemed to embrace the change.⁴⁴⁸ To see this,

440 See *id.*; cf. NCAA MANUAL, *supra* note 8, Const. art. 2, § 2.9, at 4 (noting in its Principle of Amateurism that "student-athletes should be protected from exploitation by professional and commercial enterprises").

441 See *supra* notes 182–86 and accompanying text.

442 See *supra* notes 75–77 and accompanying text.

443 See *supra* Part I.B.

444 See *supra* notes 432–33 and accompanying text.

445 HUMA & STAUROWSKY, *supra* note 10, at 5.

446 See Hruby, *supra* note 427.

447 See *id.*

448 Bob Greene, *What Changed the Olympics Forever*, CNN <http://www.cnn.com/2012/07/>

one need only compare the 1980 Lake Placid Games, which had mostly amateur athletes competing and earned \$30 million in sponsorship revenue, with the completely professionalized 2002 Salt Lake Games, which earned \$840 million.⁴⁴⁹ After seeing the success of the Olympics' transition, Andy Schwarz, an antitrust economist with extensive sports experience, noted that the belief that the market demand for watching Olympic sports was related to "what the athletes earn before or during the Olympics" was "romantic" and "irrational."⁴⁵⁰

Like the Olympics, permitting a system of endorsements and third-party payments for student-athletes would not harm the NCAA's product, and thus would present a viable means of accomplishing the NCAA's goals in a much less restrictive manner.

B. Remedial Issues

After finding the rules prohibiting student-athletes from sharing licensing revenues to be unreasonable restraints on the college education market, the court granted an injunction against those restraints.⁴⁵¹ In particular, the court permitted two new practices with regard to compensation from licensing revenues: (1) paying scholarships covering the full cost of attendance and (2) paying money above that amount into a trust for student-athletes to receive once their eligibility expires.⁴⁵² However, Judge Wilken allowed the NCAA to cap the amount paid, which must be equal for every team member in a given year, as long as that cap is no less than five thousand dollars (in 2014 dollars).⁴⁵³ Schools have the option of paying less than five thousand dollars, provided that they do not illegally collude on that amount.⁴⁵⁴ This remedy presents two main issues.

First, presenting the option for a five-thousand-dollar cap amount is problematic because it is an arbitrary number, and the NCAA schools will most likely take advantage of that floor and set the limit at that arbitrary amount. Judge Wilken said she chose the five-thousand-dollar value based on the fact that the NCAA's witnesses' con-

22/opinion/greene-olympics-amateurs/ (last updated July 23, 2012, 11:43 AM) ("[T]he fans, far from protesting in outrage at the change, didn't care. In fact, they seemed to like it a lot.").

⁴⁴⁹ Hruby, *supra* note 427.

⁴⁵⁰ *Id.*

⁴⁵¹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1007–08 (N.D. Cal. 2014).

⁴⁵² *Id.*

⁴⁵³ *Id.* at 1008.

⁴⁵⁴ *Id.*

cerns would be minimized or negated if compensation was capped at a few thousand dollars per year, and that this amount is comparable to the amount of permissible money if student-athletes qualify for a Pell grant and the amount that tennis players may receive prior to enrollment.⁴⁵⁵ Ultimately, the court found that the evidence at trial suggests this “modest payment” would not undermine the NCAA’s procompetitive goals the court deemed legitimate.⁴⁵⁶ However, whether NCAA representatives would feel *comfortable* with an amount is not a justifiable reason for setting a limit on the compensation student-athletes can receive, and neither is comparing two unrelated payments. This decision was yet another example of the deference Judge Wilken paid to the NCAA and its arguments that keeping student-athletes from being paid is important to its goals.

The other issue raised by Judge Wilken’s remedy is the concept of the trust. While many scholars have also proposed this remedy,⁴⁵⁷ holding the money in trust for student-athletes does not remedy the problem of denying student-athletes the compensation they deserve, but rather paternalistically implies that student-athletes should not have access to money to which they are entitled until they are “ready.” Furthermore, deferring payment does not solve the prevalent issue of poverty in college sports.⁴⁵⁸ While the increased value of scholarships will help somewhat to correct the shortfall of current scholarships, student-athletes will still barely be able to get by, especially considering the low-income background of many student-athletes.⁴⁵⁹ Because student-athletes will not have access to the money for the use of their likenesses until after they graduate, the temptation to accept illicit payments will persist, and the NCAA will continue to be rife with hypocritical scandals involving student-athletes seeking compensation for the value they create.⁴⁶⁰

⁴⁵⁵ See *id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ See, e.g., Hanlon & Yasser, *supra* note 117, at 294; Vladimir P. Belo, Note, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 154–56 (1996).

⁴⁵⁸ See *supra* note 10 and accompanying text.

⁴⁵⁹ See *supra* note 112 and accompanying text.

⁴⁶⁰ See *supra* notes 111–14 and accompanying text.

VI. REPLACING THE AMATEURISM REGIME

Less than two weeks after Judge Wilken issued her opinion, the NCAA filed its Notice of Appeal.⁴⁶¹ In an effort to reach a resolution before the injunction comes into effect in August 2015,⁴⁶² the appeal will be heard on an expedited schedule, with oral argument scheduled for March 17, 2015.⁴⁶³ Regardless, the issues will likely not be settled for at least a year, as the loser at the Ninth Circuit will “almost certainly” appeal to the Supreme Court.⁴⁶⁴ Thus, while change to the NCAA’s anticompetitive amateurism regime is undoubtedly coming, it is not yet clear from whom and in what form that change will come. This Part examines and analyzes the potential actors and instruments for this task, and then proposes the ideal system to replace the anticompetitive amateurism regime, based on the Olympic model. Under the proposed system, to be implemented by Congress, schools can offer scholarships covering the full cost-of-attendance and additional variable stipends up to at least ten thousand dollars, payable immediately, and most importantly, student-athletes will be able to profit from the third-party use of their NILs, whether from commercial endorsements or for their signatures.

A. *Who Will Implement Change*

The first vehicle for change is through the courts, via the *O’Bannon* case and its appeals. Despite the numerous critiques raised above, the district court decision was very well-reasoned and likely to stand up to appellate court scrutiny. There are, however, a number of drawbacks with this method. As discussed, the remedy granted was narrow, and thus will not result in the sweeping change needed.⁴⁶⁵ In addition to the constraints imposed by the analytical issues, the potential remedy in this case is relatively limited by the narrow scope of the challenge, which focused only on the NCAA’s prohibition against stu-

⁴⁶¹ Notice of Appeal, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 4:09-cv-03329-CW (N.D. Cal. Aug. 20, 2014).

⁴⁶² See Joint Motion to Revise Briefing Schedule and Set Oral Argument at 1, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601 (9th Cir. Sept. 19, 2014).

⁴⁶³ See Order, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601 (9th Cir. Jan. 26, 2015); Order, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 14-16601 (9th Cir. Sept. 24, 2014); Steve Berkowitz, *Oral Argument in NCAA Appeal of O’Bannon Set for March 17*, USA TODAY (Jan. 26, 2015, 9:46 PM), <http://www.usatoday.com/story/sports/college/2015/01/26/obannon-class-action-lawsuit-ncaa-appeal-oral-argument-keller/22379573/>.

⁴⁶⁴ Michael McCann, *Next Steps in O’Bannon Case: Both NCAA and the Plaintiffs Could Appeal*, SPORTS ILLUSTRATED (Aug. 11, 2014), <http://www.si.com/college-football/2014/08/11/obannon-ncaa-case-appeal-next-steps>.

⁴⁶⁵ See *supra* Part V.B.

dent-athletes receiving compensation for the use of their likenesses in licensing.⁴⁶⁶ This prevented Judge Wilken, and will likely prevent appellate judges, from considering restrictions related to student-athlete endorsements or the number and value of scholarships offered.⁴⁶⁷ Furthermore, *O'Bannon* only implicates FBS football and Division I men's basketball, and thus cannot bring about change outside of that context.⁴⁶⁸ Finally, this option will likely take a great deal of time to resolve, and will involve a great deal of uncertainty.

The next option to implement the needed change is also through the courts, but via the numerous pending cases challenging the amateurism regime,⁴⁶⁹ which suffers from even more delay and uncertainty. These challenges represent a much broader attack on the amateurism regime, including rules related to scholarship value, amount, and length, as well as the entire scheme of rules that prohibit compensation.⁴⁷⁰ It would be easy to look at Judge Wilken's *O'Bannon* decision and say that the pending challenges, to which she is also assigned, will fare better in the wake of her scathing analysis of the NCAA's justifications for the rules. However, in the decision, Judge Wilken expressed skepticism that antitrust law can provide a sufficient remedy, admitting "[i]t is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here."⁴⁷¹ Instead, as Judge Wilken suggested,⁴⁷² the

⁴⁶⁶ See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014) ("In particular, Plaintiffs seek to challenge the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' [NILs] in videogames, live game telecasts, and other footage."); *id.* at 984 ("Plaintiffs themselves previously indicated that they were not seeking to enjoin the NCAA from enforcing its current rules prohibiting [commercial] endorsements."); see also *id.* at 1008 (discussing scope of enjoined practices as dictated by scope of challenge); NCAA MANUAL, *supra* note 8, Bylaw 12.5.2.1(a), at 71.

⁴⁶⁷ See *O'Bannon*, 7 F. Supp. 3d at 1008.

⁴⁶⁸ See *id.*

⁴⁶⁹ See, e.g., Docket, *Rock v. Nat'l Collegiate Athletic Ass'n*, No. 1:12-cv-01019-TWP-DKL (S.D. Ind. filed July 25, 2012); Docket, *supra* note 264 (consolidating numerous current challenges, including *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-cv-01011-EDL (N.D. Cal. filed Mar. 5, 2014) (challenging scholarship-value limitation), and *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-cv-01678-FLW (D.N.J. filed Mar. 17, 2014) (challenging restrictions on direct compensation of student-athletes)); see also *supra* Part III.C (discussing current challenges to NCAA amateurism regime).

⁴⁷⁰ See *supra* Part III.C.

⁴⁷¹ *O'Bannon*, 7 F. Supp. 3d at 1009; see also Paul M. Barrett, *When Students Fight the NCAA in Court, They Usually Lose*, BLOOMBERGBUSINESS (July 2, 2014), [http://www.bloomberg.com/bw/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-](http://www.bloomberg.com/bw/articles/2014-07-02/when-students-fight-the-ncaa-in-court-they-usually-lose)

NCAA or Congress could be better suited to implement the reforms needed to truly remedy the current injustices.

The NCAA could certainly implement changes to its amateurism rules through its own internal legislative process, but this is not a likely outcome. The notoriously stubborn NCAA has recently shown some willingness to adapt to the current landscape. In late 2014, the NCAA passed groundbreaking legislation that granted the “Power 5” conferences—consisting of sixty-four schools in the richest and most competitive FBS conferences—autonomy to collectively write many of their own rules.⁴⁷³ However, the NCAA generally only makes dramatic internal changes like this when pressured, as the autonomy proposal was passed in the face of the Power 5 conferences’ “veiled threats” of leaving the NCAA.⁴⁷⁴ Using this new autonomy power, the schools making up the Power 5 conferences recently passed new legislation, binding only on those conferences.⁴⁷⁵ One piece of legislation, which passed seventy-nine-to-one, was a proposal that “redefines an athletic scholarship so that it can cover not only the traditional tuition, room, board, books and fees, but also the incidental costs of attending college,” thus allowing schools to provide aid to all their student-athletes to cover things such as “transportation and miscellaneous personal expenses.”⁴⁷⁶ While these changes are promising, they do not go far enough to truly remedy the anticompetitive harms amateurism causes. Furthermore, current NCAA president Mark Emmert has made it clear that, even in the face of the increasing public outcry in support of compensating college athletes in revenue-generating sports, the NCAA and its member schools will not abandon the ama-

lose (discussing study showing that NCAA prevails over student-athletes’ legal challenges more than seventy percent of the time, which argues that “[f]uture courts are unlikely to order the NCAA to abandon its definition of ‘amateur’ athletics” (internal quotation marks omitted)).

⁴⁷² See *O’Bannon*, 7 F. Supp. 3d at 1009; McCann, *supra* note 364.

⁴⁷³ Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN, http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (last updated Aug. 8, 2014, 1:22 PM).

⁴⁷⁴ See *id.*

⁴⁷⁵ Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY (Jan. 17, 2015, 11:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/>.

⁴⁷⁶ *Id.* While the text of the new legislation is not yet available, those involved have said, “under the cost-of-attendance arrangement, an athlete will now be able to get what amounts to a stipend based on the school’s estimate of a typical student’s transportation and personal expense costs.” *Id.* The NCAA has estimated the average difference between current scholarship value and the cost-of-attendance scholarship to be \$2,500, *id.*, while others have claimed the current scholarship shortfall from the actual cost-of-attendance to be \$3,222, see HUMA & STAUROWSKY, *supra* note 10, at 4.

teurism ideals.⁴⁷⁷ It is thus not likely that the necessary reforms to replace the anticompetitive amateurism regime will occur without a mandate from an outside force.

That leaves Congress as the last, and best, hope to replace the amateurism regime. Recognizing the next battleground over the fate of the NCAA and its amateurism regime is Washington, DC, the NCAA has turned its attention to lobbying lawmakers. In April 2014, the NCAA hired an outside lobbying firm for the first time since 1998.⁴⁷⁸ Through the first three quarters of 2014, the NCAA spent \$470,000 on lobbying, which is nearly as much as it spent the previous three years combined⁴⁷⁹ and a record for its yearly lobbying expenditures.⁴⁸⁰ Furthermore, NCAA officials and athletic directors met with the White House in January 2015, although the precise content of that meeting is not yet known.⁴⁸¹ The NCAA is also not alone in targeting efforts towards Washington, as student-athlete advocate groups have been meeting together to strategize and lobby their respective causes.⁴⁸²

Congress has accepted that it has an important role in this process and shown an interest in driving the necessary change. For example, in July 2014, the Senate Commerce Committee held a hearing on college athletics, with NCAA President Mark Emmert as its main witness.⁴⁸³ The senators leading the charge in that hearing, Jay Rockefeller, Claire McCaskill, and Cory Booker, later wrote a letter

⁴⁷⁷ See Darren Rovell, *NCAA Holds Firm: No Pay for Play*, ESPN, http://espn.go.com/college-sports/story/_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming (last updated Dec. 11, 2013, 5:30 PM).

⁴⁷⁸ Lalita Clozel, *NCAA Is on Its K Street A-Game*, OPENSECRETS BLOG (Aug. 12, 2014), <http://www.opensecrets.org/news/2014/08/ncaa-is-on-its-k-street-a-game/>; Megan R. Wilson, *NCAA Hires Lobbyists As Athletes Battle for Pay*, HILL, <http://thehill.com/business-a-lobbying/lobbying-hires/209767-ncaa-hires-lobbyists-for-the-first-time-as-athletes-battle> (last updated June 18, 2014, 4:28 PM).

⁴⁷⁹ Jake New, *Presidential Panel on College Sports?*, INSIDE HIGHER ED (Jan. 13, 2015), <https://www.insidehighered.com/news/2015/01/13/ncaa-discuss-federal-oversight-college-athletics-white-house>.

⁴⁸⁰ See Clozel, *supra* note 478.

⁴⁸¹ See Jon Solomon, *NCAA: White House Meeting Didn't Discuss Presidential Commission*, CBSSPORTS (Jan. 14, 2015, 4:37 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24962096/ncaa-white-house-meeting-didnt-discuss-presidential-commission>.

⁴⁸² *Id.* As Ramogi Huma, executive director of the National College Players Association and co-founder of the College Athletes Players Association labor group, noted, the student-athlete groups “need to have a presence in D.C., so we make sure the NCAA isn’t going to have an easy time stripping players of rights in Congress.” *Id.* (internal quotation marks omitted).

⁴⁸³ See Steve Berkowitz, *NCAA's Mark Emmert Gets Grilling from Senate Committee*, INDYSTAR (July 10, 2014, 9:12 AM), <http://www.indystar.com/story/sports/college/2014/07/09/ncaa-president-mark-emmert-calls-scholarships-life/12426805/>.

to the president of each Power 5 school demanding responses to questions in ten areas of athlete welfare, including, among other things, multiyear scholarships, cost-of-attendance stipends, and compensation for student-athletes for the use of their NILs.⁴⁸⁴ In their critical letter, the senators specifically asked for each university's position on compensating student-athletes for things like autographs and merchandise using their NILs, "similar to how Olympic athletes are compensated."⁴⁸⁵ These senators' pointed and informed questions signal that Congress understands the pressing issues facing college sports and may be on its way towards implementing the needed changes.

Since this initial congressional interest, the means to achieve the necessary reform has been an important issue. One option was proposed in November 2014, as retiring Democratic congressman Jim Moran introduced bipartisan legislation seeking to establish a presidential commission "to identify and examine issues of national concern related to the conduct of intercollegiate athletics, to make recommendations for the resolution of the issues, and for other purposes."⁴⁸⁶ While the "essentially symbolic" bill did not pass, "it drew 12 co-sponsors in the House, including four Republicans," and the Obama Administration has reportedly shown interest in such a commission.⁴⁸⁷ In addition to the potential presidential commission, another possible scenario involves the government offering the NCAA a partial antitrust exemption, similar to the one Major League Baseball has enjoyed since 1922, "as both an incentive to reform how college sports operate and as a means for the association to achieve some of those reforms."⁴⁸⁸

⁴⁸⁴ Letter from Sens. John D. Rockefeller IV, Claire McCaskill & Cory A. Booker, U.S. Senate, to unnamed university president (Sept. 18, 2014), available at <http://www.usatoday.com/story/sports/college/2014/09/18/senators-ncaa-presidents-letter-jay-rockefeller-claire-mccaskill-cory-booker-student-athletes/15837859/>.

⁴⁸⁵ *Id.* at 4.

⁴⁸⁶ H.R. 5743, 113th Cong. pmb. (2014). Representative Moran has compared the concept to "a presidential commission on the Olympics over athletes' rights created by President Gerald Ford in 1975." Solomon, *supra* note 481. President Ford's commission ultimately led to the passage of Amateur Sports Act of 1978, 36 U.S.C. §§ 371–396 (1978) (codified as amended at 36 U.S.C. §§ 220,501–220,529 (2012)), which dramatically reformed the troubled U.S. Olympics Committee. See NAFZIGER, *supra* note 73, at 288–90.

⁴⁸⁷ Steve Berkowitz & Dan Wolken, *White House to Meet with College Athletics Officials*, USA TODAY (Jan. 12, 2015, 4:49 PM), <http://www.usatoday.com/story/sports/college/2015/01/11/ncaa-white-house-president-obama/21595607/>.

⁴⁸⁸ New, *supra* note 479; see also Sharon Terlep, *Colleges May Seek Antitrust Exemption for NCAA*, WALL ST. J. (July 30, 2014, 1:27 PM), <http://www.wsj.com/articles/colleges-may-seek-anti-trust-exemption-for-ncaa-1406741252> (reporting that "[m]ajor college conferences and NCAA officials are discussing whether to seek [an antitrust] exemption as a way to ward off a multi-

Although there are questions over the wisdom and likelihood of the various means of achieving the necessary legislative solution,⁴⁸⁹ based on the interest Congress has shown, and the inadequacies of the other potential vehicles for change discussed above, it is Congress that is most likely to achieve efficient and effective reform. The following Section proposes the model that Congress should use to replace the anticompetitive amateurism regime.

B. What Should Replace the Anticompetitive Amateurism Regime

Regardless of whether Congress takes charge, or lets the NCAA or the courts work through it on each body's own respective terms, the model that should replace the anticompetitive amateurism regime should be based on the Olympic model of amateurism, thus allowing for student-athletes to receive compensation for the use of their NILs. Under the Olympic model, athletes have access to the commercial free market, permitting athletes to secure endorsement deals or get paid for signing autographs, among other things.⁴⁹⁰ Olympic athletes are not paid for their participation, although they may receive limited stipends and health insurance from their respective sports' national governing body (e.g., USA Basketball, USA Swimming, etc.).⁴⁹¹

The first aspect of the proposed new college sports regime is very much like the old, as well as the Olympic model: student-athletes should not be paid salaries for their participation. Certainly, allowing such payments would allow schools to offer greater compensation to student-athletes and increase the opportunity for price competition in the market for student-athletes' labor, but doing so would effectively turn college athletes into professionals. This would harm much of the differentiation between college and professional sports that contributes to its success.⁴⁹² Furthermore, paying student-athletes salaries

front attack on . . . amateurism"); Kevin Trahan, *The NCAA Is Trying to Hustle Congress for an Antitrust Exemption*, VICE SPORTS (Nov. 20, 2014, 10:16 AM), <https://sports.vice.com/article/the-ncaa-is-trying-to-hustle-congress-for-an-antitrust-exemption> (arguing against granting the NCAA an antitrust exemption).

⁴⁸⁹ See, e.g., Terlep, *supra* note 488 (quoting Daniel Lazaroff, a professor of sports law and antitrust law, as saying that "[a]n NCAA antitrust exemption is 'theoretically possible but not politically likely,'" and that "[i]t is not a good idea without independent oversight—you'd just be letting the people who are now violating antitrust laws do so with impunity").

⁴⁹⁰ HUMA & STAUROWSKY, *supra* note 10, at 5.

⁴⁹¹ Charles Riley, *Olympians Face Financial Hardship*, CNN MONEY (July 10, 2012, 5:37 PM), <http://money.cnn.com/2012/07/10/news/economy/olympic-athletes-financial/>.

⁴⁹² See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02 (1984) (noting that the NCAA seeks to market a "particular brand of football" which is differentiated from "professional sports to which it might otherwise be comparable"); McCor-

would classify them as “employees”⁴⁹³ and implicate Title IX.⁴⁹⁴ For these reasons, and because of the general public’s opposition to paying college players a salary,⁴⁹⁵ student-athletes should not receive salaries.

Next, the NCAA should increase its cap on scholarship values, as the court in *O’Bannon* held.⁴⁹⁶ The first part of the court’s ruling, that all athletic scholarships *must* cover the *full* cost-of-attendance,⁴⁹⁷ should be implemented in the new regime. As noted above, the Power 5 conferences voted, by an astounding seventy-nine-to-one margin, to approve this increased scholarship value, demonstrating how important and uncontroversial this element is.⁴⁹⁸ Ultimately, allowing scholarships that cover the full cost-of-attendance would incrementally increase the price of student-athlete labor and alleviate the current regime’s anticompetitive effects on that market, as well as help eliminate the current shortfall that leaves many student-athletes below the poverty line.⁴⁹⁹

Additionally, the new regime should also follow the court’s lead by allowing additional payments above scholarships based on licensing revenues,⁵⁰⁰ albeit with three important changes: first, the additional payments should be in the form of an immediate stipend, rather than in a deferred trust; second, the minimum cap for the additional payments should be raised from \$5,000 to \$10,000 annually; and third, schools should be able to offer varying amounts to recruits, rather than requiring all team members to receive the same level of payment.

mack v. Nat’l Collegiate Athletic Ass’n, 845 F.2d 1338, 1344 (5th Cir. 1988) (“The NCAA markets college football as a product distinct from professional football.”); *supra* notes 226–30, 393–30 and accompanying text.

⁴⁹³ See Patrick Hruby, *Should College Athletes Get Paid? Ending the Debate, Once and for All*, ATLANTIC (Apr. 6, 2011, 8:00 AM), <http://www.theatlantic.com/entertainment/archive/2011/04/should-college-athletes-get-paid-ending-the-debate-once-and-for-all/236809/> (noting that “employee” classification may permit labor strikes, workman’s compensation, and retirement benefits).

⁴⁹⁴ 20 U.S.C. §§ 1681–1688 (2012); see Greg Skidmore, Recent Development, *Payment for College Football Players in Nebraska*, 41 HARV. J. ON LEGIS. 319, 331 (2004).

⁴⁹⁵ See Alex Prewitt, *Poll: Big Majority Opposes Pay Aside from Scholarships*, WASH. POST, Mar. 23, 2014, at D8, available at 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 (finding that sixty-four percent of survey respondents opposed paying salaries to college athletes beyond the scholarships currently offered).

⁴⁹⁶ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).

⁴⁹⁷ See *id.*

⁴⁹⁸ See *supra* notes 475–76 and accompanying text.

⁴⁹⁹ See *supra* note 10 and accompanying text.

⁵⁰⁰ *O’Bannon*, 7 F. Supp. 3d at 1008.

These proposed alterations would introduce price competition into the market for student-athletes' labor, as schools would offer a usable stipend, of a meaningful amount, reflective of a school's interest in recruiting *that specific* athlete, and thus commensurate with the player's value.

The final and most important aspect of the new college sports regime is allowing student-athletes to profit from the third-party use of their NILs, which Judge Wilken rejected as a less restrictive alternative.⁵⁰¹ This would alleviate the anticompetitive effects of the current amateurism rules, specifically Bylaw 12.5.2.1,⁵⁰² without harming college sports' popularity.⁵⁰³ Following the proven Olympic model, student-athletes should be able to access the free market and capitalize on his or her popularity, such as by endorsing products or being paid for appearances, autographs, and memorabilia.⁵⁰⁴

This new rule allowing for compensation will undoubtedly benefit star athletes (a majority of which are male), but that is not problematic; the fact that such players have value in the free market simply reflects their current contributions to the profitable system, and the new rule allows those players to also enjoy the benefits of their value. It is not clear how these athletes will generally fare in the free market. On one hand, it is possible that they will have less overall success than Olympic athletes, as there are many more college athletes than Olympians, and college athletes likely have less national appeal than do Olympians. On the other hand, college athletes are visible every year, year-round, as opposed to the two-week window surrounding the quadrennial Olympics during which Olympic athletes are most popular. Furthermore, other than a small minority of elite college athletes, most college athletes fortunate enough to have success in the marketplace will likely do so in local markets, where fan loyalty is at its highest, such as through autograph signings and local endorsements. Regardless of their relative success in the free market, it is only fair to allow student-athletes the right to be compensated commensurate with their market value, and this proposed rule would do just that.

Perhaps the best aspect of a rule allowing student-athletes to profit from their individual names, images, and likenesses is that doing

⁵⁰¹ *Id.* at 984.

⁵⁰² NCAA MANUAL, *supra* note 8, Bylaw 12.5.2.1, at 71.

⁵⁰³ In fact, the additional exposure of college athletes may actually increase their popularity, and thus the popularity of college sports in general.

⁵⁰⁴ *See supra* note 490 and accompanying text.

so would not “expand[] opportunities for commercial exploitation of student-athletes,”⁵⁰⁵ as Judge Wilken and the NCAA claim, but rather would bring the practice out of the shadows. As the examples of Johnny Manziel and others show,⁵⁰⁶ student-athletes already try to sell their autographs and take advantage of their popularity. Rather than hypocritically punishing them, this new rule acknowledges that student-athletes have value and should be allowed to reap the benefits of their hard work on the field.

Ultimately, by replacing the hypocritical and anticompetitive amateurism regime with these proposed rules, whether through the courts, the NCAA, or congressional action, the future of college sports would operate under an efficient system of fair governance and just compensation.

CONCLUSION

Under the current NCAA amateurism regime, players like Johnny Manziel have their skill and popularity exploited to an outrageous degree of financial success, but are themselves prohibited from profiting off their own recognition and accomplishments. Unfortunately, antitrust law has proven ineffective in remedying this unreasonable restraint, as even the recently granted injunction in *O’Bannon v. NCAA* does not fully address the evils of the amateurism regime. Thus, more needs to be done, either at the hands of the appellate courts hearing *O’Bannon*, the courts hearing the pending litigation, the NCAA itself, or Congress. A combination of these actors should replace the current anticompetitive amateurism regime with a new set of rules, modeled on Olympic amateurism rules, that reflect the modern reality of the highly commercialized college sports landscape, and thus aim to increase competition and allow student-athletes to profit from their likenesses. Under the proposal offered by this Note, the next Johnny Manziel seeking to earn money simply for signing his own name would not face draconian sanctions, but rather would be realizing his worth on the free market while still participating in the unique world of collegiate athletics.

⁵⁰⁵ *O’Bannon*, 7 F. Supp. 3d at 984.

⁵⁰⁶ See *supra* notes 1–5 and accompanying text.