

U.C.L.A. Law Review

Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions

Nathan Boninger

ABSTRACT

The National Collegiate Athletic Association (NCAA) prohibits schools from providing financial aid to student-athletes beyond the costs of attending school and forbids student-athletes from receiving compensation related to their athletic ability (such as endorsement deals) from third parties. Student-athletes have challenged these severe restrictions on compensation as violations of antitrust law, which prohibits agreements that unreasonably restrain trade. These challenges have largely failed, and courts have upheld the NCAA's restrictions as justified under the Rule of Reason because they provide two procompetitive benefits: (1) the preservation of amateurism in college sports, which increases consumer demand; and (2) the integration of academics and athletics, which improves the college experience for student-athletes. This Comment argues that courts have failed to properly scrutinize these justifications, and furthermore that such justifications should be rejected because extensive evidence shows the challenged compensation restrictions do not actually achieve their alleged benefits.

However, there is a third procompetitive justification, not fully explored to date, which justifies certain NCAA compensation restrictions, but would permit student-athletes to receive payments from third parties. This Comment proposes that in the context of higher education, where Congress has shown a commitment to the social welfare goals advanced by defendants, social welfare considerations may justify an agreement under antitrust law. In accord with social welfare goals endorsed by Congress in Title IX, NCAA rules that prohibit extra payments to football and men's basketball players promote sexual equality in collegiate athletics by enabling schools to provide a wide breadth of athletic opportunities to both men and women. Thus, NCAA rules that limit schools' provision of financial aid to the costs of attendance are justified. But, third-party payments to student-athletes do not affect a school's ability to provide equality in athletics. Therefore, NCAA bans on third-party payments should not survive antitrust scrutiny, leaving student-athletes free to capitalize on their value in the market by, for example, endorsing products.



AUTHOR

J.D., 2017, University of California, Los Angeles, School of Law; B.S., 2014, The Ohio State University. I would like to thank Professor Steven Derian for his guidance and insightful comments throughout the writing process.

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INTRODUCTION

Student-athletes in ongoing litigation against the National Collegiate Athletic Association (NCAA) are currently seeking to dramatically transform the landscape of college sports. Presently, the NCAA prohibits student-athletes from receiving any aid in excess of the cost of attendance of their respective schools.¹ The college football and basketball players bringing suit seek to strike down this cap on compensation as an antitrust violation under Section 1 of the Sherman Act² and to create a free market for student-athletes' services.³

However, they must contend with the Ninth Circuit's ruling in *O'Bannon v. NCAA*.⁴ In *O'Bannon*, football and men's basketball student-athletes challenged NCAA rules that prohibited student-athletes from being paid for the use of their names, images, and likenesses (NILs).⁵ Applying the three-step analysis known as the Rule of Reason to determine if an antitrust violation occurred under the Sherman Act, the court considered: (1) whether the challenged rules had a significant anticompetitive effect; (2) whether the rules had any procompetitive effects that could serve to justify them; and (3) whether there were any less restrictive alternatives that could achieve the same procompetitive effects.⁶ While the court found the NCAA restrictions on compensation did have a significant anticompetitive effect, the court held the rules were partially justified by two of the procompetitive justifications offered by the NCAA.⁷ First, prohibiting student-athletes from receiving payments maintained the popularity of college sports by preserving their amateur nature.⁸ Second, the rules helped integrate academics with athletics.⁹ In the final step of the Rule of Reason analysis, the court concluded that increasing the aid that can be provided to student-athletes based on their

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1. NCAA, 2016–17 NCAA DIVISION I MANUAL, art. 15.01.6 (2016–17).
 2. 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .").
 3. Complaint & Jury Demand, *Jenkins v. NCAA* (*In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*), 311 F.R.D. 532, 536 (N.D. Cal. 2015).
 4. 802 F.3d 1049 (9th Cir. 2015).
 5. *Id.* at 1052.
 6. *Id.* at 1070.
 7. *Id.* at 1072–73.
 8. *Id.* at 1073.
 9. *Id.*

athletic ability up to the full cost of attendance¹⁰ was a less restrictive alternative that would continue to accomplish these procompetitive objectives.¹¹

While *O'Bannon* was a small victory for student-athletes, it is a far cry from the free market that many student-athletes seek. To completely invalidate NCAA compensation rules and create a market in which schools are free to compete for recruits by offering payments for athletic services, student-athletes first will have to overcome the two procompetitive justifications that were credited by the court in *O'Bannon*. This Comment argues that the Ninth Circuit was wrong to accept the NCAA's procompetitive justifications in *O'Bannon*. Ample evidence shows NCAA rules do not preserve the popularity of college sports by maintaining amateurism and that they fail to facilitate the integration of academics and athletics.¹² Consequently, courts should discredit these procompetitive justifications in the upcoming antitrust lawsuits against the NCAA.

However, another obstacle stands in the way of a free market for student-athletes. While courts generally do not consider social welfare as a procompetitive justification in antitrust litigation,¹³ the Third Circuit took social welfare justifications into account in *United States v. Brown University*.¹⁴ In *Brown*, the Massachusetts Institute of Technology (MIT) and eight Ivy League schools faced an antitrust challenge based on their agreement to award financial aid to admitted students only on the basis of need.¹⁵ Applying the Rule of Reason, the court found the agreement may have the procompetitive effect of promoting the same "social ideal of equality of educational access and opportunity" that Congress had attempted to

10. The cap on student-athlete aid awarded on the basis of athletic ability was previously set a few thousand dollars below the full cost of attendance. *E.g.*, *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 971–72 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

11. *O'Bannon*, 802 F.3d at 1075–76.

12. *See infra* Part III.

13. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462–64 (1986) (rejecting the procompetitive justification offered by a group of dentists that their policy of refusing to provide x-rays to dental insurers benefited the public by ensuring insurance companies do not erroneously decline to pay for needed treatment on an inadequate basis for diagnosis); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 684–85, 694–95 (1978) (rejecting the procompetitive justification offered by a society of engineers that its ban on price competition benefited public safety by preventing the poor quality of work that would result from contracts awarded to the lowest bidder).

14. 5 F.3d 658 (3d Cir. 1993).

15. *Id.* at 662–63.

promote for over twenty-five years through federal financial aid policy.¹⁶ The court remanded the case, stating that “the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered.”¹⁷ Thus, in the limited context of higher education where Congress has already acted to show a clear commitment to the social welfare goals advanced by a defendant, social welfare considerations may suffice to justify an agreement under the Rule of Reason.

Analogously, NCAA restrictions on paying student-athletes allow schools to promote equality of athletic opportunities for men and women in the context of higher education in accordance with the congressional goals of Title IX of the Education Amendments of 1972.¹⁸ Title IX prohibits discrimination between men’s and women’s athletic programs with respect to the amount of financial assistance provided to athletes of each sex, the overall quality of the programs, and the number of athletic opportunities.¹⁹ Thus, if football and men’s basketball student-athletes were paid, it is likely that Title IX would require that women student-athletes also be compensated.²⁰ Currently, only a small minority of schools’ athletic departments actually generate positive revenues.²¹ Complying with Title IX by compensating both male and female student-athletes would become too costly for many schools’ athletics programs and could undo much of the progress that has been made since the passage of Title IX.²² Thus, NCAA compensation restrictions promote the equality of collegiate athletic opportunities. According to *Brown*, this may serve as a legitimate procompetitive justification under the Rule of Reason.

The analysis under the Rule of Reason would then shift to a consideration of less restrictive alternatives that would continue to maintain

16. *Id.* at 675, 678.

17. *Id.* at 678.

18. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

19. *Id.*; 34 C.F.R. §§ 106.37(c), 106.41(c) (2015); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

20. See Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O’Bannon*, 41 J.C. & U.L. 297, 331–34 (2015).

21. See DANIEL L. FULKS, NCAA, REVENUES & EXPENSES: 2004–2014 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 12–15 (2015).

22. See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 18–20 (2003) (“[In 1971–1972], only 31,852 women, compared to 172,447 men, played college sports. Women received only 2% of schools’ athletic budgets and virtually no athletic scholarships. . . . The National Collegiate Athletic Association (NCAA) also sponsored only men’s sports.” (footnotes omitted)).

equality of athletic opportunities in college sports. One such alternative would permit schools to continue to cap financial aid at the full cost of attendance, but also allow student-athletes to be compensated by third parties for providing services such as endorsing products, making appearances, signing autographs, and selling memorabilia.²³ Thus, schools would not have to compensate student-athletes beyond the cost of attendance and athletic departments could continue to offer a wide variety of sports to both men and women. But, student-athletes would be able to capitalize on their market value.²⁴ Although this is not the free market that many student-athletes seek, this alternative would provide a source of compensation during their time in college while advancing the vital goals of Title IX.

With Congress seemingly unwilling to step in to address the student-athlete compensation issue, and given the current stall in student-athlete challenges to NCAA restrictions under labor law—especially after the National Labor Relations Board’s *Northwestern* decision declining to assert jurisdiction²⁵—this Comment offers courts an attractive solution under antitrust law. The proposed procompetitive justification provides a middle ground, permitting schools to continue limiting their own student-athlete contributions to the costs of education, while offering student-athletes the opportunity to seek an additional form of compensation beyond what they are currently receiving.

Part I of this Comment describes the history of the NCAA and Title IX and provides the framework for analysis of antitrust claims under the Sherman Act. Part II outlines past NCAA antitrust cases, including the details of the *O’Bannon* decision, and notes pending cases. Part III argues that the preservation of amateurism and the integration of athletics and

23. The district court’s decision in *O’Bannon* expressly rejected this arrangement as a less restrictive alternative. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015). This Comment asserts the district court erred in this regard and relied on an unsupported claim by the NCAA that its rules protect student-athletes from commercial exploitation.

24. See Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 851 n.49 (2014) (describing the endorsement value players can acquire based on their accomplishments in college, including an estimate that a single tweet from Johnny Manziel would have been worth nearly \$3500 before he was even drafted and the fact that Tim Tebow’s endorsement value was worth tens of millions of dollars immediately after he left college and joined the Denver Broncos).

25. *Nw. Univ. & Coll. Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. 167, at 3 (Aug. 17, 2015) (declining to assert jurisdiction over the question of whether Northwestern scholarship football players are employees under the National Labor Relations Act because a decision “would not promote stability in labor relations”).

academics should no longer be credited as procompetitive justifications for the challenged NCAA rules. Finally, Part IV further describes the *Brown* decision and applies its reasoning to NCAA compensation rules. It then argues that allowing student-athletes to receive third-party payments is a less restrictive alternative to the NCAA's total ban on compensation in excess of student-athletes' full cost of attendance.

I. OVERVIEW OF THE NCAA, TITLE IX, AND ANTITRUST LAW

The NCAA, Title IX, and antitrust law interconnect, and thus an understanding of each is essential in analyzing the current state of college athletics with regard to antitrust litigation. When schools formed the NCAA and began to adhere to its rules, their concerted action brought the schools and the NCAA within the scope of the Sherman Act.²⁶ The passage of Title IX added additional requirements for schools to follow.

A. History of the NCAA

One of the first intercollegiate athletic competitions in the United States occurred in 1852, when Yale University and Harvard University competed in a rowing contest.²⁷ This and other early intercollegiate athletic competitions were mainly run by students.²⁸ However, faculty soon started to play a larger role, and conferences were formed to provide better regulation due to concerns over cheating and increasing commercialization.²⁹ Although adequate regulation of collegiate sports remained an issue, the violence of intercollegiate football became a more pressing concern in the early twentieth century: In 1905, there were eighteen deaths in college football, bringing the total death count from 1890–1905 to 330.³⁰ To reduce violence and standardize play across college sports, sixty-two schools founded the

26. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007).

27. Christian Dennie, *He Shoots, He Scores: An Analysis of O'Bannon v. NCAA on Appeal and the Future of Intercollegiate Athletics*, 93 N.C. L. REV. ADDENDUM 90, 92 (2015). Appropriately foreshadowing the mass of controversies to come, the competition was commercially sponsored and Harvard engaged a non-student to compete in order to gain an advantage over Yale. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10–11 (2000).

28. See Smith, *supra* note 27, at 11.

29. See *id.*

30. Lazaroff, *supra* note 26, at 330 n.4.

Intercollegiate Athletic Association of the United States (IAAUS) in 1905.³¹ In 1910, the IAAUS assumed its current name, the National Collegiate Athletic Association (NCAA).³²

In its early years, the NCAA promulgated rules and regulations for college athletics, but was largely ineffective as a governing body because of its lack of enforcement power. The NCAA established eligibility requirements for college athletes, including the length of allowable participation and the requirement that athletes be full-time students.³³ In 1916, the NCAA also defined what it meant to be an amateur athlete as “one who participates in competitive physical sports only for the pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.”³⁴ But, with no way to enforce its new rules, the NCAA had to rely on voluntary compliance by member institutions.³⁵ As the popularity of college sports continued to grow,³⁶ the “temptation to ignore standards that interfered with athletic and financial success was simply too great.”³⁷

As a result of its inability to effectively regulate college sports, the NCAA’s authority to enforce its rules was expanded. In 1948, the NCAA made its first attempt to create an enforcement system that would ensure compliance by adopting the Sanity Code.³⁸ However, the only possible sanction for violations under the Sanity Code was expulsion from the NCAA, a sanction deemed too severe to enforce, and the NCAA remained “impotent and the rules ineffectual.”³⁹ The Sanity Code was quickly repealed in 1951, and a more flexible mechanism of sanctions for violations was introduced, the Committee on Infractions.⁴⁰ The NCAA’s enforcement ability continued to increase over the next several decades, with the authority to sanction schools directly for violations coming in 1976.⁴¹ During this period, the NCAA also entered into its first television contract worth over one million dollars.⁴² As its financial stability and enforcement power grew, the

31. *Id.* at 330–31.

32. *Id.* at 331.

33. *Id.*

34. *Id.* at 331–32 (quoting ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA’S AMATEUR MYTH 33, 34–35 (1998)).

35. *Id.* at 332.

36. See Smith, *supra* note 27, at 13–14.

37. Lazaroff, *supra* note 26, at 332.

38. *Id.* at 332–33.

39. Smith, *supra* note 27, at 14–15.

40. See *id.* at 15.

41. *Id.* at 15–16.

42. *Id.* at 15.

NCAA came to be the dominant authority in the regulation of college sports.⁴³

Today, the NCAA is a massive organization that regulates almost every aspect of college sports. The NCAA currently governs over 1100 universities representing nearly 500,000 student-athletes.⁴⁴ In addition, it runs ninety championships in twenty-four sports across three divisions.⁴⁵ The NCAA also promulgates extensive regulations pertaining to amateurism,⁴⁶ recruiting,⁴⁷ academic eligibility,⁴⁸ financial aid,⁴⁹ and playing and practice seasons.⁵⁰ Recently, public debate and antitrust litigation have centered on NCAA rules that limit the financial aid schools can provide to student-athletes to the cost of attendance⁵¹ and that prohibit student-athletes from receiving any form of payment in connection with their sport.⁵² Controversy over the legality of these rules continues to rage, and current litigation against the NCAA has the potential to fundamentally change college sports and the NCAA.

B. History of Title IX

While the NCAA was still consolidating its enforcement power in the 1970s, the enactment of Title IX dramatically affected college sports. Prior to Title IX, collegiate athletic opportunities for women were minimal and discrimination was widespread. In 1971–72, only 31,852 women played college sports compared to 172,447 men.⁵³ Even more striking, a mere two percent of schools' athletic budgets was devoted to women, and women received practically no athletic scholarships.⁵⁴ Further, the NCAA did not even sponsor

43. See Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 993 (1987).

44. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [<http://perma.cc/2MAH-6JGT>].

45. *Id.*

46. NCAA, *supra* note 1, at art. 12.

47. *Id.* at art. 13.

48. *Id.* at art. 14.

49. *Id.* at art. 15.

50. *Id.* at art. 17.

51. *Id.* at art. 15.01.6. "The 'cost of attendance' is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." *Id.* at art. 15.02.2.

52. See *id.* at art. 12.1.2.

53. Samuels & Galles, *supra* note 22, at 18–19.

54. *Id.* at 19.

women's sports.⁵⁵ Similar inequalities existed for women in education in general, as women were often completely excluded from educational opportunities, limited in admissions by quotas, or held to higher admission standards than male applicants.⁵⁶ Although the disparity in athletic opportunities was clearly disturbing, it was the inequality in education more generally that led to the adoption of Title IX.

In 1972, Title IX of the Education Amendments was passed in order to address discrimination against women in education, but it soon became apparent that the statute extended to athletics as well.⁵⁷ Title IX prohibits educational programs that receive federal funds from discriminating on the basis of sex.⁵⁸ Because Congress had not discussed whether Title IX would apply to athletic programs at educational institutions, there were attempts shortly after its passage to exclude athletics from its reach.⁵⁹ For example, in 1974, Senator John Tower proposed an amendment to exclude sports "that produced gross revenue or donations."⁶⁰ However, Congress rejected the Tower Amendment.⁶¹ Instead, Congress expressly directed the U.S. Department of Health, Education, and Welfare (HEW), responsible for promulgating regulations to implement Title IX,⁶² to issue regulations regarding intercollegiate athletics.⁶³ Thus, only a few years after the enactment of Title IX, it became clear that Congress intended Title IX to promote sexual equality in athletic opportunities in intercollegiate athletics and that highly profitable sports, such as football and men's basketball, were to be treated no differently under the statute.

55. *Id.* The National Association of Intercollegiate Athletics (NAIA) became the "first collegiate athletics association to sponsor both men's and women's championships" in 1980. *About the NAIA*, NAT'L ASS'N INTERCOLLEGIATE ATHLETICS, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 [<http://perma.cc/U8DX-F363>].

56. Samuels & Galles, *supra* note 22, at 18.

57. *See id.* at 18–20.

58. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

59. Samuels & Galles, *supra* note 22, at 19.

60. *Id.*

61. *Id.*

62. Responsibility for promulgating regulations to administer Title IX was transferred to the Department of Education in 1979. *Id.* at 13 n.7.

63. *Id.* at 19.

In 1975, HEW issued its regulations for the implementation of Title IX.⁶⁴ The regulations state that “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”⁶⁵ Under the regulations, schools are required to: (1) allocate athletic scholarships and financial assistance for males and females proportionally to their participation; (2) maintain equality between the men’s and women’s athletics programs with respect to their overall quality;⁶⁶ and (3) provide equality in the number of opportunities for male and female students to participate in athletics.⁶⁷ In 1979, HEW published a Policy Interpretation that clarified how to comply with the third requirement.⁶⁸ A school can comply in one of three ways: (1) by providing athletic opportunities for men and women that are substantially proportionate to their respective enrollment; (2) if one sex is underrepresented, by showing a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex; or (3) if one sex is underrepresented, by fully and effectively accommodating the interests and abilities of that sex.⁶⁹

After the new HEW regulations, schools continued to challenge Title IX’s application to athletics. Although not a case about athletic programs, *Grove City College v. Bell*⁷⁰ had major implications for Title IX’s continuing relevance with respect to athletics. In *Grove City*, the U.S. Supreme Court held that only the specific programs or activities that receive federal funds are subject to the nondiscrimination requirements of Title IX.⁷¹ Thus, if a college received federal assistance only in relation to its financial aid program, Title IX would not prevent discrimination within the college’s athletics program. Congress quickly overruled this holding by passing the Civil Rights Restoration Act of 1987.⁷² This amendment made it clear that the

64. *Id.* at 13.

65. 34 C.F.R. § 106.41(c) (2015).

66. Some of the factors taken into account for assessing overall quality include equipment, coaching, academic tutoring, and facilities. See A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

67. 34 C.F.R. §§ 106.37(c), 106.41(c) (2015); see also A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413–71,418 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

68. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,414.

69. *Id.* at 71,418.

70. 465 U.S. 555 (1984).

71. *Id.* at 573–74.

72. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (2012)).

nondiscrimination requirements of Title IX applied to all aspects of any institution that received funds, even if those funds were only directed to specific programs or activities within the institution.⁷³ In rejecting the Supreme Court's interpretation of Title IX, Congress once again showed its commitment to promoting the equality of collegiate athletic opportunities for men and women.⁷⁴

Although challenges by schools and interest groups persisted, Title IX has been successful in increasing athletic opportunities for women.⁷⁵ As of the end of the 2015–16 academic year, there were over 200,000 women participating in collegiate athletics, and women constituted 46.7 percent of Division I athletes.⁷⁶ Still, women's participation remains below their proportional enrollment, and colleges continue to spend more on men's sports, including greater recruiting expenditures and more scholarships for male athletes.⁷⁷ As a result of these continuing inequalities, the active and persistent enforcement of Title IX remains critical to achieving its goal of sexual equality in collegiate athletic opportunities.

C. Antitrust Law and the Sherman Act

Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."⁷⁸ However, every contract can be considered a restraint of trade in that it binds parties and limits their ability to act in certain ways. Consequently, the Supreme Court has interpreted the Sherman Act "to prohibit only *unreasonable* restraints of trade."⁷⁹

Before reaching the question of whether a restraint of trade is unreasonable, however, there are two threshold issues that determine whether Section 1 of the Sherman Act applies to the challenged conduct. First, the Sherman Act covers only commercial activity.⁸⁰ Commerce is defined broadly by the courts and includes "almost every activity from which

73. See 20 U.S.C. § 1687 (2012).

74. Samuels & Galles, *supra* note 22, at 23.

75. See *id.* at 24, 33.

76. See ERIN IRICK, NCAA, STUDENT-ATHLETE PARTICIPATION, 1981-82 – 2015-16: NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 8 (2016).

77. Samuels & Galles, *supra* note 22, at 33–34.

78. 15 U.S.C. § 1 (2012).

79. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984) (emphasis added).

80. Agnew v. NCAA, 683 F.3d 328, 338 (7th Cir. 2012) (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940)).

[a party] anticipates economic gain.”⁸¹ Second, Section 1 only applies to concerted action, as it is “inherently . . . fraught with anticompetitive risk.”⁸² Thus, independent action does not fall within the scope of Section 1. Once it has been established that the challenged conduct involves commercial activity and concerted action, courts move to the question of whether the conduct is an unreasonable restraint of trade.

To determine whether an agreement unreasonably restrains trade, courts have developed three related, but ultimately different, modes of analysis: (1) Rule of Reason, (2) *per se*, and (3) quick look.⁸³ Each applies in varying circumstances.

1. Rule of Reason

The Rule of Reason is the default approach to analyzing antitrust claims, including those brought against the NCAA. It follows a three-step burden shifting framework to determine if an agreement constitutes an unreasonable restraint of trade.⁸⁴

First, the plaintiff has the burden of showing that the agreement “produces significant anticompetitive effects within a relevant market.”⁸⁵ Thus, the plaintiff must first sufficiently identify a relevant market, which consists of both a product and geographic market. The product market is comprised of the goods or services whose uses are reasonably interchangeable and are subject to cross-elasticity of demand.⁸⁶ The geographic market includes the area in which buyers can find “alternative sources of supply.”⁸⁷ Once a relevant market has been defined, the plaintiff must establish the challenged restraint’s significant anticompetitive effects in the market. This may be done “indirectly by proving that the defendant possessed the requisite market power within [the]

81. *Id.* (quoting 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 260b, at 250 (2d ed. 2000)).

82. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984)).

83. *See Agnew*, 683 F.3d at 335–36.

84. *See id.*

85. *O’Bannon v. NCAA*, 802 F.3d 1049, 1070 (9th Cir. 2015) (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

86. *Tanaka*, 252 F.3d at 1063 (quoting *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)).

87. *See, e.g., id.* (quoting *Oltz*, 861 F.2d at 1446).

defined market or directly by showing actual anticompetitive effects, such as control over output or price.”⁸⁸

If the plaintiff meets this initial burden, the onus shifts to the defendant to demonstrate the restraint’s procompetitive effects.⁸⁹ Legitimate procompetitive justifications include widening consumer choice,⁹⁰ enhancing product or service quality,⁹¹ preserving or increasing consumer demand,⁹² and increasing output or operating efficiencies.⁹³ Social welfare justifications are not usually deemed procompetitive,⁹⁴ but there may be limited exceptions.⁹⁵ Defendants must not only show the challenged restraint is intended to produce the procompetitive effects, but must also demonstrate that the restraint actually “furthers the legitimate objectives.”⁹⁶

Finally, if the defendant establishes legitimate procompetitive justifications for the restraint, the burden shifts once again to the plaintiff to show “that any legitimate objectives can be achieved in a substantially less restrictive manner.”⁹⁷ In the Ninth Circuit, to be sufficient, any less restrictive alternative “must be ‘virtually as effective’ in serving the

88. *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998). Market power is defined as the “ability to raise prices above those that would be charged in a competitive market.” *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984).

89. *O’Bannon*, 802 F.3d at 1070.

90. *See Bd. of Regents*, 468 U.S. at 102 (finding that rules that maintain college football as a distinct product from professional sports “widen consumer choice” by providing a product that might otherwise be unavailable and “can be viewed as procompetitive”).

91. *See County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) (holding a hospital’s training requirements for doctors who perform C-sections had the legitimate procompetitive justification of improving patient care).

92. *See O’Bannon*, 802 F.3d at 1073 (holding that the NCAA’s prohibitions on student-athlete compensation serve a procompetitive purpose because they maintain the amateur nature of college sports, which helps preserve consumer demand).

93. *See Law*, 134 F.3d at 1023.

94. *See, e.g., FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462–64 (1986) (rejecting the procompetitive justification offered by a group of dentists that their policy of refusing to provide x-rays to dental insurers benefited the public by ensuring insurance companies do not erroneously decline to pay for needed treatment on an inadequate basis for diagnosis); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 684–85, 694–95 (1978) (rejecting the procompetitive justification offered by a society of engineers that its ban on price competition benefited the public safety by preventing the poor quality of work that would result from contracts awarded to the lowest bidder).

95. *See infra* Part IV.

96. *United States v. Brown Univ.*, 5 F.3d 658, 679 (3d Cir. 1993).

97. *O’Bannon*, 802 F.3d at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

procompetitive purposes . . . and ‘without significantly increased cost.’”⁹⁸ Further, the alternative must be “*substantially* less restrictive,” meaning courts generally will not make marginal adjustments or micromanage parties’ conduct.⁹⁹ However, the analysis of less restrictive alternatives varies greatly across federal circuits,¹⁰⁰ with some circuits requiring only that the plaintiff show the restraint was not “fairly necessary”¹⁰¹ or “not reasonably necessary”¹⁰² to achieve the legitimate procompetitive objectives. The D.C. Circuit and the Seventh Circuit also differ by “plac[ing] the burden on the defendant to prove the absence of less restrictive alternatives.”¹⁰³ If a less restrictive alternative is established, the inquiry ends, and the court finds the defendant’s conduct to be an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

2. Per Se

The per se rule is applied to hold a restraint illegal “when ‘the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.’”¹⁰⁴ In that situation, the “restraint is presumed unreasonable without inquiry into the particular market context in which it is found.”¹⁰⁵ There are several different types of agreements that courts usually presume to be unreasonable restraints under the per se approach, including price-fixing,¹⁰⁶ output limitations,¹⁰⁷ division of markets,¹⁰⁸ and group boycotts.¹⁰⁹

98. *Id.* at 1074 (quoting *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

99. *See id.* at 1075 (emphasis added).

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

101. *See, e.g., Am. Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975) (quoting *Anderson v. Am. Auto. Ass’n*, 454 F.2d 1240, 1246 (9th Cir. 1972)).

102. *See, e.g., Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005).

103. Feldman, *supra* note 100, at 583.

104. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979)).

105. *Id.*

106. *See United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309–10 (1956).

107. *See Bd. of Regents*, 468 U.S. at 100 (stating that output limitations “are ordinarily condemned as a matter of law under an ‘illegal *per se*’ approach”).

108. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608–09 (1972).

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

However, there are certain situations where one of these types of agreements is in place, but the court will still conduct an abbreviated Rule of Reason analysis known as the quick look.¹¹⁰

3. Quick Look

The quick look analysis is a shortened version of the Rule of Reason. It is “used where the per se framework is inappropriate, but where ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of . . . an agreement,’ and proof of market power is not required.”¹¹¹ Under this analysis, because of the nature of the restraint, the court is able to quickly conclude that the restraint has significant anticompetitive effects within the relevant market without a detailed inquiry.¹¹² The court then proceeds to the question of whether the defendant is able to show any procompetitive effects of the restraint.¹¹³ If the defendant demonstrates legitimate procompetitive justifications, then the analysis proceeds to less restrictive alternatives as in the Rule of Reason.¹¹⁴

II. ANTITRUST CLAIMS AND THE NCAA

A. History of NCAA Antitrust Cases

There is a long history of antitrust claims against the NCAA challenging various rules and restrictions. This history has been dominated by the influence of the Supreme Court’s *NCAA v. Board of Regents of the University of Oklahoma* (*Board of Regents*)¹¹⁵ decision in 1984. In *Board of Regents*, the University of Oklahoma and the University of Georgia challenged the NCAA’s television plan that granted exclusive rights to broadcast college football games to two networks, greatly limited the number of games each

110. See, e.g., *Bd. of Regents*, 468 U.S. at 100–01 (deciding not to apply the per se rule to an NCAA restriction that limited the output of college football broadcasts, because the NCAA and member institutions must be able to enforce some horizontal restraints in order for college sports to be available at all).

111. *Agnew v. NCAA*, 683 F.3d 328, 336 (7th Cir. 2012) (alteration in original) (quoting *Bd. of Regents*, 468 U.S. at 109).

112. However, the plaintiff must still show the existence of a relevant market. See *Agnew*, 683 F.3d at 337.

113. See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (citing *Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)).

114. See *Agnew*, 683 F.3d at 336.

115. 468 U.S. 85 (1984).

network could broadcast, and limited the number of times a school could appear on national television to four within a two-year period.¹¹⁶ The Court held that the NCAA's plan violated Section 1 of the Sherman Act.¹¹⁷ Although the case did not involve NCAA rules related to the regulation of student-athletes, the decision had three important implications for future challenges to NCAA compensation rules.

First, by subjecting the NCAA to antitrust scrutiny, the Court implicitly established that the NCAA is not a single entity and that its actions constitute concerted action that falls within the scope of Section 1. This is evidenced by the Court's statement that "[b]y participating in an association which prevents member institutions from competing against each other on the basis of price or the kind of television rights that can be offered to broadcasters, the NCAA member institutions have created...an agreement among competitors."¹¹⁸ Thus, by participating in the NCAA, schools have formed an agreement that is sufficient to subject NCAA actions to antitrust scrutiny. This is consistent with the treatment of professional sports leagues.¹¹⁹ Consequently, the threshold question of whether NCAA rules constitute concerted action is not an issue for plaintiffs.

The second important holding of *Board of Regents* was that courts should not apply the per se analysis when analyzing the reasonableness of NCAA rules. By restricting the schools' ability to sell their television rights, the NCAA's plan created a limitation on output, which is a type of agreement typically held to be illegal per se as an unreasonable restraint of trade.¹²⁰ Further, the plan effectively negated schools' ability to negotiate the price for the right to broadcast their football games.¹²¹ This is a form of price fixing, which is "perhaps the paradigm of an unreasonable restraint of trade" and would also normally be held illegal under the per se approach.¹²² However, the Court noted that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹²³ Schools must be able to agree to things such as the size of the field, the number of players on a team, and what constitutes a penalty for violent hits.¹²⁴ All of these rules affect how colleges compete. But college football could not exist without such cooperation. Therefore, the Court held that the per se approach

116. *Id.* at 88, 91–94.

117. *Id.* at 88.

118. *Id.* at 99.

119. See Lazaroff, *supra* note 26, at 338 n.40.

120. *Bd. of Regents*, 468 U.S. at 99.

121. *Id.* at 99–100.

122. *Id.* at 100.

123. *Id.* at 101.

124. *Id.*

is inappropriate, and the analysis must take into account any procompetitive justifications the NCAA may offer.¹²⁵ Thus, NCAA restrictions on student-athlete compensation, which normally would have been deemed illegal price fixing agreements under the per se analysis, are now examined under the Rule of Reason, which is sometimes abbreviated under a quick look analysis.

The third significant component of *Board of Regents* is dicta indicating that NCAA rules designed to maintain the amateur nature of college sports are procompetitive. In discussing rules that are necessary for college football to exist, the Court stated, “[i]n order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like.”¹²⁶ The Court reasoned that rules related to the preservation of that character increase consumer choice by creating a product that would otherwise not be available.¹²⁷ In its concluding paragraph, the Court wrote:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.¹²⁸

Not surprisingly, this language has greatly impacted lower courts’ handling of antitrust claims brought against the NCAA. Although it is only dicta, courts have tended to follow the Supreme Court’s suggestion and uphold rules related to student-athlete eligibility¹²⁹ and the preservation of amateurism,¹³⁰ while striking down more economically-related regulations.¹³¹

125. *Id.* at 100, 103.

126. *Id.* at 102.

127. *Id.*

128. *Id.* at 120.

129. *See, e.g., Smith v. NCAA*, 139 F.3d 180, 183–87 (3d Cir. 1998) (affirming dismissal of antitrust challenge to NCAA rules prohibiting student-athletes from playing a sport as a graduate student at a university other than the student’s undergraduate university), *vacated*, 525 U.S. 459 (1999).

130. *See, e.g., Agnew v. NCAA*, 683 F.3d 328, 332 (7th Cir. 2012) (affirming dismissal of antitrust challenge to NCAA rules prohibiting multiyear scholarships and capping the number of scholarships schools could offer); *Banks v. NCAA*, 977 F.2d 1081, 1089–94 (7th Cir. 1992) (affirming dismissal of antitrust challenge to NCAA rules prohibiting student-athletes from entering a professional draft or hiring an agent); *McCormack v. NCAA*, 845 F.2d 1338, 1343–45 (5th Cir. 1988) (affirming dismissal of antitrust challenge to NCAA rules prohibiting student-athlete compensation).

131. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1013–14, 1025 (10th Cir. 1998) (holding that NCAA rules capping the salary of Division I basketball assistant coaches, labeled restricted-earnings coaches, to a total of \$12,000 for the academic year and \$4000 for the summer months violated Section 1 of the Sherman Act); *Metro. Intercollegiate*

In discussing how courts handle challenges to rules relating to student-athletes, it is helpful to distinguish between true eligibility rules and rules about the preservation of amateurism. While courts have not always explicitly defined or used these terms, cases tend to fall in line with the following pattern based on the type of rule being challenged. Eligibility rules are those related to things such as the number of years student-athletes may play, the number of credit hours required each semester, and minimum grade point average requirements. Courts have dismissed challenges to eligibility rules as failing one of the threshold requirements to come under the regulation of the Sherman Act because they are noncommercial. For example, in *Smith v. NCAA*, a volleyball player challenged an NCAA bylaw that prohibited student-athletes from playing a sport as a graduate student at a university other than the student's undergraduate university.¹³² The Third Circuit affirmed dismissal of her complaint because the rule did not involve commercial activity.¹³³ In contrast, amateurism rules are meant to preserve a line of demarcation between college and professional sports by, for example, limiting student-athlete compensation and prohibiting student-athletes from hiring an agent or entering a professional draft. Although amateurism rules are also enforced through loss of a player's eligibility, courts have generally found them to be commercial and within the scope of the Sherman Act.¹³⁴

Having established that NCAA amateurism rules are commercial and subject to antitrust scrutiny, student-athlete plaintiffs have often struggled to identify anticompetitive effects in a relevant market to move past the first step of the Rule of Reason analysis. In 1992, in *Banks v. NCAA*, a Notre Dame football player challenged NCAA rules that prohibited student-athletes from hiring an agent or entering a professional draft.¹³⁵ These rules barred

Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 552 (S.D.N.Y. 2004) (denying the NCAA's motion for summary judgment in an antitrust challenge, brought by the association that ran the NIT, to rules requiring Division I men's college basketball teams to play in the NCAA Tournament if they were invited and preventing teams from playing in more than one postseason tournament).

132. *Smith*, 139 F.3d at 183–84.

133. *See id.* at 185–87.

134. *See, e.g., O'Bannon v. NCAA*, 802 F.3d 1049, 1064–66 (9th Cir. 2015) ("The mere fact that a rule can be characterized as an 'eligibility rule' . . . does not mean the rule is not a restraint of trade . . ."); *Agnew*, 683 F.3d at 340–45. *But see Bassett v. NCAA*, 528 F.3d 426, 433 (6th Cir. 2008) (finding that rules prohibiting improper recruiting inducements to prospective student-athletes were noncommercial). The Ninth Circuit in *O'Bannon* bluntly stated that it "believe[d] *Bassett* was simply wrong on this point." *O'Bannon*, 802 F.3d at 1066.

135. *Banks*, 977 F.2d at 1083–84.

Banks from playing in his last year of eligibility after he signed with an agent and entered the National Football League (NFL) draft, but he was not selected and failed to sign as a free agent.¹³⁶ The Seventh Circuit concluded that, at best, Banks alleged three relevant markets: (1) “NCAA football players who enter the draft” or sign with an agent; (2) NCAA schools; and (3) “the NFL player recruitment market.”¹³⁷ A divided court held that he failed to show how the challenged rules restrained competition in any of the alleged markets and affirmed the district court’s dismissal.¹³⁸ In 2012 the Seventh Circuit decided another NCAA antitrust case, *Agnew v. NCAA*, where two football players contested NCAA bylaws that prohibited multiyear scholarships and capped the total number of scholarships a school could offer.¹³⁹ The only allegation related to a market in the complaint was that “NCAA member institutions compete with each other to attract and enroll highly skilled athletes to their institution for obtaining bachelor’s degrees,” which the court found too vague to constitute the proper identification of a relevant market.¹⁴⁰ Finally, only about a year later, another complaint challenging the same rules at issue in *Agnew*—as well as the NCAA’s prohibition of athletics-based scholarships at Division III schools—was dismissed because the “‘nationwide market for the labor of student athletes’ [was] not legally cognizable.”¹⁴¹ The market definition failed because it included schools which are not reasonably interchangeable, as it grouped all schools in the same market “regardless of material distinctions in division, sport offered by gender, or athletic success.”¹⁴² Similarly, student-athletes

136. *Id.*

137. *Id.* at 1093.

138. *Id.* at 1093–94. The dissent argued that Banks had alleged an anticompetitive effect in the labor market for college football players, in which schools are the purchasers of labor and players are the suppliers. *Id.* at 1095 (Flaum, J., concurring in part and dissenting in part). It reasoned, “[i]f the no-draft rule were scuttled, colleges that promised their athletes the opportunity to test the waters in the NFL draft before their eligibility expired, and return if things didn’t work out, would be more attractive to athletes than colleges that declined to offer the same opportunity.” *Id.* Thus, one component of competition for recruits’ services was removed by the rule. The majority conceded that Banks could have alleged an anticompetitive effect in a relevant market, but that Banks failed to make the dissent’s argument in his complaint. *Id.* at 1091 (majority opinion).

139. *Agnew*, 683 F.3d at 332–33.

140. *Id.* at 346–47.

141. *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1018 (S.D. Ind. 2013).

142. *Id.* at 1021–22.

were lumped together despite “differences such as gender and sport played.”¹⁴³

Even when student-athletes have been able to meet their initial burden by establishing anticompetitive effects in a relevant market, courts have been quick to hold that the challenged NCAA rules are procompetitive, citing the *Board of Regents* dicta as support for their decision. For example, an alumnus brought suit on behalf of Southern Methodist University, its alumni, current students, several football players, and several cheerleaders after the university’s football program was given the death penalty (suspension of the entire football program) for the 1987 season for violating player compensation restrictions.¹⁴⁴ The Fifth Circuit stated that it had “little difficulty in concluding that the challenged restrictions are reasonable.”¹⁴⁵ Under the Rule of Reason, the court held the compensation rules were procompetitive because they maintained college football as a distinct product from the NFL and helped maintain academics as a focus for student-athletes.¹⁴⁶ Similarly, even though *Banks* dismissed the student-athletes’ claims without having to perform a full Rule of Reason analysis, the court strongly implied the rules would have been upheld anyway due to their procompetitive nature.¹⁴⁷ Consequently, it has been extremely difficult for student-athletes to successfully challenge NCAA bylaws that maintain strict limits on financial aid and compensation.

However, there have been some successes recently that indicate a possible change in courts’ attitudes toward the application of antitrust law to NCAA rules. In a class action in *White v. NCAA*, college football and basketball athletes alleged that the NCAA’s cap on financial aid, which limited aid to a grant-in-aid, violated the Sherman Act.¹⁴⁸ A grant-in-aid consists of financial aid for tuition, room and board, and books.¹⁴⁹ The plaintiffs argued that without this restriction, schools would offer financial aid up to the full cost of attendance, which would include additional aid for travel, laundry, insurance, and other incidental expenses.¹⁵⁰ The court denied

143. *Id.* at 1022.

144. *McCormack v. NCAA*, 845 F.2d 1338, 1340 (5th Cir. 1988).

145. *Id.* at 1344.

146. *Id.* at 1344–45.

147. *Banks v. NCAA*, 977 F.2d 1081, 1089–91 (7th Cir. 1992) (“[T]he no-draft rule and similar NCAA rules serve to maintain the clear line of demarcation between college and professional football.”).

148. *White v. NCAA*, No. CV 06-999-RGK (MANx), 2006 U.S. Dist. LEXIS 101366, at *1–2 (C.D. Cal. Sept. 20, 2006).

149. *Id.* at *1.

150. *Id.* at *1–2.

the NCAA's motion to dismiss, finding the complaint was sufficient to allege an anticompetitive effect that operated in the plaintiffs' defined relevant markets: Division I-A football schools and Division I basketball schools in the United States who compete to attract recruits.¹⁵¹ In 2008, the NCAA settled the case, agreeing to (1) make \$218 million available for Division I schools to use for the benefit of student-athletes for the subsequent five years; (2) make \$10 million available for claims by qualified former student-athletes; (3) permit Division I schools to provide comprehensive health insurance to student-athletes; and (4) permit schools to provide insurance against sports-related injuries to student-athletes.¹⁵² Although the NCAA was allowed to maintain its grant-in-aid limit,¹⁵³ the case was a victory for student-athletes and paved the way for the next case, *O'Bannon v. NCAA*.¹⁵⁴

B. *O'Bannon v. NCAA*

Only a year after the *White* settlement, current and former Division I men's football and basketball players brought suit against the NCAA, Electronic Arts, Inc. (EA),¹⁵⁵ and Collegiate Licensing Company (CLC)¹⁵⁶ for violations of the Sherman Act.¹⁵⁷ The plaintiffs alleged the NCAA, EA, and CLC engaged in anticompetitive conduct to prevent student-athletes from receiving compensation for the use of their names, images, and likenesses (NILs).¹⁵⁸ With respect to the NCAA specifically, the plaintiffs alleged that NCAA rules that prohibit student-athletes from receiving compensation restrain schools from competing for recruits by offering a "portion of the revenue they receive from . . . broadcasting and videogame licenses."¹⁵⁹

In 2013, the plaintiffs reached a settlement agreement with EA and CLC,¹⁶⁰ leaving the NCAA as the lone defendant. Shortly after the settlement,

151. *Id.* at *6–10.

152. Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 77 (2011).

153. *Id.*

154. 802 F.3d 1049 (9th Cir. 2015).

155. EA is a videogame maker that used to contract with the NCAA and schools to use their intellectual property in college football and basketball games that it produced yearly. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

156. CLC licensed NCAA and several member schools' and conferences' trademarks. *Id.*

157. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1133–34 (N.D. Cal. 2014).

158. *Id.* at 1134.

159. *Id.* at 1138.

160. *Id.* at 1134. EA and CLC settled with the plaintiffs from both parties for a total of \$40 million. Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 31, 2014),

the court denied the NCAA's motion to dismiss.¹⁶¹ The court then certified a class of plaintiffs for injunctive relief, but denied the certification of a damages class.¹⁶² As a result, the case continued solely for the purpose of seeking an injunction against the NCAA's rules prohibiting student-athletes from receiving payment for the use of their NILs.

In 2014, the court ruled on cross motions for summary judgment, denying the NCAA's motion and granting in part the plaintiffs' motion.¹⁶³ In its motion for summary judgment, the NCAA offered five procompetitive justifications for its rules prohibiting student-athletes from receiving compensation for their NILs: "(1) the preservation of amateurism in college sports; (2) promoting competitive balance among Division I teams; (3) the integration of education and athletics; (4) increased support for women's sports and less prominent men's sports; and (5) greater output of Division I football and basketball."¹⁶⁴ After analyzing each potential justification, the court found that summary judgment was only appropriate for one.¹⁶⁵ With respect to the NCAA's argument that its restraints are procompetitive because they allow schools to provide increased support for women's sports and less prominent men's sports, the court granted summary judgment in favor of the plaintiffs.¹⁶⁶ The court provided three reasons for this ruling. First, it stated that the benefits to the unrelated markets for women's and less prominent men's sports cannot justify a restraint to competition in the market for Division I football and men's basketball.¹⁶⁷ Second, the court held that the benefit to social welfare that results from supporting other collegiate sports is not considered a legitimate procompetitive justification under antitrust law.¹⁶⁸ Third, the court noted that there are less restrictive alternatives through which the NCAA could provide support to women's and

http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm [<http://perma.cc/J6J3-FBN7>].

161. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1009 (N.D. Cal. 2013).

162. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 U.S. Dist. LEXIS 160739, at *32, *39, *41 (N.D. Cal. Nov. 8, 2013).

163. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1155 (N.D. Cal. 2014).

164. *Id.* at 1146.

165. *Id.* at 1146–52.

166. *Id.* at 1151–52.

167. *Id.* at 1151.

168. *Id.*

less prominent men's sports.¹⁶⁹ With many issues left unresolved, the case proceeded to trial.

After a lengthy bench trial, the court found that the NCAA had violated the Sherman Act.¹⁷⁰ Applying the Rule of Reason, the court first held the plaintiffs had satisfied their initial burden of establishing significant anticompetitive effects in a relevant market. The plaintiffs established the presence of a "college education market" in which schools on a national level compete to sell recruits a higher education and the chance to play at a Football Bowl Subdivision (FBS) school or on a Division I¹⁷¹ men's basketball team in exchange for recruits' athletic services and permission for the schools to use their NILs during their enrollment.¹⁷² The court then found significant anticompetitive effects within the market under two alternative theories. The more intuitive approach the court described views the schools as the buyers of recruits' athletic services and NIL rights. The NCAA's restraint on compensation harms competition because it does not allow schools to engage in price competition by offering to pay more for recruits' NIL rights.¹⁷³ Thus, the plaintiffs had met their initial burden.

This shifted the burden to the NCAA to show that the restraints were procompetitive. The court rejected the NCAA's arguments that the restraints were necessary to preserve the popularity of college sports by maintaining a competitive balance and that the restraints helped increase the output of games played, finding insufficient evidence to support either of the NCAA's claims.¹⁷⁴ However, the court did credit two of the NCAA's procompetitive justifications. Although skeptical of the NCAA's changing definition of amateurism, the court found that restrictions on payments play a small part in maintaining consumer demand by preserving the amateur nature of

169. *Id.* at 1151–52.

170. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

171. "Among the three NCAA divisions, Division I schools generally have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships." *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> [<http://perma.cc/97SK-6YTQ>]. Division I is also further divided solely with respect to football, with the highest level being the Football Bowl Subdivision (FBS), which is comprised of schools that participate in bowl games. *Id.*

172. *O'Bannon*, 7 F. Supp. 3d at 986.

173. *Id.* at 991–92. The alternative conceptual theory under which anticompetitive effects were found by the court considers schools as sellers of educational and athletic opportunities that have formed a price fixing agreement to charge all student-athletes the same price because they cannot offer a "cash rebate" for use of a player's NIL. *Id.* at 988.

174. *Id.* at 1001–04.

college sports.¹⁷⁵ In addition, the court found that the restrictions play a very narrow role in improving the quality of educational services provided to student-athletes by helping to prevent them “from being cut off from the broader campus community” due to payments of large sums of money.¹⁷⁶ Thus, the NCAA met its burden under the Rule of Reason to show the procompetitive effects of the challenged restraints.

The burden then shifted back to the plaintiffs to establish a less restrictive alternative.¹⁷⁷ The court found the NCAA could achieve its procompetitive objectives using less restrictive alternatives by allowing student-athletes to receive aid up to the full cost of attendance and by permitting schools to “hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.”¹⁷⁸ As a result, the court issued an injunction prohibiting the NCAA from limiting aid to student-athletes below the cost of attendance and prohibiting the NCAA from preventing schools from offering to deposit up to \$5000 in licensing revenue per year in trust for student-athletes.¹⁷⁹

Predictably, the NCAA appealed the decision, and in 2015, the Ninth Circuit partially upheld the district court’s ruling. With respect to the first two steps of the Rule of Reason, the Ninth Circuit agreed with the district court’s analysis, finding that the NCAA rules restricting compensation “have a significant anticompetitive effect on the college education market.”¹⁸⁰ Further, the Ninth Circuit credited the NCAA’s procompetitive justifications of amateurism and the integration of athletics and academics.¹⁸¹ This necessitated an analysis of less restrictive alternatives, which is where the Ninth Circuit’s decision diverged from the district court’s.

The Ninth Circuit affirmed the portion of the injunction that required schools be allowed to provide aid up to the full cost of attendance, but reversed the part of the lower court’s holding that allowed schools to set up a trust for athletes for up to \$5000 per year in compensation for use of their NILs.¹⁸² The Ninth Circuit did not believe that allowing student-athletes to be paid for use of their NILs was as effective in preserving amateurism as not

175. *Id.* at 999–1001.

176. *Id.* at 980, 1002–03.

177. *Id.* at 1004–05.

178. *Id.* at 1005.

179. *Id.* at 1007–08.

180. *O’Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015).

181. *Id.* at 1072–73.

182. *Id.* at 1079.

allowing any payment, even if only a small sum was placed in trust for the players.¹⁸³ The court stated that “[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”¹⁸⁴ Thus, the NCAA was found to have violated the Sherman Act and required to permit schools to provide aid up to the full cost of attendance, but nothing more.

C. Pending Antitrust Litigation Against the NCAA

Hoping to build on the partial victory in *O'Bannon*, several antitrust lawsuits are currently pending against the NCAA in the Northern District of California in front of Judge Claudia Wilken, who ruled in the *O'Bannon* district court decision.¹⁸⁵ One lawsuit was originally brought by Shawne Alston, a former West Virginia football player.¹⁸⁶ Consolidated with several other suits, it now includes plaintiffs representing college football and men's and women's basketball players from the defendant conferences.¹⁸⁷ In addition to the NCAA, the Alston case has named ten FBS conferences and the Western Athletic Conference as defendants.¹⁸⁸ The other case is led in part by former Clemson football player Martin Jenkins.¹⁸⁹ The Jenkins case includes football and men's basketball players and has named the Power Five conferences¹⁹⁰ as defendants along with the NCAA.¹⁹¹ The Jenkins case has

183. *Id.* at 1076.

184. *Id.* at 1078.

185. Steve Berkowitz, *Court Filing: NCAA, Conferences Say Scholarships Could be Reduced*, USA TODAY (May 1, 2015, 1:16 AM), <http://www.usatoday.com/story/sports/college/2015/05/01/ncaa-suit-shawne-alston-martin-jenkins-kessler-nigel-hayes-claudia-wilken/26685565> [http://perma.cc/V2Q6-CLQ3].

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. The Power Five conferences are the five college conferences (Atlantic Coast Conference, Big 10 Conference, Big 12 Conference, Pacific 12 Conference, and Southeastern Conference) that generally have the most competitive athletic programs and generate the most revenue from sports. See Dennie, *supra* note 27, at 136 & n.320; Jon Solomon, *Power Five Conferences See Revenue Grow by 33 Percent in One Year*, CBS SPORTS (May 27, 2016), <http://www.cbssports.com/college-football/news/power-five-conferences-see-revenue-grow-by-33-percent-in-one-year> [http://perma.cc/L8Q9-ZYPE].

191. Berkowitz, *supra* note 185.

not been consolidated with the other suits, but they are all being briefed together.

The litigation has the potential to fundamentally change the nature of college sports. Instead of merely seeking the right for student-athletes to be paid for use of their NILs, the plaintiffs seek an injunction enjoining NCAA rules that limit the amount of aid schools can provide to student-athletes.¹⁹² This would create a free market in which schools would be allowed to bid for recruits and pay student-athletes for their athletic services.¹⁹³ In March 2018, the court ruled on the parties' cross motions for summary judgment, narrowing the issues to be decided at trial.¹⁹⁴ Once again, the court will have to determine whether the NCAA can establish procompetitive justifications for its compensation restrictions,¹⁹⁵ and if so, whether the plaintiffs can show that less restrictive alternatives exist.¹⁹⁶ The rest of this Comment examines how courts should respond to this type of antitrust claim against the NCAA.

192. *Jenkins v. NCAA (In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.)*, 311 F.R.D. 532, 536 (N.D. Cal. 2015).

193. The plaintiffs have also suggested that after enjoining the NCAA from prohibiting compensation for student-athletes, individual conferences could develop new rules for limiting the benefits that schools within the conference are permitted to provide to student-athletes. Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 4, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, Nos. 4:14-md-02541-CW, 4:14-cv-02758-CW, 2017 WL 3525667 (N.D. Cal. filed Aug. 11, 2017). This would create competition among the conferences to attract the best players and would give student-athletes the benefits of competition that antitrust law is meant to promote. *See id.* at 6.

194. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, Nos. 14-md-02541-CW, 14-cv-02758-CW (N.D. Cal. Mar. 28, 2018).

195. The remaining procompetitive justifications to be argued at trial are the same as those credited in *O'Bannon*: the preservation of the popularity of college sports by maintaining the NCAA's current definition of amateurism and the integration of academics and athletics. *Id.* at 22–25.

196. The plaintiffs have offered two new less restrictive alternatives. First, the plaintiffs propose "allowing the Division I conferences, rather than the NCAA, to set the rules regulating education and athletic participation expenses that the member institutions may provide." *Id.* at 27. This would create competition among conferences "to attract student-athletes while still maintaining the popularity of college sports and balancing the integration of academics and athletics." *Id.* Second, the plaintiffs suggest permitting schools to provide unlimited payments or non-cash benefits as long as they are "tethered to educational expenses" or "incidental to athletic participation" because the NCAA already permits payments and benefits in these two categories above the cost of attendance. *Id.* at 30.

III. COURTS SHOULD REJECT THE NCAA'S PREVIOUSLY OFFERED PROCOMPETITIVE JUSTIFICATIONS

After *O'Bannon*, the NCAA will continue to rely on the two procompetitive justifications that the court credited: (1) the preservation of amateurism, and (2) the integration of academics and athletics.¹⁹⁷ In upcoming challenges to NCAA compensation restrictions, courts should reject both of these justifications. Ample evidence shows that NCAA rules do not preserve the popularity of college sports by maintaining amateurism and that they fail to facilitate the integration of academics and athletics. Before discussing why evidence indicates the NCAA's offered procompetitive justifications should fail, it is worth noting that the influential dicta in *Board of Regents* should no longer be given such deference in courts' rulings.

A. *Board of Regents* Dicta Is Not Controlling

As noted earlier, there is powerful-sounding dicta in the seminal case of *Board of Regents*,¹⁹⁸ which seems to indicate that NCAA rules relating to amateurism are procompetitive and reasonable under the Sherman Act. Perhaps most damaging to student-athletes' antitrust claims is the Supreme Court's statement that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."¹⁹⁹ However, there are two reasons this language should largely be disregarded when assessing current challenges to NCAA compensation restrictions.

First, the Supreme Court's statements are dicta and thus do not bind lower courts. As *O'Bannon* recognized, while dicta from the Supreme Court should not be treated lightly, it is at most informative about NCAA rules relating to amateurism.²⁰⁰ *Board of Regents* addressed a challenge to the

197. See, e.g., Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 5, *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, Nos. 4:14-md-02541-CW, 4:14-cv-02758-CW, 2017 WL 3525667 (N.D. Cal. filed Sept. 29, 2017) ("As shown below, the record in *this* case, standing alone, contains substantial evidence that the NCAA rules Plaintiffs challenge are procompetitive because, among other things, they help to preserve the popularity of college sports with consumers and assist schools in integrating academics and athletics.").

198. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

199. *Id.* at 102.

200. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1063–64 (9th Cir. 2015).

NCAA's television plan for college football.²⁰¹ The Court was not investigating any rule that related to student-athletes or the amateur nature of college sports, and its remarks regarding compensation restrictions were not based on findings regarding the relationship between the popularity of college sports and their amateur nature. Under the Rule of Reason, the NCAA bears the burden of showing that its restraints are procompetitive, and dicta from the Supreme Court should not lessen that burden.

Moreover, *Board of Regents* was decided and written on the basis of the college football and men's basketball market in 1984. It has been over thirty years since the decision, and the commercialization of college sports has progressed dramatically. In *Board of Regents*, the deal at issue covered football broadcasts for all of Division I, II, and III for four years and was worth a total of about \$150 million.²⁰² In contrast, in the 2014–15 fiscal year, the Southeastern Conference (SEC) alone made \$476 million from football bowl games, the NCAA Tournament, and television deals.²⁰³ The Big 12 Conference, which earned the least out of the Power Five conferences, made \$253 million in the same year.²⁰⁴ In 2010, the NCAA agreed to a fourteen-year deal worth more than \$11 billion “with CBS and Turner Sports for the rights to broadcast the NCAA basketball tournament.”²⁰⁵ In addition, in 2012, ESPN agreed to pay \$5.64 billion for the right to broadcast the College Football Playoff for twelve years.²⁰⁶ As a result of such enormous change in the landscape of college sports, the Supreme Court's remarks concerning the importance of not paying student-athletes should not be considered determinative.

Accordingly, the NCAA must be required to prove its compensation rules actually provide a procompetitive benefit. Courts should not simply assume that a benefit exists as they have done so often in the past, particularly with respect to the value of amateurism.²⁰⁷

201. *Bd. of Regents*, 468 U.S. at 88, 91–94.

202. *See id.* at 92 & n.9, 93.

203. Chris Smith, *The SEC Is Finally the Most Valuable Conference in College Sports*, FORBES (July 20, 2015, 11:53 AM), <http://www.forbes.com/sites/chris-smith/2015/07/20/the-sec-is-finally-the-most-valuable-conference-in-college-sports/#5fbf2bc1349e> [<http://perma.cc/5E6G-ZWUH>].

204. *Id.*

205. Brief for Martin Jenkins and Nigel Hayes, and Alec James as Amici Curiae in Support of Plaintiff-Appellee at 18, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068).

206. *Id.* at 19.

207. *See* Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 360 (2005). The district court

B. NCAA Rules Do Not Increase Consumer Demand by Preserving Amateurism

Under the NCAA's current principle of amateurism, NCAA bylaws state: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."²⁰⁸ According to NCAA President Mark Emmert, this means that student-athletes may be paid only enough to cover the "legitimate costs" of attending school.²⁰⁹ To establish a procompetitive justification, the NCAA has the burden of proving that its compensation rules maintain the popularity of college sports by preserving this definition of amateurism. Despite minimal evidence to support its conclusion, the court in *O'Bannon* found that the NCAA had met this burden.²¹⁰ There is strong evidence, however, based on other formerly-amateur sports leagues and the NCAA's arbitrary and constantly changing definition of amateurism, that NCAA compensation rules do not affect consumer demand, and thus, that this justification should be discredited in future cases.

In a wide variety of other sporting contexts, transitioning from an amateur ideal to a more professional model has not decreased consumer demand for the product and has instead resulted in increased popularity. Prior to the 1970s, the International Olympics Committee (IOC) strictly adhered to a concept of amateurism and prohibited professional athletes from participating in the Olympics.²¹¹ In a situation strikingly similar to the current state of college sports, the IOC's position on amateurism became untenable due to increased commercialization and lucrative television deals, increased expense and time required for training, constant scandals involving the payment of popular athletes, and an inability to consistently enforce its

in *O'Bannon* was the first to actually receive evidence and make findings regarding the impact of amateurism on the popularity of college sports. However, as described *infra*, this evidence was inconclusive and should not have been deemed sufficient to satisfy the NCAA's burden.

208. NCAA *supra* note 1, at art. 2.9.

209. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1075 (9th Cir. 2015).

210. *Id.* at 1073.

211. Stephen Wagg, *Tilting at Windmills? Olympic Politics and the Spectre of Amateurism*, in THE PALGRAVE HANDBOOK OF OLYMPIC STUDIES 321, 331 (Helen Jefferson Lenskyj & Stephen Wagg eds., 2012).

amateurism rules.²¹² As a result, the IOC slowly abolished its restrictions on professional athletes and by the mid-1990s, professional athletes were allowed to compete in every sport except for boxing.²¹³ The Olympics have thrived since the change, despite predictions from supporters of amateurism that the change would hurt the Olympics's popularity.²¹⁴ Sponsorship revenue skyrocketed from \$30 million for the mostly amateur 1980 games to \$840 million for the entirely professional 2002 games.²¹⁵ In addition, viewership continues to rise²¹⁶ and the value of broadcasting rights has increased even accounting for inflation.²¹⁷ Similarly, television revenue continued to increase after the International Rugby Board switched from an amateur model to professionalism in 1995.²¹⁸ Finally, tennis events also increased in popularity after players were allowed to accept payment.²¹⁹ The lack of any negative effect on consumer demand when other sports leagues have stopped adhering to a concept of amateurism strongly indicates that the popularity of college sports would likewise remain strong if student-athletes were allowed to accept payment. In fact, the plaintiffs in the current antitrust case against the NCAA have presented survey evidence demonstrating exactly this finding.²²⁰

212. *Id.*; see also Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, THE ATLANTIC (July 25, 2012), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275> [<http://perma.cc/P942-BH8X>]. Despite these strong parallels, the Ninth Circuit summarily rejected the comparison of college sports to the Olympics, stating that the “Olympics have not been nearly as transformed by the introduction of professionalism as college sports would be.” *O’Bannon*, 802 F.3d at 1077. The court offered no further explanation as to why that would be the case.

213. Hruby, *supra* note 212.

214. *Id.* (noting that one defender of maintaining amateurism in the Olympics stated that “if we water down the rules now, the [Olympics] will be destroyed within eight years”).

215. *Id.*

216. See *London Olympics 2012 Ratings: Most Watched Event in TV History*, HUFF. POST (Aug. 13, 2012, 5:40 PM), http://www.huffingtonpost.com/2012/08/13/london-olympics-2012-ratings-most-watched-ever_n_1774032.html [<http://perma.cc/KWM7-TD6M>].

217. See Brief of Amici Curiae Economists and Professors of Sports Management in Support of Plaintiffs-Appellees and in Support of Affirmance at 13–14, *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos. 14-16601, 14-17068).

218. Pierre Chaix, *The Economics of Professional Rugby*, in HANDBOOK ON THE ECONOMICS OF SPORT 573, 582 (Wladimir Andreff & Stefan Szymanski eds., 2006).

219. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 977 (N.D. Cal. 2014), *aff’d in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

220. Plaintiffs’ Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 10–12, *supra* note 193, (“[T]he only consumer survey evidence in the record measuring future demand was conducted by

Moreover, the NCAA has previously violated its own principle of amateurism by allowing student-athletes to receive payment beyond the costs of attending school, yet consumer demand has not reacted negatively. After the NCAA entered into a \$20 million settlement in a lawsuit brought by student-athletes regarding the use of their NILs in videogames, the NCAA explicitly allowed then-enrolled student-athletes to receive funds connected with the settlement without losing eligibility.²²¹ While the NCAA claimed that “[i]n no event do we consider this settlement pay for athletics performance,”²²² it is clear that the student-athletes received the payment as a result of their play. There is no evidence that college sports fans reacted negatively to student-athletes receiving these payments, further demonstrating that consumer demand would not be negatively affected if student-athletes received additional pay.

Further, the NCAA’s definition of amateurism (including what does and does not constitute pay for play) is too malleable to reasonably believe that consumers would suddenly decline to watch college sports if the NCAA’s position on payments merely changed one more time. The NCAA’s definition of amateurism and how amateurism relates to student-athlete compensation has been fluid throughout the NCAA’s history, originally translating to a prohibition on any aid based on athletic ability,²²³ then meaning that aid may be permitted only up to a grant-in-aid,²²⁴ and most recently allowing aid up to the full cost of attendance.²²⁵

Plaintiffs’ expert, Hal Poret. Mr. Poret demonstrates that permitting a wide variety of additional benefits to [student-athletes] would not adversely impact Division I basketball and FBS football viewership and attendance.”). Further, the NCAA’s survey expert has admitted that providing additional aid to student-athletes may actually increase demand for college sports because viewers “may feel positively about colleges doing more for students.” *Id.* at 9.

221. *NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA (June 9, 2014, 10:53 AM), <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit> [<http://perma.cc/XU45-SFMB>].

222. *Id.*

223. See Lazaroff, *supra* note 26, at 333.

224. See *White v. NCAA*, No. CV 06-999-RGK (MANx), 2006 U.S. Dist. LEXIS 101366, at *1 (C.D. Cal. Sept. 20, 2006).

225. While the appeal of the *O’Bannon* ruling was still pending in the Ninth Circuit, the Power Five conferences voluntarily voted almost unanimously to increase allowable aid to student-athletes up to the full cost of attendance. Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 17, 2015), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins [<http://perma.cc/K36X-23AF>]. Thus, the NCAA cannot claim its most recent change to how amateurism relates to athletic aid occurred only as a result of a court mandate.

Even the NCAA's current rules that relate to compensation appear arbitrary, with no clear justifications as to why certain payments do not violate its principle of amateurism even though they go beyond the costs of attending school. For example, student-athletes are permitted to receive monetary awards for earning a medal in the Olympics from the U.S. Olympic Committee (or, for international students, from their country's equivalent body).²²⁶ Under this rule, a University of Texas swimmer from Singapore accepted \$740,000 for a gold medal and maintained his amateur status with the NCAA.²²⁷ In addition, an athlete can compete as a professional athlete and receive payment in one sport while maintaining his amateurism in another sport.²²⁸ So, Russell Wilson could play minor league baseball and receive a \$200,000 bonus after being drafted by the Colorado Rockies, but still maintain his status as an amateur athlete and play quarterback for North Carolina State and then the University of Wisconsin over the next two years.²²⁹ Moreover, the NCAA also permits student-athletes to receive gifts valued up to \$550 when participating in a football bowl game;²³⁰ the costs of transportation, meals, expenses, and lodging for certain family members to attend postseason games;²³¹ and Pell grants, even if the student-athletes' total aid then exceeds the cost of attendance.²³² Finally, tennis players alone are

226. NCAA, *supra* note 1, at art. 12.1.2.1.4.1.2, 12.1.2.1.4.1.3.

227. Jon Solomon, *NCAA Prez Concerned by Texas Swimmer Paid \$740K for Winning Olympic Gold*, CBS SPORTS (Sept. 8, 2016), <http://www.cbssports.com/college-football/news/ncaa-president-concerned-by-texas-swimmer-paid-740000-for-winning-olympic-gold> [https://perma.cc/T7KD-AK95].

228. See NCAA, *supra* note 1, at art. 12.1.3 ("A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport.").

229. See Richard Durrett, *Russell Wilson Driven at an Early Age*, ESPN (Mar. 3, 2014), http://espn.go.com/dallas/mlb/story/_/id/10542054/russell-wilson-baseball-career-joke [http://perma.cc/P4L7-2U8W]; Robby Kalland, *Russell Wilson's Jump From NC State to Wisconsin Has Paid Dividends*, CBS SPORTS (Aug. 3, 2015), <http://www.cbssports.com/college-football/news/russell-wilsons-jump-from-nc-state-to-wisconsin-has-paid-dividends> [http://perma.cc/H726-RV3U].

230. NCAA, *supra* note 1, at art. 16.1.4.1, 213 fig.16-1; see also Robby Kalland, *Bowl Game Gift Rankings: The Best and Worst Gift Packages This Bowl Season*, CBS SPORTS (Dec. 5, 2016), <http://www.cbssports.com/college-football/news/bowl-game-gift-bag-rankings-the-best-and-worst-gift-packages-this-bowl-season> [http://perma.cc/DT3Z-J7V3] (describing one bowl game gift package as including a \$305 Best Buy shopping trip, Timely Watch Co. watch, EA Sports video game, ISlide sandals, and a \$25 Buffalo Wild Wings gift card).

231. NCAA, *supra* note 1, at art.16.6.1.1.

232. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

allowed to earn up to \$10,000 per year before entering college.²³³ With such an arbitrary and ever-changing definition of amateurism, there is no reason to believe consumers would react negatively to discarding amateurism altogether or simply reshaping it to allow student-athletes to be compensated.

Finally, the NCAA has not offered any substantial evidence to prove that the popularity of college sports would suffer if student-athletes were allowed to receive payment. The *O'Bannon* trial was the first case in which the NCAA actually provided evidence for its contentions related to amateurism. The strongest evidence presented by the NCAA at trial was a survey of consumer attitudes regarding college sports tending to show that some disapproved of the payment of student-athletes.²³⁴ However, the survey suffered from serious methodological flaws and the district court discredited its findings.²³⁵ In the current antitrust case against the NCAA, the NCAA has offered self-serving testimony from conference and school officials.²³⁶ In addition, the NCAA is relying on a survey that only asked whether respondents favor or oppose additional benefits for student-athletes without attempting to predict if this would affect the consumer's behavior toward college sports.²³⁷

Even if there were survey evidence that favored the NCAA, the NCAA's arguments would still fail to persuade. The plaintiffs' expert in *O'Bannon*, Daniel Rascher, testified that fans are not good at predicting how they would actually respond to such a change.²³⁸ Opinion surveys about the Olympics's transition to professional athletes and free agency in Major League Baseball

233. NCAA, *supra* note 1, at art. 12.1.2.4.2.1 ("In tennis, prior to full-time collegiate enrollment, an individual may accept up to \$10,000 per calendar year in prize money based on his or her place finish or performance in athletics events.").

234. See *O'Bannon*, 7 F. Supp. 3d at 975.

235. *Id.* at 975–76 (noting that an initial question in the survey "primed respondents to think about . . . illicit payments" rather than sanctioned payments and that internally inconsistent answers showed "some respondents did not understand or did not take seriously some of the survey questions").

236. See Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 43–44, *supra* note 197 (offering the testimony of the American Athletic Conference Commissioner Mike Aresco and University of Michigan President Mary Sue Coleman as to the importance of not paying student-athletes).

237. Plaintiffs' Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 24, *supra* note 193. According to the NCAA, "between 56% and 64% of college sports fans oppose eliminating the restrictions on compensating student-athletes." Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 40, *supra* note 197.

238. See *O'Bannon*, 7 F. Supp. 3d at 976–77.

both showed opposition by fans, yet the popularity of the product increased in both contexts after the change.²³⁹ Thus, the NCAA should not be viewed as having provided sufficient evidence to meet its burden of proving that the preservation of amateurism in college sports maintains consumer demand.

Based on the lack of convincing evidence from the NCAA and strong indications that NCAA compensation rules have little or no effect on the popularity of college sports, future courts should reject the preservation of amateurism as a procompetitive justification. The next Subpart demonstrates why the integration of athletics and academics should similarly be rejected as a procompetitive justification based on a lack of supporting evidence.

C. NCAA Rules Do Not Improve the Integration of Athletics and Academics

The district court in *O'Bannon* found that the NCAA proved its compensation rules play a very limited role in facilitating the integration of academics and athletics, thereby improving the product offered to recruits.²⁴⁰ Based solely on the testimony of university administrators, the court found that paying student-athletes large sums of money could create a wedge between athletes and others on campus and that this was “the only way” restrictions on payment may help the integration of academics and athletics.²⁴¹ The NCAA’s arguments regarding other educational benefits that student-athletes receive were rejected outright, as services such as tutoring and academic support would be offered regardless of whether athletes are compensated.²⁴² The Ninth Circuit accepted the district court’s findings regarding the integration of academics and athletics, as they were not argued on appeal.²⁴³ Again, the district court erred in finding that the challenged NCAA restrictions play even this minimal role in facilitating the integration of academics and athletics because (1) student-athletes are often isolated from the general student body anyway; and (2) prohibiting compensation frequently forces student-athletes to struggle to keep up with simple living expenses, which likely hinders their ability to engage in academics.

Restrictions on compensation have simply not prevented the isolation of student-athletes from the rest of the campus community, especially in football

239. See *id.* at 977 (quoting Daniel Rascher as stating that, “[E]ven though the fans in polls say, ‘Hey, we don’t want the players to make so much money,’ ultimately they continue to watch on television, you know, buy tickets, concessions, the whole thing.”).

240. See *id.* at 980, 1003.

241. *Id.*

242. *Id.* at 1003.

243. *O'Bannon v. NCAA*, 802 F.3d 1049, 1072 (9th Cir. 2015).

and men's college basketball. Studies of student-athletes find they are isolated from the academic community in a variety of ways:

At [the Division I Power Five] level, we have seen a proliferation of new athlete-only workout centers, entertainment lounges, practice facilities and study centers often miles away from “main campus” that structurally isolate athletes from the rest of the university population. This structural isolation can exacerbate other forms of athlete isolation that have been documented in the literature within Division I institutions including feelings of “otherness” due to time demands, racial isolation, and academic isolation in the form of [academic major] clustering.²⁴⁴

This research is backed up by anecdotal accounts of student-athletes who report that they do not feel like a student during their time in school. For example, in the *O'Bannon* case, the court noted that “Ed O'Bannon, the former UCLA basketball star, testified that he felt like ‘an athlete masquerading as a student’ during his college years.”²⁴⁵ Additionally, in an infamous tweet, a quarterback for The Ohio State University, Cardale Jones, expressed his feeling of being disconnected from academics: “Why should we have to go to class if we came here to play FOOTBALL, we ain’t come to play SCHOOL, classes are POINTLESS.”²⁴⁶ Contrary to the district court’s finding, NCAA compensation restrictions do not help integrate student-athletes into the academic community.

Rather than help improve student-athletes’ educational experiences, prohibiting any form of compensation has likely hindered their ability to succeed academically and forced many to struggle to provide for their basic necessities. In the 2010–11 academic year, a study found that the average FBS full scholarship athlete received less funds on which to live than the federal

244. Erianne Weight et al., *Quantifying the Psychological Benefits of Intercollegiate Athletics Participation*, 7 J. ISSUES INTERCOLLEGIATE ATHLETICS 390, 394 (2014) (citations omitted); see also Matthew R. Huml et al., *Additional Support or Extravagant Cost? Student-Athletes’ Perceptions on Athletic Academic Centers*, 7 J. ISSUES INTERCOLLEGIATE ATHLETICS 410 (2014) (documenting the proliferation of academic centers dedicated solely to student-athletes and the detrimental effects they have on student-athletes by cutting them off from other parts of the academic community); Wycliffe W. Njororai Simiyu, *Challenges of Being a Black Student Athlete on U.S. College Campuses*, 5 J. ISSUES INTERCOLLEGIATE ATHLETICS 40, 47 (2012) (noting that black student-athletes often feel “lonely, unwelcome, and isolated,” which greatly hinders their academic engagement and success).

245. *O'Bannon*, 7 F. Supp. 3d at 980–81.

246. Cardale Jones (@cordale10), TWITTER (Nov. 29, 2014, 12:55 PM), <http://twitter.com/cordale10/status/538798414985973760> [<http://perma.cc/QPV6-A2WW>].

poverty line by almost \$2000.²⁴⁷ As a result, student-athletes have often been unable to afford food and other simple things, like going to see a movie.²⁴⁸ While the increase in aid to the full cost of attendance and a new rule that allows schools to provide unlimited meals to student-athletes²⁴⁹ helps alleviate some of the problem, an extra couple of thousand dollars only puts student-athletes slightly above the poverty line. Student-athletes have no time to make extra cash while going to school and working the equivalent of a full-time job in their sport.²⁵⁰ It is difficult to understand how forcing student-athletes to live close to the poverty line improves their education, especially when increased income has consistently been associated with better educational outcomes in college.²⁵¹ Accordingly, the NCAA's argument that its compensation rules improve schools' products by integrating academics and athletics should be rejected as a procompetitive justification because the rules do not actually accomplish this goal.

Thus, evidence indicates that both the preservation of amateurism and the integration of academics and athletics cannot justify the NCAA's payment prohibitions. This would apparently open the door to striking down the NCAA's rules and creating a free market for student-athlete labor. However, there is a legitimate procompetitive justification for the challenged NCAA rules that has not been fully articulated in the past. The next Part of this

247. RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 16 (2011).

248. See, e.g., April Fulton, *Hunger Games: College Athletes Make Play for Collective Bargaining*, NPR: THE SALT (Apr. 21, 2014, 12:37 PM), <http://www.npr.org/sections/thesalt/2014/04/21/304196202/hunger-games-college-athletes-make-play-for-collective-bargaining>; *Ole Miss QB Bo Wallace Says Athletes Go to Bed Hungry*, SPORTS ILLUSTRATED (July 18, 2014), <http://www.si.com/college-football/2014/07/18/ole-miss-bo-wallace-unlimited-meals-stipend>; Maxwell Strachan, *Shane Battier Comes Out in Support of Paying NCAA Players*, HUFF. POST (Mar. 24, 2015, 12:38 PM), http://www.huffingtonpost.com/2015/03/24/shane-battier-ncaa-pay-players_n_6932052.html [<http://perma.cc/CRE8-9MLF>].

249. Paul Myerberg, *NCAA Schools Put Money Where Athletes' Mouths Are*, USA TODAY (Apr. 26, 2015, 4:54 PM), <http://www.usatoday.com/story/sports/college/2015/04/26/unlimited-food-snacks-wisconsin-oregon-ncaa-student-athletes/26405105> [<http://perma.cc/7RKF-S585>].

250. See HUMA & STAUROWSKY, *supra* note 247, at 8.

251. See MARGARET CAHALAN & LAURA W. PERNA, PELL INST. & PENNAHEAD, *INDICATORS OF HIGHER EDUCATION EQUITY IN THE UNITED STATES: 45 YEAR TREND REPORT* 32 (rev. ed. 2015) ("[S]ix-year bachelor's degree attainment rates for first-year, financially dependent students who entered postsecondary education for the first-time in 2003–04 increased with family income, rising from 26 percent for dependent students in the lowest family income quartile, to 36 percent for those in the second quartile, to 46 percent for those in the third quartile, to 59 percent for those in the highest income quartile.").

Comment examines the basis for this new procompetitive justification, as well as why courts should find it persuasive and what it would mean for schools and student-athletes.

IV. SOCIAL WELFARE BENEFITS AS A LEGITIMATE PROCOMPETITIVE JUSTIFICATION FOR NCAA RESTRICTIONS ON COMPENSATION

The analysis so far has focused on the Ninth Circuit case of *O'Bannon* and, in particular, why the two procompetitive justifications that were partially credited in that decision should have been completely rejected. This Part now turns to the decision by the Third Circuit in *United States v. Brown University*.²⁵² While *Brown* did not involve the NCAA or student-athletes, the case can be interpreted as laying out a narrow set of circumstances in which social welfare benefits may serve as a procompetitive justification in antitrust litigation. When applying the reasoning of *Brown* to antitrust challenges to NCAA compensation rules, a new procompetitive justification arises which courts should find partially justifies the NCAA's rules. Before turning to this analysis, however, it is important to understand the holding in *Brown*.

A. *United States v. Brown University*

In 1958, MIT and the eight Ivy League schools formed the Ivy Overlap Group.²⁵³ Each school in the group agreed to award financial aid to admitted students solely on the basis of need.²⁵⁴ In addition, to eliminate discrepancies in the amount of aid awarded to commonly admitted students (students admitted to more than one Overlap school), the schools "agreed to share financial information concerning admitted candidates and to jointly develop and apply a uniform needs analysis for assessing family contributions."²⁵⁵ Any school that failed to comply with the Overlap Agreement was subject to sanctions.²⁵⁶ In 1991, the Antitrust Division of the Justice Department brought a civil suit against the members of the Ivy Overlap Group alleging their agreement violated Section 1 of the Sherman Act.²⁵⁷ Each of the Ivy

252. 5 F.3d 658 (3d Cir. 1993).

253. *Id.* at 662.

254. *Id.*

255. *Id.*

256. *Id.* at 663.

257. *Id.*

League schools signed a consent decree with the United States, but MIT continued to trial.²⁵⁸

At trial, the district court concluded that the schools' conduct constituted commercial activity within the scope of the Sherman Act, finding that the agreement was equivalent to determining discounts for the price of the schools' educational services.²⁵⁹ Although it found that the Overlap Agreement was a form of price fixing, which would normally be deemed illegal under the *per se* approach, the court applied the Rule of Reason.²⁶⁰ The court chose to conduct a more in depth analysis after noting that the Supreme Court has been hesitant to apply the *per se* rule to nonbusiness contexts, such as the nonprofit and educational setting in which MIT operated.²⁶¹ The court then quickly determined that because the Overlap Agreement eliminated price competition for commonly admitted students, the agreement had significant anticompetitive effects.²⁶² In response, MIT offered several procompetitive justifications, which the court lumped together as an argument that the Overlap Agreement was necessary to maintain educational opportunity and socioeconomic diversity at each of the schools.²⁶³ The court rejected the argument on the basis that social welfare or noneconomic benefits cannot justify anticompetitive restrictions under the Sherman Act.²⁶⁴ Consequently, the district court enjoined any further cooperation among MIT and other schools to jointly set the amount of aid offered to admitted students.²⁶⁵

On appeal, the Third Circuit agreed with much of the district court's analysis. The Third Circuit concluded that the district court had correctly

258. *Id.* at 664.

259. *United States v. Brown Univ.*, 805 F. Supp. 288, 298 (E.D. Pa. 1992), *rev'd*, 5 F.3d 658 (3d Cir. 1993).

260. *Id.* at 301.

261. *See id.* at 300–01.

262. *Id.* at 302–04. Although the court announced that it was applying the Rule of Reason, it actually conducted more of a quick look analysis. The court found the Overlap Agreement to be anticompetitive without going into a detailed market analysis. *See id.* (“The Rule of Reason ordinarily requires an in-depth inquiry into the actual market impact of a restraint. There are some agreements, however, that are so inherently suspect, that even under the Rule of Reason ‘no elaborate industry analysis is required to demonstrate [their] anticompetitive character.’ This is such an agreement.” (alteration in original) (citations omitted) (quoting *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459 (1986); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978))).

263. *Id.* at 304–05.

264. *Id.* at 305–06.

265. *See id.* at 307.

determined that the Overlap Agreement constituted commercial activity, that it should be analyzed under the Rule of Reason, and that the agreement had significant anticompetitive effects.²⁶⁶ However, the Third Circuit diverged from the district court in its treatment of the procompetitive justifications offered by MIT.

Instead of grouping each of MIT's procompetitive justifications together and treating them all as being based on social welfare considerations, the Third Circuit separated them into what it categorized as either economic or social welfare justifications and analyzed each separately.²⁶⁷ The Third Circuit first assessed MIT's economic procompetitive justifications. MIT argued the Overlap Agreement promoted socioeconomic diversity, which can improve the quality of the education at Overlap schools.²⁶⁸ MIT also claimed the agreement widened consumer choice by providing additional aid to needy students who otherwise may not be able to afford to attend an Overlap school.²⁶⁹ The court found that both of these arguments warranted consideration, noting that both the improvement of the quality of a product and the enhancement of consumer choice have been recognized as legitimate procompetitive justifications.²⁷⁰

The Third Circuit then turned to MIT's arguments related to the social welfare benefits of the Overlap Agreement. MIT argued that the agreement promoted social welfare by allowing schools to provide full need-based aid to prospective students, which promoted "the social ideal of equality of educational access and opportunity."²⁷¹ In evaluating MIT's contention, the Third Circuit noted that Congress had attempted to promote the same goal for over twenty-five years through federal financial aid policy.²⁷² In addition, the Court stated, "[i]t may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'"²⁷³ Significantly, the court then credited

266. *United States v. Brown Univ.*, 5 F.3d 658, 668, 672–74 (3d Cir. 1993).

267. *Id.* at 674.

268. *Id.*

269. *Id.* at 674–75.

270. *Id.* As a third economic justification, MIT also argued that "eliminating price competition among participating schools . . . channeled competition into areas, such as curriculum, campus activities, and student-faculty interaction." *Id.* at 675. The court rejected this argument, stating that "any competition that survives a horizontal price restraint naturally will focus on attributes other than price," but this mere consequence of limiting price competition cannot serve as a procompetitive justification. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 678 (quoting *Goldfarb v. Virginia*, 421 U.S. 773, 788 n.17 (1975)).

MIT's argument for the social welfare benefits of the agreement, stating that "[i]t is most desirable that schools achieve equality of educational access and opportunity" and that "[i]t is with this in mind that the Overlap Agreement should be submitted to the rule of reason scrutiny."²⁷⁴ Thus, *Brown* can be read to stand for the proposition that in the limited context of higher education, where Congress has already acted to show a clear commitment to the social welfare goals advanced by the defendant, social welfare justifications may suffice to justify an agreement under the Rule of Reason.²⁷⁵ In conclusion, the Third Circuit reversed and remanded the case, stating that "the district court was obliged to more fully investigate the procompetitive and noneconomic justifications proffered."²⁷⁶

However, the district court never had the chance to engage in this analysis, as MIT and the Justice Department settled the case about six months after the Third Circuit's ruling.²⁷⁷ In 1994, as a response to the litigation in *Brown*, Congress passed an antitrust exemption for institutions of higher learning that supports the Third Circuit's consideration of social welfare benefits as a procompetitive justification. The exemption explicitly permitted schools to engage in much of the same behavior that was present in the Overlap Agreement, including to agree to award aid only on the basis of need, to use "common principles of analysis" to determine student need, and to exchange information regarding commonly admitted students in a limited way.²⁷⁸ Though the exemption was originally temporary, it has been extended several times,²⁷⁹ most recently in 2015.²⁸⁰ Congress passed the exemption and has continued to renew it with the goal of "promoting equal access to educational opportunities for students, including low income and minority

274. *Id.*

275. While the text of *Brown* supports this interpretation, it should be noted that the decision is written somewhat ambiguously. This ambiguity is discussed further in Part IV.B.1, in connection with the summary judgment decision in *O'Bannon*.

276. *Brown*, 5 F.3d at 678.

277. See Robert L. Jackson, *MIT Agrees to Settle Antitrust Suit*, U.S. Says, L.A. TIMES (Dec. 23, 1993), http://articles.latimes.com/1993-12-23/news/mn-4834_1_financial-aid-policy [<http://perma.cc/GF8R-NX7D>].

278. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 3518, 4060-61 (1994).

279. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-963, HIGHER EDUCATION: SCHOOLS' USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 1 (2006).

280. In 2015, the majority of the exemption was once again renewed, but Congress did repeal permission for schools to exchange information regarding admitted students. See Need-Based Educational Aid Act of 2015, Pub. L. No. 114-44, 129 Stat. 472 (2015).

students.”²⁸¹ These are the very social welfare benefits that the Third Circuit believed the district court had overlooked in determining whether the Overlap Agreement was an antitrust violation. Thus, Congress appears to have agreed with the Third Circuit that the social welfare benefits in an educational context could act to justify the schools’ agreement.

Despite the Third Circuit’s acceptance of social welfare justifications and Congress’s apparent endorsement of the court’s reasoning, the district court in *O’Bannon* rejected outright any use of social welfare benefits as a procompetitive justification. The argument was not brought up or discussed on appeal in the Ninth Circuit. The next Subpart discusses why it was improper for the district court in *O’Bannon* to disregard the social welfare justifications offered, including why the district court’s interpretation of *Brown* was wrong.

B. Errors in the Summary Judgment Decision in *O’Bannon*

1. Misinterpretation of *Brown*

As noted briefly in the earlier description of *O’Bannon*, the NCAA argued that its compensation rules benefit society by advancing the educational mission of colleges and by allowing schools to provide greater financial support for the viability of both women’s and less prominent men’s sports.²⁸² In assessing these claims, the district court found that *Brown* did not provide for the acceptance of social welfare considerations as a procompetitive justification. In reference to *Brown*, the district court stated:

The [Third Circuit] rejected the plaintiff’s argument that the agreement created a purely social good, reasoning that the agreement “not only serves a social benefit, but actually *enhances consumer choice*” by expanding educational opportunities for “qualified students who are financially ‘needy’ and would not otherwise be able to afford the high cost of education.”²⁸³

Thus, the district court concluded that *Brown* had relied not on the social welfare benefits of the Overlap Agreement, but rather had remanded the case based on the agreement’s more traditional procompetitive

281. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 279.

282. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1150–51 (N.D. Cal. 2014).

283. *Id.* at 1150 (quoting *United States v. Brown Univ.*, 5 F.3d 658, 677 (3d Cir. 1993)).

justifications.²⁸⁴ Consequently, the district court rejected any use of purely social welfare benefits to justify the NCAA's restrictions.²⁸⁵

The district court's interpretation of *Brown* is reasonable, as, unfortunately, the decision in *Brown* is written somewhat ambiguously. As the district court noted, there is some language in *Brown* that supports the district court's conclusion that MIT's social welfare justifications alone would not have been enough to succeed.²⁸⁶ There are indications, however, that the better reading of *Brown* is the position, advanced in this Comment, that pure social welfare justifications may be considered in limited circumstances.²⁸⁷ The Third Circuit specifically stated that it would "address MIT's claims with respect to economic and social welfare justifications separately."²⁸⁸ The court went on to acknowledge that two of the economic justifications offered by MIT had merit.²⁸⁹ It then discussed MIT's proffered social welfare justification.²⁹⁰ Had the Third Circuit meant to hold that social welfare benefits are merely an ancillary consideration that can only be taken into account when there are established economic justifications, it would not have kept the analysis separate. Moreover, in the Third Circuit's conclusion of its analysis related to MIT's social welfare justification, it instructed the district court to determine whether the Overlap Agreement was actually necessary to "implement MIT's professed social welfare goal" with no reference to a requirement of an accompanying economic justification.²⁹¹ Thus, the economic and social welfare justifications were analyzed separately by the Third Circuit, and the proper interpretation is that each could have served to justify the restraint in question independently of the other in the limited context that the court faced.

Accepting that social welfare benefits may stand alone as a procompetitive justification, there is still one more piece of reasoning in the summary judgment decision by the district court in *O'Bannon* that must be considered. It concerns the question of whether the benefit from a procompetitive justification must occur in the restrained relevant market.

284. See *id.*

285. *Id.* at 1150–51.

286. *Brown*, 5 F.3d at 677.

287. See *supra* text accompanying notes 271–275.

288. *Brown*, 5 F.3d at 674.

289. *Id.* at 674–75.

290. *Id.* at 675–77.

291. *Id.* at 677.

2. Improper Requirement That Procompetitive Benefits Occur Within the Relevant Market

In the district court's summary judgment decision in *O'Bannon*, the court was too rigid in its requirement that the benefit from a procompetitive justification act within the exact relevant market that has been identified in the Rule of Reason analysis. In summary judgment, the court rejected the NCAA's proffered procompetitive justification for the viability of other sports on the alternative ground that it concerned the promotion of competition in a market outside of the market for football and men's basketball recruits.²⁹² The Court stated: "It is 'improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market.'"²⁹³ However, that is not necessarily always true, and the court should have considered the justification.

Although the issue of which market the benefits of a procompetitive justification must operate within in order to justify a restraint is not clearly defined,²⁹⁴ courts generally appear to accept that a restraint with anticompetitive effects in one market may be justified by its procompetitive benefits in a separate but related market.²⁹⁵ In fact, the Supreme Court endorsed this view in *Board of Regents*,²⁹⁶ the landmark NCAA antitrust case.

292. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1151 (N.D. Cal. 2014).

293. *Id.* (quoting *Sullivan v. NFL*, 34 F.3d 1091, 1112 (1st Cir. 1994)).

294. *See Sullivan*, 34 F.3d at 1111 (describing the problem of identifying the markets in which the benefits of a procompetitive justification may properly be taken into account as "a deceptive body of water, containing unforeseen currents and turbulence lying just below the surface of an otherwise calm and peaceful ocean").

295. *See, e.g., Am. Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010) (recognizing that competitive balance among teams in the NFL that benefits competition in the market with other forms of entertainment may act as a procompetitive justification for a restraint on NFL licensed goods that reduces competition between NFL teams in the market for their intellectual property); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117–20 (1984) (considering the NCAA's procompetitive justification of competitive balance between college football teams that operated to increase consumer interest in the general entertainment market, while the challenged agreement restrained competition in the market for the telecasting of collegiate football games); *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–59 (1977) (recognizing that promotion of interbrand competition may justify a restraint on franchised retailers that reduced intrabrand competition); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1397 (9th Cir. 1984) (balancing the promotion of interbrand competition between NFL teams and other forms of entertainment against the restraint to competition on intrabrand competition between NFL teams).

296. *Bd. of Regents*, 468 U.S. at 117–20.

In *Board of Regents*, the NCAA's television plan restricted schools' ability to license the broadcasting rights to their football games.²⁹⁷ Thus, the restraint reduced competition between schools in the market for the telecasting of college football.²⁹⁸ Nonetheless, the Supreme Court considered the NCAA's argument that the agreement helped increase competitive balance among teams, which operated to increase the attractiveness of college sports compared to other forms of entertainment in the separate market for entertainment in general.²⁹⁹ Thus, the Supreme Court considered possible procompetitive benefits in a related but separate market from the one in which the restraint operated.³⁰⁰ Similarly, in a challenge to NFL rules that restricted relocations by one team to another team's home territory,³⁰¹ the Ninth Circuit stated:

To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. . . . The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition.³⁰²

Thus, procompetitive benefits need not necessarily occur in the same market as the anticompetitive effects of the challenged restraint, as long they operate in a related market.

Accordingly, a procompetitive justification that produces benefits in the markets for student-athlete labor in women's sports should be accepted because those markets are highly interrelated with the markets for football and men's basketball student-athlete labor. Title IX requires equality between men's and women's athletic programs in proportion to their respective enrollments with respect to the number of opportunities provided to men and women, the overall quality of the programs, and the amount of scholarship aid awarded.³⁰³ As a result, for schools seeking to comply with

297. *Id.* at 91–94.

298. *Id.* at 99–100.

299. *Id.* at 117–20.

300. However, the NCAA's procompetitive justification still failed because the Court found that the television plan did not actually help maintain competitive balance. *Id.*

301. See L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1384–85 (9th Cir. 1984).

302. *Id.* at 1397.

303. See 34 C.F.R. §§ 106.37(c), 106.41(c) (2018); A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

Title IX, men's sports could not exist without women's sports. Thus, the markets are dependent on one another under Title IX. In addition, athletic facilities are often shared between men's and women's sports programs. For example, men's basketball stadiums are also often used for women's basketball, gymnastics, and volleyball.³⁰⁴ Consequently, increasing opportunities and funds for women's sports may also affect the markets for football and men's basketball where use of facilities overlap. Based on the closely related nature of the markets, procompetitive benefits within women's sports student-athlete labor markets should be considered and balanced against the restraint on competition in the football and men's basketball student-athlete labor markets.

Having described *Brown* and the way in which the district court in *O'Bannon* erred in its analysis of the NCAA's procompetitive justifications, this Comment turns in the next Subpart to a description of how *Brown* should be applied to upcoming antitrust lawsuits challenging the NCAA's compensation restrictions.

C. Logic of *Brown* Properly Applied to NCAA Compensation Rules

As mentioned earlier, multiple antitrust cases are currently pending against the NCAA.³⁰⁵ Unlike *O'Bannon*, in which the student-athletes only sought compensation for schools' use of their NILs, the student-athletes in the pending cases seek to create a free market where schools would be completely unrestricted in their ability to pay student-athletes for their services. This Subpart examines how courts should respond to these suits in light of *Brown* and the arguments made above. Because it has become standard for courts to apply the Rule of Reason to antitrust challenges to NCAA student-athlete compensation prohibitions,³⁰⁶ the analysis progresses through the burden-shifting steps of the Rule of Reason.

304. See e.g., *Carver-Hawkeye Arena*, UNIV. IOWA ATHLETICS, <http://hawkeyesports.com/sports/2016/6/13/facilities-iowa-carver-hawkeye-html.aspx> [<https://perma.cc/BYM8-Q2ZV>]; *Facilities – Pauley Pavilion*, UCLA (Apr. 17, 2013), <http://www.uclabruins.com/news/2013/4/17/208271486.aspx> [<https://perma.cc/JRC4-CGG8>]; *Maples Pavilion*, STAN. ATHLETICS (Apr. 17, 2013), <http://www.gostanford.com/news/2013/4/17/208446881.aspx> [<https://perma.cc/MU6U-7UQZ>].

305. See *supra* Part II.C.

306. See *supra* Part II.A.

1. Significant Anticompetitive Effects of NCAA Compensation Restrictions

Under the Rule of Reason, it is the student-athlete's burden as plaintiff to first establish that the NCAA's compensation restrictions have a significant anticompetitive effect within a relevant market. In recent cases, student-athletes have been able to meet this initial burden and they likely will not struggle with this issue in upcoming cases.³⁰⁷

In the complaint in the *Jenkins* case, student-athletes defined two relevant markets.³⁰⁸ First, they described the "FBS Football Players Market," which is nationwide and comprises all FBS football schools.³⁰⁹ Within this market, FBS football schools compete to recruit high school athletes.³¹⁰ Analogously, the complaint defined the "D-I Men's Basketball Players Market" as a national market comprising all colleges and universities throughout the nation that compete in Division I men's basketball.³¹¹ These schools also compete for student-athletes' services.³¹² These definitions likely sufficiently describe both a product market and a geographic market to establish the existence of each relevant market and are used throughout the rest of the analysis.

After defining the relevant markets, student-athletes have a relatively easy job of showing that the NCAA's rules greatly restrict competition within each market. These markets are open to alternative characterizations, with student-athletes as either buyers of educational services or sellers of their labor.³¹³ However, the more intuitive characterization is a market in which student-athletes are sellers of their labor to a monopsony.³¹⁴ Under this description, the NCAA's rules act as a price fixing mechanism that prevents schools from competing to purchase student-athletes' labor beyond offering aid up to the full cost of attendance. As price fixing is normally held to be

307. See, e.g., *O'Bannon v. NCAA*, 802 F.3d 1049, 1070–72 (9th Cir. 2015); *White v. NCAA*, No. CV 06-999-RGK (MANx), 2006 U.S. Dist. LEXIS 101366, at *10 (C.D. Cal. Sept. 20, 2006) (finding student-athletes had sufficiently alleged an anticompetitive effect to deny NCAA's motion to dismiss).

308. Complaint and Jury Demand—Class Action Seeking Injunction and Individual Damages at 18, *Jenkins v. NCAA*, No. 3:14-cv-01678-FLW-LHG (D.N.J. Mar. 17, 2014).

309. *Id.* at 19–20.

310. *Id.* at 20.

311. *Id.* at 21–22.

312. *Id.* at 22.

313. *O'Bannon v. NCAA*, 802 F.3d 1049, 1071 n.14 (9th Cir. 2015).

314. The Ninth Circuit in *O'Bannon* appeared to adopt this characterization of the market. *Id.* at 1070–71.

illegal per se because of its inherently anticompetitive effects, it is clear that NCAA compensation restrictions have a significant anticompetitive effect within both the FBS Football and D-I Men's Basketball Players Markets.

Thus, in upcoming cases, the burden will likely shift back to the NCAA to once again establish the existence of legitimate procompetitive justifications for its prohibitions on student-athlete compensation.³¹⁵

2. Promotion of Equality of Athletic Opportunities as a Procompetitive Justification

In future cases, there is no doubt that the NCAA will offer the two justifications that were accepted in *O'Bannon*. As maintained earlier, courts should reject both amateurism and the integration of athletics and academics as procompetitive justifications because they fail to achieve the procompetitive benefits claimed by the NCAA.³¹⁶ However, based on the reasoning in *Brown*, courts should credit an argument by the NCAA that its prohibitions on compensation are justified because they promote social welfare by ensuring equality of athletic opportunities for men and women. Without the NCAA's rules, struggling athletic departments would be unable to comply with Title IX, which would likely require that both men and women be compensated proportionally. As a result, the social welfare benefits of providing equality of collegiate athletic opportunities would be lost. Thus, similar to how the Overlap Agreement in *Brown* promoted equality of educational access in accordance with the congressional goals of federal financial aid policy, restrictions on paying student-athletes allow schools to promote equality of athletic opportunities for males and females in the context of higher education in accordance with the congressional goals of Title IX.³¹⁷

Even at the highest level of competition, athletic departments struggle to break even and often require additional funds from the institution or outside

315 This is exactly what happened in the most recent cases pending against the NCAA, as the court granted summary judgment in favor of the plaintiffs on the issue of the restraints' significant anticompetitive effects. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, Nos. 14-md-02541-CW, 14-cv-02758-CW, at 19 (N.D. Cal. Mar. 28, 2018).

316. See *supra* Part III.

317. As noted in Part IV.B, it is sufficient that this procompetitive justification creates a benefit in a market related to the FBS Football and D-I Men's Basketball Players Markets by promoting social welfare in women's sports student-athlete labor markets.

sources.³¹⁸ Athletic departments often receive funds from the school, such as student fees allocated to athletics and direct transfers from the general fund of the institution.³¹⁹ Schools also indirectly support athletic programs by paying for utilities, maintenance, and support salaries.³²⁰ In addition, some state and local governments provide money to athletic departments.³²¹ The NCAA defines each of these funds as “allocated revenues,” since they are not produced by the athletic department.³²² “Generated revenues,” in contrast, “are produced by the athletics department and include ticket sales, radio and television receipts, alumni contributions, guarantees, royalties, NCAA distributions, and other revenue sources that are not dependent upon institutional entities outside the athletics department.”³²³ When allocated revenues are not taken into account, only twenty-four FBS athletics departments reported positive net revenues in 2014.³²⁴ In addition, “[t]he median negative net generated revenue for all schools, representing expenses in excess of generated revenues,” was over \$14 million.³²⁵ This is not a recent development, as a study by sports economists found similar results for the 2004–05 school year, in which only one of the fifty-one Bowl Championship Series (predecessor of the FBS) schools examined was profitable when subsidies such as student fees, direct support from the school or the state government, and athletic donations were excluded.³²⁶ Thus, although football and men’s basketball may be profitable, additional funds from the university are still generally needed to support athletic departments.

Reliance on institutional support is an issue if football and men’s basketball players are allowed to be paid by schools because Title IX would likely require that female athletes be compensated equally. Title IX requires

318. See Steve Berkowitz et al., *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443> [http://perma.cc/675L-RC2P].

319. FULKS, *supra* note 21, at 9.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 13. It should be noted that some scholars argue that accounting may be manipulated to portray the desired result, and schools actually profit greatly from their athletic programs. See Jonathan Strom, Comment, *Putting Our Trust in the National Collegiate Athletic Association (NCAA): How Creating Trusts for Student-Athletes Can Save the NCAA From Itself*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 423, 446–47 (2014).

325. FULKS, *supra* note 21, at 12.

326. See Victor A. Matheson et al., *The Bottom Line: Accounting for Revenues and Expenditures in Intercollegiate Athletics* 10–11, 31 (Int’l Ass’n of Sports Economists & N. Am. Ass’n of Sports Economists, Working Paper No. 11-01, 2011).

that: (1) schools provide financial assistance to male and female student-athletes equally in proportion to their participation;³²⁷ (2) the overall quality of male and female athletic programs be equal with respect to a variety of factors, such as equipment, coaching, academic tutoring, and facilities;³²⁸ and (3) males and females be provided equality of opportunities to participate in collegiate athletics.³²⁹ Arguably, compensation would fall under the first category as a form of financial assistance, which would require that the total amount of money used to compensate student-athletes be distributed in proportion to the percentage of athletes of each sex. However, even if cash payments were interpreted as falling outside the scope of financial aid—which typically is limited to scholarships and grants tied to educational costs—the payments would certainly fall within the broad second requirement regarding the overall equality of the athletics programs.³³⁰ Payments would become characteristic of “the athlete experience no different in kind from access to academic tutoring, special housing or meal privileges, laundry service, or any other perk that universities already provide their athletes and which already must be available to male and female athletes on equal terms.”³³¹ Thus, compensating male student-athletes would probably require proportional compensation for female student-athletes under Title IX.

Some contend that Title IX would permit disparate payments to male and female athletes,³³² but this misinterprets Title IX and ignores its unique treatment of student-athletes in the civil rights context. Those who support this position point to the Equal Pay Act of 1963, which permits differences in compensation between male and female employees when their jobs differ with regard to the skill, effort, and responsibility involved.³³³ They also cite

327. 34 C.F.R. § 106.37(c) (2015).

328. 34 C.F.R. § 106.41(c) (2015).

329. A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

330. Buzuvis, *supra* note 20, at 329.

331. *Id.*

332. See, e.g., Dennie, *supra* note 27, at 145–48; Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1051–52 (2014).

333. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012) (“No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . .”).

Stanley v. University of Southern California, in which the Ninth Circuit permitted USC to pay a higher salary to the men's basketball coach than the women's coach.³³⁴ The court found there were nondiscriminatory reasons for the payment difference because of the greater experience and qualifications of the men's coach.³³⁵ The court did not rely on the greater media and spectator pressure placed on the men's team or its greater revenue generation.³³⁶ Regardless, the terms and conditions of employment of coaches are not governed by the same Title IX regulations that apply to student-athletes.³³⁷ Within the civil rights context, the treatment of athletics departments is somewhat unique because a separate-but-equal framework has been adopted, which permits separate programs for males and females as long as they are equivalent in the areas mentioned previously.³³⁸ Thus, female student-athletes are entitled to the same institutional resources and opportunities without regard to their skill, fan interest, or revenue generation compared to male student-athletes. This prevents the same social forces which inhibited female athletes in the past from limiting females' current athletic opportunities.³³⁹ To allow higher compensation for male student-athletes based on greater fan interest and revenue generation would once again permit market-based sexism to justify the disparate treatment of male and female student-athletes. The regulations created to implement Title IX are designed to prevent this exact result, and it is unlikely Title IX would ever be interpreted to allow male and female student-athletes to be compensated unequally.

Consequently, if NCAA compensation restrictions were abolished, complying with Title IX by compensating both male and female student-athletes would become too costly for many schools' athletic programs. Merely paying an additional \$10,000 to the 150 student-athletes that constitute the football and men's basketball teams would total \$1.5 million.³⁴⁰ To comply with Title IX, an equivalent payment would likely have to be made to female student-athletes in proportion to their participation in athletics.³⁴¹ For example, if females constituted forty-eight percent of the total student-athlete population, another \$1,384,615 would have to be paid to female student-

334. *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1077 (9th Cir. 1999).

335. *Id.* at 1075–77.

336. *Id.* at 1074–75.

337. See Buzuvis, *supra* note 20, at 331.

338. *Id.* at 322–23.

339. See *id.* at 325.

340. *Id.* at 334, 334 n.175.

341. See *id.* at 334.

athletes.³⁴² However, \$10,000 may be modest compared to what schools could be forced to pay to remain competitive and to recruit top high school athletes. There is already an “arms race” between schools in football and men’s basketball to recruit the best players, with schools that often cannot afford it trying to keep up with elite programs with respect to things such as coaches and facilities.³⁴³ Similar escalating payments to student-athletes would likely result as each school seeks to gain a competitive advantage. Such payments would rapidly cause already struggling athletic programs to consider other ways to save money, such as cutting nonrevenue women’s sports.

Although there is uncertainty about how schools would react if payment restrictions were lifted, there is concern that schools would simply not comply with Title IX requirements and nonrevenue women’s sports would be eliminated.³⁴⁴ Equality for women in college athletics would be devastated and the goals of Title IX completely frustrated. In addition, even if both men’s and women’s nonrevenue sports were eliminated proportionally to handle the increased expenses, the progress made because of Title IX would largely be eliminated, as “one of the great legacies of Title IX is the proliferation of women’s sports at the collegiate level and the various opportunities that this presents for these athletes—both in college and beyond.”³⁴⁵ Consequently, the NCAA’s prohibitions on compensation are necessary for schools to continue to provide equality of collegiate athletic opportunities for men and women. This promotion of social welfare is a legitimate procompetitive justification under *Brown* and should be held to satisfy the NCAA’s burden of establishing a justification for the challenged restrictions.

3. Third-Party Endorsements as a Less Restrictive Alternative

Once the burden has shifted back to student-athletes to establish the existence of a less restrictive alternative for accomplishing the NCAA’s legitimate objectives, student-athletes can show that the NCAA and member

342. *Id.*

343. Mitten & Ross, *supra* note 24, at 849.

344. See, e.g., Jane McManus, *NCAA Reforms: Good for Female Athletes?*, ESPNW (Aug. 13, 2014), <http://espn.go.com/espnw/news-commentary/article/11347170/espnw-why-ncaa-reforms-really-good-really-bad-women-sports> [<http://perma.cc/5C2Q-QNNR>].

345. Matthew J. Parlow, *The Potential Unintended Consequences of the O’Bannon Decision*, 71 WASH. & LEE L. REV. ONLINE 203, 213 (2014); see also *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) (“[A] central aspect of Title IX’s purpose was to encourage women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships.”).

schools can continue to provide the same breadth of athletic opportunities to women while allowing student-athletes to be compensated by third parties. A less restrictive alternative would permit schools to provide financial aid to athletes up to the full cost of attendance, while allowing student-athletes to be compensated by third parties for things such as endorsing products, making appearances, signing autographs, and selling memorabilia. Schools have shown an ability to cover the increased costs of providing aid up to the full cost of attendance while still providing athletic opportunities for female student-athletes.³⁴⁶ Thus, athletic departments would still have the ability to offer a wide variety of sports to both men and women and maintain equality in access to athletic opportunities. But, the rules are not as restrictive because athletes would be free to capitalize on their value in the market, which is estimated to be quite substantial for high-profile student-athletes.³⁴⁷ And, to the extent that it could be shown that schools could afford to increase compensation to athletes while maintaining the breadth of athletic opportunities for women that Title IX is meant to promote, payments from schools could be increased. However, it would be the student-athletes' burden as plaintiffs to establish that this would be possible.

Finally, it is necessary to once again address the district court decision in *O'Bannon*, which rejected the plaintiffs' proposed less restrictive alternative of permitting athletes to receive limited compensation from third-party endorsements approved by their schools.³⁴⁸ The district court rejected this alternative on the basis that it would "undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes."³⁴⁹ However, protection against exploitation was not offered as a procompetitive justification by the NCAA, and no finding was made by

346. Prior to the *O'Bannon* decision requiring an increase in aid up to the full cost of attendance, the Power Five conferences voluntarily voted almost unanimously to increase scholarships up to the full cost of attendance. 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> [<http://perma.cc/7DQG-RXRS>].

347. See, e.g., Mitten & Ross, *supra* note 24, at 851 n.49 (describing the endorsement value players can acquire based on their accomplishments in college, including an estimate that a single tweet from Johnny Manziel would have been worth nearly \$3500 before he was even drafted and the fact that Tim Tebow's endorsement value was worth tens of millions of dollars immediately after he left college and joined the Denver Broncos).

348. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

349. *Id.*

the court that the NCAA's rules accomplished that goal.³⁵⁰ To the extent that the court believed protection from exploitation helps preserve amateurism and college sports as distinct from professional sports, it has already been shown that amateurism should be discredited as a procompetitive justification because consumer interest is not diminished when athletes begin to receive payments. Consequently, the district court's decision in *O'Bannon* should not prevent the utilization of third-party endorsements as a less restrictive alternative.

Therefore, in upcoming antitrust cases against the NCAA, courts should institute this less restrictive alternative by upholding NCAA rules that prohibit schools from compensating student-athletes beyond the cost of attendance and enjoin any rule that restricts a student-athlete's ability to receive payments from third parties.

CONCLUSION

The controversy over paying student-athletes will continue until a satisfactory solution is found. Congress does not appear to be willing to step in, leaving courts to do their best to fashion a remedy factoring in all of the implications surrounding the compensation of student-athletes. The social welfare benefits of the NCAA's compensation restrictions are entitled to consideration by the courts and should serve as a procompetitive justification to uphold a part of the NCAA's restrictions. By following this reasoning, courts can preserve all of the advantages that Title IX has bestowed on female athletes, while allowing student-athletes to profit in the private market while they are in school.

350. The NCAA and member schools have actually been heavily criticized for exploiting college athletes for their own benefit. HUMA & STAUROWSKY, *supra* note 247, at 3; Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 310–18 (1998); David Berri, *Exploitation Is Everywhere in Men's College Basketball*, TIME (Nov. 14, 2014), <http://time.com/3586037/exploitation-is-everywhere-in-mens-college-basketball> [<http://perma.cc/DR4J-X2SJ>].