Washington and Lee Law Review

Volume 71 | Issue 4 Article 6

Fall 9-1-2014

The District Court Decision in *O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change

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I. Introduction

On August 8, 2014, the U.S. District Court for the Northern District of California held in *O'Bannon v. National Collegiate Athletic Association*[1] that the NCAA rules that prevent men's college basketball and football players from controlling the commercial rights to their names and likenesses "unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."[2] The court then issued an injunction preventing the NCAA from restraining its members from compensating their men's basketball and football players up to $5,000 per year for the use of their likenesses.[3] The court further enjoined the NCAA from prohibiting monetary awards to college athletes in the amounts

1. Findings of Fact and Conclusions of Law, O'Bannon v. NCAA, No. C-09-3329-CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014).

2. *Id.* at *2.

3. *See* Permanent Injunction at 1, O'Bannon v. NCAA, No. C-09-3329-CW (N.D. Cal. Aug. 8, 2014) (enjoining the NCAA from prohibiting player compensation).

up to "the full cost of attending the respective NCAA member school."[4]

The *O'Bannon* decision is an important step forward for both college-athletes' rights and sports law jurisprudence because it recognizes that NCAA rules limiting college-athlete pay may violate section 1 of the Sherman Antitrust Act.[5] Nevertheless, the ruling's impact is tempered by the iconoclastic nature of the court's injunction, which limits the immediate potential for college-athlete compensation beyond a nominal amount.[6] At the same time, the ruling seems to ignore the broader implications of NCAA restraints on third-party markets for licensing celebrities' likenesses for endorsements—restraints that federal courts eventually must overturn.[7]

This Article explains why the district court decision in *O'Bannon v. National Collegiate Athletic Association* was correct to hold that the NCAA unreasonably restrained trade by preventing athletes from sharing revenues derived from the use of their names and likenesses, but too narrow in its injunction that only mandated the NCAA to allow compensation through a deferred trust in amounts up to $5,000 per year. Part II of this article provides the procedural history of *O'Bannon v. National Collegiate Athletic Association*—a case that many believed would fundamentally change the nature of college-athletes' rights in America.[8] Part III explains the findings of fact and conclusions of law in the *O'Bannon* bench trial, and discusses the court's

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4. *Id.* at 2; *see also* Findings of Fact and Conclusions of Law, *supra* note 1, at 20 (explaining that the "gap between the full grant-in-aid," which represents the full cost of attending a respective school "and the cost of attendance varies from school to school but is typically a few thousand dollars").

5. *See* Findings of Fact and Conclusions of Law, *supra* note 1, at 1–2 (finding that NCAA rules barring student-athletes from receiving revenue earned from the use of their "names, images, and likenesses in videogames, live game telecasts, and other footage . . . unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools"); *see also* Sherman Act, 15 U.S.C. § 1 (2012) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").

6. *See infra* notes 81–88 and accompanying text (discussing the permanent injunction in greater detail).

7. *See infra* notes 109–28 and accompanying text (discussing why the permanent injunction does not fully ameliorate NCAA restraints).

8. *Infra* Part II.

permanent injunction issued against the NCAA.[9] Part IV explains why the district court in *O'Bannon* was legally correct to find the NCAA's restraints on sharing revenues with college athletes violated section 1 of the Sherman Act.[10] Part V explains why the permanent injunction issued by the court in *O'Bannon* does not fully ameliorate the NCAA's restraints.[11] Finally, Part VI discusses the logical next steps that could follow the district court's decision in *O'Bannon*, including the possibility of an appeal by both parties, follow-up lawsuits seeking to further dismantle the NCAA's amateurism rules, player unionization efforts, Title IX compliance issues, and a petition by the NCAA to Congress for a broad-based antitrust exemption to fully preserve its longstanding restraints on college-athlete pay.[12]

II. A Trial More Than Five Years in the Making: The Procedural History in O'Bannon v. NCAA

A. Pleadings and Early Decisions

The recent bench trial in *O'Bannon v. National Collegiate Athletic Association* represents the culmination of more than five years of litigation by elite men's basketball and football players against the NCAA.[13] This litigation began on June 21, 2009 when twelve former NCAA football and men's basketball players, led by

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9. *Infra* Part III.

10. *Infra* Part IV.

11. *Infra* Part V.

12. *Infra* Part VI.

13. *See infra* notes 14–48 and accompanying text (summarizing the procedural history). For further discussion of the case history in *O'Bannon v. National Collegiate Athletic Association*, see Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the* NCAA Student-Athlete Name & Licensing Litigation *Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1033–36 (2014) (discussing the *O'Bannon* case history more thoroughly); Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 235 (2014) (providing a concise procedural history of the *O'Bannon* case); Michael McCann, *Ed O'Bannon v. NCAA Class Certification Hearing Primer*, SPORTS ILLUSTRATED, http://www.si.com/college-football/2013/06/19/ncaa-ed-obannon-hearing-primer (last updated May 28, 2014) (last visited Nov. 18, 2014) (providing an overview of the case's procedural history in more colloquial language) (on file with the Washington and Lee Law Review).

former UCLA basketball standout Ed O'Bannon, filed an antitrust complaint against the college sports trade association in the U.S. District Court for the Northern District of California.[14] The complaint alleged, in pertinent part, that NCAA members "conspired to fix the price of former student athletes' images at zero and . . . boycott former student athletes in the collegiate licensing market."[15] The complaint further alleged that "these restraints occurred within a product market for live broadcasts, various kinds of non-live game video footage, and college sports videogames."[16]

Since the filing of this antitrust complaint, the plaintiffs' case has morphed "like Heraclitus's river: always changing, yet always the same."[17] On January 15, 2010, the U.S. District Court for the Northern District of California consolidated the substance of the complaint in *O'Bannon* with that of another lawsuit before the same court, *Keller v. Electronic Arts*.[18] "The *Keller* litigation had asserted claims against the NCAA, the College Licensing Company (the NCAA's independent licensing arm), and the videogame developer Electronic Arts, all related to an alleged conspiracy to violate student-athletes' publicity rights in college sports videogames."[19] The central link between the two cases was that, in *Keller*, one of Electronic Arts's affirmative defenses was that "the NCAA granted it the rights to use student-athlete likenesses."[20] "Meanwhile, in the early stages of *O'Bannon*, the NCAA denied having granted any such rights to third parties."[21]

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14. Edelman, *supra* note 13, at 1033; *see also* Complaint at 2–8, O'Bannon v. NCAA, No. C-09-3329-CW (N.D. Cal. Jul. 21, 2009) (stating plaintiffs' antitrust claims); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C-09-1967-CW, 2011 WL 1642256, at *1 (N.D. Cal. May 2, 2011) (discussing the procedural history).

15. Order on NCAA's and CLC's Motions to Dismiss at 9, O'Bannon v. NCAA, No. C-09-3329-CW, 2010 WL 445190, at *5 (N.D. Cal. Feb. 8, 2010); *see also In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2011 WL 1642256, at *2 (stating the antitrust violations alleged in the complaint).

16. Edelman, *supra* note 13, at 1033 (citing Complaint, *supra* note 14, at 62–67).

17. *Id.* at 1034 (quoting Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'ship, 34 F.3d 410, 413 (7th Cir. 1994)).

18. *Id.* (footnote omitted).

19. *Id.* (footnote omitted).

20. *Id.* (footnote omitted).

21. *Id.* (citing Jon Solomon, *NCAA Knew EA Sports Videogames Used Real*

After the court consolidated *O'Bannon* and *Keller* into a single litigation known as the *NCAA Student-Athlete Name & Likeness Licensing Litigation*, "the plaintiffs then filed an amended complaint and moved for class certification—a motion" that was vehemently opposed by the NCAA.[22] "Thereafter, the court notified the plaintiffs that they would need to add at least one current student-athlete to their complaint" to avoid dismissal—a result that "led the plaintiffs to file a third amended complaint adding six current student-athletes as named plaintiffs."[23]

"[B]efore the court could review this third amended complaint, the plaintiffs [from the *Keller* case] entered into settlement negotiations with both Electronic Arts and the College Licensing Company, which led to the filing of a stipulation of settlement."[24] This settlement "left the court to review the merits

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Players, E-mails from Ed O'Bannon Lawsuit Show, AL.COM, http://www.al.com/sports/index.ssf/2012/11/ncaa_knew_ea_sports_video_game.html (last updated Nov. 12, 2012) (last visited Nov. 18, 2014) (quoting NCAA spokesperson Erik Christianson as stating that "the NCAA never marketed student-athlete likeness[es]") (on file with the Washington and Lee Law Review).

22. *Id.* at 1034–35 (footnote omitted); *see also* Tom Fornelli, *Court Asks O'Bannon's Lawyers to Add Current Players to Lawsuit*, CBSSPORTS.COM, http://www.cbssports.com/collegefootball/eye-on-collegefootball/22498428/obannons-lawyers-asked-to-add-current-players-to-lawsuit (last updated June 21, 2013) (last visited Nov. 18, 2014) (stating that "[t]he NCAA maintains the lawsuit should not be a class-action lawsuit because the claims of thousands of college athletes are different and should not be treated the same") (on file with the Washington and Lee Law Review).

23. Edelman, *supra* note 13, at 1035 (footnote omitted); *see also* Steve Berkowitz, *Judge Will Allow Current Player to Join* O'Bannon *Suit*, USA TODAY, http://www.usatoday.com/story/sports/college/2013/07/05/ed-obannon-ncaa-likeness-lawsuit/2492981 (last updated July 5, 2013) (last visited Nov. 18, 2014) (discussing the court ruling requiring the plaintiffs to add at least one current college athlete as a named plaintiff) (on file with the Washington and Lee Law Review).

24. Edelman, *supra* note 13, at 1035 (footnote omitted); *see also* Order Denying Motions to Dismiss at 1, 7, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW (N.D. Cal. Oct. 25, 2013); *cf.* Josephine (Jo) R. Potuto, William H. Lyons & Kevin N. Rask, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 911 (2014) (noting that the settlement was no surprise because Electronic Arts's claim that its videogames were entitled to First Amendment protection had already been denied by two different federal circuit courts).

of the plaintiffs' antitrust claims only vis-à-vis the NCAA."[25] "[O]n November 8, 2013, the U.S. District Court for the Northern District of California [then] certified a class to pursue injunctive relief against the NCAA" based upon the antitrust claims that were originally pled in the *O'Bannon* complaint.[26] The certified class included:

> All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men's basketball team or on an NCAA Football Bowl Subdivision . . . men's football team and whose images, likenesses, and/or names may be, or have been, included in game footage or in videogames licensed or sold by [the NCAA], their co-conspirators, or their licensees after the conclusion of the athlete's participation in intercollegiate athletics.[27]

"The court did not certify a damages subclass."[28]

B. Summary Judgment Motions

Plaintiffs and the NCAA thereafter filed cross-motions for summary judgment.[29] Plaintiffs urged the court to find the

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25. Edelman, *supra* note 13, at 1035 (citing Order Denying Motions to Dismiss, *supra* note 24, at 8–24).

26. *Id.* at 1035–36 (citing Order Granting in Part and Denying in Part Motion for Class Certification at 5–16, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2013 WL 5979327, at *3–7 (N.D. Cal. Nov. 8, 2013)).

27. Order Granting in Part and Denying in Part Motion for Class Certification at 23, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013).

28. Edelman, *supra* note 13, at 1036 (footnote omitted); *see also* Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration at 4, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW (N.D. Cal. Apr. 11, 2014) (noting that "[t]he Court granted Plaintiffs' request to certify the injunctive relief class but denied their request to certify a damages subclass, citing various barriers to class manageability").

29. *See* Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 4 ("On November 15, 2013, one week after the class certification order issued, Plaintiffs filed the instant motion for summary judgment. The NCAA cross-moved for summary judgment one month later.").

NCAA's restraints on college-athlete compensation illegal because they alleged that the procompetitive justifications for the restraints lacked any *bona fide* economic merit.[30] Meanwhile, the NCAA urged the court, among other things, to find the procompetitive effects of their restraints on college-athlete pay sufficient to dismiss the case in its entirety.[31] For the most part, the court dismissed both parties' summary judgment motions, albeit the court did rule in favor of the plaintiffs with respect to one of the NCAA's alleged procompetitive justifications.[32]

The court opined that in order to prevail on a restraint of trade claim under section 1 of the Sherman Act, the plaintiffs needed to prove three elements: "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under . . . rule of reason analysis; and (3) that the restraint affected interstate commerce."[33] With the court having already concluded in earlier proceedings that the first and third elements of such a claim were met, the cross-motions for summary judgment focused exclusively on the second element: the restraint's competitive effects.[34]

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30. *See id.* at 29–41 (disputing the NCAA's purported procompetitive justifications).

31. *See id.* (analyzing the NCAA's justifications, including "(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").

32. *See id.* at 47 ("Plaintiffs are entitled to summary judgment that the NCAA's fourth asserted justification for the challenged restraint—increased support for women's sports and less prominent men's sports—is not legitimately procompetitive.").

33. *Id.* at 7 (citations omitted) (internal quotation marks omitted); *see also id.* at 8–9 (explaining why the rule of reason was the most appropriate standard under the second prong of the court's test). *See generally* Sherman Act, 15 U.S.C. § 1 (2012) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."). It is worth further noting that while these three requirements are recognized by all circuits, they are often stated somewhat differently, with the first and third being grouped together into what are often called "threshold requirements." *See, e.g.*, Edelman, *supra* note 13, at 1037 (referencing the "threshold requirements" to a section 1 Sherman Act claim); Marc Edelman, *The NCAA's "Death Penalty Sanction"—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 394 (2014) (same).

34. *See* Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for

The court further explained that, with respect to the competitive effects element of an antitrust violation, longstanding Ninth Circuit precedent has held that "[a] restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects" based on "a burden-shifting framework."[35] Under this burden-shifting framework, the court explained that the "plaintiff[s] bear[] the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market."[36] If the plaintiffs meet this burden, the defendants then must produce evidence of the restraint's procompetitive benefits.[37] Meanwhile, if the defendants produce sufficient evidence of procompetitive effects, the plaintiffs finally must "show that any legitimate objectives can be achieved in a substantially less restrictive manner."[38]

Applying this three-step approach, the court in *O'Bannon* concluded that the plaintiffs met their initial burden of showing that the NCAA's restraints on athlete pay produced a significant

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Reconsideration, *supra* note 28, at 9–14 (analyzing the parties' arguments regarding the competitive effects of the NCAA's restraints on student-athletes' pay). *See generally* Findings of Fact and Conclusions of Law, *supra* note 1, at 48 ("The NCAA does not dispute that [its challenged] rules were enacted and are enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably.").

35. Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 7 (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (internal quotation marks omitted)). This burden-shifting framework has been adopted by most, but not all courts; the practical realities of how courts apply the framework is discussed in detail by esteemed antitrust-law professor Michael Carrier in his article *The Rule of Reason: An Empirical Update for the 21st Century*. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829–36 (2009) (exploring instances of courts applying the burden-shifting framework).

36. Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 7 (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (internal quotation marks omitted)).

37. *See id.* (citing Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)) (stating the second part of the burden-shifting framework).

38. *Id.* at 7–8 (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)) (internal quotation marks omitted).

anticompetitive effect within the two relevant markets: "the 'college education' market and the 'group licensing' market"[39]—a burden that is met by less than 3% of all antitrust plaintiffs.[40] The court then reviewed whether the NCAA met its burden of producing evidence related to procompetitive benefits of its restraints on athlete pay from the use of their names, images, and likenesses.[41] In this vein, the court analyzed five purported procompetitive effects alleged by the NCAA: (1) preserving amateurism in college sports; (2) promoting competitive balance among Division I teams; (3) the increased output benefits in college sports; (4) increased integration of education and

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39. *See id.* at 9–11 (discussing the court's reasoning for determining that the plaintiffs' had offered "sufficiently plausible evidence of anticompetitive effects" in both markets).

40. *See* Carrier, *supra* note 35, at 828 (noting that "[c]ourts dispose of 97% of cases at the first stage" of burden-shifting—the showing of an anticompetitive effect). In finding that plaintiffs had met their initial burden with respect to the group licensing market, the court concluded that there was indeed a real possibility that such a market existed because, absent the NCAA's restraints, the plaintiffs had cognizable rights of publicity, and these rights were not preempted by the First Amendment. *See* Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 15–29 (analyzing the existence and scope of a group-licensing market). For further information about college athletes' publicity rights, see Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 567–84 (2013) (discussing in detail college athletes' publicity rights and their balance against First Amendment considerations). Even with respect to the use of college athletes' likenesses in live television broadcasts, the court concluded that "the First Amendment does not guarantee . . . an unfettered right to broadcast entire sporting events without regard for the participating athletes' rights of publicity." Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 16 (citing Zacchini v. Scripps–Howard Broad. Co., 433 U.S. 562, 563–64, 574–76 (1977)). *See generally id.* at 20

> There is no principled reason why the First Amendment would allow the NCAA to restrict press access to college football and basketball games (via exclusive licensing agreements) but, at the same time, prohibit student-athletes from doing the same (via right-of-publicity actions) . . . . As far as the First Amendment is concerned, these rights stand on equal footing.

41. *See* Order Resolving Cross-Motions for Summary Judgment, Granting Motion to Amend Class Definition, Denying Motion for Leave to File Motion for Reconsideration, *supra* note 28, at 29–41 (analyzing the NCAA's procompetitive justifications).

athletics; and (5) increased viability of maintaining less popular men's sports and women's sports.[42]

The court held that the NCAA's purported procompetitive justification of maintaining less popular men's sports and women's sports failed as a matter of law, and awarded summary judgment to the plaintiffs on that argument.[43] However, the court denied both parties' summary judgment motions with respect to all other affirmative defenses, recognizing that each defense entailed unresolved issues of fact.[44] Most notably, the court opined that the NCAA could prevail on its amateurism defense if it could factually prove that maintaining amateurism increased overall consumer demand for college sports.[45] Meanwhile, the NCAA could prevail on its argument that no-pay rules promote the integration of education and athletics if it could demonstrate that this integration would actually enhance the quality of student athletes' educational experience.[46]

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42. *See id.* at 29 (describing the five procompetitive effects).

43. *See id.* at 38–40 (finding that the NCAA's purported defense "is not a legitimate procompetitive justification" because competition cannot be foreclosed with respect to a particular sector of the economy simply to promote competition within a different economic sector (citing United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972))). In addition, as the court explained in its discussion of the integration of education and athletics defense, a restraint of trade may not be justified on the basis of social or public policy goals. *See id.* at 36 ("[A]ntitrust defendants cannot rely on these types of social welfare benefits to justify anticompetitive conduct under the Sherman Act." (citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990))).

44. *See id.* at 29–41 (noting conflicting evidence regarding the purported procompetitive benefits of preserving amateurism, promoting competitive balance among teams, fostering integration of education and athletics, and increasing output benefits in college sports).

45. *See id.* (noting that a reasonable fact-finder could conclude that the challenged rules serve the procompetitive purpose of promoting amateurism).

46. *See id.* at 36–38 (indicating that the NCAA would need to present evidence at trial to show that "(1) the ban on student-athlete compensation actually contributes to the integration of education and athletics and (2) the integration of education and athletics enhances competition in the 'college education' or 'group licensing' market"). Relying on Supreme Court decisions such as *National Society of Professional Engineers v. United States*, which have held that social welfare benefits may not justify otherwise anticompetitive conduct, the court explained that the NCAA's integration of education with athletics argument could prevail only if the integration actually promoted competition within the relevant market. *Id.* at 36.

Recognizing these outstanding issues of fact, the court then ordered a pretrial conference and jury trial on the outstanding issues.[47] The plaintiffs thereafter waived their right to trial by jury, and instead opted for a bench trial before Judge Wilken.[48]

III. The District Court's Ruling at Trial

The bench trial in *O'Bannon v. NCAA* spanned three weeks—beginning on Monday, June 9, 2014, and culminating on Friday, June 27, 2014.[49] On August 8th, Judge Wilken issued her ruling in the form of a ninety-nine page "findings of fact and conclusions of law."[50] At the same time, the court entered a judgment in favor of the class action plaintiffs, and ordered a permanent injunction against the NCAA.[51]

A. Finding of Facts and Conclusions of Law

The court's decision, in summary, found that "the challenged NCAA rules unreasonably restrained trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."[52] The decision further held that the procompetitive justifications that the NCAA offered did not

47. *See id.* at 48 (describing the court's order).

48. *See* Sara Ganim, *As Testimony Starts in Former College Star's Suit, NCAA Settles Another Suit*, CNN (June 9, 2014), http://www.cnn.com/2014/06/09/us/ed-obannon-ncaa-lawsuit (last visited Nov. 18, 2014) (noting that "the plaintiffs gave up their request for monetary damages in exchange for a bench trial, meaning there will be no jury, and the judge will make the decision") (on file with the Washington and Lee Law Review).

49. O'Bannon v. NCAA, No. C-09-3329-CW, 2014 WL 3899815, at *2 (N.D. Cal. Aug. 8, 2014).

50. *Id.* at *1–99.

51. Permanent Injunction at 1–2, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C-09-3329-CW (N.D. Cal. Aug. 8, 2014); *see* Judgment at *1, O'Bannon v. NCAA, No. C-09-3329-CW (N.D. Cal. Aug. 8, 2014) (stating that a judgment in the case "is hereby entered in favor of the Class Plaintiff, and the Plaintiffs recover from Defendant National Collegiate Athletic Association their costs of action").

52. *O'Bannon*, 2014 WL 3899815, at *2.

justify the NCAA's restraints, and these restraints could have been achieved through less restrictive means.[53]

1. Relevant Markets and Anticompetitive Effects of NCAA Rules

The court first concluded that plaintiffs presented sufficient evidence to show that the NCAA's restraints on competition in the college education market yielded *bona fide* anticompetitive effects.[54] With respect to the alleged relevant markets and anticompetitive effects in those markets, the court found that the evidence presented established that NCAA Division I Football Bowl Subdivision schools ("FBS football schools") and the Division I men's basketball schools "compete to recruit the best high school football and basketball players."[55] In addition, the court found that "FBS football and Division I basketball schools are the only suppliers of the unique bundles of goods and services described above."[56]

Based upon these findings, the court then concluded that "absent the challenged NCAA rules, teams of FBS football and Division I basketball players would be able to compete for the services of college athletes by offering them a share of the revenues derived from the use of their names, images, or likenesses in various forms."[57] However, because of the NCAA's current rules, athletes at FBS football schools and Division I men's basketball schools have been precluded from selling

53. *See id.* (describing the limits of the NCAA restraints).

54. *See id.* at *78 ("Because Plaintiffs have presented sufficient evidence to show that the NCAA's rules impose a restraint on competition in the college education market, the Court must determine whether that restraint is justified.").

55. *Id.* at *7–8; *see also id.* at *12 (concluding that "there are no professional football or basketball leagues capable of supplying a substitute for the bundle of goods and services that FBS football and Division I basketball schools provide").

56. *Id.* at *8; *see also id.* at *11–12 (finding that NFL and NBA teams are not an alternative market to college sports because they do not permit players to enter their league directly after high school and, furthermore, that minor league sports teams are not alternative markets because "recruits do not typically pursue opportunities in those leagues").

57. *Id.* at *16, *19.

their services in the United States, if not the world.[58] In a legal sense, this finding represented an anticompetitive restraint of trade within this college education market.[59]

2. Alleged Procompetitive Benefits of the NCAA Rules

Once the court found the plaintiffs to have met their burden of proving anticompetitive effects within a relevant antitrust market, the district court next turned to whether the NCAA was able to prove a procompetitive benefit within the same market.[60] Upon review of the evidence, the court fully rejected two of the defendants' procompetitive justifications—one based on competitive balance, and the other based on a purported increase in the number of schools competing in FBS football and Division I men's basketball.[61] Nevertheless, two

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58. *See id.* at *22 (explaining that in agreements with schools, the "recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange").

59. *See id.* at *56 ("This price fixing agreement constitutes a restraint of trade."). As a matter of law, this anticompetitive restraint did not require the plaintiffs to make a direct showing of consumer harm because "[t]he Supreme Court has indicated that monopsonistic practices that harm suppliers may violate antitrust law even if they do not directly harm consumers." *Id.* at *63 (citing Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948)).

60. *See* Findings of Fact and Conclusions of Law at *78, O'Bannon v. NCAA, No. C-09-3329-CW, 2014 WL 3899815 (citing Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)) (explaining that to determine whether anticompetitive restraints are justified, the Court "must consider whether the 'anticompetitive aspects of the challenged practice outweigh its procompetitive effects'").

61. With respect to the NCAA's claims that its restraints promoted competitive balance, the court found such evidence fully rebutted by the plaintiffs' lawyers, concluding that "the NCAA has not presented sufficient evidence to show that its restrictions on compensation actually have any effect on competitive balance, let alone produce an optimal level of competitive balance." Findings of Fact and Conclusions of Law at *83, O'Bannon v. NCAA, No. C-09-3329-CW, 2014 WL 3899815. *See generally id.* at *34–37 (discussing the entirety of the court's finding of facts with respect to the NCAA's competitive balance argument). The court recognized that "[e]ven if the NCAA had presented some evidence of a causal connection between its challenged rules and its current level of competitive balance, [the NCAA] ha[d] not shown that the current level of competitive balance [was] necessary to maintain its current level of consumer demand." *Id.* at *36. Moreover, the trend of premier college sports programs using their additional resources to invest more heavily in

other of the NCAA's affirmative defenses fared somewhat better.[62]

With regard to the NCAA's first affirmative defense—that its restraints on college-athlete pay were procompetitive because they "promote[d] consumer demand for its product by preserving its tradition of amateurism in college sports"—the court held that "the NCAA's restrictions on student-athlete compensation play a limited role in driving FBS football and Division I basketball-related products."[63] Thus, while "these restraints might justify a restriction on large payments to student-athletes while in school, they do not justify the rigid prohibition on compensating student-athletes—in the present or the future—with any share of licensing revenue generated from the use of their names, images and likenesses."[64] Of particular note, the court found that the

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"recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes . . . negated whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had on competitive balance." *Id.* at *85. As for the NCAA's claims that its restraints enabled it to increase the number of schools and student-athletes that participate in FBS football and Division I basketball, the court found that "the restrictions on student-athlete compensation do nothing to increase this output." *Id.* at *40. To the contrary, the court found the evidence to show that "because participation in FBS football and Division I basketball typically raises a school's profile and leads to increased athletic-based revenue, the number of schools participating in FBS football and Division I basketball has increased steadily throughout time, and likely will continue to rise." *Id.* at *40. Moreover, "the NCAA's assertion that schools will leave FBS and Division I for financial reasons if the challenged restraints were removed was not credible." *Id.* at *41–42.

62. *See id.* at *37–43 (recognizing, in part, the benefits of integrating student-athletes into college communities and increasing the number of games played).

63. *Id.* at *24, *82.

64. *Id.* at *82–83. As a matter of law, the court rejected the NCAA's argument that the Supreme Court holding in *Board of Regents v. NCAA* stood for the sweeping proposition that student-athletes must be barred during their college years and forever thereafter from receiving any money for NCAA members' use of their names, likeness, and identities, holding to the contrary that certain incidental language in *Board of Regents* "does not establish that the NCAA's current restraints on compensation are procompetitive and without less restrictive alternatives." *Id.* at *79, *80. Upon review of the factual evidence related to the purported link between the NCAA's no-pay rules and preserving fan interest via amateurism, the court found that "the historical evidence presented demonstrates that the association's amateurism rules have not been nearly as consistent as the NCAA has proclaimed." *Id.* at *24, *27 (indicating further that in the early days of college sports the NCAA's amateurism rules did

NCAA failed to present any evidence whatsoever that payment to college athletes of less than $20,000 per year, or payment to college athletes via a trust, would harm consumer demand to view college sports.[65]

Meanwhile, as for the NCAA's proposed justification that its restraints on athlete pay help to "promote the integration of academics and athletics," the court found the evidence presented by the NCAA to somewhat validate this argument.[66] Recognizing a legal principle that improving product quality may be a legitimate procompetitive justification, the court acknowledged that the pay restraints could be procompetitive if they helped to reduce the great disparity in wealth among college students, and that this result helped "to integrate student-athletes into the academic communities of their schools."[67] Nevertheless, the court still concluded that the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community," and that "[a]s with the NCAA's amateurism justification . . . the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future . . . ."[68] Thus, the court concluded that limited restrictions on student-athlete compensation may help schools to achieve this narrow procompetitive goal.[69]

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not even address the importance of athlete education, which "the NCAA now considers the primary motivation for participating in intercollegiate athletics").

65. *See id.* at *28–30 (considering the flaws of and rejecting a survey indicating that viewers would be less likely to watch college football if athletes were paid); *id.* at *82 (noting that the NCAA's expert witness "did not ask respondents for their opinions about providing student-athletes with a share of the licensing revenues generated from the use of their own names, images, and likenesses," among other flaws in his surveying methodologies).

66. *See id.* at *37–40 (weighing the evidence supporting and rejecting the claim that restrictions on compensation help student-athletes integrate into college communities).

67. *Id.* at *39, *86.

68. *Id.* at *86–88.

69. *See id.* at *87 (noting the benefits of limited restrictions).

3. Allegedly Less Restrictive Alternatives

Upon finding the NCAA to have shown very limited procompetitive effects to its wage restraints on college athletes, the court finally turned to the issue of whether these procompetitive benefits could be achieved in a less restrictive manner.[70] Here, the plaintiffs proposed three less restrictive alternatives to the NCAA's blanket prohibition on student-athlete pay: (1) raising the permissible grant-in-aid limit that schools may award to their athletes in stipends; (2) allowing NCAA member schools to hold in trust for their athletes a limited and equal share of licensing revenues; and (3) permitting student-athletes to receive compensation from third-party endorsements.[71]

With respect to the first proposal—raising the permissible grant-in-aid limit that schools may award to their athletes in stipends—the court found the alternative would limit the anticompetitive effects without harming NCAA interests because "[a] stipend capped at the cost of attendance would not violate the NCAA's own definition of amateurism [as] it would only cover educational expenses."[72] Noting that "the NCAA member schools used to provide student-athletes with similar stipends before the NCAA lowered its cap on grant-in-aid," the court further found that "none of the evidence presented at trial suggests that consumer demand for the NCAA's product would decrease if schools were to provide such stipends to student-athletes once again."[73] To the contrary, the court found that "[i]f anything, providing student-athletes with such stipends would [better meet the NCAA's stated goals of integrating student-athletes into general academic life] by removing some of the educational expenses that they would otherwise have to bear, such as school supplies, which are not covered by a full grant-in-aid."[74]

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70. *See id.* at *89–94 (noting the court's analysis of benefits in a less restrictive manner).

71. *See id.* at *43–48 (describing the plaintiff's alternatives).

72. *Id.* at *44.

73. *Id.*

74. *Id.* at *44–45.

Regarding the second alternative—allowing schools to hold limited payments in trust for student-athletes—the court similarly found this to enable the NCAA to achieve its stated goals in a less restrictive manner, as long as the compensation was limited and distributed equally among team members.[75] In addition, the court found the evidence failed to show that allowing payments of this nature would hurt consumer demand for college sports, as long as these payments were limited in amount, equal for all players based on the use of their names, images, and likenesses, and not actually paid to the athletes until after they left school.[76] Finally, the court found that "holding compensation in trust for student-athletes while they are enrolled would not erect any new barriers to schools' efforts to educate student-athletes or integrate them into their schools' academic communities."[77]

Nevertheless, with respect to the third alternative—permitting student-athletes to receive compensation from third-party endorsements—the court found this outcome did not offer a less restrictive way for the NCAA to achieve its stated goals.[78] To the contrary, the court concluded that "[a]llowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student athletes" even though much evidence at trial indicated that the NCAA itself does not always act in a manner to protect such exploitation.[79] The findings of fact further noted that "[p]laintiffs themselves previously indicated that they were not seeking to enjoin the NCAA from enforcing its current rules prohibiting such endorsements"—thus indicating this restraint may have been

75. *Id.* at *45.

76. *Id.* at *45–46.

77. *Id.* at *46.

78. *Id.* at *47.

79. *See id.* at *47–48 ("Although the trial record contains evidence—and Dr. Emmert himself acknowledged—that the NCAA has not always succeeded in protecting student-athletes from commercial exploitation, this failure does not justify expanding opportunities for commercial exploitation of student-athletes in the future.").

viewed differently by the court if the plaintiffs had proposed this remedy from the very beginning.[80]

B. Permanent Injunction

Based upon the court's legal findings, the court entered an injunction to remove what it deemed to be the "unreasonable elements" of the NCAA's restraints, as were found in the case.[81] First, the court issued a permanent injunction, enjoining the NCAA from enforcing any rules that "would prohibit its member schools and conferences from offering their FBS football and Division I [men's] basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses, in addition to a full grant in aid."[82] The injunction, however, still allowed the NCAA to cap the amount of pay immediately available to student-athletes at the full cost of attending college.[83]

In addition, the court enjoined the NCAA from "enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires."[84] This part of the injunction, however, was again limited to allow the NCAA to cap the amount of money that may be held in trust annually for each player at $5,000 (in 2014 dollars).[85] The injunction also allows the NCAA to enact and enforce a rule that ensures no school may offer any recruit a greater share of the licensing revenue than any other recruit in the same class, on the same team.[86]

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80. *Id.* at *47.

81. *Id.* at *96.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* at *96–97 ("[The injunction] will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) [on the amount of money to be held in trust] for every year that the student-athlete remains academically eligible to compete.").

86. *Id.* at *97.

Although the court is not entirely transparent about the basis for this $5,000-per-year cap on athlete compensation, one could surmise this amount is based in part on the NCAA expert study about consumer reaction to paying college athletes, which failed to test for consumer opposition to paying athletes less than $20,000.[87] It also seems based in part on testimony by NCAA expert witness Neal Pilson that "he would not be troubled if schools were allowed to make five thousand dollar payments to their student-athletes . . . if the payments were held in trust."[88]

IV. Why the District Court Was Correct to Find the NCAA's Restraints on Revenue Sharing to Violate Section 1 of the Sherman Act

Overall, the court's decision in *O'Bannon* was a legally sound win for the plaintiffs.[89] The gravamen of the district court's ruling—that NCAA restraints on college-athlete pay violate antitrust law—was omniscient in both its reasoning and its outcome.[90] While the decision was among the first to hold that the NCAA's "no pay" rules may violate antitrust law, the decision indubitably conformed to the well-established antitrust principles that have long been accepted by courts in the general sports marketplace.[91] For example, the decision recognized that an

87. *See id.* at *82 ("[The survey suggests that] the public's attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive. This is consistent with the testimony of [the NCAA's expert witnesses], who both indicated that smaller payments to student-athletes would bother them less than larger payments.").

88. *Id.* at *45.

89. *See infra* note 108 and accompanying text (explaining the proper application of the rule of reason analysis); *see* Michael McCann, *What Ed O'Bannon's Victory Over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED ONLINE (Aug. 10, 2014), http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights (last visited Nov. 18, 2014) (describing the *O'Bannon* ruling as "a significant, but carefully limited, legal victory for advocates of student-athletes") (on file with the Washington and Lee Law Review).

90. *See infra* Part V (explaining the limits of the *O'Bannon* holding).

91. *See infra* notes 109–11 and accompanying text (explaining the need to evaluate Sherman Act claims on the competitive effects of regulations rather than the needs of the industry's members); *see* Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Public Policy or Letting the Fox Loose in the*

agreement among separate entities in the sports industry to collectively fix athletes' wages below the market rate produces a substantial anticompetitive effect under section 1 of the Sherman Act.[92] This is a conclusion that has long been axiomatic in sports-antitrust cases where the defendants have been parties other than the NCAA.[93]

The *O'Bannon* decision also helped to reconcile the longstanding differences between the antitrust treatment of the NCAA's wage restraints with respect to players and coaches.[94] Importantly, in *Law v. NCAA*,[95] the U.S. Court of Appeals for the Tenth Circuit held that the NCAA's attempt to cap assistant coaches' salaries below the free market rate produced substantially anticompetitive effects under antitrust law.[96] Presuming that the Tenth Circuit's ruling in *Law* was indeed good law, the same conclusion should logically have always extended to wage restraints for FBS football players and Division I men's basketball players,

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Henhouse, 41 PEPP. L. REV. 229, 231 (2014) (noting that "[w]ith respect to alleged anticompetitive restraints on student-athletes," courts historically "side[d] with the NCAA when its amateurism rules were challenged" even though there is perhaps a legal basis to rule in the opposite direction).

92. *See* Findings of Fact and Conclusions of Law 50–66, O'Bannon, 2014 WL 3899815 (comparing the case at hand to a volume of jurisprudence and concluding that the plaintiffs "presented sufficient evidence to show an analogous anticompetitive effect in a similar labor market").

93. *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 76 (2013) (noting that wage fixing by sports leagues with market power is typically seen as illegal); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist*, 86 OR. L. REV. 329, 359 (2007) (explaining that the NCAA amateurism rules and limits on athlete compensation represent "a quintessential example of a horizontal price restraint"); *cf.* Brown v. Pro Football Inc., 50 F.3d 1041, 1061–62 (D.C. 1995) (explaining that because athletic prowess is a unique and highly specialized resource, "[i]f team owners join together to suppress the price of athletic services through monopsony practices, most athletes will not be able to switch profitably to other lines of work," making the market susceptible to monopsony).

94. *See infra* note 166 and accompanying text (arguing that because student-athletes are not paid, the salaries and endorsement opportunities offered to coaches are disproportionately high).

95. 134 F.3d 1010 (10th Cir. 1998).

96. *See id.* at 1020 ("Under [the quick look rule of reason], the undisputed evidence supports a finding of anticompetitive effect.").

given that both categories "are closely akin in practice to traditional workers."[97]

Furthermore, the district court's ruling in *O'Bannon* accurately interpreted the 1984 Supreme Court decision *NCAA v. Board of Regents of the University of Oklahoma*[98] in light of both its underlying context, and the factual realities about the college sports marketplace.[99] Despite the NCAA's longstanding contentions to the contrary, the *Board of Regents* decision stands foremost for the proposition that collective action by NCAA member schools is subject to antitrust scrutiny under section 1 of the Sherman Act.[100]

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97. *See* Edelman, *supra* note 93, at 77 (noting that the average Division I college football player devotes on average over forty hours per week to his sport—more time than the typical U.S. worker spends practicing his profession). *See* Robert McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74 (2006) ("[The] characterization—that athletes at NCAA-member schools are student-athletes—is essential to the NCAA because it obscures the legal reality that some of these athletes, in fact, are also employees."). The McCormicks go on to argue that

> [b]y creating and fostering the myth that football and men's basketball players at Division I universities are something other than employees, the NCAA and its member institutions obtain the astonishing pecuniary gain and related benefits of the athletes' talents, time, and energy—that is, their labor—while severely curtailing the costs associated with such labor.

Id.

98. 468 U.S. 85 (1984).

99. *See* Findings of Fact and Conclusions of Law at 79–80, O'Bannon, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014)

> Plaintiffs have also presented ample evidence here to show that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided. Accordingly, the Supreme Court's incidental phrase in *Board of Regents* does not establish that the NCAA's current restraints on compensation are procompetitive and without less restrictive alternatives.

100. *See id.* at *79–80 (explaining in detail why even though "the NCAA has cited the Supreme Court's decision in *Board of Regents* as support for its amateurism justification, its reliance on the case remains unavailing"); *see also* Edelman, *supra* note 93, at 79 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 108 (1984) (supporting this same conclusion)); Lazaroff, *supra* note 91, at 239 (explaining that without an antitrust exemption, the NCAA is rightful to be concerned about antitrust liability in light of the Supreme Court's ruling in *NCAA v. Board of Regents*); Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1301 (1992) [hereinafter *Sherman Act* Note] (footnote omitted) ("Most significantly, the Supreme Court in *NCAA v. Board of Regents of the University of Oklahoma*

It does not stand for the proposition that certain NCAA restraints are per se legal.[101]

Finally, the district court in *O'Bannon* also did not fall victim to any of the errors that had plagued past courts when reviewing the wage restraints the NCAA imposed against its athletes.[102] Many past decisions had mistakenly applied a bifurcated test to determine whether NCAA rules were subject to antitrust law—placing "business rules" within the scope of antitrust scrutiny and "eligibility rules" (such as those related to amateurism) on the

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held that NCAA actions are subject to antitrust scrutiny and should be analyzed under the 'rule of reason' . . . .").

101. *See* Marc Edelman, *The NCAA's Death Penalty Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK L. REV. 385, 413 (2014) (footnote omitted)

> [I]t is an absurdity of construction to presume that the Supreme Court's statement that 'most of the regulatory controls of the NCAA are justifiable means of fostering competition' is equivalent to a finding that the NCAA conduct cannot yield an anticompetitive effect—especially in light of the fact the Supreme Court in *Board of Regents* ultimately found the NCAA's broadcasting rules to be illegal;

Sherman Act Note, *supra* note 100, at 1301 (stating that "[t]he Supreme Court's decision in *Board of Regents* confirms that the amateurism bylaws are subject to antitrust scrutiny"). As further explained in my law review article *The NCAA's Death Penalty Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*:

> A closer inspection of the *Board of Regents* decision indicates that the language cited by [cases that have found amateurism as a defense, in itself, of anticompetitive conduct] does not truly mean what . . . these courts purport it to mean. A closer inspection of the *Board of Regents* decision indicates that the language cited by these cases came from a section of the decision that explained why NCAA conduct should be reviewed under the Rule of Reason rather than the per se test. In addition, the language cited specifically states that NCAA amateurism rules '*can* be used as procompetitive and not that they '*must'* be viewed in such a light. By using the word 'can' rather than 'must' and using it in context of determining the proper Competitive Effects Test for reviewing NCAA conduct, it is clear that the Supreme Court in *Board of Regents* never actually reached any legal conclusion in favor of specially preserving NCAA amateurism. All it did was note the argument could have been broached by the NCAA as a defense under the Rule of Reason.

102. *See infra,* notes 103–108 and accompanying text (identifying the importance of weighing the competitive effects of regulation rather than the benefits or disadvantages of enjoining the industry's members from enacting them).

outside of scrutiny.[103] The court in *O'Bannon*, however, properly recognized that even the NCAA's amateurism rules were subject to antitrust law because, as a matter of economic reality, these rules substantially impact commerce.[104] Furthermore, whereas other past courts had allowed the NCAA to defend its otherwise anticompetitive restraints based on the mere claims of "preserving amateurism"[105] and providing "an opportunity for competition among amateur students pursuing a collegiate education,"[106] the court in *O'Bannon* disagreed, holding that "[t]he Supreme Court has made clear that antitrust defendants cannot rely on . . . social welfare benefits to justify anticompetitive conduct under the Sherman Act."[107] Thus, the

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103. *See, e.g.*, Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998) (stating that "many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements"), *vacated*, NCAA v. Smith, 529 U.S. 459 (1999); Bowers v. NCAA, 9 F. Supp. 2d 460, 497 (D.N.J. 1998) (noting that certain NCAA bylaws related to athlete eligibility were non-commercial); Gaines v. NCAA, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (presuming a legal difference in treatment under antitrust law "between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism").

104. *See* Order on NCAA's and CLC's Motion to Dismiss, O'Bannon v. NCAA, Nos. C 09-1967 CW, 2010 WL 445190, at *7 (N.D. Cal. Feb. 8, 2010) (finding that the plaintiffs in *O'Bannon* had met their burden with respect to pleading an impact on interstate commerce); *see also* Edelman, *supra* note 93, at 63, 88–89 (noting that NCAA oversees a nearly $11 billion college sports industry with colleges producing yearly revenues upwards of $100 million; television rights for events like NCAA men's basketball tournaments make upwards of $750 million yearly; and NCAA schools receive millions of dollars from stadium and players' equipment advertising rights); Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 254–55 (2014) (explaining that the "'myth of amateurism' [improperly] ignores the fact that the NCAA has become a profit-seeking enterprise that governs multi-billion dollar entertainment products"); J.G. Joakim Soederbaum, Comment, *Leveling the Playing Field—Balancing Student-Athletes' Short- and Long-Term Financial Interests with Educational Institutions' Interests in Avoiding NCAA Sanctions*, 24 MARQ. SPORTS L. REV. 261, 277 (2013) (noting that NCAA members schools, despite their claims of amateurism and non-commercialism, willingly "partake in the lucrative athletic endorsement field").

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

106. Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992).

107. Order Resolving Cross-Motions for Summary Judgment; Granting Motion to Amend Class Definition; Denying Motion for Leave to File Motion for Reconsideration, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C-09-1967-CW, 2014 WL 1410451, at *15 (N.D. Cal. Apr. 11, 2014)

O'Bannon decision properly acknowledged that under the modern view of antitrust law, "even a positive, noneconomic motive can no longer save an otherwise [anticompetitive] restraint."[108]

V. Why the District Court's Permanent Injunction in O'Bannon *Was Insufficient, and Does Not Fully Ameliorate the NCAA's Restraints*

While the district court's reasoning in *O'Bannon* was both legally sound and societally groundbreaking, the permanent injunction implemented by the court was nevertheless limited and weak, as it failed to ameliorate the NCAA's anticompetitive practices as effectively as possible.[109] Indeed, the only alleged procompetitive benefits to which the court ascribed any merit related to links between the NCAA's 'no pay' rules and both the popularity of college sports and the quality of students' educations.[110] Nevertheless, the court's injunction in *O'Bannon* seemed to allow NCAA practices that did not clearly and substantially benefit either of these areas.[111]

Perhaps it would have made more sense for the court to have simply enjoined the NCAA's restraints outright, without crafting a complex system of restraints on college-athlete pay that the court deemed less restrictive.[112] Although antitrust law's Rule of

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(citing FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990)).

108. Edelman, *supra* note 93, at 92; *see also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (noting that any proper rule of reason analysis must turn on the competitive effects of the restraint and not on whether the restraint is "in the interest of the members of [the] industry").

109. *See infra* notes 110–11 (explaining the practices which are permitted by the injunction but offer dubious procompetitive effects). *See generally* McCann, *supra* note 89 (noting that the court's injunction allowing for payment of college athletes up to $5,000 per year "is not quite the all-encompassing change that some NCAA critics sought").

110. *See* Findings of Fact and Conclusions of Law at 78–89, O'Bannon v. NCAA, No. C-09-3329 CW (N.D. Cal. Aug. 8, 2014) (discussing procompetitive justifications).

111. *Cf. Sherman Act* Note, *supra* note 100, at 1312 (finding that limits on college-athlete pay are "not tailored to the goal of promoting intercollegiate athletics because many NCAA institutions frequently violate the rule," and "[t]he public knows these violations occur, but the product of college sports in the economic marketplace continues to increase in popularity").

112. *See infra* notes 113–19 and accompanying text (offering less limited

Reason has been described as "[o]ne of the most amorphous rules in antitrust,"[113] the court in *O'Bannon* did not necessarily have to adopt one of the less restrictive alternatives suggested by the plaintiffs.[114] Rather, the court could have simply recognized that under a "balancing test" the NCAA's longstanding restraints on college-athlete pay far exceeded any alleged procompetitive justifications, and thus the court could have entirely enjoined the NCAA's 'no pay' restraints.[115] If the court in *O'Bannon* had simply overturned the NCAA's 'no pay' rules, anarchy would not have ensued throughout college sports as the NCAA incredulously suggests.[116] Rather, the result would have been the benign devolving of power from the NCAA overall to the various individual athletic conferences.[117] Such a result would have

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alternatives to the court's injunction and arguing their potential efficacy).

113. Carrier, *supra* note 35, at 827; *see* Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545, 571 (1995) (describing antitrust law's Rule of Reason as "very ambiguous in practice"). *See generally* Lazaroff, *supra* note 13, at 237 (explaining that "[t]he rule-of-reason journey is an arduous one, and it can generate considerable expense and substantial investment of time and money").

114. *See* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 563 (2009) (noting that the Supreme Court has never adopted a less restrictive alternatives inquiry as part of the Rule of Reason, and even the circuits that have adopted this inquiry have generally not required it where a restraint does not have meaningful procompetitive benefits and is thus otherwise already illegal); *see also* Carrier, *supra* note 35, at 831 (noting that where an anticompetitive restraint does not have any procompetitive benefits, the restraint is deemed illegal without the need to assess the availability of less restrictive alternatives).

115. *See, e.g.*, United States v. Visa U.S.A., Inc., 344 F.3d 229, 243 (2d Cir. 2003) (upholding district court's ruling enjoining a restraint under antitrust law's Rule of Reason based on bench trial findings that rule had an anticompetitive effect in a relevant market, and that the defendants "failed to show that the anticompetitive effects of their exclusionary rules are outweighed by procompetitive benefits"); *see also* Carrier, *supra* note 35, at 831 (describing the ruling in *United States v. Visa U.S.A., Inc.* as the "sole plaintiff victory" in five reviewed instances during which the court applied true balancing).

116. *See infra* notes 117–19 and accompanying text (explaining why anarchy would not ensue if a balancing test were used); *see also* Edelman, *supra* note 13, at 1021 n.3 (providing a series of quotes from NCAA leaders arguing that overturning the NCAA's amateurism restraints would lead to anarchy).

117. *See, e.g.*, Edelman, *supra* note 13, at 1046 (discussing this option of devolving power to the conference); Edelman, *supra* note 93, at 97 ("[R]ules governing student-athlete pay at the conference level . . . would likely be far less restrictive to student-athletes, colleges, and consumers because individual

allowed "each individual conference to choose a common wage regime . . . without the need for an overarching super-cartel to control the entire market for college-age athletes."[118] It would have continued to prevent an entirely free market for college-athlete services, but would have still importantly allowed for inter-conference competition determined by the free market under traditional principles of supply and demand.[119]

Alternatively, if the court did not enjoin the NCAA's restraints outright, the court still, at a minimum, should have implemented the third less restrictive alternative discussed in the court's opinion—allowing for college athletes to seek third-party compensation for the sale of their likenesses.[120] Plaintiffs' lawyers may have hurt their prospects of obtaining this injunction by initially stating that they were not seeking a free market for athlete endorsements, and by initially indicating that their claim was only about creating a free market to sell their names and likenesses to the NCAA.[121] Nevertheless, an injunction of this nature would have benefited the most elite college athletes by providing them with the opportunity to obtain financial security. In turn, this may have helped to integrate these athletes into their academic communities by incentivizing

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conferences lack sufficient 'market power' within any relevant market to illegally restrain trade. Thus, each individual sports conference represents just a small share of the college . . . sports marketplace.").

118. Daniel A. Rascher & Andrew D. Schwarz, *"Amateurism" in Big-Time College Sports*, 14 ANTITRUST 51, 54 (2000).

119. *See* Edelman, *supra* note 93, at 97

> "[C]onference-wide salary caps on student-athlete pay are unlikely to lead to a . . . ban of student-athlete compensation. [S]ome conferences would likely opt to allow student-athletes to receive money as a means to compete . . . for student-athlete labor . . . . [Others may] recogniz[e] that taking the moral high ground may make . . . consumers more interested in [making] purchas[es] . . . ."

120. *See infra* notes 121–22 and accompanying text (discussing pros and cons of allowing athletes to seek third-party compensation for sale of likenesses).

121. *See* Findings of Fact and Conclusions of Law at 47, O'Bannon v. NCAA, No. C-09-3329 CW (N.D. Cal. Aug. 8, 2014) (stating, in terms of evaluating the proposed less restrictive alternative of allowing college athletes to receive money for endorsement deals, that "[p]laintiffs themselves previously indicated that they were not seeking to enjoin the NCAA from enforcing its current rules prohibiting such endorsements").

them to stay in college for a full four years and work toward earning their diplomas alongside their classmates.[122]

The argument that college athletes would be more likely to stay in school for four years and earn their degrees if they were allowed to engage in third party sponsorship deals is not a novel one.[123] It has long been established that the Division I college football and men's basketball players who are most likely to leave school early to enter the professional ranks are those from low-income families.[124] Allowing these athletes to receive the full cost of attendance is a step in the right direction; however, the sort of money enabled by the *O'Bannon* injunction pales in comparison to the amount that would have been available through third-party sponsorship opportunities.[125] While a $5,000 per year stipend may provide a college athlete ample money for food, shelter and perhaps even the occasional movie, this sum is almost certainly not enough to shift an elite college athlete's priorities away from imminently turning professional.[126]

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122. *See* Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J. L. REFORM 861, 863 (2002) ("By colluding to restrain the financial opportunities of student-athletes, Amateurism influences star college basketball players to leave school without graduating in favor of professional leagues.").

123. *See, e.g.*, *id.* at 875 ("College basketball players, not sharing in the revenue generated by their talents, are increasingly forgoing college in favor of the NBA."); *cf.* Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 415 (2012) (discussing how allowing college athletes access to a free market for endorsements is likely to meet their financial needs).

124. *See* Kenneth Shropshire, *Compensation and the African American Student-Athlete*, *in* RACISM IN COLLEGE ATHLETICS, 272–73 (2000) (noting that when considering the low graduation rates of African-American athletes in Division I men's basketball and FBS football, the reality of race as a near proxy for familiar wealth needs to be considered).

125. *See, e.g.*, Edelman, *supra* note 122, at 876 (noting that even more than fifteen years ago, basketball star Tracy McGrady was able to sign a six-year, $12 million endorsement deal immediately out of high school, before even playing in a professional game).

126. *See id.* at 885–86 (discussing a deregulation model as a solution); Michael Corgan, *supra* note 123, at 415 (concluding that "[p]roviding student-athletes with thirty to fifty dollars per month (or $360 to $600 a year) would not lessen the desire for poor student-athletes to accept thousands of dollars from sports agents," but "[a]llowing student-athletes to seek lucrative endorsement deals . . . [would provide] an ample amount of money").

Furthermore, allowing college athletes to sponsor products or sell their publicity rights brings the treatment of college athletes in line with non-athletes on college campuses, whose private ventures are not regulated.[127] To the extent that procompetitive benefits truly emanate from college athletes engaging with the mainstream academic community, allowing college athletes to engage in the same unregulated lifestyle as traditional students represents an important step in the right direction.[128] In addition, allowing elite college athletes to license the rights to their likenesses to third parties enables these athletes to obtain business and negotiation experience that may be directly relevant to their course work—should they pursue studies in strategic management, marketing, or sports management.

VI. Implications of the O'Bannon *Decision and Logical Next Steps*

Some advocates for college-athlete rights have expressed disappointment over the outcome in *O'Bannon v. National Collegiate Athletic Association*—believing that the court's injunction did not go far enough to protect the interests of college athletes. Nevertheless, the U.S. District Court's decision in *O'Bannon* is unlikely to serve as the last word in the dispute over college-athlete compensation.[129] The stark contrast between the court's holding and the limited nature of its injunction may lead

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127. *See* Jon Solomon, *Can Congress (Yes, Congress) Help NCAA Find Solutions?*, CBS SPORTS (Aug. 18, 2014), http://www.cbssports.com/college football/writer/jon-solomon/24666147/can-congress-yes-congress-help-ncaa-find-solutions (last visited Nov. 18, 2014) (noting that Jo Potuto believes "the NCAA should have no rule banning players from using their name and likeness to be paid," likening such pay "to actress Emma Watson being paid for appearing in movies while a student at Brown and still participating in theater performances at the university") (on file with the Washington and Lee Law Review). *See* Edelman, *supra* note 122, at 884 (explaining why stipends "fail to provide young basketball players enough money to keep them from leaving the NCAA for the NBA").

128. *See supra* notes 105–23 and accompanying text (discussing the benefits of allowing college athletes the same unregulated lifestyle as classmates).

129. *See infra* notes 130–95 and accompanying text (discussing both parties' grounds for appeal in *O'Bannon*, subject matter for subsequent lawsuits against the NCAA, impact of *O'Bannon* on unionizing and Title IX compliance, and potential for a statutory antitrust exemption).

to an appeal of the decision by both parties.[130] Meanwhile, the decision also may lead to various new class action lawsuits involving NCAA amateurism rules, as well as strategic changes to the college-athlete unionization efforts, new concerns about Title IX compliance, and even an attempt by NCAA leaders to secure from Congress a statutory exemption from U.S. antitrust law.[131]

A. Grounds for an NCAA Appeal

Within days of the district court's ruling in *O'Bannon*, the NCAA already had indicated plans to appeal the court's decision.[132] The anticipated NCAA appeal may argue that, as a matter of law, the Supreme Court's decision in *Board of Regents* precludes any antitrust challenges related to NCAA eligibility rules, including challenges related to college athlete 'no pay' rules.[133] To support this argument, the NCAA may rely upon three appellate decisions from other circuits that interpret *Board of Regents* in a manner more favorable to the NCAA's position.[134]

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130. *See infra* notes 132–54 and accompanying text (discussing the grounds for appeal for each *O'Bannon* party).

131. *See infra* notes 155–95 and accompanying text (discussing subject matter for subsequent lawsuits against the NCAA, impact of *O'Bannon* on unionizing and Title IX compliance, and potential for a statutory antitrust exemption).

132. *See, e.g.*, Steve Berkowitz & Thomas O'Toole, *NCAA Seeks Clarification Prior to Appeal of* O'Bannon *Case*, USA TODAY (Aug. 11, 2014), http://www.usatoday.com/story/sports/ncaaf/2014/08/10/ed-obannon-ncaa-appeal-court-ruling-images-likenesses/13860823 (last visited Nov. 18, 2014) (indicating the NCAA's intent to appeal the district court's ruling in *O'Bannon*) (on file with the Washington and Lee Law Review); Michael Marot, *Emmert Says NCAA Will Appeal O'Bannon Ruling*, ASSOCIATED PRESS (Aug. 10, 2014), http://bigstory.ap.org/article/emmert-says-ncaa-will-appeal-obannon-ruling-1 (last visited Nov. 18, 2014) (quoting NCAA president Mark Emmert that "[n]o one on our legal team or the college conferences' legal teams think this is a violation of antitrust laws and we need to get that settled in the courts," and Donald Remy, stating he would take the case to the Supreme Court) (on file with the Washington and Lee Law Review).

133. *See infra* notes 134–40 and accompanying text (discussing appellate decisions the NCAA may use to support its argument).

134. *See infra* notes 135–40 and accompanying text (listing the three appellate decisions).

First, in *Smith v. NCAA*,[135] the U.S. Court of Appeals for the Third Circuit held that "the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements" because these requirements are not commercial in nature.[136] In *McCormack v. NCAA*,[137] the U.S. Court of Appeals for the Fifth Circuit held that rules that determine who is eligible to compete in college football games "enhance public interest in intercollegiate athletics" and are consequently procompetitive.[138] Meanwhile, in *Banks v. NCAA*,[139] the U.S. Court of Appeals for the Seventh Circuit held that NCAA rules about player eligibility are procompetitive because "the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a collegiate education."[140]

None of these three decisions, however, is binding on the courts in the Ninth Circuit. In addition, each of these three decisions is suspect in its legal reasoning.[141] Although the court in *Smith* concluded that the NCAA's amateurism rules were not "interstate commerce," the Supreme Court's ruling in *Board of Regents* recognized the exact opposite—that NCAA rules meet the "interstate commerce" requirement and are thus subject to review

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135. 139 F.3d 180 (3d Cir. 1998).

136. *Id.* at 185.

137. 845 F.2d 1338 (5th Cir. 1988).

138. *Id.* at 1344 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984)). The court in *McCormack* further cited directly to *Board of Regents* for the proposition that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . ." *Id.* (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).

139. 977 F.2d 1081 (7th Cir. 1992).

140. *Id.* at 1089–90 (preserving an NCAA rule that disallows college athletes who had previously entered a professional sports league's draft in that same sport).

141. *See infra* notes 142–52 and accompanying text (discussing the flaws in the legal reasoning of each decision). *See* Lazaroff, *supra* note 93, at 340 (noting that since the Supreme Court decision in *Board of Regents* "lower federal courts [in some circuits have] seized the opportunity to treat NCAA player restraints in a significantly different manner" and have adopted "a more deferential approach" to the NCAA than is seen otherwise in sports antitrust jurisprudence).

on their competitive merits.[142] Furthermore, as a factual matter, "intercollegiate athletics in its management is clearly business, and big business at that."[143] Currently, the NCAA represents an $11 billion industry with numerous colleges producing revenues upwards of $100 million per year.[144] Even some NCAA member schools nowadays produce annual revenues upwards of $100 million from their athletics programs.[145]

Similarly, the court's reasoning in *McCormack* was likely flawed because it "gerrymandered the language in *Board of Regents* to rule in favor of the NCAA."[146] The language quoted in *McCormack* in favor of finding the NCAA's eligibility rules procompetitive specifically "came from a section of *Board of Regents* that explained why NCAA conduct should be reviewed

142. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984); *see* Edelman, *supra* note 93, at 88 (explaining that under the principles of the Supreme Court decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980), "the only thing a plaintiff must demonstrate to meet the threshold issue of 'interstate commerce' is a 'substantial effect on interstate commerce generated by [a defendant's general business activities]'"); *see also* Carstensen & Olszowka, *supra* note 113, at 567–68 ("The conclusion is inescapable that the NCAA is a private organization engaged in the restraint of economic competition in intercollegiate athletics programs, and so is necessarily within the jurisdiction of the Sherman Act.").

143. Hennessey v. NCAA, 564 F.2d 1136, 1150 (5th Cir. 1977); *see* Lazaroff, *supra* note 93, at 352 (concluding that "the line of demarcation between professional and intercollegiate athletics is not as clear as some would have it, and NCAA regulations directed at student-athletes should be properly characterized as more commercial in nature than earlier case law suggests").

144. *See* Edelman, *supra* note 93, at 63 (noting that "some NCAA members have become increasingly wealthy—grossing annual revenues upwards of $100 million per year" and that "in 2010, a twelve-team athletic conference collected more than $1 billion in athletic receipts"); *see also Where Does the Money Go?*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Nine+points+to+consider_one (last visited Nov. 18, 2014) (accessed by entering the URL in the Internet Archive index) ("[The] annual revenue for college athletics programs was estimated for 2008–09 at about $10.6 billion.") (on file with the Washington and Lee Law Review).

145. Edelman, *supra* note 93, at 63; *see also NCAA Finances*, USA TODAY, http://www.usatoday.com/sports/college/schools/finances (last visited Nov. 18, 2014) (listing thirteen NCAA member colleges with annual revenues exceeding $100 million, topped by the University of Texas with $165.7 million in annual revenues) (on file with Washington and Lee Law Review).

146. Edelman, *supra* note 93, at 94 (citing McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988)).

under the full rule of reason rather than the per se test."[147] Furthermore, the exact language cited in *McCormack*, as quoted from *Board of Regents*, actually states that the NCAA's amateurism rules . . . '*can*' be viewed as procompetitive."[148] "By using the word '*can*' rather than '*must*,'" the Supreme Court was not declaring that all NCAA amateurism rules were procompetitive as a matter of law.[149] Rather, the Court was simply leaving open the possibility that, upon a full factual inquiry, many of the NCAA's amateurism restraints might ultimately be found procompetitive.

Lastly, the court in *Banks* misconstrued the language from *Board of Regents* in the same manner as *McCormack*—error that was pointed out by the Honorable Joel Flaum in his robust dissent to that case.[150] Even Supreme Court Justice Harry Blackmun seemed to agree with the dissent's view in *Banks*.[151] In a bench memorandum that assessed whether to grant certiorari, Justice Blackmun wrote by hand "CA7 got this one dead wrong."[152] Nevertheless, the Supreme Court never granted certiorari in the case.

B. Grounds for a Plaintiffs' Appeal

The plaintiffs in *O'Bannon* also may attempt to appeal based on the decision's limited practical benefits to elite college athletes.[153] It is odd to think that, as a matter of law, an agreement among NCAA members to pay their athletes $0 for the rights to use their likenesses would constitute illegal wage fixing, but an agreement to cap athlete payments for these rights at

147. *Id.*

148. *Id.*

149. *Id.* (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).

150. *See* Banks v. NCAA. 977 F.2d 1081, 1098–99 (7th Cir. 1992) (Flaum, J., dissenting) (stating the steps that Banks would have to take under *Board of Regents* and other case law to prove his claim).

151. *See infra* note 152 and accompanying text (discussing Justice Blackmun's reaction to the *Banks* outcome).

152. Edelman, *supra* note 93, at 95 (citations omitted).

153. *See id.* at 76 (suggesting alternatives to the no-pay rule).

$5,000 per year could potentially still be deemed procompetitive.[154]

Nevertheless, the iconoclastic nature of the court's ruling in *O'Bannon* seems to arise from the plaintiffs' own failure to introduce evidence showing that payments to college athletes exceeding $5,000 per year would benefit consumers in any relevant market. Furthermore, Judge Wilken's decision leaves open the possibility that future litigation will lead to a far broader injunction against NCAA pay restraints. This would happen if future plaintiffs can introduce better evidence showing that restraints on college-athlete pay harm consumers by denying them the ability to monetarily voice their preferences for particular college football and basketball recruits signing with colleges in their home markets.

Should the plaintiffs in *O'Bannon* choose to appeal the decision, they will likely face an uphill battle of challenging the district court's ruling in light of their failure to produce evidence that lifting the restraints on college-athlete pay beyond $5,000 per year would benefit consumers overall. Had the plaintiffs produced even a single expert report showing that fan interest in college sports would have remained stable in a truly free market for college athletes' services, the plaintiffs would have been in a far better position to appeal the district court's ruling as a matter of law.

C. Subject Matter for Subsequent Lawsuits Against the NCAA

As referenced in the previous section, the district court's decision in *O'Bannon* may further impact a number of other lawsuits currently under review by the U.S. District Court for the Northern District of California, as well as encourage the filing of new lawsuits against the NCAA based on slightly different antitrust theories.[155] One notable antitrust lawsuit currently

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154. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.").

155. *See infra* notes 156–67 and accompanying text (discussing a current lawsuit and the potential of future lawsuits).

under review by the same district court is *Jenkins v. National Collegiate Athletic Association*.[156] This lawsuit seeks to overturn NCAA rules "placing a ceiling on the compensation that may be paid to [college] athletes for their services."[157] It specifically alleges that colleges competing in FBS football and Division I basketball contests have illegally conspired to deny their athletes the ability to sell their athletic services to colleges in a free market.[158]

Although some legal commentators have opined that the *Jenkins* lawsuit is "doomed for failure" based on the district court's limited remedy in *O'Bannon*,[159] such a conclusion is overly simplified if not downright inaccurate. To the contrary, the legal holding in *O'Bannon* explicates that the NCAA's restraints on college-athlete pay have strong anticompetitive effects,[160] albeit also perhaps some procompetitive benefits.[161] Because the restraints on college-athlete compensation exceeding $5,000 per year remain unsettled by the *O'Bannon* decision, the *Jenkins* lawsuit gives a new class of antitrust plaintiffs the chance to demonstrate that the anticompetitive effects of the NCAA's restraints—even with respect to payments exceeding $5,000 per year—cannot be offset by their procompetitive benefits.[162]

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156. Complaint at 1, Jenkins v. NCAA, No. 14-cv-02758-CW, (D.N.J. Mar. 17, 2014).

157. *Id.* at 2.

158. *Id.* at 3.

159. *See* Michael McCann, TWITTER, https://twitter.com/McCannSportsLaw/status/499581988656140288 (Aug. 13, 2014) (last visited Nov. 18, 2014) (tweeting that "[t]op sports lawyer Alan Milstein: O'Bannon ruling doesn't help Jeffrey Kessler lawsuit, which 'is doomed for failure'") (on file with the Washington and Lee Law Review).

160. *See* Findings of Fact and Conclusions of Law, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09–3329 CW, 2014 WL 3899815, at *8 (N.D. Cal. Aug. 8, 2014) (explaining that the agreement among schools to attribute zero value to a student-athlete's name, image, and likeness harms the student-athlete and creates an anticompetitive effect).

161. *See id.* at *36 ("Although the rules do yield some limited procompetitive benefits by marginally increasing consumer demand for the NCAA's product and improving the educational services provided to student-athletes, plaintiffs have identified less restrictive ways of achieving these benefits.").

162. *See* Jenkins v. Nat'l Collegiate Athletic Ass'n, No. 3:14-cv-01678 (D.N.J. complaint filed Mar. 17, 2014) (alleging that the ceiling on athlete pay created by NCAA restrictions is a pernicious and blatant violation of antitrust law, which has no legitimate procompetitive justification).

The *Jenkins* plaintiffs further enjoy the benefit of learning from the mistakes the *O'Bannon* plaintiffs made in strategizing their case. While the *O'Bannon* plaintiffs produced no meaningful evidence to rebut the NCAA expert's findings of an inverse correlation between athlete pay and consumer demand, the *Jenkins* plaintiffs will have a fresh opportunity to commission an expert report to rebut these findings.[163] If the *Jenkins* plaintiffs are able to produce meaningful evidence to rebut the presumption of an inverse correlation between athlete pay and consumer interest in college sports, it could reasonably lead to the conclusion that the NCAA's amateurism rules do not aid consumer demand and thus have no procompetitive virtue.[164] In such an event, a court might ultimately overturn the NCAA's restraints outright.

Beyond *Jenkins*, a slightly different legal theory under which a plaintiff could challenge the NCAA "no pay" rules may allege that the NCAA rules that prevent college athletes from endorsing products restrain trade in various sports celebrity endorsement markets.[165] A challenge of this nature might also allege that the NCAA's restraints in endorsement markets lead to windfall profits for college coaches who, based upon these restraints, do not have to compete against their own athletes for endorsement/promotional opportunities within their local college communities.[166] Although the court in *O'Bannon* did not order

163. *See O'Bannon*, 2014 WL 3899815 at *11 (noting that the plaintiffs did not produce a rebuttal report to Dr. Dennis's report, which indicated an inverse correlation between college–athlete pay and fan interest).

164. *Cf.* Lazaroff, *supra* note 93, at 359–60 (suggesting that a potential source for such evidence may arise from a showing that even when "illicit payments in violation of NCAA regulation have been uncovered repeatedly over the years . . . [such] violations of NCAA amateurism rules . . . have not diminished student, faculty, or alumni support for successful college football or basketball teams"); *Sherman Act* Note, *supra* note 100, at 1313 (suggesting that "[c]onsumer demand for college sports does not decline when violations of the rule are exposed," and that "the quality of the sports programs and the athletes' affiliations with educational institutions appear to be the only two factors that affect consumer demand for college sports").

165. *See supra* notes 125–27 and accompanying text (explaining the drastic difference between the compensation available to student-athletes after *O'Bannon* and the compensation that would be available if student-athletes could endorse products).

166. *See* Edelman, *supra* note 122, at 862 (arguing that because student-athletes are not paid, the salaries and endorsement opportunities offered to

deregulation of the third-party endorsement markets, a subsequent lawsuit under this theory might achieve a more favorable result if the plaintiffs are able to show that some businesses would seek to hire college-athlete endorsers if they were not precluded from doing so by the NCAA bylaws.[167]

Furthermore, a direct challenge to the NCAA rules forbidding college athletes from endorsing products is likely to succeed on its antitrust merits because the NCAA could not easily argue that there are any procompetitive benefits to restraining third-party endorsement markets. It would be difficult for the NCAA to argue that a free market for college athletes endorsing products would harm consumer demand for attending college sporting events because other sporting events such as the Olympic Games have not lost popularity after beginning to allow athletes to endorse third-party products. In addition, allowing college athletes to endorse third-party products would not necessarily lead to athlete disengagement from the broader educational community, as many college students who are famous for pursuits other than sports currently endorse products without it interfering with their overall college experience.

D. Impact of the O'Bannon *Ruling on College-Athlete Unionizing and Title IX Compliance*

The ruling in *O'Bannon* simultaneously creates a possibility for changes in legal strategies pertaining to college-athlete unionizing efforts and Title IX compliance.[168] In terms of unionizing, from the players' perspective the *O'Bannon* decision

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coaches are disproportionality high); *see also id.* at 874 ("Since student-athletes are not allowed to profit from their skills, men's college basketball revenues create a windfall of payments to league administrators, directors, and coaches.").

167. *See* Findings of Fact and Conclusions of Law, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09–3329 CW, 2014 WL 3899815 at *17 (N.D. Cal. Aug. 8, 2014) (rejecting the third alleged less restrictive alternative of allowing for a free market for college athletes to sell their services to third parties).

168. *See infra* notes 169–81 and accompanying text (discussing the potential benefits student-athletes may appreciate if they unionize and discussing why Title IX claims are unlikely to succeed).

could discourage such efforts based on an earnest belief that antitrust law, and not labor law, is the best way to secure financial gains.[169] Although the permanent injunction issued in *O'Bannon* creates only an immediate upside of modest financial gains, FBS football and Division I men's basketball players may look to the upcoming *Jenkins* litigation as the potential case that could break meaningful ground toward a free market for college athletes' services.[170]

By contrast, some NCAA leaders may view the *O'Bannon* ruling as creating a stronger basis to support the FBS football players and Division I men's basketball players unionizing efforts as long as these efforts occur as part of a multiemployer bargaining unit.[171] The reason being, if college football and men's basketball players unionize as part of a multiemployer bargaining unit, the NCAA would incur an immediate obligation to bargain with these athletes over the mandatory terms and conditions of employment—hours, wages, and general working conditions.[172] This, in turn, would grant the NCAA the benefit of antitrust law's non-statutory labor exemption—thus allowing for collective bargaining over athlete pay without the risk of any further antitrust liability.[173]

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169. *See infra* note 173 and accompanying text (discussing how if the players unionize, it may take away their rights under antitrust law based on the non-statutory labor exemption). *See generally* Lazaroff, *supra* note 13 (concluding that if college athletes are permitted to unionize by the National Labor Relations Board, "the non-statutory labor exemption will come into play").

170. *See supra* notes 156–64 and accompanying text (describing the *Jenkins* lawsuit).

171. *See infra* notes 172–73 and accompanying text (explaining the benefits of unionizing).

172. *See* N.L.R.B. v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (explaining that the National Labor Relations Act establishes "the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment"). The Court further reasoned that "[t]he duty is limited to those subjects, and within that area neither party is legally obligated to yield." *Id.*

173. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 237 (1996) (recognizing an exemption from antitrust laws when unionized employees bargain in good faith with their employers over hours, wages, and working conditions). This "exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from

Meanwhile, in terms of Title IX compliance, some NCAA members currently may be reluctant to raise scholarship levels to the true cost of attendance for only FBS football and men's basketball players based on the fear of lawsuits challenging this practice under Title IX.[174] Indeed, if certain colleges increase their scholarship amounts to the true cost of attendance for male college athletes but not for female athletes, this pricing practice may very well present some Title IX risk.

Nevertheless, the risk of an NCAA member school violating Title IX by "paying" its athletes a share of their name, image and likeness revenues should be viewed as substantially lower than simply offering unequal scholarship amounts—especially if colleges pay different amounts to athletes based on the actual free market value for their services/likenesses.[175] In past court decisions, Title IX's requirements as related to equal pay have been generally interpreted as "coextensive with the antidiscrimination provisions that appear in the Equal Pay Act of 1963 and the Civil Rights Act of 1964."[176] Thus, disparate pay for male and female athletes is likely permissible under Title IX as long as the male athletes' job descriptions involve greater skill, effort, or responsibility than the female athletes' job descriptions.[177]

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antitrust sanctions." *Id.* Further, the Court explained that the non-statutory labor exemption arises because "as a matter of logic, it would be difficult . . . to require groups of employers and employees to bargain together, but at the same time to forbid them to make . . . *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable." *Id.*

174. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681–1688 (2012) (discussing obligations of equal educational opportunities for students, irrespective of their gender).

175. *See infra* notes 176–81 and accompanying text (discussing why the risk of a Title IX claim based on disparate pay between male and female athletes is unlikely to succeed).

176. Edelman, *supra* note 13, at 1051; *see* John Gaal et al., *Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues*, 28 J.C. & U.L. 519, 545 (2002) (explaining that "the few courts that have addressed Title IX as an independent employment discrimination statute in the context of [college] coaches' compensation have not viewed it as any broader than the [Equal Pay Act] . . . ."); Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1077 (9th Cir. 1999) (explaining that the plaintiff's Title IX claim fails for the same reasons as her Equal Pay Act claim fails).

177. Thus, disparate compensation of male and female student-athletes

Based on the foregoing, there is a reasonable argument that if individual athletes were to receive a salary or stipend based on the economic value they generate for their particular athletic programs, FBS football and Division I men's basketball players' jobs would be found to involve greater skill, effort and responsibility than the jobs of their non-revenue producing counterparts in other sports.[178] The case that seems to best support the point is *Stanley v. University of Southern California*.[179] There, the U.S. Court of Appeals for the Ninth Circuit rejected a motion to enjoin the University of Southern California from providing higher pay to its men's basketball coach than its female coach on the ground that the revenues generated by the men's basketball team is "90 times greater than the revenue generated by the women's basketball team."[180] Although

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would be permissible under Title IX of the Education Amendments of 1972 as long as the male student-athletes' job descriptions involved greater skill, effort, and responsibility than the female student-athletes' job descriptions. Edelman, *supra* note 13, at 1051.

178. *See id.* at 1052 (arguing that male student-athletes' jobs indeed involve greater skill, effort, and responsibility for purposes of pay discrimination laws because male student-athletes in football and men's basketball typically generate substantially higher revenues for their colleges from the use of their names and likenesses than do female student-athletes"); *see also* Jon Gaal et al., *supra* note 176, at 527 ("Courts have recognized that differences in revenue production and media expectations can provide evidence of a difference in responsibilities sufficient to preclude a finding of 'equal work.'"); Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1322 (9th Cir. 1994) ("The responsibility to produce a large amount of revenue is evidence of a substantial difference in responsibility."); Jacobs v. Coll. of William & Mary, 517 F. Supp. 791, 797 (E.D. Va. 1980), *aff'd without opinion*, 661 F.2d 922 (4th Cir. 1981) (stating that the obligation to produce revenue demonstrates that coaching jobs are not substantially equal).

179. 13 F.3d 1313 (9th Cir. 1994).

180. *Id.* at 1321. Furthermore, as previously noted in my Oregon Law Review Article *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*:

> [I]t is worth noting that the NCAA's alleged concerns about the gender pay gap seem disingenuous in light of various NCAA members' longstanding practices of allowing for a wide pay gap between male and female coaches, even in sports where differences in revenue generation would not justify such a distinction. A 2001 *Chronicle of Higher Education* survey on the gender pay gap in college sports found that the disparity in pay among college athletic coaches was far greater than the disparity in society overall. Meanwhile, statistics accumulated by the Department of Education

some Title IX scholars have argued that *Stanley* was wrongly decided,[181] the case remains good law in the Ninth Circuit—one of the federal circuits that is perceived as adopting a more liberal interpretation to Civil Rights statutes such as Title IX.

E. Potential NCAA Advocacy Before Congress for a Statutory Antitrust Exemption

Finally, the recent ruling in *O'Bannon* is likely to increase the NCAA's efforts to lobby Congress for a statutory exemption from federal antitrust law.[182] As has previously been noted in various academic writings, "[t]he unique nature of the NCAA as a bottom-up organization composed of politically powerful universities makes it into a prime candidate to seek special

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> from 2003 to 2010 show that the average salary for NCAA Division I men's team coaches increased sixty-seven percent, whereas the salary for women's team coaches increased just sixteen percent. In the context of the gender disparity of college coaches' pay, the NCAA has remained largely silent.

Edelman, *supra* note 13, at 1052–53.

181. *See, e.g.*, Erin Buzuvis, *More Thoughts on the Title IX Question*, TITLE IX BLOG (Mar. 28, 2014), http://title-ix.blogspot.com/2014/03/more-thoughts-on-title-ix-question-in.html (last visited Nov. 18, 2014) (on file with the Washington and Lee Law Review).

182. *See* Eben Novy-Williams & Erik Matuszewski, *NCAA Escape from Court Loss Seen Resting in Antitrust Exemption*, BLOOMBERG (Aug. 11, 2014 12:00 AM), http://www.bloomberg.com/news/2014-08-11/ncaa-escape-from-court-loss-seen-resting-in-antitrust-exemption.html (last visited Nov. 18, 2014) (discussing the possibility of NCAA members lobbying Congress for a special statutory antitrust exemption) (on file with Washington and Lee Law Review); Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 659 (2009) (explaining that independent businesses may concertedly petition Congress to change the law without risking an antitrust violation based on the *Noerr-Pennington* doctrine, which allows competing businesses to join together for the purposes of influencing government action, even if the underlying goal is one that is to restrain competition); Lazaroff, *supra* note 13, at 240 (referencing a 2007 monograph produced by the American Bar Association, which notes that there are more than twenty statutory exemptions from federal antitrust law). These exemptions generally fall into three broad categories: "(1) natural monopoly, (2) market and institutional failures of various kinds, or (3) subsidy for some socially desired activity or wealth transfer to some socially preferred group." *Id.* at 241.

legislation in its favor."[183] Moreover, Congress has a history of passing special legislation to protect the NCAA's interests to the detriment of college athletes.[184] For example, on September 9, 2004, Congress passed the Sports Agent Responsibility and Trust Act (SPARTA),[185] which indoctrinated into law aspects of the NCAA bylaws that prevented sports agents from providing anything of value to student athletes.[186]

Lobbying efforts for an NCAA antitrust exemption might seek either a broad based exemption (seeking complete insulation from any collective agreements ranging in topic from television broadcast rights to coaches' compensation) or a narrow exemption (addressing only a specific aspect of NCAA business, such as athlete pay).[187] Among the more recent proposals for granting

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183. Edelman, *supra* note 33, at 418; *see also* Lazaroff, *supra* note 13, at 237–38 (discussing various past suggestions for crafting an antitrust exemption to protect the NCAA).

184. *See, e.g.*, *infra* note 185 and accompanying text (providing an example of legislation that protects NCAA interests and harms student-athletes).

185. 15 U.S.C. § 7802(a)(1)(B) (2012).

186. *Id.*; *see also* Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform Its Sports Agent Laws to Conform with True Agency Principles*, 4 J. SPORTS & ENT. L. 145, 178 (2013) (discussing remedies under SPARTA).

> In terms of remedies, SPARTA provided a cause of action to just about every party other than the athletes. SPARTA granted the Federal Trade Commission ("FTC") authority to enforce the act as if it were part and parcel to the FTC Act. In addition, it permitted state attorney general[s] to bring suit against sports agents under the act, either in the same capacity as the FTC, or on behalf of its residents if the attorney general could show that the agent had threatened or adversely affected a resident's interest. Meanwhile, SPARTA even allowed NCAA member schools to sue sports agents under the act if they could show that a sports agent's conduct resulted in expenses to the NCAA including 'losses resulting from penalties, disqualification, suspension and/or restitution for losses suffered due to self-imposed compliance actions.'

Id. (citation omitted).

187. *See* Lazaroff, *supra* note 13, at 239 (explaining that "[a] broadly drafted antitrust exemption for the NCAA could undoubtedly shield it and its members from any real threat of Sherman Act liability"). In contrast, "a more limited exemption would provide some relief from the steady stream of litigation, which creates expense and uncertainty about the validity of NCAA business practices." *Id. Cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221–22 (1940) (noting that Congress does not provide the Court with discretion to preserve certain price-fixing restraints on social policy grounds, and thus if an industry

NCAA member schools a narrow exemption, Marquette Law School professor Matthew Mitten and Pennsylvania State Law School professor Stephen F. Ross suggested, in a 2014 Oregon Law Review Article, that Congress should grant an antitrust exemption to any college that is willing to submit voluntarily to the authority of "an independent federal regulatory commission, which would provide an inclusive and transparent rule-making process."[188]

Nevertheless, even if Congress were able to exempt the NCAA from antitrust law, it would be misguided for Congress to do so.[189] Insulating the NCAA, even in part, from antitrust law would "chill individual NCAA members' ability to make independent decisions from the NCAA majority and thus would prevent gradual reform movements within the institution."[190] It further may "slow (if not freeze) the process of individual member schools implementing stipends to improve the standard of living for student-athletes."[191]

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seeks special exemption from antitrust law, it needs to seek congressional action).

188. *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, 844 (2014) ("Although the commission's rules would not be legal mandates, their voluntary adoption by the NCAA and its member institutions would immunize anticompetitive restraints in connection with big-time college sports from judicial scrutiny under federal and state antitrust laws.").

189. *See infra* notes 190–93 and accompanying text (discussing the problems with an NCAA exemption from antitrust law); *see also* Lazaroff, *supra* note 13, at 239–45 (discussing potential rationales behind an antitrust exemption for the NCAA).

> The $64,000 question is reduced to this: does any acceptable rationale for a legislative antitrust exemption really further the case for giving one to the NCAA? I think not. . . . The NCAA is the dominant player in intercollegiate athletics, possessing great bargaining power in purchasing the raw ingredients for and selling its athletic product.

Id. at 245; *see also* Edelman, *supra* note 33, at 418 (concluding that "[e]ven though Congress has the power to pass a statute that safeguards the NCAA 'death penalty,' it would be misguided for Congress to do so").

190. Edelman, *supra* note 33, at 418.

191. *Id.*; *see also* Lazaroff, *supra* note 13, at 246 ("In sum, any blanket [antitrust] exemption for the NCAA would allow colleges and universities to keep money that a competitive market would put in the pockets of others. One might call the result a 'reverse Robin Hood effect,' where the rich get richer and the have-nots continue to struggle.").

Finally, an administrative solution to regulate college sports such as the one suggested by Professors Ross and Mitten still ignores the overwhelming political power that the NCAA already exercises over the U.S. government.[192] It further ignores the general view that consumers are best protected from anticompetitive conduct by free market solutions rather than bureaucratic remedies.[193]

Even Professors Ross and Mitten seem to recognize the implicit drawbacks to using administrative solutions to regulate sports leagues rather than antitrust law. Professor Mitten writes in his 2000 law review article, *Applying Antitrust Law to NCAA Regulation of 'Big Time' College Athletics*, that the commercial business practices of the NCAA ideally should be held subject to antitrust law because "[t]here is no valid justification for permitting the NCAA to determine arbitrarily the permissible degree of economic competition among its members."[194] Meanwhile, Professor Ross concludes in his seminal 1989 article *Monopoly Sports Leagues* that it would be better to break up Major League Baseball and the National Football League than to allow for administrative regulation of these leagues because "those officials assigned to regulate the sports industry soon may

192. *See* Mitten & Ross, *supra* note 188, at 844 (discussing an administrative law proposal to regulate college sports); *see also* Greg Johnson, *Lawmaker Challenges NCAA on Tax Exemption*, L.A. TIMES (Oct. 6, 2006), http://articles.latimes.com/2006/oct/06/sports/sp-ncaa6 (last visited Nov. 18, 2014) (quoting professor Gary Roberts, one of the leading authorities on sports law in the United States, as describing the political power of the NCAA and college sports as "unbelievable") (on file with the Washington and Lee Law Review).

193. *See* Lazaroff, *supra* note 13, at 247–48 (comparing a blanket antitrust exemption for the NCAA to "leaving the fox free to devour its prey"); Edelman, *supra* note 33, at 402–19 (discussing the importance of treating the NCAA identically to other business associations with market power). *See* Brown v. Pro Football, Inc., 518 U.S. 231, 252 (1996) (Stevens, J., dissenting) (noting that "[t]he basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels," and that "[c]ollusion among competitors, it is believed, may produce prices that harm consumers"); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (concluding that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources").

194. Matthew Mitten, *Applying Antitrust Law to NCAA Regulations of 'Big Time' College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 8 (2000).

become 'captured' by the very owners that they supposedly are regulating."[195]

VII. Conclusion

The district court's recent ruling in *O'Bannon v. National Collegiate Athletic Association* was, at once, both pioneering and mundane. The decision was pioneering to the extent that it was among the first to recognize that certain restraints on college-athlete pay may violate section 1 of the Sherman Act.[196] In addition, the ruling established both a limited free market for college athletes' services[197] and important legal precedent to facilitate future antitrust challenges to other aspects of the NCAA's bylaws.[198]

Nevertheless, the *O'Bannon* ruling was also mundane because it failed to establish a true free market for college-athlete services, and it failed to grant college athletes with legal protection to license the rights to their names, images, and likenesses to third parties.[199] Although the court in *O'Bannon* had the opportunity to fully enjoin the NCAA's restraints on student-athlete pay, it instead elected to only enjoin those aspects of the NCAA rules that prevent colleges from providing athletes with the full cost of attendance to a school plus up to $5,000 per year via trust fund.[200] While some legal scholars describe this injunction as helping to "split the baby," antitrust jurisprudence is not supposed to be about creating compromises donned in social policy.[201] It is supposed to protect consumers and free markets.

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195. Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 702–03, 755 (1989) (noting that "[b]aseball and football are not natural monopolies; two or more rival leagues can compete in each sport," and "[t]he existence of rival leagues would solve most of these economic problems [associated with professional sports]").

196. *Supra* Part III.

197. *Supra* Part III.

198. *Supra* Part IV.

199. *Supra* Part V.

200. *Supra* Part III.

201. Ken Belson, *What the O'Bannon Ruling Means for Colleges and Players*, N.Y. TIMES (Aug. 8, 2014), http://www.nytimes.com/2014/08/09/ sports/what-the-

Consequently, the *O'Bannon* decision—albeit an important step in the quest for improving college athletes' economic rights—will likely not serve as the last word in determining the legal status of concerted restraints on college-athlete pay. Subsequent lawsuits are likely to attempt to use the favorable language in *O'Bannon* to further carve away at the NCAA's limits on free market compensation for college athletes.[202] Meanwhile, NCAA leaders are likely to attempt to overturn the *O'Bannon* decision through either a successful appeal to the U.S. Court of Appeals for the Ninth Circuit or a petition for certiorari to the Supreme Court.[203] At the same time, the NCAA may lobby Congress for an antitrust exemption to limit the viability of future athlete lawsuits against the NCAA.[204]

At the end of the day, Judge Wilken's decision in *O'Bannon v. National Collegiate Athletic Association* will likely be memorialized as the decision that resurrected the legal argument that the NCAA "no pay" rules may violate section 1 of the Sherman Act. Even though the *O'Bannon* case failed to establish a true free market for college athletes' services, it created a blueprint for future lawyers to attempt to use antitrust law to obtain that very result.

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obannon-ruling-means-for-colleges-and-players.html?_r=0 (last visited Nov. 18, 2014) (quoting New York University Professor of Sports Management Robert Boland) (on file with Washington and Lee Law Review).

202. *Supra* Part IV.

203. *Supra* Part VI.A.

204. *Supra* Part VI.E.