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## Assessing Amateurism in College Sports

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# Assessing Amateurism in College Sports

Casey E. Faucon\*

## *Abstract*

*College sports generate approximately \$8 billion each year for the National C[artel] Athletic Association and its member institutions. Most of this revenue flows from lucrative television broadcasting deals, which often incorporate the right to commercialize and sell the names, images, and likenesses of college athletes. Under its current revenue scheme, student-athletes—85 percent of whom live below the poverty line—receive a share of zero. For over a century, we’ve justified this exploitative distribution scheme under a cloak of student-athlete “amateurism.” Antitrust challenges to the NCAA’s amateurism rules clash with the assumption that “amateurism” is a revered tradition and an important tenet upholding the value and integrity of U.S. college sports. But is this true? Is amateurism in U.S. college sports such hallowed ground? And, if so, what values should animate the distinctions society values between collegiate and professional sports? Does it mean college athletes shouldn’t get paid?*

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*This Article provides a descriptive and theoretical examination of the consumer justifications for amateurism in college sports under an antitrust framework. In general response to these inquiries, this Article finds that some consumer value exists in maintaining amateurism in college sports. However, amateurism’s uniqueness to American culture, and the values that should shape amateurism’s norms, stem from regional and institutional loyalty, athletic tradition, and the preparation and life skills gained from dual academic-athletic participation. Although competitive balance and fairness could be an animating factor, insufficient support for this position exists. This Article then theorizes that allowing name, image, and likeness (NIL) commercialization or “pay for play” would not impact those main animating factors and that student-athletes should be allowed as much pay for play as the consumer market would tolerate.*

*The Article then proposes pay for play and NIL commercialization schemes that more robustly incorporate not only consumer preference, but also moral, ethical, and equitable considerations, following the Supreme Court’s 2021 decision in NCAA v. Alston.*

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## INTRODUCTION

Alabama freshman football player Ga'Quincy "Kool-Aid" McKinstry has always been a bit eccentric. Growing up around the Birmingham, Alabama area, the five-star defensive cornerback goes by the name "Kool-Aid,"<sup>1</sup> a moniker his grandmother gave him because he "entered the world with a smile,"<sup>2</sup> like "the Kool-Aid man."<sup>3</sup> In August 2021, the flavored drink company Kool-Aid announced McKinstry as its new brand athlete,<sup>4</sup> and the team officially updated McKinstry's team roster name to Kool-Aid McKinstry.<sup>5</sup> While a notable endorsement, McKinstry's partnership with Kool-Aid is just one among many, often lucrative, new deals by which student-athletes can now profit off their names, images, and likenesses (NILs).<sup>6</sup>

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1. Alex Scarborough, *Alabama Crimson Tide Freshman Ga'Quincy 'Kool-Aid' McKinstry Signs NIL Deal with Drink Company*, ESPN (Aug. 18, 2021), <https://perma.cc/DB78-7EA9>.

2. Nick Kelly, *Alabama Football Freshman Kool-Aid McKinstry Lands NIL Partnership with Kool-Aid*, TUSCALOOSA NEWS (Aug. 18, 2021, 9:40 AM), <https://perma.cc/ZV6V-5BAU>.

3. Blake Toppmeyer, *The Tasty Backstory Behind Kool-Aid McKinstry's Endorsement Deal with Kool-Aid*, TUSCALOOSA NEWS (Aug. 20, 2021, 11:48 AM), <https://perma.cc/X9ZL-SB5E>.

4. Scarborough, *supra* note 1.

5. *Kool-Aid McKinstry*, ALA. FOOTBALL ROSTER (2021), <https://perma.cc/5LNU-HST3>.

6. See Bill Bender, *NIL Tracker: Which College Athletes Are Signing Endorsement Deals?*, SPORTING NEWS (July 1, 2021), <https://perma.cc/PT65-ZTLN> (tracking "[w]hich student-athletes [took] advantage of early NIL deals"); Russell Steinberg, *The Most Fascinating NIL Deals in College Sports So Far*, BOARDROOM (Aug. 23, 2021), <https://perma.cc/3BN6-B7BU> (highlighting noteworthy NIL deals).

For years, the National Collegiate Athletic Association (NCAA) denied student-athletes access to this marketplace through its enforcement of eligibility rules that allegedly maintained the Principle of Amateurism in college sports.<sup>7</sup> These amateurism rules generally prohibited payment to student-athletes in the forms of both “pay for play” and profiting from NIL commercialization.<sup>8</sup> Instead, the approximate \$8 billion in industry revenue flowed to the NCAA and its member institutions, but the student-athletes—the most valuable input to the college sports consumer market—received a share of zero.<sup>9</sup> Although it may be in society’s and the players’ best interests to continue to uphold and maintain some form of amateurism in college sports,<sup>10</sup> public sentiment demonstrates increasing dissatisfaction with how inequitably the NCAA and its member institutions distribute the largesse of its cartel spoils.<sup>11</sup> The Principle of Amateurism is merely a guise through

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7. See NCAA, NCAA DIVISION I MANUAL, § 12.01.1 (2021) [hereinafter NCAA MANUAL], <https://perma.cc/5XLP-5PLJ> (PDF) (“Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”).

8. See *id.* § 12.1.2.

9. See Allen R. Sanderson & John J. Siegfried, *The National Collegiate Athletic Association Cartel: Why It Exists, How It Works, and What It Does*, 52 REV. INDUS. ORG. 185, 189 (2018).

10. For the vast majority of college athletes, a bachelor’s degree is far more valuable—and realistic—than the prospect of a professional sports career. See Beth Daley, *Let’s Get Real with College Athletes About Their Chances of Going Pro*, CONVERSATION (Apr. 24, 2019, 6:47 PM), <https://perma.cc/DB6P-ST9X> (“Given that only 1 in 4,233 high school players go from high school to college to the pros, there is a giant gap between college players’ dreams and reality.”); see also Tim Stobierski, *Average Salary by Education Level: The Value of a College Degree*, NE. UNIV. (June 2, 2020), <https://perma.cc/M88Q-AUZR> (sharing that in 2019, Americans with bachelor’s degrees earned, on average, \$64,896 while those with just a high school diploma earned, on average, \$38,792 (citing *Learn More, Earn More: Education Leads to Higher Wages, Lower Unemployment*, U.S. BUREAU OF LAB. STATS. (May 2020), <https://perma.cc/VL97-72W5>)).

11. See Jon Solomon, *NCAA Expert: 69 Percent of Public Opposes Paying College Players*, CBS SPORTS (June 25, 2014, 11:51 AM), <https://perma.cc/L5RT-QGUV> (citing a 2013 survey reporting that “69 percent of the public and 61 percent of sports fans oppose paying college athletes”). However, according to a 2019 poll, “[t]wo-thirds of adults say college athletes should be allowed to earn money from endorsements and sponsorships and half say athletes at colleges and universities with major athletic programs should receive a share of revenue received from broadcast rights.”

which the NCAA continues to justify this inequity and maintain its cartel control—leaving the student-athletes, their families, their futures, and society at large for the worse.<sup>12</sup>

Resulting from numerous social, political, cultural, and economic catalysts, California presented the first state challenge to the NCAA's rules on amateurism.<sup>13</sup> Receiving public support from prominent sports figures like LeBron James,<sup>14</sup> California's "Fair Pay to Play" Act<sup>15</sup> allows student-athletes to profit off their NILs, as well as hire licensed agents and attorneys.<sup>16</sup> Although not without its flaws,<sup>17</sup> many praised the California Act's September 2019 passage as both aggressive virtue signaling<sup>18</sup> and progress toward remedying a system sharply criticized as unfairly exploitative of the labor and likenesses of student-athletes.<sup>19</sup> Setting off a flurry of movement in state legislatures nationwide, 2020 and 2021 saw

*Compensation for Collegiate Athletes*, UNIV. OF CHI. NAT'L OP. RSCH. CTR., <https://perma.cc/AB7S-JUDM>.

12. See WALTER BYERS WITH CHARLES HAMMER, *UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 3* (Univ. Mich. Press 1995) (lambasting the NCAA's amateurism system as "biased against human nature and simple fairness"); Michael Steele, Comment, *O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 512 (2015) ("Big-time college football and basketball are now multi-billion dollar industries, and to pretend that these student-athletes are amateurs is nonsense.").

13. See Tyler Tynes, *The Ripple Effects of California's 'Fair Pay to Play' Act*, RINGER (Oct. 11, 2019, 6:55 AM), <https://perma.cc/7PUC-KNHP>.

14. Michael Shapiro, *LeBron James Calls for Support of California Student Athlete Compensation Bill*, SPORTS ILLUSTRATED (Sep. 5, 2019), <https://perma.cc/9XMA-P992>.

15. CAL. EDUC. CODE § 67456 (West 2022) (effective Jan. 1, 2023).

16. *Id.*

17. See *infra* Part II; Steven A. Bank, *The Olympic-Sized Loophole in California's Fair Pay to Play Act*, 120 COLUM. L. REV. F. 109, 112 (2020) (arguing that the Act is unlikely to result in revenue sharing for student-athletes).

18. "It's going to change college sports for the better by having now the interest, finally, of the athletes on par with the interests of the institutions," said California's governor, Gavin Newsom. *LeBron James Celebrates California Law Allowing College Athletes to Make Money*, GUARDIAN (Sep. 30, 2019, 11:30 AM), <https://perma.cc/9FA8-UDDT>.

19. See @NancySkinnerCA, TWITTER (Sep. 30, 2019, 12:31 PM), <https://perma.cc/LRE9-2X3N> ("For decades, college sports has generated billions for all involved except the very people most responsible for creating the wealth. That's wrong.").

twenty-nine states pass laws allowing student-athletes to receive compensation for the commercialization of their NILs.<sup>20</sup>

These state acts take direct aim at the NCAA's rules enforcing the Principle of Amateurism in college sports, rules which the U.S. Supreme Court and circuit courts have too often deemed presumptively reasonable against antitrust challenges.<sup>21</sup> Although the NCAA has shifted its position with respect to NIL commercialization,<sup>22</sup> it continues to cling to the position that it enjoys "broad leeway" in enforcing its rules prohibiting and limiting activities falling within the purview of "pay for play."

The NCAA maintained this position in its appeal to the Supreme Court in 2021's *NCAA v. Alston*.<sup>23</sup> In *Alston*, the Ninth Circuit held that the NCAA's rules that limit scholarships are both subject to and violate antitrust laws.<sup>24</sup> The decision also allowed for unlimited scholarships to student-athletes as long as

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20. Five states passed legislation similar to California's in 2020. Citing a need to stay competitive, forty states introduced fair pay-for-play acts, with nineteen passing. Andrew Smalley, *Student-Athlete 'Pay for Play' Gets Lawmakers' Attention*, NAT'L CONF. OF ST. LEGISLATURES (May 24, 2021), <https://perma.cc/G6ML-HF5B>. A majority of the states acting in 2021 include those in the Southwest and Southeast. *Id.* Numerous states have legislation introduced or pending. *Id.* The regional area with the least amount of movement is in the Midwest and far Northeast. *Id.*

21. Compare CAL. EDUC. CODE § 67456(a)(2) (West 2020) (stating the NCAA may not enforce rules that accord with its amateurism principle), with *NCAA v. Bd. of Regents*, 468 U.S. 85, 101–02 (1984) (endorsing amateurism as procompetitive because "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like").

22. See NCAA BOARD OF GOVERNORS, FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 3 (2020) [hereinafter NCAA REPORT AND RECOMMENDATIONS], <https://perma.cc/W635-FQ9W> (PDF).

23. 141 S. Ct. 2141 (2021). Petition for Writ of Certiorari at 30, *Alston*, 141 S. Ct. 2141 (No. 20-520), 2020 WL 6162022 (opposing "annual 'academic achievement' cash payments of at least \$5600 to every student-athlete in the affected classes").

24. Compare *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1257 (9th Cir. 2020) ("[T]he NCAA is not entitled to a presumption that its restraints are procompetitive." (citing *O'Bannon v. NCAA*, 802 F.3d 1049, 1064 (9th Cir. 2015))), with *Agnew v. NCAA.*, 683 F.3d 328, 339 (7th Cir. 2012) ("It is reasonable to assume that most of the regulatory controls of the NCAA are . . . procompetitive because they enhance public interest in intercollegiate athletics." (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 117 (1984))).



those costs are related to education and academics.<sup>25</sup> The Supreme Court's decision not only affirmed the actions of the circuit court and district court, but also clarified that the NCAA's amateurism rules do not, in fact, enjoy "broad leeway" and a "quick" judicial "look" under federal antitrust laws.<sup>26</sup> Instead, these rules are subject to antitrust's more scrupulous rule of reason analysis, which the lower court properly applied.<sup>27</sup> Finding no error in the district court's weighing of the evidence within that more thorough rule of reason framework, the Supreme Court affirmed the lower court's holding that the NCAA could not prevent schools from providing scholarships that include the full cost of attendance as long as those expenses are related to education and academics.<sup>28</sup>

The Supreme Court's decision did much to solidify the doctrinal implications of the NCAA's amateurism rules under an antitrust rule of reason analysis, but the Court did not answer—nor was the question before it to answer—the scope and meaning of "amateurism" in the U.S. college sports market for antitrust's rule of reason analysis purposes.<sup>29</sup> While Justice Kavanaugh's concurrence berated the NCAA for cartel-like behavior and its failure to provide a meaningful definition of "amateurism" to define its impact in the relevant consumer market, the Court did not define the term, leaving the question of fact open.<sup>30</sup>

While fairer NIL profit distribution might appease public and political dissatisfaction with student-athlete exploitation for now, the current doctrinal approaches and legislative strategies rely on a potentially faulty antitrust analysis: that amateurism is valued in the U.S. college sports consumer

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25. *In re NCAA*, 958 F.3d at 1260.

26. *See Alston*, 141 S. Ct. at 2157.

27. *See id.* (concluding the "NCAA's rules fixing wages for student-athletes" merit rule of reason analysis rather than a quick look because "[t]hat dispute presents complex questions requiring more than a blink to answer").

28. *Id.* at 2166.

29. *See id.* (endorsing the lower court's view that resolving the amateurism debate in college sports is important, but not appropriate for appellate judges).

30. *See id.* at 2167 (Kavanaugh, J., concurring) (dismissing the NCAA's assertion that its compensation rules are procompetitive as "circular and unpersuasive").

market and that “not paying student-athletes is *precisely what makes them amateurs*.”<sup>31</sup> This Article challenges both parts of that assumption: Is this Principle of Amateurism a foundational and valued tenet of U.S. college sports? And, if so, what are the key defining features that uphold the distinctions between professional and collegiate sports and that consumers value? What is it about college athletics and the student-athletes who engage in them that drives the consumer marketplace?

Unpacking and defining the key features of “amateurism” in U.S. college sports can assist in determining which of its aspects have a pro (or anti) competitive basis in the relevant consumer marketplace. The answer to this inquiry not only informs how courts should analyze future amateurism cases under a rule of reason analysis, but can also inform state legislatures, the NCAA, athletic conferences, and university athletic programs regarding how to draft more tailored NIL commercialization and, potentially, pay-for-play rules without impacting consumer demands.

Finding that there is some value in academic-based collegiate athletes for all stakeholders involved, this Article argues that the only animating factor for purposes of defining amateurism in U.S. college sports (that society should value) is that the student-athlete remain a fully enrolled student at the participating university, with some limitations on those student-athletes who have previously played their sport professionally. On the other hand, consumers value regional and institutional loyalty, athletic tradition, and the preparation and life skills that dual academic-athletic participation imparts. This Article then theorizes that allowing NIL commercialization or pay for play would not impact those main animating factors and that student-athletes should be allowed as much “pay for play” as the consumer market would tolerate.<sup>32</sup>

This Article then argues that, while fair-market-based approaches for compensating student-athletes based on the value of their contributions to their relevant consumer market might be more beneficial for certain individual players in certain

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31. *O'Bannon v. NCAA (O'Bannon II)*, 802 F.3d 1049, 1076 (9th Cir. 2015).

32. *See infra* Part III.

sports,<sup>33</sup> a more equitable approach under current antitrust trends and a rule of reason analysis incorporates equitable and societal values as well. A bit surprisingly, the Supreme Court noted in dicta that additional supporting evidence of the impact of the NCAA's amateurism rules on the relevant *player* market (and not only the consumer market) might also be appropriate support under a rule of reason analysis.<sup>34</sup> Though dicta, the inclusion of future studies measuring the impact of "pay for play" could expand the current scope of antitrust analysis in general to include equitable impacts, and not just commercialized ones. Incorporating this idealized, expanded rule of reason analysis, this Article then proposes less restrictive pay-for-play and NIL rule alternatives.<sup>35</sup>

\* \* \*

Part I of this Article first overviews the historical development of college sports in the United States and the regulatory institutions overseeing their rules of play. Part I then addresses the current NCAA governance and revenue structure. Finally, Part I discusses Sanderson and Siegfried's 2017 work describing the NCAA's illicit cartel behavior and how their model begins to break down upon reaching the profit distribution stage. Those on the lowest rung of the organizational hierarchy, as well as the socio-political largesse, admonish the distribution of the cartel spoils as exploitative and unfair.

Intercollegiate sports generate approximately \$8 billion in revenue for the NCAA and its member institutions each year,<sup>36</sup> mainly from television broadcasting rights, which sharply increased after 1984's *NCAA v. Board of Regents*,<sup>37</sup> thereby subjecting commercialized intercollegiate sports to the Sherman

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33. See generally Expert Report and Affidavit of Daniel A. Rascher on Damages Class Certification, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:14-md-02541), 2016 WL 3671671; Andy Schwarz, *Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes*, SANTA CLARA SPORTS L. SYMP. (2011), <https://perma.cc/F34K-56K7> (PDF).

34. See *Alston*, 141 S. Ct. at 2154 (noting that the District Court's rule of reason analysis considered the relevant market as a labor market for the highest quality student-athlete).

35. See *infra* Part IV.

36. Sanderson & Siegfried, *supra* note 9, at 189.

37. 468 U.S. 85 (1984).

Act.<sup>38</sup> In 2015, the median intercollegiate athletics program in the 128 schools in the Division I, Football Bowl Division generated \$48 million, which was 110 percent more than the median of \$23 million in 2004.<sup>39</sup> Revenue for college football teams at 2,072 colleges and universities rose from \$1.89 billion in 2003 to \$4.66 billion in 2014; basketball from \$1.13 billion to \$2.68 billion, respectively.<sup>40</sup> While the long-term impacts of the coronavirus on revenues generated by the current business model of college sports remain unclear,<sup>41</sup> consumer demand for live sporting events and rapidly changing technologies, which are often initially incorporated into and tested within sports broadcasting,<sup>42</sup> will likely ensure that there will continue to be plenty of money in college sports to go around.

But the money doesn't go to the players. While elite coaches in forty states are the highest paid public figures in their states,<sup>43</sup> 85 percent of student-athletes at NCAA institutions live below the poverty line.<sup>44</sup> The players work over forty hours a week on their respective sports while having to maintain their studies.<sup>45</sup> They don't have time for second jobs and, honestly, most of them will never step foot inside a professional sports

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38. The *Board of Regents* decision removed television licensing from the exclusive purview of the NCAA and allowed conferences to negotiate television contracts. *See Bd. of Regents*, 468 U.S. at 121. This caused television revenues to climb from \$29 million in both 1978 and 1979 to \$72 million in 1985. *See D. Kent Meyers & Ira Horowitz, Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, a Case in Point*, 48 OKLA. L. REV. 669, 687 (1995).

39. Sanderson & Siegfried, *supra* note 9, at 186 n.1.

40. *Id.*

41. *See, e.g.,* Craig Garthwaite & Matthew J. Notowidigdo, *The COVID-19 Pandemic Is Revealing the Regressive Business Model of College Sports*, BROOKINGS INST. (Oct. 16, 2020), <https://perma.cc/3GDL-MXTV>.

42. *See, e.g.,* Mary H. Tolbert & D. Kent Meyers, *The Lasting Impact of NCAA v. Bd. of Regents of the University of Oklahoma: The Football Fan Wins*, 89 OKLA. BAR J. 22, 24 (2018) (explaining the direct correlation between increased competition in broadcasting college football games and consumer demand).

43. Charlotte Gibson, *Who's Highest-Paid in Your State?*, ESPN (2019), <https://perma.cc/CK29-26VQ>.

44. *Study College Athletes Worth Six Figures Live Below Federal Poverty Line*, DREXEL UNIV. (Sept. 13, 2011), <https://perma.cc/ZWU7-UBET>.

45. Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUS. INSIDER (Jan. 27, 2015, 11:44 AM), <https://perma.cc/5EQT-S4HT>.

arena as players after their college playing days are over.<sup>46</sup> And while many student-athletes pedagogically and developmentally benefit and mature through the strict programming and supervision of a college athletics program,<sup>47</sup> many student-athletes report that coaches discouraged them from engaging in activities outside of their sport,<sup>48</sup> ill-preparing them for a life after college that doesn't care how well they interact with a ball. Part II of this Article focuses on the NCAA's enforcement of its inequitable cartel distributions using the façade of the Principle of Amateurism.

Part II ends with a discussion of the current state fair pay-for-play acts as well as the Supreme Court's decision in *Alston/In re NCAA Antitrust Litigation*, detailing how neither go far enough in addressing the underlying question regarding a meaningful definition of amateurism for college sports purposes at the heart of this Article.

The commercial exploitation of these student-athletes becomes increasingly insidious considering the racial composition of student-athletes in an NCAA Power Five conference. In 2018, Dr. Shaun R. Harper released an updated study on Black male student-athletes and racial inequalities in NCAA, Division I college sports, which includes statistics from sixty-five universities in the Power Five conferences.<sup>49</sup> "Black men were 2.4% of undergraduate students enrolled at the 65 universities, but comprised 55% of football teams and 56% of men's basketball teams on those campuses."<sup>50</sup> Harper's study also demonstrated the lower rates at which Black male

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46. Each year, approximately 1.2 percent of draft-eligible NCAA men's basketball players are selected in the NBA draft, while 1.6 percent of draft-eligible football players matriculate to the NFL. *Estimated Probability of Competing in Professional Athletics*, NCAA, <https://perma.cc/29LC-HF6W> (last updated Apr. 8, 2020).

47. See, e.g., Katie Barrer, *Feature Story: The "Pros" of Being a Student Athlete*, UNIV. OF OR., <https://perma.cc/2PZ4-QBCU> ("Learning discipline prepares athletes for the future of a career and family life, especially when it comes to time management.").

48. See SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 5 (2018), <https://perma.cc/V6XL-FKSZ> (PDF) ("[C]oaches prioritized athletic accomplishment over academic engagement and discouraged participation in activities beyond their sport.").

49. See *id.* at 2.

50. *Id.* at 3.

student-athletes graduate as compared to their peers.<sup>51</sup> These alarming graduation rate statistics, coupled with a programmatic culture in which high-achieving Black male athletes report that coaches prioritized athletic accomplishment over academic engagement, compound the inequity.<sup>52</sup>

This inequity rings especially true for the women's athletics participants, whose prospects for lucrative professional athletic careers are even more slim.<sup>53</sup> Consider UCLA gymnast Katelyn Ohashi, who went viral in 2019 for her perfect 10.0 floor routine,<sup>54</sup> later appearing on Good Morning America<sup>55</sup> and in the ESPN body issue,<sup>56</sup> among others. She later blasted the NCAA in a *New York Times* video, lamenting that she felt “handcuffed by the NCAA rules.”<sup>57</sup> She is now retired from gymnastics; “after [her] final meet, [she] had no pro league to join.”<sup>58</sup> She could have done something as simple as post a picture with a sports drink and an #ad notation or run a monetized YouTube channel, profiting off her sports physique while in the limelight and with

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51. See *id.* (“55.2 % of Black male student-athletes graduated within six years, compared to 69.3% of student-athletes overall, 60.1% of Black undergraduate men overall, and 76.3% of undergraduate students overall.”).

52. See *id.* at 4–5 (indicating that student-athletes struggle to engage with faculty because they lack free time outside of classes and practices).

53. See Tan Boston, *As California Goes, So Goes the Nation: A Title IX Analysis of the Fair Pay to Play Act*, 17 STAN. J. C.R. & C.L. 1, 52 (2021) (concluding that collegiate sports' current landscape deepens gender inequality). Anthony Edwards, the #1 pick in the 2020 NBA draft, will make \$10 million in his first season, while Sabrina Ionescu, the #1 pick in the 2020 WNBA draft will make just \$68,000 in her rookie season. See Kurt Badenhausen, *NBA Draft 2020: Projected Contracts for Edwards, Wiseman, LaMelo and Other First-Round Picks*, FORBES (Nov. 19, 2020, 7:30 AM), <https://perma.cc/37HX-EJQ3>; James Crepea, *Sabrina Ionescu Drafted by New York Liberty with No. 1 Pick in WNBA Draft*, OR. LIVE (Apr. 17, 2020, 4:15 PM), <https://perma.cc/9CMN-JXRE>.

54. As of March 2022, Ohashi's routine has been viewed over 221 million times. UCLA Athletics, *Katelyn Ohashi—10.0 Floor (1-12-19)*, YOUTUBE (Jan. 13, 2019), <https://perma.cc/C4GH-C6WW>.

55. *Gymnast Katelyn Ohashi Flips Pancakes for Michael and Sara*, GOOD MORNING AM. (Jan. 17, 2019), <https://perma.cc/8U3K-AJHX>.

56. *Katelyn Ohashi: “I Wanted to Bring the Joy Back to Gymnastics”*, ESPN (Sept. 4, 2019), <https://perma.cc/TJ2B-R8GU>.

57. Katelyn Ohashi, *Everyone Made Money Off My N.C.A.A. Career, Except Me*, N.Y. TIMES (Oct. 9, 2019), <https://perma.cc/GE32-J454>.

58. *Id.*

some guidance from professionals and mentors.<sup>59</sup> Earning money through personal and school branding on social media could be a passive source of revenue for any student-athlete, especially for a struggling one, whose parents will sleep on the floor of their kids' hotel rooms to watch them play during the NCAA's March Madness, a tournament which generates \$900 million in revenue for the NCAA each year.<sup>60</sup>

Many proposals attempt to more fairly redistribute the profits made off the commercial use of student-athletes' NILs.<sup>61</sup> These practical solutions include syphoning royalties from the use of a student-athlete's NIL into a trust for the student-athlete to receive after graduation or some other definitive point,<sup>62</sup> or creating a clearinghouse to distribute royalties, a system which the music industry already utilizes.<sup>63</sup> Such solutions, while addressing the need to compensate student-athletes for the commercial uses of their NILs, still exist within a structure that otherwise maintains the NCAA's competitive restrictions regarding pay for play under the guise of upholding the Principle of Amateurism.<sup>64</sup>

This exploitative profit distribution scheme, which prevents student-athletes from receiving pay for play or NIL commercialization profits, is enshrined within Article 12 of the

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59. See, e.g., Patrick Rishe, *NIL Earnings: The Factors Impacting How Much a College Athlete Can Make from Endorsements*, FORBES (July 4, 2021, 8:22 PM), <https://perma.cc/HK3J-6E6E> (brainstorming how college athletes can profit off NIL deals).

60. *Protecting the Integrity of College Athletics: Hearing Before the S. Judiciary Comm.*, 116th Cong. 54:50–55:10 (2020) (statement of George Wrihster, III), <https://perma.cc/5RU5-VQ2G>.

61. See NCAA REPORT AND RECOMMENDATIONS, *supra* note 22, at 3.

62. See Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 568–69 (2010). NCAA Executive Director Walter Byers “proposed that the endorsement income go into a trust fund from which athletes would draw upon graduation or the completion of their eligibility.” Ivan Maisel, *The NCAA Must Again Put Athletes First, This Time Around the NIL Debate*, ESPN (Apr. 23, 2020), <https://perma.cc/4K29-SFKT>.

63. See, e.g., CAL. FAM. CODE § 6753 (West 2022) (providing for the establishment of a trust account for minor musicians).

64. See BYERS WITH HAMMER, *supra* note 12, at 376 (“Collegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice.”).

NCAA Bylaws.<sup>65</sup> Article 12 regulates amateurism and essentially provides a list of “permissible” and “impermissible” activities concerning pay for play and NIL commercialization.<sup>66</sup> Student-athletes are barred from doing either. Instead, revenues flow to the NCAA and its members, who are authorized to commercialize, advertise, and sell merchandise using a student-athlete’s NIL.<sup>67</sup>

The right of the NCAA and its member institutions to reap the profits from athletics revenues and to commercialize student-athletes NILs is exclusive.<sup>68</sup> Student-athletes can do neither. In fact, they cannot even effectively file for trademark protection over their own NILs while they are still active unless they are within the last six months of their athletic eligibility<sup>69</sup>—this does little to help younger players, like Johnny Manziel, who received national recognition as a freshman.<sup>70</sup>

Article 12 goes even further by putting the onus on the student-athletes and their athletics departments to protect the NCAA’s exclusive commercial use of the student-athletes’ NILs and to take active steps to prevent improper commercial use by *third parties* or risk eligibility.<sup>71</sup> Part II will discuss the

65. See NCAA MANUAL, *supra* note 7, § 12.2 (Involvement with Professional Teams); *id.* § 12.3 (Use of Agents); *id.* § 12.4 (Employment); *id.* § 12.5 (Promotional Activities); *id.* § 12.6 (Financial Donations from Outside Organizations); *id.* § 12.11 (Ineligibility).

66. See *id.* § 12.5.1.1(i) (permitting NIL use for “charitable, educational or nonprofit” purposes); *id.* § 12.1.2(b) (“An individual loses amateur status [if he or she] [a]ccepts a promise of pay even if such pay is to be received [in the future].”).

67. *Id.* § 12.5.1.1.

68. See *id.* § 12.5.1.1(e) (“All moneys derived from the activity or project go directly to the institution, conference or the charitable, educational or nonprofit agency.”).

69. Some student-athletes file on an Intent to Use basis. See Christie Cho, *Protecting Johnny Football®: Trademark Registration for Collegiate Athletes*, 13 NW. J. TECH. & INTELL. PROP. 65, 66 (2015) (using Johnny Manziel’s trademark triumph to show that “intent to use” is “a viable means of protecting the intellectual property interests of current student-athletes”).

70. See *id.* at 66–67.

71. A recent example of this process concerns former Alabama football quarterback Tua Tagovailoa, recently picked fifth in the NFL draft by the Miami Dolphins. One online t-shirt company in Birmingham, Alabama, applied for a trademark registration with the USPTO for the mark “Tua-Loosa” and was actively selling t-shirts online with that phrase. Notice of Opposition, at ¶ 13 U.S. Trademark Application Serial No. 88148822 (Apr.



Principle of Amateurism, transitioning to a discussion of Article 12 of the NCAA's Bylaws. Part II then overviews the doctrinal interpretations of the Principle of Amateurism by chronicling the jurisprudential development of the Principle of Amateurism under antitrust challenges, focusing specifically on cases that impact the case law on both pay for play and NIL commercialization, leading to the still unanswered and murky question about the definition of amateurism.

The NCAA's exploitative and convoluted scheme of amateurism rules in Article 12 is barely teetering on a foundation of the NCAA's supposed role as the defender (and enforcer) of amateurism in college sports. The NCAA does have one thing right in its writ to the Supreme Court, particularly with regard to judicial rewriting of eligibility rules,<sup>72</sup> which opens up a much larger question. Each time a plaintiff challenges the bounds of the current pay-for-play or NIL limitations, they do so with a certain rule or limitation in mind: providing evidence to determine, under a rule of reason analysis, whether this particular rule violates antitrust laws from the framework of whether consumers would tolerate it without impacting value and revenue. While recent judicial opinions have started to question whether the underlying assumption that amateurism in college sports exists and is revered,<sup>73</sup> the evidence and studies presented do not clarify what "amateurism" means to the public or, from a positive perspective, which aspects of college sports society values.

Part III of this Article addresses that underlying assumption: Is amateurism in U.S. college sports a revered and honored tradition? If so, what aspects or facets of that definition have an impact on consumers, society, and the players regarding

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8, 2019), <https://perma.cc/S7GR-QXWJ> (PDF). Tua then had to file a Notice of Opposition to this third-party trademark application. *Id.* But if compliance had not monitored improper third-party usage, Tua and the university would have risked sanctions by the NCAA.

72. See Petition for a Writ of Certiorari at 15–16, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (No. 20-520), 2020 WL 6162022 (“[J]udges should not be empowered to rewrite [NCAA amateurism rules.]”); see also Gregory M. Krakau, *Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten its Existence*, 61 OHIO ST. L.J. 399, 413 (2000).

73. See *NCAA v. Alston*, 141 S. Ct. 2141, 2152 (2021) (recognizing that the district “court struggled to ascertain for itself any coherent definition of [amateurism]” (internal quotations omitted)).

the economic and societal value of U.S. college sports? Although scholars and stakeholders often lament the hollow shell that is the NCAA's amateurism ideal, few have examined what aspects of it, from an antitrust perspective, the law should promote and value about it—why do we care so much about college sports?

To answer the first question simply: yes, amateurism is revered in U.S. college sports. And some value exists in maintaining a distinction between college and professional sports. But the value does not lie in not paying players. The only distinction that matters (that society should value) is that the student-athlete remain just that—a fully enrolled student at the participating university, with some limitations on those who have previously played professionally within that sport for which they play for the academic institution. Theorizing, instead, that negative opinions about player compensation or commercialization are not animating factors at all—consumers value loyalty, school allegiance, student-athlete status and representation of the school, and competition—not in the sense of fair competition, as college football is more predictable than the pros, but in the sense of a need to witness physical contests and historical regional rivalries among (generally) college-aged players.

Next, while dominant law and economics theories strip economic rules from morality considerations, focusing solely on economic efficiency from a consumer welfare perspective,<sup>74</sup> Maurice Stucke argues that antitrust rules and economic safeguards should—and in some cases already do—have a basis in morality and what the public perceives as fair behavior.<sup>75</sup> The Supreme Court's dicta regarding the potential impact on the

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74. See Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 258 (critiquing the predominant antitrust theory because it ignores market imperfections); Ianni Drivas, *Reassessing the Chicago School of Antitrust Law*, UNIV. OF CHI. SCH. OF L. (June 4, 2019), <https://perma.cc/27HE-FPN9> (“[A]ntitrust law should serve consumer interests and . . . protect competition rather than individual competitors.”).

75. See Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 603 (2020); see also Nathan Boninger, Comment, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 754 (2018) (arguing that social welfare benefits are a legitimate procompetitive justification).

player market supports and demonstrates this movement.<sup>76</sup> Part IV discusses the potential for an expanded study addressing the NCAA's cartel control over the student-athlete market, i.e., improper restrictions on market inputs.

Fair-market-based approaches for compensating student-athletes based on the value of their contributions to their division might be equitable toward individual players in certain sports, as argued by the *Alston* plaintiffs and previously by others.<sup>77</sup> But a more equitable approach under the current antitrust framework and rule of reason analysis is to first determine the fair market value of each student-athlete based on sport and gender within each conference, and then equally distribute such amounts to each eligible student-athlete within each conference at the end of an academic year or other set timeline. Student-athletes should also be able to commercialize their names, images, and likenesses while enrolled in school on both a group licensing and individual basis.

Part IV then sets out suggested proposals for distribution (pay for play) and NIL commercialization schemes that are less restrictive alternatives to the NCAA's current amateurism rules under a rule of reason approach, but that more robustly incorporate moral and equitable values as well. This Part ends with counterarguments and suggestions for implementation and continued inquiry.

## I. THE NCAA CARTEL, A PRIMER

*You're actually causing economic injury because  
all of us have a finite time in life that we are  
going to have our highest earning potential.  
Sometimes it's in your teens, sometimes it's in  
your twenties—and you should be able to  
capitalize on that. You go to college to get an  
education. And you also go to college to get a*

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76. See *Alston*, 141 S. Ct. at 2154 (“[T]o prevail, the plaintiff student-athletes [need not] show that [the NCAA’s] restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market.” (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321 (2007))).

77. See, e.g., Schwarz, *supra* note 33, at 46.

*head start in life. So it's completely un-American  
to cut off the free market system.*

George Wrihster, III<sup>78</sup>

A. *History of Collegiate Sports Regulation*

The *Board of Regents* dicta draws on an assumption that amateurism is a “revered tradition” of college sports in the United States.<sup>79</sup> But this ideal of amateurism, which in its current form is unique to the United States, stems not from American origins.<sup>80</sup> This concept of amateurism was developed by nineteenth century social elites in Britain to elevate the upper social classes above associating with the “lower” and “working classes.”<sup>81</sup> As Ronald Smith points out, “It was clearly a social class concept that did not make sense to many Americans who lacked the sharp social class divisions so clearly seen in British society.”<sup>82</sup> Americans charged fees at the gates, recruited athletes, and hired professional coaches—none of which were considered very aristocratic, a realm in which sports were played merely as a means of activity and entertainment.<sup>83</sup> Aristocrats didn’t need to make money through (or pay money for) sports.<sup>84</sup>

The first sporting contest between two universities was a rowing competition between Harvard and Yale in 1852.<sup>85</sup> Universities introduced sports in the late 1800s as a means to attract students, as universities grew rapidly in number and size during the last part of the 1800s.<sup>86</sup> The first intercollegiate

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78. *Protecting the Integrity of College Athletics: Hearing Before the S. Judiciary Comm.*, 116th Cong. 56:50–57:20 (2020) (statement of George Wrihster, III), <https://perma.cc/5RU5-VQ2G>. Mr. Wrihster is a former member of the National Football League Players Association Board of Representatives and former NFL tight end. *Id.*

79. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984).

80. See RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM* 57 (Univ. of Ill. Press 2011).

81. *Id.*

82. *Id.*

83. *Id.* at 58.

84. See *id.* at 57.

85. *History*, YALE UNIV. ROWING, <https://perma.cc/RUD4-HVL8>.

86. See GERALD GURNEY ET. AL, *UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS—AND HOW TO FIX IT* 4 (2017) (“The athletic branding of

baseball game occurred between Amherst and Williams in 1859.<sup>87</sup> The first five-on-five basketball game was played in 1896 between the University of Chicago and the University of Iowa.<sup>88</sup> The first intercollegiate football game occurred in 1869 between Princeton and Rutgers.<sup>89</sup> As Sanderson and Siegfried describe, the development of intercollegiate football was circuitous, initially resembling soccer, then rugby, and then finally reaching the current and distinct “American football” style played today.<sup>90</sup>

The first intercollegiate sports “organization” to address “amateurism” in intercollegiate sports was in reference to the first baseball game between Amherst and Williams in 1859.<sup>91</sup> In 1876, students founded the Intercollegiate Football Association and created the first Thanksgiving Day championship game in New York City, establishing an American “Turkey Day” tradition of football.<sup>92</sup> In 1879, a baseball conference of students met to discuss whether professional baseball players could play for their universities.<sup>93</sup> This conference included students from Amherst, Brown, Dartmouth, Harvard, Princeton, and Yale.<sup>94</sup>

Faculty became involved in the governance of intercollegiate athletics in 1881, when Princeton created the Committee of Athletics and Musical Activities because the athletes and glee club members often missed class.<sup>95</sup> A year later, the Harvard Athletic Committee formed in 1882 with three students, three alumni, and three faculty.<sup>96</sup> The first instance in which these new committees encountered the issue

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universities began as early as 1869, when Charles Eliot, one of America’s best-known educators and then in his first year as president of Harvard University, proudly noted that Harvard excelled in the ‘manly sports.’”)

87. Daniel Wilco, *The Story of the First-Ever College Baseball Game, in 1859*, NCAA (July 1, 2020), <https://perma.cc/GCQ9-YWS6>.

88. Daniel Wilco, *What We Know About the First College Basketball Game Ever Played*, NCAA (Jan. 11, 2019), <https://perma.cc/ZTA7-UNXN>.

89. Sanderson & Siegfried, *supra* note 9, at 193.

90. *Id.*

91. See SMITH, *supra* note 80, at 10 (“[R]ules were created between the two schools after a challenge for a contest was made.”).

92. *Id.* at 12.

93. *Id.* at 11.

94. *Id.* at 10.

95. *Id.* at 19.

96. *Id.* at 20–22.

of amateurism was in relation to college baseball players, beginning in the 1880s.<sup>97</sup> College baseball players were hired to work at upscale vacation resorts in the mountains or the coasts and to play for guests' entertainment.<sup>98</sup>

However, these organizations were principally a "debating society for faculty representatives interested in amateur sports."<sup>99</sup> Schools held the autonomy to regulate themselves through Home Rule.<sup>100</sup> In fact, the 1907 IAAUS Constitution includes an amendment which provides that "[l]egislation enacted at a conference of delegates shall not be binding upon any institution."<sup>101</sup>

However, from 1890 to 1905, over 300 university students died from intercollegiate football-related injuries.<sup>102</sup> Sanderson and Siegfried point out that news stories played a vital role in turning public attention toward violence and "cheating" within the popular sport.<sup>103</sup> This attention spurred then-President Theodore Roosevelt to call representatives from Harvard, Yale, and Princeton to the White House and have them promise to reduce violence in college football.<sup>104</sup> Following a Union College player's death in 1905 due to taking a hit from the New York University offensive line's use of a "Flying Wedge,"<sup>105</sup> the NYU chancellor, along with representatives from sixty-two colleges, formed the Intercollegiate Athletic Association of the United States (IAAUS).<sup>106</sup> The IAAUS created a rules committee aimed

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97. *See id.* at 54.

98. *Id.* at 54–57.

99. *Id.* at 51.

100. *See id.* at 52.

101. *Id.* at 52–53.

102. Sanderson & Siegfried, *supra* note 9, at 193.

103. *See id.* ("News reports about collegiate football deaths and injuries threatened to undermine its continued popularity.")

104. *Roosevelt Campaign for Football Reform*, N.Y. TIMES, Oct. 10, 1905, at 1, <https://perma.cc/F26J-LH5H>.

105. *Football Player Killed. William Moore, of Union College, Dies from Blow on Head*, WASH. POST, Nov. 26, 1905, <https://perma.cc/22PV-7NWX>.

106. *See* ARTHUR A. FLEISCHER III ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 39 (Univ. of Chi. Press 1992).

at eliminating the Flying Wedge and requiring at least six offensive players be on the line of scrimmage at the snap.<sup>107</sup>

The IAAUS needed an enforcement arm because teams would only agree to abide by the newer, safer rules if they believed that the other teams would as well, as ignoring them would result in a competitive advantage.<sup>108</sup> Even at the outset, the IAAUS understood that its regulations impacted how universities, coaches, and players would try to win on the field, incorporating a “fundamental application of a game theoretic dominant equilibrium.”<sup>109</sup> Thus, the ability to monitor adherence to the regulations to curb cheating in a system which rewards winning became an integral part of the IAAUS’s authority.<sup>110</sup>

By 1906, thirty-nine colleges had joined the IAAUS.<sup>111</sup> Its constitution prohibited payments to students for athletic participation and skill, prohibited recruitment, limited player eligibility to four years, and banned former professional players.<sup>112</sup> The constitution said nothing about payments to coaches or profits to universities.<sup>113</sup> Unsurprisingly, the NCAA still does not limit the compensation of head coaches and athletic directors (although in the 1990s, some assistant basketball coaches were limited to earning \$16,000).<sup>114</sup> And the NCAA does not limit or control institutional spending on facilities, but it does limit recruiting costs to at least preserve the benefits to those who can financially benefit.<sup>115</sup>

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107. See *id.* at 39–40; *Change the Football Rules*, N.Y. TIMES, Dec. 2, 1893, at 2, <https://perma.cc/JD6Y-6CEQ>.

108. Sanderson & Siegfried, *supra* note 9, at 193–94.

109. *Id.* at 194.

110. These changes in regulation to the game also spurred the creation of “conferences.” The first multisport conference was the Southern Intercollegiate Athletic Association in 1895, which included Alabama, Auburn, Georgia Tech, South Carolina, and University of the South (Sewanee). SMITH, *supra* note 80, at 58.

111. Sanderson & Siegfried, *supra* note 9, at 194.

112. *Id.*

113. *Id.*

114. *Id.* at 197; see *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (striking down the \$16,000 cap on assistant basketball coach annual salary as an “unlawful restraint of trade”).

115. See Sanderson & Siegfried, *supra* note 9, at 197.

In 1910, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA), and it had ninety-five member universities by 1911.<sup>116</sup> By this time, as Sanderson and Siegfried describe, the NCAA had become “entrenched” as the self-regulatory body over intercollegiate college sports.<sup>117</sup> But this regulatory body lacked teeth.

When WWI occurred, then-President Woodrow Wilson touted the idea of college athletes becoming soldiers.<sup>118</sup> His Secretary of War was quoted as saying, “There are not enough star athletes in our universities to fill our armies.”<sup>119</sup> Such public praise of college athletes, likening them to patriots and ideal soldiers, contributed to the public’s perception of these athletes as “warriors” willing to sacrifice their peak physical years and prowess for a cause.<sup>120</sup> College sports continued to grow until WWII.<sup>121</sup>

A “stadium-building frenzy” occurred throughout the 1920s. Every Big Ten member built a stadium of at least 50,000-person capacity in the 1920s.<sup>122</sup> Stanford funded a 60,000-person stadium with one game against California, which it later expanded to 90,000-person capacity.<sup>123</sup> In 1924, Notre Dame signed coach Knute Rockne to a ten-year, \$100,000 contract.<sup>124</sup> That same year, Stanford signed Pop Warner to the first incentive-based contract in 1924, offering a \$2,500 bonus for a Rose Bowl appearance.<sup>125</sup>

The NCAA tried to limit paying players, introducing nine principles of amateurism in 1922, but it lacked enforcement ability due to schools’ continued adherence to Home Rule.<sup>126</sup> The now-SEC became the first conference to openly allow athletic scholarships, which the NCAA opposed at its 1939 convention,

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116. *Id.* at 194.

117. *Id.*

118. SMITH, *supra* note 80, at 60.

119. *Id.*

120. *See id.* at 59.

121. *Id.*

122. *Id.* at 62–63.

123. *Id.* at 63.

124. *Id.* at 65.

125. *Id.* at 65–66.

126. The concept of “Home Rule” was that schools would exercise autonomy and regulate themselves. *Id.* at 52.



amending the NCAA constitution to require that all financial aid must be based on need and not athletic ability.<sup>127</sup> Even without the Home Rule self-enforcement tradition, the NCAA had little enforcement power or money at that time—apparently \$10,000 in 1939 (a potential incentive to start the Men’s Basketball Tournament that same year.)<sup>128</sup> Despite the rule, and with the NCAA’s lack of enforcement power, the SEC kept giving “athletic” scholarships instead of financial-based ones.<sup>129</sup>

In 1946, the NCAA passed a “purity code,” which outlines positions on amateurism, institutional control of athletics, admitting athletic students on the same standards as other students, banning off-campus recruiting, limiting scholarships based on need and to tuition and fees, and allowing competition only by those who adhered to the rules.<sup>130</sup>

The NCAA began to strengthen its enforcement capabilities in 1948, when it adopted what became known as the “Sanity Code” at the 1948 NCAA Convention.<sup>131</sup> The Sanity Code was a set of rules that prohibited schools from giving athletes financial aid that was based on athletic ability and not available to ordinary students.<sup>132</sup> The Sanity Code also created a compliance scheme, establishing a Compliance Committee that could terminate an institution’s membership to the NCAA.<sup>133</sup> According to then-President of the American Council on Education, George F. Zook, who advocated at the 1948 convention that the NCAA should create a more centralized organizational structure, the NCAA needed to act with “regulatory authority” because “[m]any will vote for the code but are figuring out ways to beat it.”<sup>134</sup> The convention also voted to

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127. *See id.* at 89–90.

128. *See id.* at 91 (“In the last few years of the 1930s, the NCAA had about \$10,000 in the bank. The NCAA basketball tournament, begun in 1939, brought in the most money, but it was only a few thousand dollars each year . . .”).

129. *Id.* at 93.

130. *Id.*

131. *Id.* at 88.

132. *See O’Bannon II*, 802 F.3d 1049, 1054 (2015) (citing Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 333 (2007)).

133. *Id.*

134. SMITH, *supra* note 80, at 95.

give the NCAA the enforcement power it needed, establishing a “compliance committee.”<sup>135</sup>

These rules restricted player compensation to a grant-in-aid, but the NCAA moved away from the Sanity Code in 1956 to permit members to give, for the first time, scholarships based on athletic ability, capped at a full “grant in aid,” which included tuition, fees, room and board, and required course-related books.<sup>136</sup> This is due in part to the Southern, SEC, and Southwestern conferences meeting and agreeing in 1949 to demand the ability to pay room, board, books, and laundry expenses for their players, an agreement that the University of Virginia quickly endorsed.<sup>137</sup> The “sinful seven”—UVA, Virginia Tech, Maryland, the Citadel, VMI, Villanova, and Boston College—were brought before the NCAA Compliance Committee in 1950 because of their numerous infractions.<sup>138</sup> The Committee voted 111-93 for expulsion, but expulsion required a two-thirds majority.<sup>139</sup> With bad behavior left unpunished, the late 1940s and early 1950s saw a litany of cheating scandals.<sup>140</sup>

But as to the issue of athletic scholarships, the NCAA limited the number of scholarships available for a team in

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135. See *id.* at 97 (“Through the first year of the Sanity Code, there were few complaints of violations, as the Compliance Committee was being set up to investigate any wrongdoers.”).

136. *Id.* at 96.

137. *Id.* at 97.

138. *Id.* at 98.

139. *Id.*

140. In 1945, while surveilling a suspected thief, the New York District Attorney happened to discover then-powerhouse basketball school, Brooklyn College, point-shaving. *Id.* at 110. In 1949, four men were arrested and convicted for attempting to bribe GWU basketball players to fix games. *Id.* at 111. In 1951, five men were convicted for attempting to fix a Minnesota-DePaul basketball game at Madison Square Garden. *Id.* at 112. Also, in 1951, basketball players from the following schools were arrested for point-shaving: City College of New York, Long Island University, New York University, Toledo, Bradley, and national champion Kentucky. *Id.* These scandals were not confined to the basketball court; in 1950, news broke that Army football players had been receiving improper benefits and eighty-three West Point cadets would be expelled from school, bringing an end to a six-year span that saw the Black Knights go 57-3-4 and capture two national championships. *Id.* at 113-14.

1973.<sup>141</sup> Football was limited to 105 scholarships, then 95 in 1978, then to 85 in 1992 (where we are today).<sup>142</sup> In August 2014, the NCAA announced that it would allow conferences to increase scholarships up to the full “cost of attendance.”<sup>143</sup>

### B. *The NCAA Operations*

The NCAA split into Divisions I, II, and III in 1973.<sup>144</sup> Division I includes large universities that compete at elite levels.<sup>145</sup> Division II schools are smaller and compete at the intermediate level.<sup>146</sup> Division III schools have primary emphasis on regional in-season and conference competition.<sup>147</sup> Division I subdivided into three groups for football: Football Bowl Subdivision (FBS) composed of 128 schools at the highest levels, Football Championship Subdivision (FCS) composed of approximately 120 teams that compete at a lower level, and approximately 100 teams that have elite basketball teams but do not play football.<sup>148</sup> In addition to the approximately 350 Division I teams, there are about 300 teams in Division II and 450 teams in Division III.<sup>149</sup>

The NCAA is currently registered as an active, 501(c)(3) non-profit organization with the IRS, a status which has been sharply criticized in the social politic.<sup>150</sup> The NCAA’s highest governing body is the Board of Governors.<sup>151</sup> The Board is composed of chief executive officers who direct and oversee

141. These scholarship restrictions were driven by “the anticompetitive intent of cost containment.” Expert Rep. of Daniel A. Rascher on Damages Class Certification at 51, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (N.D. Cal. 2020) (No. 4:14-md-02541), 2016 WL 3671671.

142. Sanderson & Siegfried, *supra* note 9, at 194.

143. NCAA MANUAL, *supra* note 7, § 15.02.6 (revised 8/7/14).

144. Sanderson & Siegfried, *supra* note 9, at 194.

145. *Id.*

146. *Id.*

147. Unlike in Divisions I and II, student-athletes at Division III schools cannot receive athletics scholarships. *Id.*

148. Sanderson & Siegfried, *supra* note 9, at 194.

149. *Id.*

150. NCAA, CONSOLIDATED FINANCIAL STATEMENTS 10 (2020), <https://perma.cc/8R4X-346D> (PDF); *see, e.g.*, George F. Will, *Tax Breaks for Football*, WASH. POST (Oct. 25, 2006), <https://perma.cc/72E2-UVD4>.

151. NCAA MANUAL, *supra* note 7, § 4.01.1.

issues that affect the NCAA.<sup>152</sup> The NCAA's website provides, "The board is charged with ensuring that each division operates consistently with the basic purposes, fundamental policies and general principles of the Association."<sup>153</sup> The Board is currently composed of twenty-five members, who meet once a month.<sup>154</sup> The Board also publishes articles and resolutions passed by its members, a few of which directly address the California Act and investigate ways to enhance name, image, and likeness compensation opportunities.<sup>155</sup>

The impact of "power and money" drives the NCAA's revenue structure.<sup>156</sup> These revenues derive mainly from television broadcasting contracts following the 1984 *Board of Regents* case.<sup>157</sup> That decision ended an agreement that restricted the number of college football games for broadcasting, pushing the prices to supra-competitive levels.<sup>158</sup> While studies show an initial dip in profits after this decision, the three decades following it saw an "explosion in revenue."<sup>159</sup> This was due to orchestration by the NCAA and its member institutions, evolving demographics, and rapidly changing broadcast technology.<sup>160</sup>

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152. NCAA *Board of Governors*, NCAA, <https://perma.cc/X6QP-Y26A>.

153. *Id.*

154. NCAA MANUAL, *supra* note 7, § 4.1.1.

155. See, e.g., *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020), <https://perma.cc/DFN3-CPAZ> ("At its meeting this week, the Board of Governors supported rule changes to allow student-athletes to receive compensation for third-party endorsements both related to and separate from athletics.").

156. Sanderson & Siegfried, *supra* note 9, at 186.

157. *Id.*

158. *Id.*

159. *Id.*

160. Although many people predicted that broadcast rights would decline sharply after 1984, about \$250,000 at the time, they failed to appreciate the rapid growth of TV networks that demand football game content and the degree to which college football demand is regional, which preserved market power for regional conferences. *Id.* Before 1984, ABC and CBS—which held the rights to televise Saturday college football—had been airing simultaneous games rather than a single game broadcast nationally. *Id.* The greater appeal of Southeastern Conference (SEC) games in the South and of Big Ten matchups in the "rust belt" must have been enough to boost advertising receipts by more than the extra cost of airing multiple games. *Id.* Interest in college sports, especially football, is regional in part because many alumni of

After *Board of Regents*, the Power Five conferences—the ACC, the SEC, the Big Ten, the Big 12, and the Pac-12—added members during the 1990s and 2000s.<sup>161</sup> During that time, a duopoly emerged: the College Football Association (CFA) negotiated TV rights for teams in the SEC, the ACC, and the Big Eight (now Big 12), plus Notre Dame and Penn State (independents); the Big Ten and Pac-12 joined together for TV broadcasting purposes.<sup>162</sup> Both alliances broke down over revenue disagreements.<sup>163</sup> Since 1995, all Power Five conferences negotiate TV rights on behalf of their members.<sup>164</sup> And they have done so deftly—“parlay[ing] the regionally parochial sports interests of their fans and the growing number of broadcast networks that seek game content (e.g., Fox and ESPN) relative to the number of conferences that offer games into an ever growing financial bonanza.”<sup>165</sup>

By 2015 the sixty-five teams in the power conferences were each earning \$20 to \$35 million annually from television broadcast rights.<sup>166</sup> Because many big-time university sports teams play in locations where there is limited competition for live-gate attendance and their devoted fans exhibit relatively inelastic demands, the teams can exploit their market power in pricing and implement price discrimination to maximize gate receipts as well.<sup>167</sup> While the power conferences solidified their market power, technological developments increased the

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colleges and universities reside relatively close to their alma maters, and they and the current students constitute a substantial base demand for television broadcasts and live attendance. *Id.*

161. *Id.* at 187.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. The powerful intercollegiate athletics programs have tried to diminish any economic competition that may have existed a few decades ago. In 2007, as the outcome of a settlement that ended an antitrust suit between the National Invitation Tournament (NIT) and NCAA, the NCAA purchased the NIT, thereby ending its modest competitive threat to the NCAA’s lucrative “March Madness” basketball tournament. *Id.* at 187–88. The NAIA (National Association of Intercollegiate Athletics, which governs about 250 very small athletics programs) has been marginalized, and women’s basketball has been brought under the NCAA’s control. *Id.* at 188.

relative value of televising events that viewers prefer to watch: “breaking news” and live sporting events.<sup>168</sup> Many fans prefer to watch a sporting event in real-time, and viewers cannot easily avoid the commercials in live sports broadcasts.<sup>169</sup> This increases the relative value of advertising on live events, and thereby allows price increases that further bolster broadcast revenues.<sup>170</sup> The consequence of these changes has been to create a college commercial sports enterprise that “now measures aggregate revenues in the billions and compensates head coaches and some athletic directors in the millions.”<sup>171</sup>

### C. *The NCAA Cartel, Examined Through Its Spoils Distribution*

Despite its tax-status as a 501(c)(3) non-profit organization, the NCAA and its member institutions can maintain this revenue scheme by engaging in illicit cartel behavior. As Lawrence Kahn stated, “Most economists who have studied the NCAA view it as a cartel that attempts to produce rents, both by restricting output and limiting payments for inputs such as player compensation.”<sup>172</sup>

The word “cartel” derives from the Italian word “cartello,” which essentially means a leaf of paper.<sup>173</sup> In English, the word was used to designate a written agreement between warring nations regarding the exchange of prisoners of war.<sup>174</sup> Today, the term is colloquially used to refer to gang-related and

168. *See id.*

169. *Id.*

170. *See id.*

171. *Id.* In 2021, the highest paid NCAA member football coach was Alabama’s Nick Saban (School pay: \$9,500,000; Total pay: \$9,753,221). *College Football Head Coach Salaries*, USA TODAY, <https://perma.cc/7RSK-2X5J> (last updated Oct. 14, 2021, 9:09 AM). LSU’s Ed Orgeron was number two (School pay: \$8,387,500; Total pay: \$9,012,917). *Id.* For NCAA men’s basketball, Kentucky’s John Calipari was the highest paid coach (School pay: \$8,000,000; Total pay: \$8,095,800) and Duke’s Mike Krzyzewski was number two (Total pay: \$7,044,221). *Men’s Basketball Head Coach Salaries*, USA TODAY, <https://perma.cc/FBW9-NJR6> (last updated Mar. 9, 2021, 3:21 PM).

172. Lawrence M. Kahn, *Markets: Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSPS. 209, 210 (2007).

173. *Cartel*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/BSK9-44S5>.

174. *Id.*

organized crime.<sup>175</sup> Economically, a cartel is a group of market actors within an oligopoly who agree or collude with one another to increase profits and market shares.<sup>176</sup> While the agreement can take many forms, cartel behavior includes price-fixing agreements, production-output reductions to increase demand, and fixing bidding on public projects.<sup>177</sup>

The NCAA's economic cartel is composed of two principle agreements: limiting the compensation and demand for players, the "most essential input to games," and restricting the number of games for sale for broadcasting purposes.<sup>178</sup> Both measures reduce compensation below market demand.<sup>179</sup> The result, social scientists describe, is a "large financial surplus for intercollegiate athletics, with a corresponding opportunity for other claimants such as coaches and administrators to tap into the excess."<sup>180</sup>

In contrast to professional sports that implement revenue sharing, penalize excessive payrolls, limit aggregate payrolls, and limit individual player compensation through negotiation with a players' union, colleges have simply agreed amongst themselves through the NCAA to limit player remuneration to

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175. See, e.g., *Narcos: Mexico* (Netflix 2021) (chronicling the rise of the Guadalajara Cartel as an American DEA agent learns the danger of targeting "Narcos" in Mexico).

176. George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45–46 (1964).

177. *Id.* at 45–48.

178. Sanderson & Siegfried, *supra* note 9, at 196.

179. See *id.* ("The former removes costs relative to what their level would be in a competitive player market, while the latter enhances broadcast revenues compared to their competitive level.")

180. *Id.* Before 1984, the NCAA limited broadcasts to just one game per week, which created an artificial scarcity of games. See *id.* at 196

Bids for the rights escalated rapidly, with the three over-the-air networks chasing just a single source of game content. After the US Supreme Court ended the broadcast rights agreement in 1984, the number of televised games increased rapidly, and rights fees per game plummeted to less than a third of the level that they had been under the plan. But fees recovered quickly, as new technologies to record and play televised shows without advertisements increased the relative value of advertising on broadcasts that viewers preferred to watch live, especially sports. (citation omitted)

a tuition scholarship, plus room and board, and now all meals and snacks.<sup>181</sup>

To maintain a cartel, each operation must control four challenges: (1) the difficulty in reaching agreement among diverse constituents, (2) the erosion of profits by non-price competition or cheating, (3) the deterrence of new entrants, and (4) the equitable distribution of the spoils.<sup>182</sup> “The NCAA is no exception.”<sup>183</sup>

### 1. Reaching Agreement

The NCAA’s member institutions must agree to restrict both player input and broadcast output. This Article focuses on that first restriction. Controlling what to agree on is difficult when each member has different goals, positions, and bargaining power.<sup>184</sup> As Sanderson and Siegfried point out, “[w]ith such differences among members, it is remarkable the NCAA has coalesced for over 60 years as a vibrant cartel.”<sup>185</sup>

The NCAA is successful in limiting player input and subsisting on a grant-in-aid with a little help from the NFL and the NBA, whose collective bargaining agreements prohibit drafting players who are fewer than three years out of high school for football and one year out of high school for basketball.<sup>186</sup> Historically, these two policies limited a young player’s options in the United States.<sup>187</sup> A high school basketball player might play overseas or in the NBA’s development league,<sup>188</sup> but the non-price competition incentives to play basketball for Duke University for a year can easily persuade a seventeen-year-old to go the college basketball one-and-done

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181. *Id.* at 196. The bylaws are not subject to the 1935 National Labor Relations Act because no union or collective bargaining agreement was involved. *See id.*

182. *Id.* at 198.

183. *Id.*

184. *Id.*

185. *Id.* at 199–200.

186. *Id.* at 196–97.

187. *See id.* at 197 (“These professional league policies have drastically reduced viable paid options available to young athletes.”).

188. *Id.*



route.<sup>189</sup> But this option doesn't exist for high school football players.<sup>190</sup> American style football is really only played in America; the Canadian Football League is a poor alternative in terms of training and notoriety.<sup>191</sup> These associational and marketplace restrictions funnel college athlete-age players into intercollegiate play.

## 2. Controlling Non-Price Competition and Controlling Cheating

Though cartel participants agree to alter their behaviors, participants are still often rivals, and incentives exist for a cartel member to “advertise, improve service, innovate, or otherwise expend funds in an effort to add unit sales at the expense of rivals” (non-price competition).<sup>192</sup> Failing to control non-price competition causes all cartel members' costs to rise and profits to fall.<sup>193</sup> Regarding player input, many opaque opportunities exist for a member university to deviate from the cartel bargain.<sup>194</sup> These incentives—like intense recruiting, state of the art training and playing facilities, professional grade locker rooms and recreational players areas, luxury and health conscious food and dining options, and selling a dream of fame and glory on a televised, national stage—can create competition that can undermine the original bargain.<sup>195</sup> When there is no salary to attract players, non-price competition can become the selling point.<sup>196</sup>

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189. See *id.* at 199 (“When direct price (salary) competition is prohibited, non-price competition will increasingly affect prospective players' choices about which institution to attend.”). But see Bridget Condon, *Luckiest Man in the Word: LaVar Ball Has 3 Sons in the NBA and Tells ABC11 All About It*, ABC 11 (Dec. 7, 2020), <https://perma.cc/89Q7-3AH2> (“Ball has had sharp words about the NCAA and used both of his younger sons as examples . . . . Both LiAngelo Ball and LaMelo Ball played overseas and from there went to the NBA.”).

190. Sanderson & Siegfried, *supra* note 9, at 197.

191. The Arena Football League is no longer an option, folding in October 2019. Gary Phillips, *Arena Football League Closes Shop After 30-Plus Years*, FORBES (Nov. 28, 2019, 1:28 PM), <https://perma.cc/X4GH-R5QZ>.

192. Sanderson & Siegfried, *supra* note 9, at 199.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Cartels must protect profits from those cheating on the bargain. Because cheating in recruiting and payments to players, for example, can impact a cartel's profit distributions, cartels must provide incentives to deter cheating.<sup>197</sup> Because cheaters often do so secretly, the cartel must provide either an enforcement arm or a mechanism to incentivize participants to report on one another.<sup>198</sup> The NCAA employs both, doling out the dreaded "death penalty" for its most egregious defectors.<sup>199</sup> The "death penalty," which requires a school to sit out of athletics for a season, was enforced only once against SMU in 1987 for what was then, and would even now be, considered egregious recruiting and pay-for-play violations.<sup>200</sup> It has never been used against a school again due to harsh backlash and long-term impacts to college football's reputation of purity.<sup>201</sup>

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197. *Id.* at 200.

198. See Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success*, 44 J. ECON. LITERATURE 43, 67 (2006) ("[Successful cartels] develop an elaborate internal hierarchy that allows communication on various levels (executive and middle-management) not only to provide flexibility in the details of the agreement, but to build trust.").

199. See FLEISCHER III ET AL., *supra* note 106, at 24 (detailing the history of NCAA enforcement measures).

200. See NCAA COMM. ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY INFRACTIONS REPORT 2 (1987), <https://perma.cc/Z5V9-3J4R> (PDF) ("During the period September 1985 through December 1986 . . . 13 football team members received payments during the 1985–86 academic year that totaled approximately \$47,000, and eight student-athletes continued to receive payments from September through December 1986 that totaled approximately \$14,000."). It should be noted that NCAA infractions were—and continue to be—widespread. See BYERS WITH HAMMER, *supra* note 12, at 216 ("Violations are so prevalent that they have become classified as secondary and major by the NCAA. The secondary cases have become an industry within themselves."); *Division I Infractions: 2019-20 Annual Report*, NCAA (2020), <https://perma.cc/259X-THBC> (PDF) (recording 3,666 Level III Violations in 2019 among NCAA member schools). The school that perhaps came closest to receiving the "death penalty" was the University of Alabama in 2002, when it was revealed that three boosters made payments to recruits totaling more than \$150,000. Tim Layden, *The Loneliest Losers*, SPORTS ILLUSTRATED VAULT (Nov. 18, 2002), <https://perma.cc/EKS6-LK8W>.

201. See Layden, *supra* note 200 (arguing that the NCAA has avoided the "death penalty," even when teams qualified, because the SMU "program still hasn't recovered").

### 3. Deterring New Entrants

To protect its profits, cartel members must deter new entrants who are attracted to the average 23 percent increase in profits that results from cartel enforcement.<sup>202</sup> The NCAA's Division I FBS, which generates the most revenue, successfully maintains a vertical monopoly over cartel entrance.<sup>203</sup>

Only 14 universities have gained NCAA Division I status since 2000. The challenge of acquiring access to one of the five power conferences, to football bowl games, or to March Madness are additional hurdles that face new competitors. In October 2016 two recently successful football programs, the University of Houston and Brigham Young University, were both denied entry to the Big-12 conference even though they arguably both fit its geographic profile and the Big-12 had only 10 teams at the time.<sup>204</sup>

### 4. Distributing the Spoils Fairly

The final challenge for a successful cartel is to assure its members that the fruits of its agreement are equitably distributed.<sup>205</sup> Those who do not contribute to the output (teams whose games are not televised and who receive less revenues from athletics) are likely to favor equal distribution, while those who produce the output (teams with revenue-generating power) are likely to favor a “distribution principle based on production.”<sup>206</sup> An acceptable balance can always be a challenge

202. LAWRENCE M. KAHN, *THE ECONOMICS OF COLLEGE SPORTS: CARTEL BEHAVIOR VS. AMATEURISM* 20 (IZN 2006), <https://perma.cc/WDD2-MSSH> (PDF).

203. Sanderson & Siegfried, *supra* note 9, at 202 (“The NCAA’s Division I FBS . . . has been quite successful in fending off potential entrants.”).

204. *Id.* at 203. “There are many major universities without a commercialized intercollegiate athletics program . . . that could try to enter the big-time, as did Michigan State successfully in the 1950s and Louisville, Houston, and Boise State accomplished more recently.” *Id.* at 202. “But entry generally is not a source of new competition for the NCAA’s elite sports universities because the programs that have upgraded were already NCAA members and had agreed to abide by the cartel rules. Moreover, upgrades are hampered by other NCAA threshold requirements.” *Id.*

205. *Id.* at 203.

206. *Id.*

in an unequal consumer market, otherwise a cartel member may “bolt the agreement,”<sup>207</sup> destabilizing the cartel.

Large revenues and media coverage have placed collegiate athletics at the forefront of the public conversation.<sup>208</sup> Journalists, professional athletes, members of Congress, faculty, and the student-athletes themselves have begun to question the revenue distribution.<sup>209</sup> Student-athletes have lodged protests against the payment scheme, arguing that coaches and athletic administrators are earning “salaries that are far in excess of what they could earn in their next-best employment opportunities and that are at least partially earned on the backs of players.”<sup>210</sup> The Northwestern football team, discussed later, attempted to unionize to bargain for compensation and better health benefits.<sup>211</sup> For decades, such attempts have failed in garnering student-athletes a piece of the pie.<sup>212</sup>

In 2018, Goldburn Maynard Jr. argued that the NCAA’s amateurism rules, specifically those that limit endorsements, are simply the continued enforcement of ancient sumptuary laws, which essentially restrict luxury spending.<sup>213</sup> Such laws were often used to keep women, enslaved people, and low-class persons in their socioeconomic status.<sup>214</sup> During the Middle Ages, sumptuary laws were enacted to limit competition from

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207. *Id.*

208. *Id.* at 188 (“Gross revenues of intercollegiate athletics programs have grown to such gargantuan proportions that an enterprise that was once largely a peripheral activity on college campuses no longer goes unnoticed.”).

209. *Id.*

210. *Id.*

211. *See* Nw. Univ., 362 N.L.R.B. 1350, 1350 (2015); *see also* Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1007 (2012) (questioning whether existing labor laws allow college athletes to unionize).

212. *See, e.g.*, Fram & Frampton, *supra* note 211, at 1027–38.

213. *See* Goldburn P. Maynard Jr., *They’re Watching You: How the NCAA Infringes on the Freedom of Families*, 2018 WIS. L. REV. FORWARD 1, 1–2 (2018) (“[T]he NCAA’s surveillance of the family and enforcement of its rules amount to a sumptuary restraint on the families of talented NCAA athletes.”).

214. *Id.* at 4.

the up-and-coming bourgeoisie.<sup>215</sup> According to Spanish Colonial law:

No *negra* or *mulata* woman, free or slave, can wear gold, pearls, or silk. But, if the free *negra* or *mulata* were married to an *español* man, she may wear gold earrings with pearls, a choker, and velvet on the hem of the skirt. They cannot wear crepe mantles or mantles of any other fabric, except for capes that fall just below the waist. The penalty for violating this law will result in the removal and forfeiture of the gold jewelry, silk dresses, and mantel.<sup>216</sup>

Well into the eighteenth century, sumptuary laws regarding clothing were enacted for whites and enslaved people and directed at “conceptions and images of the social order.”<sup>217</sup> Sumptuary laws were “concerned with attempts to protect hierarchical conceptions of social relations, to resist some of the most directly visible manifestations of rising social groups challenging or undermining the incumbents of advantaged social positions.”<sup>218</sup>

As sumptuary laws are aimed at “consumption” and public perceptions, Maynard’s logical connection to the NCAA’s current revenue scheme reinforces many of the insidious racial and gender impacts previously discussed.<sup>219</sup> Their rules “exemplif[y] a modern, ongoing attempt to enforce sumptuary laws that disproportionately disadvantage the families of poor black athletes.”<sup>220</sup>

Maynard discusses the cases of Reggie Bush and Ryan Boatright, who were both penalized under the NCAA’s amateurism rules.<sup>221</sup> Bush was ostracized when a prospective

215. *Id.* at 4–5 (“The nobility figured that if bourgeois subjects appeared to be as wealthy as themselves, it could undermine the nobility’s presentation of themselves as powerful, legitimate rulers.”).

216. *Id.* at 5 (citing RECOPIACIÓN DE LAS LEYES DE LOS REINOS DE LAS INDIAS 325 (5th ed. 1841); Danielle Terrazas Williams, Capitalizing Subjects: Free African-Descended Women of Means in Xalapa, Veracruz During the Long Seventeenth Century (2013) (Ph.D. dissertation, Duke University)).

217. ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW 143 (1996).

218. *Id.*

219. *See* Maynard, *supra* note 213, at 6.

220. *Id.*

221. *Id.* at 6–9.

agent paid for his mother to stay in a house rent-free and for her travel during away games.<sup>222</sup> Upon going pro, Bush went with a different agent, the agent sued, people found out, and Reggie had to give back his Heisman.<sup>223</sup> Boatright received a three-game suspension because his mother allegedly received travel expenses, information that the NCAA publicly released much to the outrage of Boatright's attorney.<sup>224</sup> As Maynard points out: "It is . . . impossible to escape the fact that both the Bush and the Boatright families are black," and that, "[n]one of this behavior would have been suspicious if these parents were wealthier."<sup>225</sup>

The NCAA rules disproportionately impact student-athletes of color. Considering the "big ticket" sports, football and basketball, and the revenue generating (high output) schools, the statistics are stark. A 2018 study by Dr. Shaun Harper found that Black men made up only 2.5 percent of undergraduate students enrolled across sixty-five studied institutions, but they comprised 56 percent of men's basketball teams and 55 percent of football teams.<sup>226</sup> The study also showed that less than 12 percent of head coaches at these schools were Black.<sup>227</sup> The average salary for the sixty-five athletics directors in the major conferences was \$707,418, but just 15.2 percent of them were Black.<sup>228</sup> And none of the commissioners of those conferences, who earned \$2.58 million annually on average, were Black.<sup>229</sup>

The public has considered the historical lack of spoils distributions to the players as acceptable because, in the words of Joe Burrow's own father, he's a "23-year-old millionaire living in [his] parents' basement."<sup>230</sup> But this will not be the case for most student-athletes. Professional leagues recruit less than 2

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222. *Id.* at 7.

223. *Id.* at 6–7.

224. *Id.* at 7–8.

225. *Id.*

226. HARPER, *supra* note 48, at 3.

227. *Id.* at 8.

228. *Id.*

229. *Id.*

230. Ryan Young, *Joe Burrow Still Hasn't Signed with Bengals, 'Waiting to See What Happens' Amid Coronavirus Pandemic*, YAHOO SPORTS (May 8, 2020), <https://perma.cc/K884-JXT2>.

percent of athletes.<sup>231</sup> The NCAA is “robbing them and their families of the most valuable period of their lives,” leaving them with only “memories of big games.”<sup>232</sup> Otherwise, “they stay in their socio-economic station through monitoring and threats of lost eligibility.”<sup>233</sup>

The threat of lost eligibility and the dream that rarely materializes also improperly incentivize student-athletes to sacrifice their bodies and physical health, to undergo groundbreaking surgeries on their ankles, backs, and legs, and play injured for fear of appearing “soft” or losing their draft stock.<sup>234</sup> From 1960 to 1980, the average weight of an All-American football player rose from 214.5 pounds to 226.1 pounds.<sup>235</sup> The average college football player was 232 pounds as of 2017, with the average University of Alabama football player weighing in at 237.5.<sup>236</sup> These student-athletes, and the institutions that exploit them, leverage increased bulk and the speed of youth against longer-term bad health impacts like head injuries, diabetes, numerous corrective surgeries, and mental health disorders.<sup>237</sup>

Risking this without an opportunity to share in the spoils of their all-consuming, gladiator-like exploits, poor students of color are transferring the revenue disproportionately to wealthier white individuals.<sup>238</sup> This, Maynard emphasizes, is what makes the NCAA’s no play for pay and NIL rules even worse than ancient sumptuary laws—the lower classes weren’t forbidden from making money; they were just forbidden from

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231. *Id.*

232. *Id.*

233. *Id.*

234. *See Estimated Probability of Competing in Professional Athletics*, NCAA, <https://perma.cc/GP5H-4TTH> (last updated Apr. 8, 2018).

235. BYERS WITH HAMMER, *supra* note 12, at 93.

236. Daniel Wilco, *How Large Is the Average College Football Player? Which Team Is the Biggest? Smallest?*, NCAA (Nov. 7, 2017), <https://perma.cc/NJL9-YCGS>.

237. *See* NCAA, NCAA DIVISION I STUDENT-ATHLETE INSURANCE COVERAGE OVERALL FINDINGS (2016), <https://perma.cc/4H8B-9QUP> (PDF).

238. *See* Maynard, *supra* note 213, at 12 (“Revenue-generating sports are still very much built on the back of black athletes.”); HARPER, *supra* note 48, at 8 (emphasizing that “white men call[] the shots” in collegiate athletics).

dressing like nobles.<sup>239</sup> To quote the comedic sage Chris Rock: “Shaq is rich. The white man who signs his check is wealthy.”<sup>240</sup>

## II. AMATEURISM UNDER ANTITRUST LAW

*Each generation of young persons come[s] along and all they ask is, “Coach, give me a chance, I can do it.” And it’s a disservice to these young people that the management of intercollegiate athletics stays in place committed to an outmoded code of amateurism. And I attribute that to, quite frankly, to the neo-plantation mentality that exists on the campuses of our country and in the conference offices and in the NCAA. The coach owns the athlete’s feet, the college owns the athlete’s body, and the athlete’s mind is supposed to comprehend a rulebook that I challenge Dave Berst, who’s sitting down in this audience, to explain in rational terms to you inside of eight hours.*

Walter Byers<sup>241</sup>

Many predicted and called for the end of the NCAA’s enforcement of amateurism, “and yet,” for years, “the NCAA marche[d] on.”<sup>242</sup> With the Supreme Court’s pronouncement in *Alston* and the pressure from states to support student-athlete NIL commercialization, the NCAA can no longer justify its exploitative profit distribution scheme under the guise of amateurism.

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239. See Maynard, *supra* note 213, at 3–4.

240. *Chris Rock: Never Scared* (HBO television broadcast Apr. 17, 2004).

241. Karen Given, *Walter Byers: The Man Who Built the NCAA, Then Tried to Tear It Down*, WBUR (Oct. 13, 2017), <https://perma.cc/56HU-M7XX> (quoting Walter Byers); see also BYERS WITH HAMMER, *supra* note 12, at 2–3 (“Today, the NCAA Presidents Commission is preoccupied with tightening a few loose bolts in a worn machine, firmly committed to the neoplantation belief that the enormous proceeds from college games belong to the overseers (the administrator) and the supervisors (coaches).”).

242. Maynard, *supra* note 213, at 12.



A. *The NCAA's Bylaws Enforcing Amateurism*

The main governing document for the NCAA and its member institutions is the 2021–2022 NCAA Division I Manual, effective August 1, 2021.<sup>243</sup> The Manual is a 464-page document that includes the NCAA's Constitution (Articles 1 to 6), the NCAA's Operating Bylaws (Articles 10 to 21), and an Administrative Bylaw (Article 31).<sup>244</sup> The Constitutional Articles contain information regarding the NCAA's purposes, "its structure, its membership and legislative-process information, and the more important principles for the conduct of intercollegiate athletics."<sup>245</sup> The Operating Bylaws consist of "legislation" adopted by the membership and regulate the conduct of member institutions and student-athletes and their interactions with the NCAA.<sup>246</sup>

The NCAA Constitution provides that one of the stated purposes of the NCAA is to "encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism."<sup>247</sup> Neither the Constitution nor the Bylaws define "amateurism." This is likely intentional, so that its interpretation (and enforcement) can remain malleable on a case-by-case basis.

Of the sixteen Principles for Conduct of Intercollegiate Athletics listed in Article 2 of the NCAA's Constitution,<sup>248</sup> Section 2.9 addresses the "Principle of Amateurism:"

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated *primarily by education* and by the physical, mental[,] and social benefits to be derived. Student participation in intercollegiate athletics is *an avocation*, and student-athletes should be protected from exploitation by professional and commercial enterprises.<sup>249</sup>

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243. NCAA MANUAL, *supra* note 7.

244. *Id.* at x.

245. *Id.*

246. *Id.*

247. *Id.* § 1.2(c).

248. *See id.* §§ 2.1–2.16.

249. *Id.* § 2.9 (emphasis added).

I agree that student-athletes should be motivated by education, but additional physical, mental, and social benefits derive from intercollegiate athletic participation. Further, previous studies<sup>250</sup> indicate that the motivation is not always primarily education-motivated, nor is such participation a “hobby.”<sup>251</sup> Rule-adjacent bylaws impacted by the Principle of Amateurism are grounded in related principles like “competitive equity,” “recruiting,” “eligibility,” and “financial aid.”<sup>252</sup> Like amateurism, many of these related principles are hortatory in theory but unrealistic in practice.

Member institutions in Division I also support certain “commitments” that are not binding, but should serve as overarching guidance for regulatory rules.<sup>253</sup> The “Commitment to Amateurism” requires member institutions to conduct their athletics programs in accordance with the NCAA Bylaws, “thus maintaining a line of demarcation between student-athletes who participate in the Collegiate Model and athletes competing in the professional model.”<sup>254</sup> Though the constitutional articles do not define “amateurism,” based on this language it likely entails some distinction between college and professional sports. Further, the NCAA’s definition of a “professional athlete” entails the concept of payment: “one who receives any kind of payment, directly or indirectly, for athletics participation, except as permitted.”<sup>255</sup> Extrapolating from those two definitions, we can surmise that amateurism at least involves a demarcation between college and professional sports in which payment equals professionalism.

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250. See SHAUN R. HARPER, BLACK MALE STUDENT-ATHLETES AND RACIAL INEQUITIES IN NCAA DIVISION I COLLEGE SPORTS 3 (2016), <https://perma.cc/P8GH-BKMH> (PDF) (“Black men are socialized to value sports over academics at a young age . . .”).

251. *Avocation*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/KZB9-8LR6> (“[A] subordinate occupation pursued in addition to one’s vocation especially for enjoyment: HOBBY.”).

252. NCAA MANUAL, *supra* note 7, §§ 2.10–2.13.

253. See *id.* at xiii (“[M]embers . . . support the following commitments in the belief that these commitments assist in defining the nature and purposes of the division.”).

254. *Id.*

255. *Id.* § 12.02.11.

Of all the Operating Bylaws, I focus on Article 12, which regulates “Amateurism and Athletics Eligibility.”<sup>256</sup> Article 12’s reach is expansive, regulating conduct both before full-time enrollment (labeled an individual) and during full-time enrollment (labeled a student-athlete).<sup>257</sup> Article 12 provides a list of general principles of amateurism and an extensive definitions section that, notably, fails to define “amateurism.” The article also regulates involvement with professional teams, the use of agents, employment, promotional activities, financial donations from outside organizations, athletic eligibility requirements, the five-year seasons of competition rule, as well as rules governing certification, loss of, and restoration of eligibility.<sup>258</sup> While many of these rules deserve intense scrutiny and potential revision, this next subsection focuses on the rules that impinge on pay for play and NIL commercialization, as well as some eligibility rules impacted by either pay-for-play or NIL commercialization rules.

### 1. Amateurism Certification Process

All student-athletes at a member institution must submit to an amateur certification process, in which an institutional center reviews a student-athlete’s activities prior to the submission of the request.<sup>259</sup>

### 2. Pay for Play

Once certified, student-athletes can lose their amateur status (and be ineligible to compete) if, among other things, they: use their athletic skill for pay in any form in that sport or

256. *Id.* art. 12.

257. *See id.* § 12.01.3

NCAA amateur status may be lost as a result of activities prior to enrollment in college. If NCAA rules specify that an “individual” may or may not participate in certain activities, this term refers to a person prior to and after enrollment in a member institution. If NCAA rules specify a “student-athlete,” the legislation applies only to that person’s activities after enrollment.

258. *See id.* § 12.2 (Involvement with Professional Teams); *id.* § 12.3 (Use of Agents); *id.* § 12.4 (Employment); *id.* § 12.5 (Promotional Activities); *id.* § 12.6 (Financial Donations from Outside Organizations); *id.* § 12.7 (Athletics Eligibility Requirements); *id.* § 12.8 (Seasons of Competition: Five-Year Rule).

259. *Id.* § 12.1.1.1.

accept a promise of pay in the future,<sup>260</sup> receive a salary,<sup>261</sup> “reimbursement . . . or any other form of financial assistance from a professional sports organization based on athletics skill or participation.”<sup>262</sup>

Section 12.02.10 defines “pay” as “the receipt of funds, awards or benefits not permitted” by the rules.<sup>263</sup> Prohibited forms of pay under the rules include “[a]ny direct or indirect salary, gratuity, or comparable compensation”;<sup>264</sup> “[a]ny division or split of surplus” such as from bonuses or game receipts (which would include funds from commercial licensing of games, for example);<sup>265</sup> unauthorized educational expenses (although a “grant-in-aid” is not considered pay);<sup>266</sup> excessive or improper expenses, awards, and benefits (here, the NCAA includes cash or funds placed in trust as an award for participation in sports at any time or excessive expenses from an outside sponsor above “actual and necessary expenses”);<sup>267</sup> and payments based on performance (those conditioned on a player or team’s finish or performance or preferential treatment based on skill).<sup>268</sup>

Like any overly regulated and convoluted set of rules, exceptions exist. Many of these exceptions, however, benefit the NCAA, the member institution, or the international governing body over the student-athlete. For example, institutional, charitable, educational, or fundraising activities that involve the use of a student-athlete’s abilities, such as a “swim-a-thon” are allowed, but all money must go to the institution or sponsoring organization.<sup>269</sup>

Exceptions are made for student-athletes participating in the Olympics, but all payments received must be for educational expenses and Olympians can only receive the same

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260. *Id.* § 12.1.2(b).

261. *Id.* § 12.1.2.1.1.

262. *Id.* § 12.1.2(d).

263. *Id.* § 12.02.10.

264. *Id.* § 12.1.2.1.1.

265. *Id.* § 12.1.2.1.2.

266. *Id.* § 12.1.2.1.3.1.

267. *Id.* § 12.1.2.1.4.1.1.

268. *Id.* § 12.1.2.4.3.

269. *Id.* § 12.1.2.4.5.

nonmonetary benefits available to other Olympians in that sport.<sup>270</sup>

There is also, unsurprisingly, an exception for tennis. Individuals who received tennis prize money before enrolling as student-athletes may keep up to \$10,000 of that prize money per year and then may accept payment for actual and necessary expenses on top of the \$10,000 limit.<sup>271</sup> Non-tennis players can only receive prize money that does not exceed their individual, or their family's, actual and necessary expenses.<sup>272</sup> Why tennis you ask? The egalitarian response is that tennis is a solo sport which is difficult to fund with the necessary coaching and travel.<sup>273</sup> But a more cynical response is that, well, wealthy people play tennis and likely lobbied the Board of Governors to make exceptions for tennis in 2012.

Without losing their eligibility, student-athletes may receive, for instance, (1) awards valued at several hundred dollars for athletic performance (athletic “participation awards”), which may take the form of Visa gift cards;<sup>274</sup> (2) disbursements—sometimes thousands of dollars—from the NCAA’s Student Assistance Fund (SAF) and Academic Enhancement Fund (AEF) for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid,

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270. *Id.* §§ 12.1.2.4.5–12.1.2.4.7.

271. *Id.* § 12.1.2.4.2.

272. *Id.* § 12.02.2.1.

273. This rationale appears reasonable at first glance. After all, “[p]rospective student-athletes and their families spend exorbitant amounts of money for travel and other expenses related to competing in tennis events.” *Division I Proposal—2007–23–A*, NCAA, <https://perma.cc/HX3N-JWYF>. However, the NCAA does not make similar exceptions for other sports, which can be expensive. “A study conducted [in 2016] by TD Ameritrade found that parents whose children participated in ‘highly competitive or elite teams run by a non-school organization’ were spending on average \$100 to \$500 per month, per child. And at least 20 percent of them dished out \$1,000 per month.” Jason Smith, *Paying to Play: How Much Do Club Sports Cost?*, USA TODAY (Aug. 1, 2017, 10:00 AM), <https://perma.cc/PTF3-F8S3>. The study broke down average expenses per sport, per year, finding: baseball at \$3,700; softball “just over \$1,000”; basketball at \$500 or \$5,000 (depending on whether the team is sponsored by a company like Nike or Adidas); soccer between \$2,500 and \$5,000; and volleyball either \$8,000–\$10,000 or \$1,500 (depending on whether the team is on a “nation-wide” or “regional” circuit). *Id.*

274. NCAA MANUAL, *supra* note 7, § 16.1.4.1.

health and safety expenses, clothing, travel, personal or family expenses, loss-of-value insurance policies, car repair, personal legal services, parking tickets, and magazine subscriptions;<sup>275</sup> (3) cash stipends of several thousands of dollars calculated to cover costs of attendance beyond the fixed costs of tuition, room and board, and books, but used wholly at the student-athlete's discretion;<sup>276</sup> (4) unlimited meals and snacks;<sup>277</sup> (5) reimbursements for expenses incurred by student-athletes' significant others and children (up to six persons once a year) to attend certain athletic competitions;<sup>278</sup> and (6) a \$30 per diem for "unitemized incidental expenses during travel and practice" for championship events.<sup>279</sup>

The NCAA created many of these exceptions in the past six years.<sup>280</sup> "[B]efore 2015, athletic participation awards did not take the form of cash-like Visa gift cards."<sup>281</sup> And after the NCAA permitted grants-in-aid for the full cost of attendance (COA), effective August 2015, many more student-athletes began to receive above-COA payments, such as cash stipends, Pell Grants, and AEF as well as SAF distributions.<sup>282</sup>

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275. *Id.* § 15.01.6.

276. *Id.* §§ 15.2.4, 15.2.6–15.2.6.4.

277. *Id.* § 15.2.2.1.6.

278. *Id.* § 16.6.1.1. Note that the rules allow for reimbursement. Many families are not in a financial position to pay for such travel expenses up front. See *Study College Athletes Worth Six Figures Live Below Federal Poverty Line*, *supra* note 44.

279. NCAA MANUAL, *supra* note 7, § 16.8.1.1.

280. See, e.g., *id.* § 15.2.6.3 (effective date 8/1/19); *id.* § 15.2.6.4 (effective date 8/1/19); *id.* § 15.2.2.1.6 (effective date 8/1/14); *id.* § 16.6.1.1 (revised date 1/19/18); *id.* § 16.8.1.1 (revised date 8/7/14).

281. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1245 (9th Cir. 2020). However, further investigation indicates that the Chick-fil-A Bowl distributed Visa gift cards as far back as 2013. See David Broughton, *Want a New Gift Suite Choice? Take a Seat*, SPORTS BUS. J. (Dec. 9, 2013), <https://perma.cc/2YUE-Z8SF>; *Bowl Games Gift Guide*, L.A. TIMES (Dec. 17, 2014, 11:41 PM), <https://perma.cc/SSV3-6B8F>.

282. See Michael McCann, *How Tentative Grant-in-Aid Class Action Settlement Affects NCAA, Student-Athletes*, SPORTS ILLUSTRATED (Feb. 4, 2017), <https://perma.cc/G88A-DRZ8>.

### 3. Professional Activities

The NCAA's regulation of professional activities and involvement with professional sports is where some of the more particularized input rules consider professional sports organizations and leagues. Many of the particular rules or exceptions in this section involve either men's hockey, baseball, or men's skiing; men's hockey being subject to the NHL, which uses a hybrid junior league model reminiscent of European soccer clubs.<sup>283</sup> The special rules for men's skiing seem to be a direct response to the Jeremy Bloom case, discussed below.<sup>284</sup> While individuals are allowed to try out for and practice with professional leagues, athletes can lose their amateur status, for example, if they sign a contract with a professional team,<sup>285</sup> enter the draft,<sup>286</sup> hire a sports agent,<sup>287</sup> or promise to hire a representative for future negotiations (the Reggie Bush rule).<sup>288</sup> However, the student-athlete can benefit from the use of a professional sports counseling panel, provided by the institution, which has limited counseling authority, and still retain their amateur status.<sup>289</sup> Hiring an agent is otherwise strictly prohibited.<sup>290</sup>

Professional sports organizations can contribute funds to a member institution, but such funds must not be earmarked for athletics and must be put in the general university fund,<sup>291</sup> or be used in a commercial venture to promote institutional sports other than men's basketball and football.<sup>292</sup>

Also included under "professional activities" is working an actual job, like a sales position. Student-athletes may do so

283. See NCAA MANUAL, *supra* note 7, § 12.2 (exempting men's hockey and skiing from rules governing "involvement with professional teams"); *id.* § 12.3.1 (exempting baseball and men's hockey from rules banning representation by an agent).

284. See *infra* Part III.

285. NCAA MANUAL, *supra* note 7, § 12.1.2(c).

286. *Id.* § 12.2.4.2. The athletes lose eligibility even if they rescind their name from the draft prior to the draft. *Id.* § 12.2.4.2(a).

287. *Id.* § 12.1.2(g).

288. *Id.* § 12.3.1.3.

289. *Id.* § 11.1.3.1.

290. *Id.* § 12.1.2(g).

291. *Id.* § 12.6.1.3.

292. *Id.* § 12.6.1.3(d).

(provided they can find the time—they can't), as long as they are paid the market rate for their work and their NILs are not used to promote or advertise the products or services.<sup>293</sup> A student-athlete can also start a business, but he or she cannot use their NIL to advertise, promote, or sell the products or services.<sup>294</sup> Finally, and almost laughably, student-athletes can essentially sell institutional merchandise to community boosters and organizations during a “goodwill tour,” but “on a salary,” not a commission.<sup>295</sup>

#### 4. Promotional Activities

Though the NCAA and its member institutions can profit off their student-athletes' NILs, since its inception the NCAA has prohibited student-athletes from receiving any remuneration for the use of their NILs and from commercializing their NILs.<sup>296</sup> For example, the member's institutional, charitable, educational, or nonprofit activities are authorized to incorporate student-athlete NILs to support their activities, subject to some limitations on commercial co-ventures,<sup>297</sup> but NCAA rules require that funds raised go directly to the sponsoring institution or organization.<sup>298</sup> Further, the institution and its institutionally controlled outlets, or said charitable, educational, or nonprofit organizations, can sell commercial items with the NILs of *multiple* student-athletes, but not individual ones.<sup>299</sup> Jerseys with a student-athlete's individual name on the back of it are, technically, unauthorized.<sup>300</sup> And of course, the NCAA has full reign to use the NILs of any and all of the student-athletes, collectively or individually, to promote its championships, events, activities, or programs.<sup>301</sup>

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293. *Id.* § 12.4.1.1.

294. *Id.* § 12.4.4.

295. *Id.* § 12.4.2.4.

296. Robert Litan, *The NCAA's "Amateurism" Rules What's in a Name?*, MILKEN INST. REV. (Oct. 28, 2019), <https://perma.cc/KVV5-CSLN>.

297. *See* NCAA MANUAL, *supra* note 7, § 12.5.1.1.

298. *Id.* § 12.5.1.1(e).

299. *Id.* § 12.5.1.1(h).

300. *Id.*

301. *Id.* § 12.5.1.1.1.



Ironically, it is also permissible for a student-athlete's NIL to appear in books, articles, and other publications, films, or videos related to sport-skill demonstration, analysis, or instruction.<sup>302</sup> So if I, a professor, wanted to write an academic article critiquing the skill of a particular student-athlete and incorporate still images of that student-athlete demonstrating those skills, I can.

But the student-athletes would not be eligible to compete if the individual accepted compensation for, or permitted the use of, their NIL to advertise a commercial product or services or if they received remuneration for use of such product or service.<sup>303</sup> While the student-athletes were allowed to engage in media activities, they could not receive remuneration, and they could not miss class.<sup>304</sup>

More troubling is Section 12.5.2.2's requirement that the student-athlete must actively take steps to prevent *third parties* and individuals from using their name and likeness in an impermissible commercial manner.<sup>305</sup> This onus is placed on the student-athlete (and their institution), despite the prohibition against the student-athlete protecting or commercializing their name or likeness through the majority of the student-athlete's years of eligibility.<sup>306</sup>

Many of these rules, which the NCAA purports are meant to protect the student-athletes from commercial exploitation, are continuances of ancient sumptuary laws. Institutions cannot distribute player "trading cards," but a commercial entity can distribute a wallet-sized program schedule card if the

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302. *Id.* § 12.5.1.5.

303. *Id.*

304. *Id.* § 12.5.1.1(d).

305. *Id.* § 12.5.2.2

If a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain eligibility for intercollegiate athletics. Such steps are not required in cases in which a student-athlete's photograph is sold by an individual or agency (e.g., private photographer, news agency) for private use.

306. *Id.*

student-athlete's NIL is not used on the same page as the commercial language (i.e., turn the card over).<sup>307</sup> Further, an individual who was an Olympic athlete prior to enrollment is allowed to receive payment for the advertisement, but they must "forward[] the payment to the U.S. Olympic and Paralympic Committee or national governing body for the general use of the organization(s)."<sup>308</sup>

If an individual worked as a model before becoming a student-athlete, they can continue earning in that capacity at market rate, as long as the student-athlete does not promote a commercial product or services or let their sports abilities or involvement be used.<sup>309</sup> Such a rule essentially allows persons who are already in an elevated social and economic sphere to continue to reside in that space.

The Bylaws most akin to ancient sumptuary laws are those that regulate the size of a commercial sponsor's logo that can appear on a student-athlete's uniform, and even the size of logos on clothing worn during *post-game* activities—two and one-fourth inches,<sup>310</sup> with a special rule for uniforms with laundry labels.<sup>311</sup>

##### 5. Current NCAA Interim Policy on Name, Image, and Likeness and State Fair Pay to Play Acts

In response to California, the NCAA published notices in 2019 encouraging each conference to consider ways to allow student-athletes to share in the revenues and participate in the commercialization of student-athlete NILs.<sup>312</sup> Amidst state, federal, and socio-cultural pressure and with several state NIL statutes set to take effect on July 1, 2021, the NCAA issued an Interim Policy on student-athlete name, image, and likeness commercialization on June 30, 2021.<sup>313</sup> Effective in all three

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307. *Id.* § 12.5.1.1.5.

308. *Id.* § 12.5.1.2.

309. *Id.* § 12.5.1.3.

310. *Id.* § 12.5.4.

311. *Id.* § 12.5.4.1.

312. Khristopher J. Brooks, *NCAA to Let College Athletes Profit from Their Likeness*, CBS (Oct. 29, 2019, 2:08 PM), <https://perma.cc/EUC6-TJY2>.

313. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://perma.cc/94PQ-BFJS>.

NCAA Divisions, the policy essentially provides that student-athletes can engage in NIL commercialization activities according to their applicable state laws and university rules and policies; that student-athletes in non-NIL permissible states can retain NCAA eligibility if engaging in such commercialization; and that student-athletes can hire agents and work with attorneys to protect and commercialize their rights.<sup>314</sup>

Noting that the policy is a temporary solution pending further collaboration between the NCAA and Congress, Division Presidents explicitly provided that the policy maintains the NCAA's rules prohibiting pay for play, but allows NIL commercialization.<sup>315</sup> This crucial distinction was intended to “reinforce[] key principles of fairness and integrity” and “prohibit[] improper recruiting inducements.”<sup>316</sup> Such a statement continues to link direct payments for players' on field participation with maintaining “integrity” and “fairness.”<sup>317</sup>

While legislative efforts at the state level may have prompted this movement within the NCAA, such state acts, in their haste to protect their student-athlete constituents, both expand and limit NIL commercialization rights. The California Act bars an association from preventing student-athletes in California from profiting off their NILs, as well as allows student-athletes to hire licensed agents and attorneys.<sup>318</sup> This would allow student-athletes in California to negotiate with video game companies for their NIL usage in college sports games; to receive compensation to sponsor summer camps; and to sign endorsement deals with apparel companies, sports beverage companies, car dealerships, or other commercial entities.<sup>319</sup>

The Act, however, prevents a student-athlete from entering into a contract that conflicts with their team's contract.<sup>320</sup> This limitation gives the member institution broad leeway to reject individual endorsements that might conflict with any number of

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314. *See id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. CAL. EDUC. CODE § 67456(a)(3), (c)(1) (West 2022).

319. *See id.* § 67456(a)(3).

320. *Id.* § 67456(e)(1)–(3).

their numerous commercial sponsorship deals.<sup>321</sup> Further, the Act provides no mechanism for student-athletes to challenge or refute such an institutional determination.<sup>322</sup> None of the acts allow for pay for play.<sup>323</sup>

Such discussions have not been limited to state legislatures. Senators Cory Booker and Richard Blumenthal authored a Student Athlete Equity Act.<sup>324</sup> Both senators spoke during a Senate Judiciary Hearing on July 22, 2020, regarding the need to protect athletes, whose “blood, sweat, and tears . . . is what fuels a \$14 billion industry.”<sup>325</sup> Blumenthal wants to give athletes lifetime scholarships to complete degrees.<sup>326</sup> Senator Booker expressed concern about the long term impacts to athlete health.<sup>327</sup> However, most of the testimony presented from member institutions or the NCAA expressed a desire to have a federal antitrust exemption that would immunize the NCAA, calling judicial antitrust enforcement a “blunt instrument” that exists “without considering any broader collateral effects on intercollegiate athletics” as a whole.<sup>328</sup>

Unless and until Congress either protects student-athlete rights or makes an explicit exception for student-athletes under antitrust scrutiny, courts are duty-bound to analyze challenges to the NCAA’s amateurism rules under the Sherman Act.<sup>329</sup> The NCAA’s activities are commercial in nature, they involve a restraint on trade, and are subject to antitrust law’s

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321. See Bank, *supra* note 17, at 114 (arguing that the loophole “removes most of the potential for [California’s Act] to be a ‘game changer’”).

322. See CAL. EDUC. CODE § 67456 (West 2022).

323. The California Act, for example, does not address direct payments for play. *Id.*

324. Student Equity Act, H.R. 1804, 116th Cong. (2019).

325. *Protecting the Integrity of College Athletics: Hearing Before the S. Judiciary Comm.*, 116th Cong. 26:00–26:17 (2020) (statement of Sen. Richard Blumenthal, Member, S. Comm. on the Judiciary), <https://perma.cc/5RU5-VQ2G>.

326. *Id.* at 30:40–30:47.

327. *Id.* at 36:00–36:15 (statement of Sen. Cory Booker, Member, S. Comm. on the Judiciary).

328. *Id.* at 50:15–50:25 (statement of Sen. Cory Booker, Member, S. Comm. on the Judiciary).

329. See *NCAA v. Alston*, 141 S. Ct. 2141, 2159–60 (2021) (subjecting the NCAA’s rules to the Sherman Act).

protection.<sup>330</sup> While the current cases may have asked the inappropriate question under the antitrust framework in the context of amateurism,<sup>331</sup> the Supreme Court and any future legislation or associational legislation should shape its amateurism rules with antitrust laws and ideals in mind.

### B. *The Principle of Amateurism Under Antitrust Scrutiny*

In 1984, the United States Supreme Court stated that the NCAA is the guardian of the “revered tradition” of amateurism in intercollegiate athletics and has wide leeway to uphold that tradition.<sup>332</sup> In *Board of Regents*, the Court’s justification supporting amateurism in intercollegiate athletics was that it promotes “competitive balance.”<sup>333</sup> The Court stated in dicta that “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and [are] therefore procompetitive because they enhance public interest in intercollegiate athletics.”<sup>334</sup>

Enshrined in the Court’s explication of the revered tradition of amateurism is both an assumption that the NCAA has broad authority to enforce that principle and a presumption that its rules in furtherance of that goal are reasonable.

Numerous plaintiffs have brought suits challenging the NCAA’s rules governing amateurism as Sherman Act violations since the 1970s.<sup>335</sup> Until the past decade, such claims found little success when either brought by a player or when challenging

330. *Id.*

331. *See id.* at 2159 (“The ‘statutory policy’ of the Act is one of competition and it ‘precludes inquiry into the question whether competition is good or bad.’”).

332. *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984); *see id.* at 101 n.23; Ryan S. Hilbert, *Maintaining the Balance: Whether a Collegiate Athlete’s Filing of a Federal Trademark Application Violates NCAA Bylaws*, 2 BERKELEY J. ENT. & SPORTS L. 120, 123 (2013) (“The United States Supreme Court has recognized the National Collegiate Athletic Association (‘NCAA’) as ‘the guardian of an important American tradition’—amateurism in intercollegiate athletics.” (citing *Bloom v. NCAA*, 93 P.3d 621, 626 (Colo. Ct. App. 2004))).

333. *Bd. of Regents*, 468 U.S. at 116–17.

334. *Id.* at 117.

335. *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. RESV. L. REV. 61, 83–86 (2013) (collecting cases).

amateurism, eligibility, or recruiting violations, as judicial decisions on these cases exempt the NCAA's bylaws from antitrust scrutiny as "noncommercial."<sup>336</sup> Scholars lament that these decisions were wrongly decided under antitrust doctrine and that the NCAA's limitations on pay for play and NIL commercialization are "the very antithesis to the type of competitive markets envisioned by drafters of the Sherman Act."<sup>337</sup> The Supreme Court's decision in *NCAA v. Alston* attempts to right these wrongs.

### 1. Sherman Act Framing

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . is . . . illegal."<sup>338</sup> Courts balance this plain language against a common law "reasonableness" gloss.<sup>339</sup> To reach this reasonableness analysis, a plaintiff must first meet two "threshold requirements": (1) the existence of a "concerted action between two legally distinct economic entities" (2) that affects "trade or commerce among the several states."<sup>340</sup> If a plaintiff can meet these two threshold requirements, the court will apply a competitive effects test to the challenged restraint and determine whether the alleged restraint unduly suppresses competition.<sup>341</sup>

In applying the competitive effects test, a fact finder can apply one of three standards.

(1) On one end of the spectrum is a "per se" analysis in which a restraint that appears nefarious on its face is deemed per se unreasonable, unless subject to an exemption.<sup>342</sup>

(2) On the other end of the spectrum is "rule of reason" test. If the court thinks, on first glance, that the restraint has some competitive benefit, it will apply a rule of reason

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336. *Id.*

337. *Id.* at 70.

338. Sherman Act of 1890, 15 U.S.C. § 1.

339. See Edelman, *supra* note 335, at 70–71 ("[C]ourts have interpreted the [Sherman] Act, in conjunction with preexisting common law, to prohibit only those contracts that 'unreasonably' restrain trade.").

340. *Id.* at 71 (citation omitted).

341. *Id.* at 73.

342. *Id.*

analysis—distinguishing between “restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>343</sup> It additionally

requires investigating every aspect of a restraint, including [(A)] whether the parties to the restraint had the power to control any relevant market (“market power”), [(B)] whether the restraint encourages or suppresses competition, and [(C)] whether the restraint caused the market place “antitrust harm.”<sup>344</sup>

Finally, (3)

A court may elect to perform an “abbreviated or quick-look rule of reason analysis.” Under this third test, a court will probe into certain aspects of a restraint while relying on its initial presumptions about others. Most courts that apply the quick-look test do so in favor of the plaintiff based on a preliminary finding of anticompetitive effects, relieving the burden of establishing market power and shifting the burden to the defendant to provide justification.<sup>345</sup>

Within this Section 1 analysis framework, however, courts bifurcate claims involving the NCAA into those involving “commercial” activities, like television broadcasting contracts, and those involving “noncommercial” activities, namely bylaws addressing and enforcing amateurism and eligibility rules, often dismissing cases at this threshold stage as non-commercial.<sup>346</sup> While the landmark 1984 Supreme Court case *Board of Regents of Oklahoma v. NCAA* found that the actions of the NCAA and its member institutions were subject to the Sherman Act, it did so in the context of examining agreements meant to restrict the number of games available for television broadcasting deals.<sup>347</sup> But when the claimant is challenging an amateurism, eligibility, or recruiting rule, courts routinely exempt the claims from antitrust scrutiny as noncommercial.<sup>348</sup> The circuit courts

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343. *Id.* at 74 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)).

344. *Id.*

345. *Id.* (footnotes omitted).

346. *See id.* at 85.

347. *Id.* at 94.

348. *See* Edelman, *supra* note 335, at 83–86 (providing cases).

that reach a competitive effects test are inconsistent in their application, and one court misapplied the rule of reason analysis upon reaching it.<sup>349</sup>

## 2. Pre-2008 Cases

Operating under this presumptively reasonable gloss, numerous relevant circuit and lower court decisions addressing amateurism rules exempt the particular bylaw from antitrust scrutiny, stating that the NCAA's rules maintaining the balance between amateurism and professionalism are noncommercial. Courts would exempt the rules regarding amateurism,<sup>350</sup> recruiting,<sup>351</sup> or eligibility<sup>352</sup> as non-commercial, only reaching commerciality and conducting a rule of reason analysis regarding coaches' salaries.<sup>353</sup> Edelman discusses eight

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349. *See id.* at 83 (arguing that the circuits that exempted NCAA eligibility rules from antitrust scrutiny based their reasoning on faulty factual assumptions and interpretations).

350. *See* *Coll. Athletic Placement Servs. v. NCAA*, No. 74-1144, 1974 WL 998, at \*4 (D.N.J. Aug. 22, 1974) (explaining that the legal challenge to rules presented in the case did not come within the purview of the Sherman Act because it served merely to “preserv[e] [the] educational standards in its member institutions”); *Marjorie Webster Junior Coll., Inc. v. Middle States Ass’n of Colls. & Secondary Schs.*, 432 F.2d 650, 654–55 (D.C. Cir. 1970) (noting that antitrust laws were inapplicable to regional college associations setting eligibility accreditation because no commercial motive existed); *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (stating that the plaintiff could not challenge the NCAA’s rule banning a college hockey player for his previous receipt of an athletic stipend and that the actions were noncommercial).

351. *See* *Pocono Invitational Sports Camps v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (reasoning that NCAA Bylaw allowing Division I coaches to evaluate high school basketball players only at certified camps did not violate antitrust law).

352. *See* *Gaines v. NCAA*, 746 F. Supp. 738, 740–41, 745 (M.D. Tenn. 1990) (deciding that a plaintiff wishing to return to college football after entering the NFL draft could not bring an antitrust challenge against the NCAA, distinguishing between broadcasting restrictions (“business rules”) and amateurism bylaws (“eligibility rules”)); *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998) (deciding that a rule that barred a student from eligibility to play for a school different from the graduate one she was currently attending was exempted from antitrust scrutiny); *Bowers v. NCAA*, 9 F. Supp. 2d 460, 497 (D.N.J. 1998) (noting that NCAA Bylaws that determine academic eligibility lie outside the Sherman Act).

353. *See* *Hennessey v. NCAA*, 564 F.2d 1136, 1151–52 (5th Cir. 1977) (NCAA rule limiting how many coaches an institution could hire); *Law v. NCAA*, 134 F.3d 1010, 1012, 1020 (10th Cir. 1998) (NCAA rule capping



pre-2008 cases in which the courts were simply wrong in finding that amateurism rules were non-commercial.<sup>354</sup>

One case that Edelman did not discuss, which seems to have shaped many of the NCAA's exceptions for men's skiing and previously professional athletes, is Jeremy Bloom's case. In *Bloom v. NCAA*,<sup>355</sup> the Colorado Court of Appeals affirmed imposition of the NCAA's rule that athletes cannot receive endorsements for sports other than the one they play for their university.<sup>356</sup> In *Bloom*, an Olympic skier went on to play NCAA football for the University of Colorado after receiving notoriety and fame as a teenager for his skill in moguls and his Olympic performance.<sup>357</sup> The NCAA determined that, because of his previous status as a professional before he entered college, he was ineligible to play NCAA football.<sup>358</sup>

Finally, as recently as 2012, the Seventh Circuit in *Agnew v. NCAA*<sup>359</sup> affirmed the district court's decision dismissing student-athletes' action against the NCAA.<sup>360</sup> The athletes unsuccessfully alleged that regulations capping the number of scholarships per team and prohibiting multi-year scholarships were anticompetitive.<sup>361</sup>

### 3. And Then There Was *O'Bannon*

In 2015, the Ninth Circuit went rogue, upholding the district court's findings that the NCAA's amateurism rules were, in fact, subject to antitrust laws and that the challenged conduct constituted an unlawful restraint of trade.<sup>362</sup>

In 2008, Ed O'Bannon, a former All-American basketball player at UCLA, visited a friend whose son told O'Bannon that

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compensation of entry-level coaches). *But see* Bassett v. NCAA, 528 F.3d 426, 430–438 (6th Cir. 2008) (rejecting an antitrust challenge arising from the NCAA banning a coach from coaching).

354. See Edelman, *supra* note 335, at 83–86.

355. 93 P.3d 621 (Colo. App. 2004).

356. *Id.* at 627.

357. *Id.* at 622.

358. *Id.*

359. 683 F.3d 328 (7th Cir. 2012).

360. *Id.* at 347.

361. *Id.*

362. See generally *O'Bannon II*, 802 F.3d 1049 (9th Cir. 2015).

Electronic Arts (EA), a software company that produced video games, was using O'Bannon's NIL in a college basketball video game.<sup>363</sup> The video game avatar visually resembled O'Bannon, played for UCLA, and wore O'Bannon's jersey number: 31.<sup>364</sup> O'Bannon did not consent to this use nor was he compensated for it.<sup>365</sup> In 2009, O'Bannon sued the NCAA and the Collegiate Licensing Company (CLC) complaining that the NCAA's amateurism rules, which prevented student-athletes from receiving compensation for their NILs, was an illegal restraint of trade under Section 1 of the Sherman Act.<sup>366</sup>

The Ninth Circuit agreed with the Supreme Court and other circuits that "many of the NCAA's amateurism rules are likely to be procompetitive," but held that such rules are "not exempt from antitrust scrutiny; rather, they must be analyzed under the rule of reason."<sup>367</sup> Applying the rule of reason, the circuit court found that the district court properly identified one less restrictive alternative: allowing NCAA members to provide scholarships up to the full cost of attendance, but that the district court's other remedy—allowing cash compensation up to \$5,000 per year to be placed in trust—was erroneous.<sup>368</sup> The court affirmed and reversed in part.<sup>369</sup>

In addressing the NCAA's threshold claim, the Ninth Circuit flatly rejected that it was bound by the Supreme Court's dicta in *Board of Regents* that the NCAA's amateurism rules

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363. *Id.* at 1055.

364. *Id.*

365. *Id.*

366. *Id.* Synchronously, Sam Keller, a former starting quarterback for the Arizona State University and University of Nebraska football teams, also brought suit against the NCAA, CLC, and EA, alleging that EA had impermissibly used student-athletes' NILs in its video games, blaming the NCAA and CLC for turning a blind eye. *Id.* Keller also stated claims under Indiana's and California's right of publicity statutes and other common law claims. *Id.* The two cases were consolidated and the district court granted class certification. *Id.* Once certified, the plaintiffs dismissed their damages claim with prejudice, also settling their claims against EA and CLC, and the cases were de-consolidated. *Id.* at 1056. The antitrust claims left in *O'Bannon* went to trial. *Id.*

367. *Id.* at 1051.

368. *Id.*

369. *Id.* at 1052.

were noncommercial and presumptively reasonable.<sup>370</sup> The Ninth Circuit noted that the *Board of Regents* case “certainly discussed the NCAA’s amateurism rules at great length,” but it did so “with a different and particular purpose: to explain why NCAA rules should be analyzed under the rule of reason, rather than held to be illegal per se.”<sup>371</sup> The point was significant—“Naked horizontal agreements among competitors to fix the price of a good or service, or to restrict their output, are usually condemned as per se unlawful.”<sup>372</sup> According to the circuit court, *Board of Regents* decided that because college sports could not exist without certain horizontal agreements, the NCAA’s rules should not be held per se unlawful even when, as with *Board of Regents’* television broadcasting limits, they appear to be “pure restraints on the ability of member institutions to compete in terms of price and output.”<sup>373</sup> The court’s “encomium to amateurism, though impressive-sounding,” was just dicta.<sup>374</sup>

The district court meticulously described the impact on trade or commerce in two relevant markets: the college education market and the group NIL licensing market.<sup>375</sup> In the college education market, FBS football and Division I basketball schools compete to recruit the best high school players by offering them “unique bundles of goods and services” that include non-price incentives, such as coaching, athletic facilities, and high-quality competition.<sup>376</sup>

[V]ery few elite athletes talented enough to play FBS football or Division I basketball opt not to attend an FBS/Division I school; hardly any choose to attend an FCS, Division II, or Division III school or to compete in minor or foreign

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370. *Id.* at 1063.

371. *Id.*

372. *Id.*

373. *Id.* (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984)).

374. *Id.*

375. *O’Bannon v. NCAA (O’Bannon I)*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014).

376. *O’Bannon II*, 802 F.3d 1049, 1056 (9th Cir. 2015) (quoting *O’Bannon I*, 7 F. Supp. 3d at 956–66).

professional sports leagues, and athletes are not allowed to join either the NFL or NBA directly from high school.<sup>377</sup>

Within the group NIL licensing market, the court analyzed how, but for the NCAA's rules, college football and basketball athletes would be able to sell group licenses for the use of their NILs such as for live game telecast, sports video games, game rebroadcasts, and ads.<sup>378</sup>

Having found that the NCAA's NIL rules impacted competition in these two relevant markets, the court then moved to a rule of reason analysis. At the first step, "the court found that the NCAA's rules have an anticompetitive effect on the college education market."<sup>379</sup> Without them, schools would compete with each other by offering recruits an amount far exceeding the "cost of attendance."<sup>380</sup> The rules prohibiting compensation for NILs is thus a price-fixing agreement: the players pay for the services provided by the colleges with their labor and NILs, but the sellers of these services, the colleges, "agree to value [NILs] at zero."<sup>381</sup> The Ninth Circuit points out that under this theory, the colleges and universities behave as a *cartel*—colluding to fix the price of their product.<sup>382</sup>

Alternatively, the court found that the college education market can be construed as one in which the athletes are the sellers and the schools are the purchasers of athletic services.<sup>383</sup> Under this perspective, the college education market is then a monopsony: a market in which there is only one buyer (for reasons previously discussed) for particular goods or services (the labor and NIL rights of college-age athletes), and "the colleges' agreement not to pay anything to purchase recruits' NILs causes harm to competition."<sup>384</sup>

Surprisingly, the district court found no anticompetitive effects with respect to the group licensing market. While these submarkets exist, the court explained, there would be no

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377. *Id.* (citing *O'Bannon I*, 7 F. Supp. 3d at 966).

378. *Id.* at 1057 (citing *O'Bannon I*, 7 F. Supp. 3d at 968–71).

379. *Id.*

380. *Id.*

381. *O'Bannon I*, 7 F. Supp. 3d at 973.

382. *O'Bannon II*, 802 F.3d at 1058.

383. *Id.* (citing *O'Bannon II*, 802 F.3d at 973, 991).

384. *Id.*

competition within these submarkets if the NCAA rules were changed with respect to group licensing.<sup>385</sup> I follow the district court's reasoning that an NIL license's value to a live game broadcaster or a video game company would depend on the licensee acquiring every license from every other team or player it might show on screen.<sup>386</sup> And in the video game submarket, a creator would need to acquire the NIL rights of all teams and players it included in the game, thus creating an economic disadvantage to the teams and players.<sup>387</sup> However, in what in my opinion was *clear error*, the district court found that it was "highly unlikely that groups of student-athletes would compete with each other to sell their NIL rights; on the contrary, they would have an incentive to cooperate to make sure that the package of NIL rights sold to buyers was as complete as possible."<sup>388</sup> Admittedly, removing the regulations might cause an anti-competitive effect—it might create a collectively beneficial contract that might devalue the shares of prominently featured elite athletes. But that effect does not negate the fact that the current regulation is anticompetitive too. Regardless, I digress . . . sort of.<sup>389</sup>

Finding anti-competitive effects for the college education market, the burden then shifted to the defendants to proffer procompetitive purposes for its anti-competitive rules. At the district court level, the NCAA offered four procompetitive purposes: (1) Amateurism; (2) Competitive Balance; (3) Integrating Academics and Athletics; and (4) Increasing Output.<sup>390</sup> The district court rejected the second and fourth justifications, but analyzed the first and third.<sup>391</sup>

Finding that the NCAA presented two procompetitive justifications for its limits on compensation—increasing consumer demand for college sports and preventing a "wedge" between student-athletes and other students—the district court

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385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.* (citing *O'Bannon I*, 7 F. Supp. 3d 955, 998–99 (N.D. Cal. 2014)).

389. *See infra* Part IV.

390. *O'Bannon I*, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014).

391. *Id.*

then proceeded to the third and final step of the rule of reason.<sup>392</sup> The court considered whether “substantially less restrictive” means of achieving those purposes exist other than a total ban on compensating student-athletes for use of their NILs.<sup>393</sup> The court then held that the plaintiffs identified two legitimate, less restrictive alternatives:

(1) allowing schools to award stipends to student-athletes up to the full cost of attendance, thereby making up for any “shortfall” in their grants-in-aid, and (2) permitting schools to hold a portion of their licensing revenues in trust, to be distributed to student-athletes in equal shares after they leave college. The court determined that neither of these alternatives to the total ban on NIL compensation would undermine the NCAA’s procompetitive purposes. The court also held that it would be permissible for the NCAA to prohibit schools from funding these stipends or trusts with anything other than revenue derived from the use of players’ NILs.

After entering judgment for the plaintiffs on their antitrust claims, the district court permanently enjoined the NCAA from prohibiting its member schools from (1) compensating FBS football and Division I men’s basketball players for the use of their NILs by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to \$5,000 per year in deferred compensation to FBS football and Division I men’s basketball players for the use of their NILs, through trust funds distributable after they leave school.<sup>394</sup>

On appeal, the Ninth Circuit affirmed that the NCAA’s amateurism rules are subject to antitrust scrutiny and upheld the district court’s decision allowing NCAA member schools to award grants in aid up to their full cost of attendance as a substantially less restrictive alternative.<sup>395</sup> But the Ninth Circuit reversed the district court’s \$5,000 trust alternative.<sup>396</sup> To quote the Ninth Circuit: “[I]n finding that paying students cash compensation would promote amateurism as effectively as

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392. *Id.* at 980–81, 1003–05.

393. *Id.* at 1004–05.

394. *O’Bannon II*, 802 F.3d 1049, 1056 (9th Cir. 2015) (citations omitted).

395. *Id.* at 1074–76.

396. *Id.* at 1076–79.

not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.<sup>397</sup> The Ninth Circuit’s statement on the status of the \$5,000 trust payment as deferred compensation for the use of the student-athletes’ NIL also tied NIL commercialization and payments to features that would violate its definition of amateurism. In the Ninth Circuit’s opinion: “The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”<sup>398</sup>

The Ninth Circuit also critiqued the district court’s weighing of the evidence to find that “small payments of cash compensation will preserve amateurism.”<sup>399</sup> The evidence elicited, however, “merely indicate[d] that paying students large compensation payments would harm consumer demand more than smaller payments would—not that small cash payments will preserve amateurism.”<sup>400</sup> In other words, the claimants should have put on evidence showing whether making small payments to student-athletes serves the same procompetitive purposes as not paying them. Without a clear definition of “amateurism,” however, finding the proper supporting evidence regarding how a change in that status would impact consumer demand might prove to be a difficult task.

### C. *A Shifting Tide: Alston/In re NCAA Antitrust Litigation*

In March 2014, in the midst of *O’Bannon I*, numerous FBS football and D1 men’s and women’s basketball players filed multiple antitrust actions against the NCAA and eleven D1 conferences.<sup>401</sup> These cases were later transferred to and, with one exception, consolidated in *In re Antitrust Litigation vs. NCAA (Alston)* before the same federal district court that heard *O’Bannon I*.<sup>402</sup> Unlike in *O’Bannon I*, the plaintiffs in *Alston* did not “confine their challenge to rules prohibiting NIL

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397. *Id.* at 1076.

398. *Id.* at 1078.

399. *Id.* at 1077.

400. *Id.*

401. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1247 (9th Cir. 2020).

402. *Id.*

compensation,” but instead “sought to dismantle the NCAA’s entire compensation framework,” challenging the NCAA’s prohibitions on pay for play and NIL commercialization.<sup>403</sup>

In August 2014, the NCAA amended its D1 bylaws to allow the Power Five conferences the autonomy to collectively adopt “legislation” regarding limits on athletics scholarships, also known as grants-in-aid.<sup>404</sup> In January 2015, the Power Five conferences voted to increase the grant-in-aid limit to the full cost of attendance at each school.<sup>405</sup> Subsequently, since August 2015, the NCAA Bylaws provide that a full grant-in-aid includes “tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance.”<sup>406</sup>

After a ten-day bench trial, the district court entered judgment for the student-athletes, in part.<sup>407</sup> The district court held that NCAA limits on education-related benefits are “unreasonable restraints of trade,” but declined to hold that limits *unrelated* to education (such as for NIL commercialization or royalties for broadcast deals) also violate the Sherman Act.<sup>408</sup> On May 18, 2020, the Ninth Circuit affirmed the district court’s decision, relying on its holding in *O’Bannon II* to provide that the NCAA’s limits on aid related to education violate antitrust laws, but that compensation *unrelated* to education do not.<sup>409</sup> Again, the Ninth Circuit stated that NIL payments were merely a form of deferred compensation and that not paying players is “precisely what makes them amateurs.”<sup>410</sup>

Insatiably, the NCAA filed a petition for writ of certiorari to the Supreme Court, which the Court granted on December 17,

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403. *Id.*

404. Michelle Brutlag Hosick, *Division I Moves Closer to New Structure*, NCAA (July 18, 2014), <https://perma.cc/9GBK-AAF4>.

405. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015), <https://perma.cc/3NQ2-G6Y6>.

406. NCAA MANUAL, *supra* note 7, § 15.02.6 (effective 8/1/15). “In December 2015, the district court certified three injunctive relief classes comprised of (i) FBS football players, (ii) D1 men’s basketball players, and (iii) D1 women’s basketball players.” *In re NCAA*, 958 F.3d at 1247.

407. *In re NCAA*, 958 F.3d at 1248.

408. *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1109 (N.D. Cal. 2019)).

409. *In re NCAA*, 958 F.3d at 1254–55.

410. *Id.* at 1247 (quoting *O’Bannon II*, 802 F.3d 1049, 1076 (9th Cir. 2015)).



2020.<sup>411</sup> On appeal, the NCAA asked the Supreme Court to find that its current restraints regarding amateurism survive antitrust scrutiny, even ones related to education.<sup>412</sup> The student-athletes no longer sought to dismantle all of the NCAA's current amateurism rules (likely in light of the concurrent passage of state NIL legislation), but instead asked the Court to affirm the Ninth Circuit's decision with respect to education-related expenses.<sup>413</sup> Because the student-athletes dismissed the NIL commercialization-related claims, the Court was left to consider only the Ninth Circuit's decision with respect to the NCAA's rules on amateurism and limiting education-related expenses.<sup>414</sup>

The Court heard oral arguments in the case on March 31, 2021, and issued its unanimous opinion on June 21, 2021.<sup>415</sup> The opinion provided a robust historical overview of the regulation of intercollegiate athletics,<sup>416</sup> highlighting the NCAA and its member institutions' current monopoly control over the college athlete market (and its commercialization) under the current rules.<sup>417</sup> The Court also noted the vast revenues that these institutions enjoy by profiting off the labor and likenesses of student-athletes.<sup>418</sup>

In affirming the Ninth Circuit's decision, the Court's opinion addressed and clarified three key legal doctrines.

1. The NCAA's Amateurism Rules Are Subject to Antitrust's Rule of Reason Analysis and Not Immune as Non-Commercial Activity

The NCAA did not dispute that it and its members enjoy monopoly power over the market for student-athletes or that its

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411. Petition for Writ of Certiorari, *supra* note 23, at 1.

412. Brief for Petitioner at 2–3, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (No. 20-512), 2021 WL 408325.

413. Brief for Respondents at 1–4, *Alston*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520), 2021 WL 859705.

414. *Alston*, 141 S. Ct. at 2154–55.

415. *Id.* at 2144.

416. *Id.* at 2148–51.

417. *See id.*; *id.* at 2166 (Kavanaugh, J., concurring).

418. *Id.* at 2148–51.

restraints do, in fact, harm competition.<sup>419</sup> The NCAA did argue that the lower courts used the incorrect antitrust framework, the “rule of reason,” when reviewing the NCAA’s limits on student-athlete compensation.<sup>420</sup> Instead, the NCAA contended, the lower courts should have used the deferential “quick look” analysis.<sup>421</sup> The Court acknowledged that reviewing restraints on trade can require varying degrees of “work” and that the Court can determine some restraints on trade at the far ends of the spectrum in the “twinkling of an eye.”<sup>422</sup> But, for the “restraints in the great in-between,” deferential review is inappropriate.<sup>423</sup>

Even within the context of restraints on trade in college sports, varying degrees of antitrust review might apply. A “quick look” might be sufficient to review and approve rules “necessary to produce a game,” like how many players may be on the field; other restraints may require a “fuller review.”<sup>424</sup> In addressing where the NCAA’s compensation rules fall, the Court was unequivocal: “whether and to what extent those restrictions in the NCAA’s labor market yield benefits in its consumer market that can be attained using substantially less restrictive means” is a “complex” question, requiring more than a “blink to answer.”<sup>425</sup>

Attempting to rely on the commercial vs. non-commercial distinction that appears in lower-court NCAA restriction cases from the 1990s, the NCAA simply argued that it was immune from antitrust scrutiny because its restrictions regarding amateurism and eligibility are non-commercial.<sup>426</sup> However, the NCAA’s status as a 501(c)(3) non-profit and its purpose of engaging in a charitable or social mission do not exempt it from scrutiny. These attributes have not protected similarly situated organizations that serve some social good from scrutiny under

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419. *Id.* at 2154.

420. *Id.* at 2155.

421. *Id.*

422. *Id.* (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 (1984)).

423. *Id.*

424. *Id.* at 2157.

425. *Id.*

426. *Id.* at 2158.

antitrust laws.<sup>427</sup> The Court refused to recognize an exemption for the NCAA simply because its operations fall at the intersection of “higher education, sports, and money.”<sup>428</sup> Any exemptions from application of the Sherman Act, the Court added, are properly left to the legislature.<sup>429</sup>

## 2. The Court Is Not Bound by *Board of Regents*’ Dicta

Despite the NCAA’s implorations, the Court clarified that it was not bound by its oft-quoted statement in *Board of Regents*.<sup>430</sup> The holding in *Board of Regents* concerned the NCAA’s restrictions on television marketing and did not require an investigation into an amateurism rule.<sup>431</sup> Further, the Court’s dicta in *Board of Regents* merely suggested that courts should take a more scrupulous look at student-athlete compensation rules and remain “sensitive to their procompetitive possibilities.”<sup>432</sup> But the *Board of Regents* decision did not hold that the NCAA’s compensation restrictions were procompetitive and survived antitrust scrutiny.<sup>433</sup>

## 3. The Lower Courts Did Not Err in Weighing the Sufficiency of Evidence

Brushing aside the NCAA’s initial doctrinal objections, the remainder of the Court’s opinion in *Alston* reviewed the lower courts’ application of the rule of reason for error, finding none. The Court found that the student-athletes met their initial burden to show that the NCAA’s rules on compensation restrain

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427. *See id.* at 2159 (“This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.”).

428. *Id.*

429. *Id.* at 2160.

430. *Id.* at 2157.

431. *Id.*

432. *Id.* at 2158.

433. *See id.* (“*Board of Regents* may suggest that courts should take care when assessing the NCAA’s restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA’s compensation restrictions.”).

competition.<sup>434</sup> To conduct this analysis, the Court explained, requires a “fact-specific assessment of market power and market structure” to assess the restraints’ actual impact on competition.<sup>435</sup>

First, the Court recognized that the NCAA has “near complete dominance of, and exercise[s] monopsony power in, the relevant market,” which the court defined as the market for athletic services in the plaintiffs’ relevant markets (here, Division I basketball and FBS football).<sup>436</sup> On this point, the district court determined that the NCAA and its member schools have the “power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance.”<sup>437</sup> Almost by admission, the NCAA did not contest the evidence showing that “it and its members have agreed to compensation limits on student-athletes . . . and these limits ‘affect interstate commerce.’”<sup>438</sup> During oral arguments before the Court, the NCAA admitted that “the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market.”<sup>439</sup> Based on the “voluminous record” before the trial court, the plaintiffs met their evidentiary burden to show that the NCAA’s limits on education-related expenses restrain competition.<sup>440</sup>

Next, meeting this initial threshold, the burden shifted to the NCAA to show a procompetitive justification for the restriction.<sup>441</sup> The NCAA provided three: its restraints “increase output in college sports,” “maintain a competitive balance among teams,” and “preserve amateurism.”<sup>442</sup> The district court rejected the first two justifications, which the NCAA did not

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434. *Id.* at 2161.

435. *Id.* at 2155 (citation omitted).

436. *Id.* at 2151 (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019)).

437. *Id.* (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

438. *Id.* (quoting *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019)).

439. Transcript of Oral Argument at 31, *NCAA v. Alston*, 141 S. Ct. 2141 (2021) (Nos. 20-512, 20-520).

440. *Alston*, 141 S. Ct. at 2161 (2021).

441. *Id.* at 2152.

442. *Id.*

appeal to the Supreme Court.<sup>443</sup> With respect to its procompetitive justification that its rules preserve amateurism, the NCAA argued that preserving amateurism “in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports.”<sup>444</sup> The district court then considered the procompetitive benefits of amateurism in the consumer market.<sup>445</sup>

It is at this stage that the Supreme Court notes, and I think its language could have been more explicit in doing so, that the asserted procompetitive benefit “accrues to consumers in the NCAA’s seller-side consumer market” and not the previously identified restrained market of “student-athletes whose compensation the NCAA fixes in its buyer-side labor market.”<sup>446</sup> The district court instead considered consumer market impact, not labor market impact.<sup>447</sup> This comment in the Court’s opinion leads one to consider that previous studies used in antitrust litigation, which ask whether consumers would still watch college sports if the student-athletes were paid or allowed to engage in NIL commercialization, are answering the wrong question, an implication I will discuss in more depth below.

Accepting the NCAA’s procompetitive justification that amateurism expands consumer choice by offering a product “distinct from professional sports,” the lower court did not err in finding that the NCAA’s evidence was unpersuasive.<sup>448</sup> The NCAA first failed to define or offer a meaningful definition of the term “amateurism,” other than an extrapolated requirement that it be distinct from the pros.<sup>449</sup> This lack of a clear (and consistent) definition and application of “amateurism,” received specific admonishment in Justice Kavanaugh’s concurring opinion.<sup>450</sup>

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443. *Id.* at 2151 (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019)).

444. *Id.* at 2152.

445. *Id.* (citing *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1067 (N.D. Cal. 2019)).

446. *Id.*

447. *Id.*

448. *Id.* at 2152–53.

449. *Id.* at 2152.

450. *See id.* at 2167 (Kavanaugh, J., concurring) (“The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels

In weighing the evidence, the trier of fact determined that the NCAA failed “to establish that the challenged compensation rules . . . have any direct connection to consumer demand.”<sup>451</sup> The NCAA’s only economic expert “on the issue of consumer demand” failed to include “any standard measures of consumer demand” and simply “interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel.”<sup>452</sup> Comparatively, the student-athletes submitted expert testimony and economic and other evidence showing that (1) consumer demand has increased in recent years despite the new types of compensation allowed, and that (2) further increases in student-athlete compensation would “not negatively affect consumer demand.”<sup>453</sup>

Finding no compelling evidence that the NCAA’s amateurism rules promote competition, the lower court then conceded that some of the NCAA’s restrictions on player compensation might have procompetitive effects, such as limits on payments *unrelated* to education.<sup>454</sup> The burden then shifted back to the student-athletes to demonstrate a less-restrictive alternative to promote the same procompetitive effect, which they easily met, considering the lack of evidence the NCAA submitted during the second step. The NCAA’s evidence was especially thin on the question of whether restrictions on expenses related to education would impact competition in the consumer market and, if so, which expenses (i.e., would giving student-athletes assistance for all expenses related to education, such as a trumpet for music class or a laptop for management classes, cause consumers to consume less college sports).<sup>455</sup> In finding no error in the lower court’s application of the rule of reason’s three-step analytical framework, the Supreme Court affirmed.<sup>456</sup>

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cannot disguise the reality: The NCAA’s business model would be flatly illegal in almost any other industry in America.”).

451. *Id.* at 2152 (majority opinion).

452. *Id.* at 2152–53 (internal quotations omitted).

453. *Id.* at 2153 (internal quotations omitted).

454. *Id.*

455. *Id.*

456. *Id.* at 2162, 2166.

#### 4. Unanswered Questions and Future Doctrinal Implications

Considering the evidence and arguments presented in the case and considering the socio-political climate on the student-athlete NIL issue, the holdings set forth in the Supreme Court's June 2021 decision are not that shocking. Like with many writs it grants, the Court took the opportunity to clarify a longstanding misapplication and differential application of law among district and circuit courts and to discuss the scope of its previous decision in *Board of Regents* and how that case impacts future amateurism decisions.

But we can glean multiple potential long-term implications from the opinion. Here, I discuss three.

First, the opinion recognized the NCAA and its member schools as engaging in cartel behavior, both with respect to the output market and with respect to the input market, clarifying that both are appropriate questions in an antitrust analysis.<sup>457</sup> Again, while some cartel activity and agreements are necessary or justifiable under antitrust scrutiny, its application to the NCAA's activities at multiple levels of engagement in the marketplace should prompt the organization to reassess its regulations, at least with respect to these two market interfaces—the consumer market and the labor market.

Second, the Court did not consider, nor was the issue before it, the distinct question of whether the NCAA's NIL commercialization rules violate antitrust principles. The opinion “does not stop the NCAA from continuing to prohibit compensation from sneaker companies, auto dealerships, boosters, or anyone else.”<sup>458</sup> To some, the NIL issue might seem like a moot point because the NCAA no longer prohibits NIL commercialization.<sup>459</sup> But it's not. We still have no working definition of “amateurism,” and it's unclear whether NIL commercialization is a feature that would be included within that definition for procompetitive purposes. The statutes are so new, some are hastily drafted and leave room for potential abuse, and we still do not know the implications of allowing NIL commercialization on the market. But we can soon begin

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457. See *id.* at 1248–51.

458. *Id.* at 2164 (internal quotations omitted).

459. See NCAA REPORT AND RECOMMENDATIONS, *supra* note 22, at 3.

collecting evidence on this issue to continue to improve these regulations and, when necessary, protect consumers and players while promoting competition.

Third, the opinion also shows us, or tries to show us, that we should additionally consider and collect evidence of the impact of the restrictions on the labor market side, as well as evidence on the consumer-side market.<sup>460</sup> This implication is echoed by Kavanaugh’s concurrence, which chides the NCAA for “generat[ing] billions of dollars in revenues for . . . [c]ollege presidents, athletic directors, coaches, conference commissioners, and NCAA executives” while the “student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing.”<sup>461</sup> Though included in a concurrence and not legally binding, this empathetic positioning, coupled with the opinion’s suggestion to include studies focusing on player impact, could have longer term impacts on the scope and purposes of antitrust laws.

Should we consider impacts other than market impact when addressing antitrust claims under the Sherman Act, especially given that we’re dealing with college-age students (many of whom are underage when starting college, and let’s not forget the fourteen-year-old who was recruited and signed with LSU back in 2014)?<sup>462</sup> Again, in describing the restrictions on the student-athletes, the Court used empathetic language and said more than once that an impact study on the player market would be appropriate.<sup>463</sup> Such a potential move might slowly contribute to the expanding application of antitrust laws to include multi-faceted considerations beyond economic ones.

Importantly, the opinion did not define or provide a definition of “amateurism,” which would be required to properly conduct a consumer demand and labor market impact study. The opinion only discusses particular uses of “amateurism” in the past, such as a product “distinct from professional sports.”<sup>464</sup> While the concurring opinion laments the NCAA’s failure to

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460. NCAA v. Alston, 141 S. Ct. 2141, 2152–53 (2021).

461. *Id.* at 2168 (Kavanaugh, J., concurring).

462. See Kayle Fields, *14-Year-Old Texas Junior High Quarterback Commits to LSU*, ABC NEWS (Feb. 25, 2014), <https://perma.cc/K8VA-35FS>.

463. *Alston*, 141 S. Ct. at 2152–53.

464. *Id.* at 2152.



adequately define and maintain any coherent method or working definition of amateurism,<sup>465</sup> the Court itself did not attempt to do so. Nor was the question before it.

What the Court did show was the continued romanticizing of college football that its dicta in *Board of Regents* seemed to recognize: that college sports are revered in the United States.<sup>466</sup> Justice Kavanaugh in *Alston* recognized that, yes, the “NCAA and its member colleges maintain important traditions that have become part of the fabric of America,”<sup>467</sup> listing our cherished college sporting events—“game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women’s and men’s lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on.”<sup>468</sup> But as the Court points out, that does not mean college athletics are immune from antitrust laws.<sup>469</sup>

### III. ASSESSING AMATEURISM

*Baseball is more than a game. It’s like life played  
out on a field.*

Juliana Hatfield<sup>470</sup>

With the need for a clear definition of amateurism crystalizing within both social and legal spheres, the need to fully understand our love of college sports—and more specifically, what is driving it—is paramount. With the rising passage of state NIL legislation and with news of endorsement deals among prominent student-athletes breaking every day, we need to address some of the unanswered, but necessary, questions regarding college sports regulation. Namely, without

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465. *Id.* at 2167 (Kavanaugh, J., concurring).

466. *See id.* at 2148–50 (majority opinion) (regaling readers with a 140-year history of college football); *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (“The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.”).

467. *Alston*, 141 S. Ct. at 2168 (Kavanaugh, J., concurring).

468. *Id.* at 2168–69.

469. *See id.* at 2155–57 (majority opinion).

470. KAREN WEEKES, “WOMEN KNOW EVERYTHING!”: 3,241 QUIPS, QUOTES, & BRILLIANT REMARKS 406 (2007).

a working definition of “amateurism” and an assessment of the aspects that consumers value, it becomes impossible to study how a change in those different features might impact consumer demand under a strict antitrust framework. This Part attempts to craft such a definition through theoretical, case study, and some empirical support, to then address which aspects of “amateurism” consumers value such that altering them would impact consumer demand. This Part then extrapolates a core definition of “amateurism” by investigating questions or statements oft used in tandem or near discussions of amateurism:

1. Is amateurism a “revered tradition” in U.S. college sports?<sup>471</sup>
2. If so, does that mean that the product’s link to “an academic tradition” that differentiates college sports and makes college football, for example, more popular than professional sports dictates that “athletes must not be paid, must be required to attend class, and the like”?<sup>472</sup>
3. Do the current amateurism rules “foster[] competition”<sup>473</sup> and “promote competitive balance,”<sup>474</sup> and are they therefore “procompetitive because they enhance public interest in intercollegiate athletics”?<sup>475</sup>

Finding some consumer value in college sports, this Part ultimately theorizes that the features of “amateurism” that consumers of college sports value are student-athlete status, enrollment at the college (college sports and its attendant state and regional alliances), and limitations on age and eligibility consistent with current NCAA rules (i.e., college-age students who haven’t played professionally in other sports). This Part argues that not paying student-athletes and prohibiting NIL commercialization are likely inanimate factors.

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

472. *Id.* at 102.

473. *Id.* at 117.

474. *O’Bannon II*, 802 F.3d 1049, 1059 (9th Cir. 2015).

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

A. “Amateurism” Is a Revered Tradition in U.S. College Sports

1. It’s Certainly Unique

One thing is clear: The U.S. college sports model is decidedly unique, if not also revered. Most of the international sports models use a tiered club system.<sup>476</sup> Somewhat comparable to minor league baseball teams, the European model is like if the Atlanta Braves had T-ball, Little League, 14U, 16U, and 18U teams, as well as various Braves teams in which adults could play recreationally.<sup>477</sup> England has high school teams, but these are not as popular as club competition.<sup>478</sup> Most European countries simply do not have “high school” teams.<sup>479</sup> European soccer leagues also do not use a “draft.”<sup>480</sup> The Australian Football League is a “hybrid” system that uses a club system like European soccer<sup>481</sup> but utilizes a draft.<sup>482</sup>

The closest model to resemble the American high school-to-college-to-the-pros system is Japan’s baseball model. In Japan, the Nippon League (akin to our MLB) is considered second only to the MLB in terms of premier baseball leagues.<sup>483</sup> Nippon League also uses a draft.<sup>484</sup> In 2018, the Japanese government established the Japan Association for University Athletics and Sports (UNIVAS), touting it as the country’s

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476. See Stefanie Loh, *Club Sports Is King in Europe, but There Are Downsides to That System Too*, PENN LIVE (Apr. 24, 2011, 2:54 PM), <https://perma.cc/79SM-P3Q8> (last updated Jan. 6, 2019, 12:09 AM).

477. *Id.*

478. *Id.*

479. Andrew Miller, *In Europe, You Don’t Play High School or College Sports. Some Think U.S. Should Follow Suit.*, POST & COURIER (Oct. 7, 2018), <https://perma.cc/S75H-AQ6Y> (last updated Dec. 14, 2020).

480. *Does Soccer Have a Draft?*, AUTH. SOCCER, <https://perma.cc/4C26-GCQY>.

481. *Youth Football*, PLAY.AFL, <https://perma.cc/2TNZ-Z843>.

482. *NAB AFL Draft History*, PLAY.AFL, <https://perma.cc/N8DZ-LPHY>.

483. Zachary D. Rymer, *How Good Is the Japanese Professional Baseball League?*, BLEACHER REP. (Nov. 12, 2013), <https://perma.cc/KC83-TYMP>.

484. Kozo Ota, *2010 NPB Draft Preview: How Does the NPB Draft Work?*, TOKYO SWALLOWS (Oct. 22, 2010), <https://perma.cc/6FVF-DNDC>.

version of the NCAA.<sup>485</sup> UNIVAS includes over 200 colleges, and Dome Corporation, Japan's official licensee of Under Armour, is driving its creation and funding.<sup>486</sup> Japan is looking at the NCAA as a revenue generating model.<sup>487</sup>

Baseball is very popular in Japan. The country's biggest sporting event of the year, played since 1915, is a televised high school baseball tournament among forty-nine regional champions played every August in front of crowds as large as 50,000 people at the Koshien Stadium in Nishinomiya, near Kobe Mountain.<sup>488</sup> Japanese high school coaches understand the value of dual academic and athletic instruction: "High school baseball is an education of the heart, the ground is a classroom of purity, a gymnasium of morality; that is its essential meaning."<sup>489</sup>

## 2. It's Also a Little Socialist and Anti-Free Market.

Although our college amateurism model is certainly unique, it is also criticized as "un-American" and a bit anti-free market. Even the U.S. professional leagues have elements of socialism, while European soccer leagues are more free market based.<sup>490</sup> For example, Euro-leagues have no salary cap.<sup>491</sup> Lionel Messi, Cristiano Ronaldo, and Neymar each earn over \$100 million annually.<sup>492</sup> There is also no overall spending cap: "[y]ou 'buy' players in Europe; you do not trade them. Those clubs that

485. J. Brady McCollough, *Effort to Americanize and Monetize College Sports in Japan Faces Obstacles*, L.A. TIMES (Jan. 29, 2020, 5:04 PM), <https://perma.cc/Z2C7-A2XB>.

486. *Id.*

487. Revenue would come, largely, through university-branded apparel. *Id.* UNIVAS founder, Kensuke Nakata, noticed that university-branded clothing is very popular in the United States, but "[i]n Japan, it's like people feel it's embarrassing to wear a school's name on your T-shirt." *Id.*

488. Robert Whiting, *Agony and Ecstasy: Why Japan Is Obsessed with High School Baseball*, NIKKEI ASIA (July 24, 2019), <https://perma.cc/YJW6-WGRC>.

489. *Id.* ("The fact that a man has appeared at Koshien means he will be honored for life—and in many cases allowed admission to prestigious universities even if not academically qualified.")

490. See Tom McTague, *America's Wildly Successful Socialist Experiment*, ATLANTIC (Sept. 14, 2019), <https://perma.cc/HVW7-PEAS>.

491. *Id.*

492. *Id.*

spend too much go bankrupt.”<sup>493</sup> In contrast, failure in the United States is “rewarded” with a draft, “a form of redistribution rejected elsewhere in the American economy.”<sup>494</sup> According to an article in the *Atlantic* by Tom McTague, “If American and European sports leagues were politicians, Europe would be Donald Trump, and the U.S. would be Bernie Sanders.”<sup>495</sup>

### 3. But Is It So Revered?

While our amateurism rules are unique and historical, and while the NCAA frames its conception of a “Principle of Amateurism” as a core article in its constitution, many question whether amateurism in college sports is, in reality, such sacred ground. In *O’Bannon I*, the NCAA argued that amateurism is “one of the NCAA’s core principles since its founding” and that it is “a key driver of college sports’ popularity with consumers and fans.”<sup>496</sup> The district court, however, found that the NCAA’s definition of “amateurism” was “malleable” because its key features change in “significant and contradictory ways,” citing exceptions made to the rules, as well as the extensive use of waivers on a case-by-case basis.<sup>497</sup>

In an attempt to chastise the NCAA, others have argued that the NCAA “has forfeited the legitimate pursuit of amateurism for the revenues associated with commercialism.”<sup>498</sup> The connection between academics and athletics differentiates college from professional sports.<sup>499</sup> However,

with the increased commercialization of the NCAA, the question is whether this educational mission has taken a back seat to commercial goals. For example, the NCAA has a

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493. *Id.*

494. *Id.*

495. *Id.*

496. *O’Bannon II*, 802 F.3d 1049, 1058 (9th Cir. 2015) (citing *O’Bannon I*, 7 F. Supp. 3d 955, 999–1000 (N.D. Cal. 2014)).

497. *Id.* (quoting *O’Bannon I*, 7 F. Supp. 3d 955, 999–1000 (N.D. Cal. 2014)).

498. Sundram, *supra* note 62, at 566.

499. *See id.* (“This academic mission differentiated the NCAA from professional sports.”).

multibillion-dollar TV deal to broadcast its annual college basketball tournament, yet out of the four semifinalists in the 2008 tournament, only one school had a graduation rate above 50%.<sup>500</sup>

As many, like Gary Roberts, have already pointed out with much more bravado, college athletes technically aren't amateurs anyway because they get paid a scholarship.<sup>501</sup> And, according to Roberts, college sports' popularity is not necessarily greater because the athletes are only paid with "in-kind academic services."<sup>502</sup> Others have argued that student-athletes are more akin to employees, engaging in a work-study job for which they receive scholarships but no other compensation.<sup>503</sup> Amateurism, in the way the NCAA defined it (not getting paid), is not the primary driver, but does have some procompetitive purposes.<sup>504</sup>

#### 4. But Consumers Want a Product Distinct from the Pros

Even if our current, unique system appears to run afoul of conceptions of free market regulations, studies show that consumers of college sports in the U.S. want a product that is distinct from professional sports.<sup>505</sup> Arguments upholding the need to maintain the "purity" of college sports do not fall on deaf ears.<sup>506</sup> Sports fans exist who will avidly watch and support college football, but have little-to-no interest in NFL football,

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500. *Id.*

501. See Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2658–59 (1996).

502. *Id.* at 2659.

503. See, e.g., John Fitzgerald, *Like Students in Work-Study Programs, NCAA Athletes Deserve Pay, Suit Says*, 26 WESTLAW J. CLASS ACTION, no. 10, 2019, at 01.

504. See Roberts, *supra* note 501, at 2639–46; *O'Bannon II*, 802 F.3d at 1058–59.

505. Roberts, *supra* note 501, at 2642.

506. In 1946, the NCAA passed the "Purity Code," which outlined statements on, inter alia, amateurism, recruiting, and scholarships. SMITH, *supra* note 80, at 93. In a somewhat inverted instance of history repeating itself, the Southeastern Conference threatened to secede from the NCAA because its member schools sought the *right to pay* players. *Id.* Ultimately, the conference remained in the NCAA due to the popularity of the Purity Code and a desire not to be ostracized. *Id.*

due to a number of factors such as regional allegiances,<sup>507</sup> alumni and family ties,<sup>508</sup> and a dislike of the commercialization and professional statuses (and attendant personas) that accompany professional sports.<sup>509</sup>

In that sense, the conception of amateurism or having a product that is distinct from professional sports is grounded in tradition and appears to have value from a consumer perspective in that it provides consumers of sports more choice in their consumption.<sup>510</sup> However, what we're missing are surveys and statistics showing the procompetitive effects and benefits of amateurism.<sup>511</sup> In *O'Bannon I*, the NCAA's expert witness, Dr. J. Michael Dennis, presented a study showing that Americans "generally oppose[] the idea of paying college football and basketball players,"<sup>512</sup> but the district court dismissed its findings as unreliable.<sup>513</sup> But the district court did acknowledge, and I agree, that some procompetitive value exists in distinguishing between college and professional sports;<sup>514</sup> whether or not we continue to call it "amateurism" is irrelevant.

B. *But It Doesn't Mean They Shouldn't Get Paid or Profit  
from Commercializing Their NILs*

Some procompetitive value exists in distinguishing college from professional sports by providing consumers with an option containing features not found in professional sports, as the

507. See, e.g., Jon Solomon, *Alabama-Auburn Game Draws Overnight TV Rating That's 2nd Highest in College Football*, AL.COM (Dec. 1, 2013, 2:28 PM), <https://perma.cc/KJ3H-6VHH> (last updated Mar. 7, 2019, 6:58 AM) (noting the Alabama-Auburn rivalry's regional popularity).

508. See generally Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 18196, 2016), <https://perma.cc/8L4P-RF2H> (PDF).

509. See *Turned Off NFL Fans: 'Too Angry, Too Commercialized and Too Stupid Expensive'*, WASH. POST (Nov. 2, 2016), <https://perma.cc/R2H9-PQPL>.

510. See Roberts, *supra* note 501, at 2642 (promoting greater consumer choice through maintaining amateur sports).

511. See *O'Bannon II*, 802 F.3d 1049, 1059 (9th Cir. 2015) (commenting that almost all surveys have found that compensation rules do not develop competitive balance).

512. *O'Bannon I*, 7 F. Supp. 3d 955, 975 (N.D. Cal. 2014).

513. *Id.*

514. *Id.* at 1005.

district court in *O'Bannon I* explained, such as through “loyalty to their alma mater or affinity for the school in their region of the country.”<sup>515</sup> Not paying the athletes, however, is not how we foster those values in college sports.

If consumers of college sports preferred that student-athletes “not be paid,” then the NCAA wouldn’t need a rule requiring it or the authority to enforce it.<sup>516</sup> As Roberts explains, if the rule fixing compensation were repealed, schools would only “pay” student-athletes what consumers would tolerate.<sup>517</sup> If amateurism really was the value we sought in college sports, then colleges would “unilaterally” decide that the highest commercial use would be to “maintain teams of amateurs and not pay them.”<sup>518</sup> The fact that the NCAA needs the rule “belies the claim of consumer preference.”<sup>519</sup> The so-called procompetitive effect of not paying players is “just a disguised argument that the free market does not maximize consumer welfare by producing the highest quality product.”<sup>520</sup>

With respect to pay for play, the real question is how much payment would the market tolerate before impacting consumer demand. Without preliminary studies to test the market to determine that threshold, it is possible to theorize, as the Ninth Circuit did in *O'Bannon*, that larger payments might impact consumer demand more than smaller payments.<sup>521</sup> But questionable studies attempt to show that fact.<sup>522</sup> Consumers already tolerate direct payment-like support for student-athletes, a list of benefits the Supreme Court exhaustively listed.<sup>523</sup>

With respect to NIL commercialization and its ties to consumer demand, even if there are aspects of the current

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515. *O'Bannon II*, 802 F.3d at 1059 (citing *O'Bannon I*, 7 F. Supp. 3d at 977–78).

516. See Roberts, *supra* note 501, at 2633–35.

517. *Id.* at 2660.

518. *Id.*

519. *Id.*

520. *Id.*

521. See *O'Bannon II*, 802 F.3d 1049, 1077 (9th Cir. 2015) (describing studies that found consumers responded negatively to larger payments).

522. See *id.* (suggesting concerns with the NCAA’s survey about consumer behavior).

523. See *NCAA v. Alston*, 141 S. Ct. 2141, 2149 (2021).



amateurism rules that we want to maintain, can we say with a straight face that the student-athletes in big time college athletic programs aren't already commercialized just like professional athletes (while also having to go to school)? The student-athletes' regulatory associations and broadcasting partners treat them as almost the same product as professional players for commercialization and advertising purposes.<sup>524</sup> Isn't the large revenue structure and commercial nature of the NCAA's "nonprofit" enterprise contributing more to the erosion of the purity of college sports than a student-athlete posting a #ad on Instagram next to a sports drink or shoe, or, even more collaboratively lucrative for all university constituents, next to a university-sponsored sports drink, shoe, or student-owned business?

A similar argument surrounded the "professionalization" of the Olympics,<sup>525</sup> when, in 1971, the Olympic Committee allowed athletes to receive endorsement deals and stipends for their training and participation<sup>526</sup> (only, of course, after the Committee realized that promoting the athletes and, thus, the games, would bring additional revenue that would benefit all participants).<sup>527</sup> Though professional, Olympic-caliber athletes, even from developed and well-performing countries, lament the comparatively small stipend they receive for their intensive training and participation. And allowing Olympic athletes to profit off sponsorships and commercialize off their potentially once-in-a-lifetime moment in the international sporting spotlights did not seem to diminish the integrity or popularity of the Olympics.<sup>528</sup>

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524. See Adam R. Schaefer, *Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C. L. REV. 555, 560–61 (2005) (describing commercialism in college sports).

525. See *Olympics Chief Opposed to Pros*, N.Y. TIMES (July 6, 1972), <https://perma.cc/K6S8-SA5E> (expressing concerns over professional athletes in the Olympics).

526. See *How Olympic Athletes Make a Living*, SPORTS MGMT. DEGREE HUB, <https://perma.cc/YPE2-73VG>.

527. *Olympics Chief Opposed to Pros*, *supra* note 525.

528. After athlete endorsement restrictions were lifted, Olympic television viewership climbed for both the Summer and Winter Olympics, peaking during the 1996 (Atlanta) and 2002 (Salt Lake City) Olympics, respectively. *Historical TV Ratings for Past Olympic Broadcasts*, NIELSEN (Aug. 6, 2008), <https://perma.cc/3L2J-VSSL>.

The appeal of the Olympics, similar to college sports, is the connection to national pride and having an athlete represent a viewer's country in ancient, centuries-old feats of competition against those who are considered the best in the world.<sup>529</sup> Other contributors, such as cheating by falsifying the ages of athletes, supporting banned doping, or the abuse of underage athletes, have contributed to critiques of its operations.<sup>530</sup> But the long-term impacts of the commercialization and resulting professionalization of its athletes has not been one of those critiques.<sup>531</sup> And people still love the Olympics and love buying a Wheaties box with a national hero on it for their kids.<sup>532</sup>

College sports fans would easily dish out \$40 to wait in line for a picture with Heisman Trophy winner and all-around cool guy Joe Burrow; they waited in line for hours anyway just to see him get off the team bus in the middle of the night<sup>533</sup> after LSU defeated Alabama in 2019.<sup>534</sup> These student-athletes work exceptionally hard, and some evidence suggests that the public is growing more dissatisfied with a full athletic scholarship and "cost of attendance."<sup>535</sup>

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529. See generally Ivo van Hilvoorde et al., *How to Influence National Pride? The Olympic Medal Index as a Unifying Narrative*, 45 INT'L REV. SOCIO. SPORT 87 (2010).

530. See Kayleigh Roberts, *15 of the Biggest Scandals in Olympics History*, HARPER'S BAZAAR (Feb. 11, 2018, 8:02 PM), <https://perma.cc/S7N4-NQVC>.

531. *Id.*

532. Perhaps the most iconic Wheaties box featured Caitlyn Jenner after winning the gold medal in the decathlon over the U.S.S.R. in 1976. This box has sold on Ebay in recent years for as much as \$255. Sam Frizell, *Bruce Jenner Wheaties Boxes Are Selling for Hundreds on eBay*, TIME (Apr. 17, 2015, 10:52 AM), <https://perma.cc/83F8-M3RA>.

533. See, e.g., Schaefer, *supra* note 524, at 566–67 (noting how after most away night games, athletes don't get back to their dorms until early in the morning).

534. Glenn Guilbeau, *Around the SEC Column: Nov. 9, 2019—The Night the Tide Died . . . for LSU*, DAILY ADVERTISER (Nov. 15, 2019, 10:36 AM), <https://perma.cc/3GRU-NUPL> (last updated Nov. 15, 2019, 11:57 AM).

535. See Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014), <https://perma.cc/NK6G-YFVX> (detailing policy changes, like unlimited meal plans, meant to benefit student-athletes' health).

C. *Promoting Competitive Balance Could Be Valuable, but Consumers Don't Seem to Care About Competitive Balance in College Sports*

The U.S. Supreme Court and circuit courts, until *O'Bannon I*, seemed to accept that these amateurism rules promote “competitive balance” among participating colleges.<sup>536</sup> Little theoretical support exists linking amateurism to maintaining “competitive balance” among participating collegiate athletics programs, however.<sup>537</sup> Amateurism may be just one factor contributing to the goal of “competitive balance,” but one could argue that competitive balance and equity among participating institutions is itself a farce and hollow tenet, considering schools funnel costs toward non-pay related services, like coaches, facilities, and the like, which “negate[s] whatever equalizing effect the NCAA’s restraints on student-athlete compensation might have once had.”<sup>538</sup> Nor does there appear to be any thorough balancing of factors to ensure that the NCAA’s amateurism enforcement rules are reasonable in promoting or supporting that so-called “competitive balance.”<sup>539</sup>

In fact, college sports are more predictable and less competitive than professional sports. Best friends Bill Belichick and Nick Saban have won six Super Bowls and six National Championships, respectively, but Saban’s winning percentage at Alabama is considerably higher than Belichick’s at New England: .881 to .720.<sup>540</sup> During late October of the 2020 NFL season, the largest NFL line<sup>541</sup> was 19.5 between the Chiefs and

536. See e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 119–20 (1984) (describing the role and benefits of amateurism); *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (discussing the NCAA’s efforts to maintain competitive balance); *Deppe v. NCAA*, 893 F.3d 498, 499 (7th Cir. 2018) (noting the essentiality of amateurism for competitive balance in collegiate sports).

537. See *O'Bannon II*, 802 F.3d 1049, 1077 (9th Cir. 2015) (expressing concerns with the factual record and studies supporting “competitive balance”).

538. *Id.* at 1059.

539. See *id.* (providing analysis but no clear factors or rules for defining reasonableness in these circumstances).

540. See *Nick Saban*, SPORTS REFERENCE, <https://perma.cc/KXA6-GBAG>; *Bill Belichick*, PRO FOOTBALL REFERENCE, <https://perma.cc/6BMT-4GRW>.

541. *Betting Lines Explained*, ONLINE GAMBLING, <https://perma.cc/J3MA-6M4B> (“A betting line is a form of wagering whereby the bookmaker or

Jets, which, at the time, many would have considered the league's best against the worst.<sup>542</sup> Seven of the fourteen games that week had spreads of just four points or fewer.<sup>543</sup> Comparatively, in college that same week, only thirteen out of forty-four games had spreads of four points or fewer.<sup>544</sup> The largest spread was 31.5 points.<sup>545</sup>

In comparing winning percentages from the 2019–2020 seasons for collegiate and NBA basketball, the traditional four college “powerhouse” schools, Duke (.806), Kansas (.903), Kentucky (.806), and Gonzaga (.939), all had win percentages well above NBA Conference Champions, the Lakers (.732) and the Bucks (.767).<sup>546</sup> Comparing women's elite college basketball programs to the WNBA's two conference champions, the Washington Mystics (.765) and the Connecticut Sun (.676),<sup>547</sup> the college teams greatly outperformed the pros: UConn (1.000), Baylor (.944), Oregon (.944), Stanford (.778), South Carolina (1.000), Mississippi State (.813), and Gonzaga (.944).<sup>548</sup>

Others have decried the lack of competitiveness in college sports. During the Senate Judiciary Hearings, the Executive Director of the National College Players Association, Ramogi Huma, testified that a “level playing field does not exist under current NCAA rules” and that “college athletes shouldn't be forced to sacrifice their economic freedom and rights so the NCAA and colleges can continue to pretend that a level playing

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sportsbook set gambling odds and determine the favorite and underdog teams in a match.”).

542. Jimmy Reinman, *Jets Could Become 9th Team in NFL to Be 20+ Point Underdogs*, USA ONLINE SPORTSBOOKS (Oct. 29, 2020, 2:11 PM), <https://perma.cc/7D24-XRFF>.

543. *NFL Scores and Odds Archive*, SPORTS BOOK REVS. ONLINE, <https://perma.cc/6YC7-S925>.

544. *NCAA Scores and Odds Archive*, SPORTS BOOK REVS. ONLINE, <https://perma.cc/Z5Z7-776Y>.

545. *Id.*

546. *2019–20 College Basketball Conference Standings*, SPORTS REFERENCE, <https://perma.cc/62JU-QXW8>; *2019–20 NBA Standings*, BASKETBALL REFERENCE, <https://perma.cc/544K-W95Z>.

547. *Women's National Basketball Association Standings 2019*, ESPN, <https://perma.cc/G9US-557V>.

548. *Women's College Basketball Standings—2019–2020*, ESPN, <https://perma.cc/Y7R8-P3XK>.

field exists.”<sup>549</sup> The current NCAA football playoff system, for example, while an attempt to bring some sense of competitive balance to the NCAA football national championships, still only invites four teams.<sup>550</sup> But since the four-team playoff took effect in 2015, only thirteen different teams have appeared in these bowl games, with Alabama appearing in seven of the eight years of the playoff, Clemson making six appearances, Oklahoma and Ohio State each appearing four times, and Notre Dame making two appearances.<sup>551</sup>

However, I am not convinced that consumers value competitive balance in intercollegiate sports. In fact, I argue that part of the appeal of college sports is its competitive imbalance because it allows us to “root for the underdog,” since it’s so rare to see a Stony Brook University, for example, make it to the College World Series.<sup>552</sup> It’s a shock when the University of Alabama or Clemson University loses a football game,<sup>553</sup> or when Duke loses a basketball game.<sup>554</sup> Consumers say they care about competitive balance in the context of the College Football Playoffs, but college sports fans also seem to

549. *Protecting the Integrity of College Athletics: Hearing Before the S. Judiciary Comm.*, 116th Cong. 1:09:20–1:10:06 (2020) (statement of Ramogi Huma), <https://perma.cc/5RU5-VQ2G>. “In 2019, Ohio State earned \$209 million in athletics revenue. Ohio University earned \$28 million. Both are in the FBS division. ESPN’s preseason rankings have Ohio State at number two in the nation while Ohio University is ranked 90th.” *Id.*

550. *About*, COLL. FOOTBALL PLAYOFF, <https://perma.cc/8JNS-J22Y>.

551. Anthony Chiusano, *Teams with the Most College Football Playoff Wins and Appearances*, NCAA (Jan. 11, 2022), <https://perma.cc/VC9R-6VZB>.

552. In 2012, the Stony Brook Seawolves made an improbable run through the Miami Regional and Baton Rouge Super Regional on their way to the College World Series in Omaha, Nebraska. *Shock the World! Baseball Season in Review*, STONY BROOK ATHLETICS (July 27, 2012, 12:00 AM), <https://perma.cc/BWL5-5V2M>.

553. Paul Theroux, an American travel writer, wrote *Deep South*, in which he reflected on Alabama’s “obsession” with its college football team. Bryant-Denny stadium, at the time, was the eighth-largest sports field in the world and bigger than any soccer stadium in Europe. PAUL THEROUX, *DEEP SOUTH* (2015).

554. See, e.g., Shawn Krest, *Coach K: “We Were Very Soft. I’m Extremely Disappointed”*, SPORTS ILLUSTRATED (Feb. 1, 2021), <https://perma.cc/3SNX-FHC5> (“Duke suffered a shocking loss at Miami to a Hurricanes team with just seven scholarship players who had lost four straight games by at least a dozen points each.”).

relish the “upset.”<sup>555</sup> Again, more research is needed to determine whether consumers care about cheating and competitive balance, or whether we prefer the competitive imbalance of college sports because of the rare “Cinderella” story narrative that can arise in college sports and the otherwise longstanding tradition of “winning” that some powerhouses exploit.

I do think that competitive balance could be a value animating college sports, contrary to its current competitive imbalance. Part of the issue in achieving competitive balance is an inability to control the desire to win over the desire to play fair.<sup>556</sup> Heather Lyke, the Director of Athletics at the University of Pittsburgh testified at the Senate Judiciary Hearing that she opposed gambling on college sports and that “prop betting,” a new type of bet in sports betting, opens the door to athletes potentially receiving payment to throw games.<sup>557</sup> A prop bet wagers on how one particular player might perform in one particular situation, e.g., will Joe Burrow pass for over or under 300 yards this game. Prop bets could be premised on virtually any moment, such as one play or one pitch.<sup>558</sup> Lyke’s concern is not unfounded.<sup>559</sup> Student-athletes who are already struggling

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555. See Austin Lloyd, *College Football: 5 Upsets That All Fans Want to See in 2021*, FANSIDED (Aug. 2, 2021), <https://perma.cc/XXC3-BM43> (“The underdog is the one who is expected to fail; many college football fans like that quality in the team(s) they root for.”).

556. See SMITH, *supra* note 80, at 208 (“As Homer’s *Iliad* showed three millennia ago, humans love to compete and too often do it in unethical ways in order to win.”).

557. *Protecting the Integrity of College Athletics: Hearing Before the S. Judiciary Comm.*, 116th Cong. 2:19:40–2:20:00 (2020) (statement of Heather Lyke), <https://perma.cc/5RU5-VQ2G>.

558. *Id.*

559. All-American point guard, Stevin “Hedake” Smith, may be the ultimate cautionary tale. A standout on the court and in the classroom (3.5 GPA), Smith was named the 1994 Arizona State Male Athlete of the Year. However, after going into \$10,000 of gambling debt, Smith started “throwing” games for bookies to repay his debt. Although still scoring at a breakneck pace (thirty-nine points on a conference-record ten three-pointers in one game), he purposely played poor defense so that his team would fail to “cover the spread.” The FBI caught wind after news spread throughout the Las Vegas sports betting community and massive amounts were suddenly being bet against Arizona State. See Richie Whitt, *Mavs Ex ‘Headake’ Smith Offers Cautionary Tale on Sports Gambling*, SPORTS ILLUSTRATED (May 20, 2020), <https://perma.cc/3JBV-9ZPQ>; Stevin (Hedake) Smith, *Confessions of a Point*

financially might see increased opportunities to engage in such behavior for the potential financial benefits. However, as long as gambling, winning, and competition are valued to sports consumers, who are essentially betting on a game, incentives will need to exist to curb the desire to cheat in order to win or reap financial gains. Further, more studies are needed to determine if consumers care about cheating and will watch less sports if a salacious cheating scandal breaks. For now, it seems, for college sports, all publicity is good publicity.

#### D. *The Heart of Amateurism: School Ties*

Though college sports' revenues are a big reason for their modern day existence, many question why we play college sports at all, "especially because there is no evidence that intercollegiate athletics help[] to create and disseminate knowledge."<sup>560</sup> Clotfelter examined the websites of fifty-two large universities that collect substantial revenues from intercollegiate athletics and found just four that mention athletics in their mission statements.<sup>561</sup> Most colleges play no sports.<sup>562</sup> Why expend the capital and expose the university to potential reputational harm through bad actors in the athletics programs? Clotfelter identified four roles for intercollegiate athletics: (1) "a consumer good that students and alumni value," assisting with student recruiting; (2) "a business enterprise that serves as an entrepreneurial outlet"; (3) a tool "for universities to build support from constituencies"; and (4) "an educational role, as intercollegiate sports may promote courage, effort, fortitude, discipline, and teamwork and foster grace in winning and losing."<sup>563</sup>

Similar to the district court's findings in *O'Bannon I*, that amateurism serves a procompetitive purpose of "integrating

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*Shaver Former Arizona State Star Hedake Smith Reveals How He and His Accomplices Fixed Basketball Games*, SPORTS ILLUSTRATED (Nov. 9, 1998), <https://perma.cc/J586-4X7D>.

560. Sanderson & Siegfried, *supra* note 9, at 189 (citing CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES 15 (2011)).

561. *Id.*

562. *Id.*

563. *Id.* (citing CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES 15 (2011)).

academics and athletics” but not as a result of the NCAA’s amateurism rules,<sup>564</sup> I posit that the only distinction that consumers should value in the context of the college sports product is the athlete’s ties to and full-time enrollment in an institution of higher learning. While untested, it is likely that teams would be less attractive to consumers if they were unaffiliated with colleges, similar to European club leagues. For example, the University of Nebraska likely would generate more interest in its football team than an unaffiliated club team in the United States called the “Lincoln Cornhuskers.”<sup>565</sup>

But, as Roberts echoes, “I doubt that many football consumers, who greatly enjoy games played by professionals over twenty-two years of age, will be much less attracted to games played by eighteen- to twenty-two-year-old athletes because they are paid a salary.”<sup>566</sup> Further extrapolating and with a bit of lamentation, considering all of the publicity attendant to violations,<sup>567</sup> academic fraud,<sup>568</sup> athletes who read and write at third grade levels,<sup>569</sup> “correspondence courses,”<sup>570</sup> and other illicit payments to players (the University of Tennessee was most recently exposed for outright paying its football players in 2020),<sup>571</sup> and the still continued popularity of

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564. *O’ Bannon I*, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014).

565. Roberts, *supra* note 501, at 2659.

566. *Id.*

567. Widely publicized outrage over violations goes back more than a century. *See, e.g., Collegiate Reformers to Control Athletics*, N.Y. TIMES (Apr. 1, 1906), <https://perma.cc/5R6T-TMTM>.

568. From 2014–2018 among Division I schools, the NCAA found thirty violations of “Academic Certification” and twenty-four violations involving “Academic Misconduct.” NCAA, DIVISION I INFRACTIONS ANNUAL REPORT 17 (May 2019), <https://perma.cc/AB27-8UVX> (PDF).

569. “[A] CNN investigation [of twenty-one schools] revealed that most schools have between 7% and 18% of revenue sport athletes who are reading at an elementary school level.” Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <https://perma.cc/4QSX-8NGZ>. Moreover, “of 183 UNC-Chapel Hill athletes who played football or basketball from 2004 to 2012 . . . [one researcher] found that 60% read between fourth- and eighth-grade levels. Between 8% and 10% read below a third-grade level.” *Id.*

570. *See generally* Doug Lederman, *NCAA Punishes Missouri in Blatant Academic Fraud Case*, INSIDE HIGHER ED (Feb. 1, 2019), <https://perma.cc/9YBK-V7BQ>.

571. As of January 18, 2021, no sanctions had yet come down, but Tennessee fired its head football coach, Jeremy Pruitt for cause, voiding his



college sports, it seems the only animating factor is the connection to the school, and not necessarily that the student-athletes and college universities benefit from dual academic-athletic enrollment.<sup>572</sup>

Paying student-athletes might also alleviate many of the socioeconomic hardships faced by the athletes and their families, producing a positive outcome on the student-athletes themselves (incentivizing them to stay in school longer, benefitting from the rigor of dual academic-athletic training, shifting the focus truly back to the academic benefits of providing one's athletic abilities in exchange for a college education).<sup>573</sup> This benefits society as well by preparing student-athletes for a life after sports, enabling them to contribute financially to their families, economies, and schools.

Both the universities and the students could benefit from cross promotion. As universities are continually on the hunt for "their Gatorade," a sports drink tied to the University of Florida,<sup>574</sup> universities seeking to commercialize their own faculty and staff research initiatives could leverage the images of their star student-athletes on a mutually beneficial individual or group basis to promote such research.

The only value that should thus animate amateurism from a consumer perspective is that the student-athletes are fully enrolled students at the university, with some eligibility limitations on those who played their sport professionally before playing that sport for the university. Recall here the case of Jeremy Bloom, the Olympic skier who lost his eligibility to play

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\$12.6 million contractual buyout. Blake Toppmeyer, *Jeremy Pruitt Fired as Tennessee Football Coach for Cause After Internal Investigation*, KNOXVILLE NEWS (Jan. 18, 2021, 12:15 PM), <https://perma.cc/2X9S-Z3E8>.

572. See Roberts, *supra* note 501, at 2659 (noting that the popularity of collegiate sports is due less to player's academic status and more to school ties).

573. See *supra* Part I.

574. See *The Legend of Gatorade*, YOUTUBE at 2:01–2:24 (Jan. 7, 2008), <https://perma.cc/G5KX-YWW8> (crediting Gatorade for Florida's 1967 Orange Bowl win over Georgia Tech).

The problem for the [University of Florida] Gators was that they expended so much energy early in the game, that they had none left for the end. So we devised a drink of carbohydrate and electrolytes that speeds into the system and supplies everything they need for energy production. Naturally we named it Gator-ade.

*Id.* at 1:02–1:21.

college football for CU because of his skiing endorsements.<sup>575</sup> I, among many others, disagree with the outcome of the *Bloom* case and the subsequent gerrymandering of NCAA rules to incorporate its precedent onto men's skiing regulations.<sup>576</sup> Mr. Bloom should have been able to play NCAA football.

Further, in agreement with *O'Bannon* and in line with the mentality of Japanese high school baseball coaches, value exists to both the student-athletes and the public in integrating athletics and academics: "There is very little levity that comes with playing high school baseball at a high level in Japan; it is a task filled with regimented training and complete devotion, heavy responsibility and historical accountability."<sup>577</sup> Similarly, student-athletes in the United States understand the long tradition in which they play, relish in the decades-old rivalries between regional schools, and because of those loyalties and traditions undertake sacrifices to glimpse the lights of the stadium during a night game. The benefits to the student-athletes can be more comprehensive than just focusing on and training on their sport.

#### IV. REASSESSING AMATEURISM UNDER THE RULE OF REASON

*Technology changes rapidly, but human nature,  
if it changes at all, moves at glacial speed.*

Ronald A. Smith<sup>578</sup>

Theorizing that the value of amateurism lies in an athlete's connection to and enrollment in an institution of higher learning, and potentially competitive balance, the normative implications of this finding impact both the current analysis of amateurism under the rule of reason and a potentially more robust, ethical application in action. In using this new definition

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575. *Bloom v. NCAA*, 93 P.3d 621, 622–23 (Colo. App. 2004).

576. See NCAA MANUAL, *supra* note 7, §§ 12.1.2, 12.2.1–12.2.3, 12.2.5, 12.8.3 (creating exceptions for skiing to the NCAA's amateurism rules).

577. Tim Keown, *New Baseball Film Captures the Tournament that Made Shohei Ohtani, Yusei Kikuchi Stars*, ESPN (Jun. 29, 2020), <https://perma.cc/MHZ9-6LG2>. "Every baseball field in Japan is considered sacred ground, and before each game the players gather in a ruler-straight line in front of their dugouts and bow to the earth to thank it for providing the canvas for their endeavor." *Id.*

578. SMITH, *supra* note 80, at 208.

of amateurism under a strict antitrust framework, one can more appropriately respond to the Ninth Circuit's insightful question in *O'Bannon II* of whether small payments to players would impact consumer preference as opposed to not paying them at all.<sup>579</sup> One could also respond to the thornier questions of potentially paying players larger sums and how to allow full NIL commercialization on the free market consistent with antitrust values.

A. *Proposed Distributions Schemes for Pay for Play*

If we accept that consumers likely do not care about whether athletes are paid, then the question of how to compensate athletes becomes one of a “less restrictive alternative” that still promotes the value of amateurism. While fair-market-based approaches for compensating student-athletes based on the value of their contributions to their division might be equitable toward individual players in certain sports, as the plaintiffs in *Alston* argued,<sup>580</sup> I posit instead that one should first determine the fair market value of each student-athlete based on sport and gender within each conference, and then distribute such payments in equal amounts to each eligible student-athlete within each conference at the end of an academic year or other set timeline.<sup>581</sup> Considering some of the hardships that student-athletes face in season, however, I could be convinced that institutions and conferences should pay them on a monthly or even biweekly basis.

If we removed all restraints on paying student-athletes and allowed them to negotiate for and receive the fair market value of their services, one study found that FBS football and men's basketball players would have earned at least \$6.2 billion

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579. See *O'Bannon II*, 802 F.3d 1049, 1076–77 (9th Cir. 2015).

580. See generally Expert Report and Affidavit of Daniel A. Rascher, Ph.D., *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:14-md-02541), 2016 WL 3671671; Schwarz, *supra* note 33.

581. See *O'Bannon I*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014) (outlining the different hypothetical scenarios that the trial court's injunction would prohibit).

between 2011 and 2015.<sup>582</sup> While the average full athletic scholarship was worth approximately \$23,204 per year, the study estimated the average annual fair market value of “big time college football and men’s basketball players to be \$137,357 and \$289,031, respectively. . . . Ultimately, football players receive about 17% of their fair market value while men’s basketball players receive approximately 8% of theirs.”<sup>583</sup>

Would we be comfortable with that level of compensation for student-athletes, i.e., would consumers stop watching if we paid Division I men’s basketball players over \$200,000 a year? What if it was lower, or substantially lower, like \$10,000 a season? In 2014, the district court in *O’Bannon I* seemed to suggest, based on one expert’s testimony, that \$5,000 put into a trust for a student-athlete to receive after graduation for each year of play might be reasonable.<sup>584</sup> But that portion was reversed on appeal.<sup>585</sup> The NCAA’s study, which the district court in *O’Bannon I* weighed lightly,<sup>586</sup> did provide some probative value in showing that 53 percent of the public is less likely to watch or attend games if star players are paid more than non-stars.<sup>587</sup>

Finally, while dominant law and economics theories strip economic rules of morality considerations, focusing solely on economic efficiency from a consumer welfare perspective, Stucke

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582. See RAMOJI HUMA & ELLEN J. STAUROWSKY, THE \$6 BILLION HEIST: ROBBERING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM 3 (2012), <https://perma.cc/8GTE-CWWW> (PDF).

583. *Id.*

In 2011, the NFL reached an agreement with players that they would share at least 46.5% of the revenue generated by the league while the NBA owners agreed to a 50% revenue-sharing standard for its players. Those standards were applied to the revenue reported by colleges’ and universities’ football and basketball revenues to better gauge the value of the college players that participate in these sports.

*Id.* at 12.

584. *O’Bannon I*, 7 F. Supp. 3d at 1006–07.

585. *O’Bannon II*, 802 F.3d at 1078–79.

586. See *O’Bannon I*, 7 F. Supp. 3d at 975–76 (“These responses suggest that some respondents did not understand or did not take seriously some of the survey questions and illustrate the limits of Dr. Dennis’s conclusions.”).

587. Transcript of Testimony of Defendants’ Expert, John Dennis at 2664, *O’Bannon I*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), ECF No. 267, <https://perma.cc/VC98-KGCS> (PDF).

argues that antitrust rules and economic safeguards should (and arguably already do) have a basis in morality and what the public perceives as acceptable and fair behavior.<sup>588</sup> Antitrust doctrine is not the only body of law regulating college athletes. Title IX also requires equal opportunities and funds for men's and women's college sports.<sup>589</sup> Simply paying all student-athletes their free-market value would likely run afoul of this requirement,<sup>590</sup> as well as fail to address many of the inequities facing the majority of student-athletes who do not play men's football or basketball at a Division I conference school.<sup>591</sup>

Setting the fair market value per player by conference also maintains the existing competitiveness of the conferences and at least attempts to promote competitiveness more directly than amateurism's current rules. Conferences have regional alliances and loyalties at heart and have already historically impacted NCAA rules in furtherance of players' well-beings and in the name of promoting competition when working in concert.<sup>592</sup> An equal payment to all student-athletes at an institution and within a conference takes those equitable and moral factors into account, in the way the NCAA purports to do.<sup>593</sup>

#### B. *Proposed Application to NIL Commercialization*

#bringbackncaafotball. Consumers are demanding student-athlete NIL commercialization.<sup>594</sup> And under this new definition of amateurism, student-athletes should be able to

588. See Steinbaum & Stucke, *supra* note 75, at 598–99.

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

590. *But see* Schwarz, *supra* note 33, at 59–62 (contesting that payments would violate Title IX and analyzing the impact of proposed payment schemes).

591. See *supra* Parts I–II.

592. See Sanderson & Siegfried, *supra* note 9, at 187, 192, 203.

593. See Sundram, *supra* note 62, at 569 (“This tradeoff [of balancing athlete notoriety and payment amount considerations] is necessary to preserve the spirit of amateurism and allow the NCAA to distinguish itself from professional leagues.”).

594. #bringbackncaafotball, TWITTER, <https://perma.cc/3Z43-W6F7>.

commercialize their names, images, and likenesses while enrolled in college. The NCAA is moving in this direction, but begrudgingly and only in response to concerted state action. Student-athletes should be able to receive compensation for the use of their NILs on both a group licensing and individual basis, with some mentorship and guidance.

Less restrictive alternatives exist regarding student-athlete NIL commercialization that would still promote and preserve dual academic-athletic enrollment. Student-athletes should be able to share in the commercialization of their names, images, and likenesses, on both a group licensing basis and an individual basis. Student-athletes should have an active role in negotiating for and a share in the commercialization of their NILs. As previously implicated in Part II, student-athletes are, in fact, invested in and have proven capable of organizing and negotiating on their own behalf.

In 2015, Northwestern University football players attempted to unionize, and the National Labor Relations Board's (NLRB) Chicago regional director initially determined that the players were "employees" under the National Labor Relations Act of 1935,<sup>595</sup> thus giving the players the right to bargain collectively and obtain union representation.<sup>596</sup> The full NLRB vacated this decision because it lacked jurisdiction, emphasizing that it could not decide whether college athletes were employees because it only has jurisdiction over private employers.<sup>597</sup> Given the "symbiotic" relationship between the NCAA, the various conferences, and member schools, the NLRB lacked sufficient jurisdiction to allow the private schools to unionize.<sup>598</sup>

The implications that student-athletes should not receive a share of group licensing deals or that conferences are best suited to negotiate for group licensing without student-athletes' input are simply incorrect. Student-athletes should become stakeholders in such conference group licensing deals, not only as third-party beneficiaries in the receipt of funds, but also as

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595. 29 U.S.C. § 152(3) (defining "employee").

596. Nw. Univ., 362 N.L.R.B. 1350, 1356 (2015).

597. *Id.*

598. *Id.* at 1353–54.

parties to the original negotiation. Such representation at the initial deal stage could also potentially increase overall licensing and advertising revenue because of the strong negotiating power any organized student-athlete group could leverage after such initial rule changes.

As the California and other state acts implore, student-athletes should also be allowed to commercialize their own NILs on an individual basis while in college. With some training and guidance, student-athletes are more than capable of actively or passively commercializing their NILs. Further, institutions should proactively advise student-athletes of their legal rights or provide authorized agents,<sup>599</sup> as well as subject all student-athletes to a rigorous overview on commercialization and endorsement deals.<sup>600</sup> Notably, the California act allows an institution to prevent a student-athlete from accepting a deal or promotion that might conflict with an institutional deal.<sup>601</sup> This broad exception could theoretically disempower student-athletes who might want to promote, for example, a local or start-up athletic shoe designer.<sup>602</sup> To account for potential conflicts between the institution and a student-athlete's individual promotion, such individual deals should be brought before a conflicts committee. Such a committee ideally would include institutional, athletics' compliance, legal, and student-athlete representation. For example, it might carve out a regional advertising or promotional market for a promotion of a local shoe designer.

But because of a student-athlete's ties to a particular school, such a committee could also consider the ethical and moral implications of a student-athlete's individual deal. Though it is questionable whether consumers care about the tawdry and often salacious stories surrounding, for example, recruiting violations, playing for a school and representing something larger than oneself might require imposing some morality-based

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599. See Sundram, *supra* note 62, at 567 (arguing that lawyers should be provided to athletes without cost).

600. Some state NIL statutes already require that universities provide student-athletes with mentorship and financial guidance. See, e.g., H.B. 404, 2021 Reg. Sess. (Ala. 2021).

601. S.B. 206, 2079 Leg., Reg. Sess. (Cal. 2019) (codified at Cal. Educ. Code § 67456).

602. See Bank, *supra* note 17, at 112.

limits. For instance, should a student-athlete be allowed to promote a sport-betting app or a local strip club? Again, I'm not entirely convinced that the public would care overall, but regionally based consumers might, and more research needs to be conducted on whether general and regional consumers care about the ethical morals of their players.

### C. *Counterarguments: Testing This Theory*

The amateurism rule is outdated and exploitative. It needs reassessment. And right now, everyone from the Senate to the Supreme Court, to the NCAA and its member institutions are exploring how to end the inequity. The arguments posed in this Article are meant to inform all such potential policymakers and stakeholders, with an understanding that its theories are untested and need further study. But here I'd like to address some potential counterarguments to this Article's approach.

#### 1. Antitrust Is the Appropriate Approach.

Because of the strict rigidity of and sole theoretical concern for consumer value, one could argue that antitrust doctrine is not the appropriate approach to remedy the inequities of the current distribution system. While the antitrust rule of reason analysis might focus solely on consumer preference, the fact remains that the Sherman Act's jurisdiction includes contracts made in restraint of trade.<sup>603</sup> In any other context, these claims would fall under the Sherman Act.<sup>604</sup> Just because we've always exempted them or just because we have students as a stakeholder instead of professionals does not mean that antitrust reasoning is inapplicable.<sup>605</sup>

Not only is antitrust law the appropriate approach, but utilizing it appropriately can disrupt the current payment schemes. By reassessing the definition of amateurism under a rule of reason analysis, judicial doctrine or policy makers can establish a floor of acceptable limitations below which the NCAA and any other association governing college athletes cannot fall.

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603. Edelman, *supra* note 335, at 70–71.

604. *See id.* at 82.

605. *See* NCAA v. Alston, 141 S. Ct 2141, 2162 (2021) (applying the rule of reason when evaluating rules limiting education-related benefits).



After that, the concern for judicial rewriting of amateurism rules will have less impact because the NCAA, its member institutions, and other interested constituents (including student-athletes) will implement rules that the market will likely respond to regardless. If the NCAA and its member institutions fail to rewrite its amateurism rules, I have little doubt that competing associations, potentially with support from state legislatures, will emerge to rival the NCAA.<sup>606</sup> One way or another, the market will cause the NCAA to change its ways, and the most powerful weapon in this war of attrition could be antitrust law. But, again, if used correctly.

## 2. You're Not Just a Joint Venture; You're a Cartel.

Despite the NCAA's arguments in its petition to the Supreme Court that its ruling would impact not only the NCAA but all future agreements between contracting parties,<sup>607</sup> that might not be a negative outcome of judicial precedent. The NCAA's agreement with its member institutions might be considered a joint venture, but that does not exempt it from antitrust laws, especially when the joint venture operates like an impermissible cartel—exactly the type of behavior antitrust law was created to deter.<sup>608</sup> If such a ruling impacts all future cartels from exploiting their labor market, maybe that is precisely what we want.

## 3. We Can Still Maintain Distinctions between College and Professional Sports.

Although the Ninth Circuit admonishes that not paying players “is precisely what makes them amateurs,”<sup>609</sup> and others might agree with that, we don't know that for sure from a consumer perspective. The Ninth Circuit was right that the

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606. See, e.g., J. Brady McCollough, *Forget the NCAA: Startup Basketball League to Offer Prep Players Pay, Plus Education*, L.A. TIMES (Oct. 26, 2019, 9:00 AM), <https://perma.cc/D9MF-E63X> (reporting on “a college basketball league that would challenge the NCAA by offering salaries ranging from \$50,000 to \$150,000 to the top prep players nationally and internationally, while setting them up with a clear path to higher education”).

607. Petition for Writ of Certiorari, *supra* note 23, at 31.

608. See Steinbaum & Stucke, *supra* note 75, at 596.

609. *O'Bannon II*, 802 F.3d 1049, at 1076–78 (9th Cir. 2015).

exact studies we need to support the theory I posit in this Article do not exist.<sup>610</sup> But without them, I also do not think that the Ninth Circuit can reasonably continue to say that amateurism equals no compensation. Further, we can still maintain the features of college sports that consumers value and that distinguish them from pro sports. And we can do it in a way that might encourage student-athletes to stay in school longer, graduate, and emerge with practical and professional life skills.

#### CONCLUSION

The time to reassess what it means to be a student-athlete in America is nigh. For over a century, we've simply gotten it wrong. At this critical juncture in our social, cultural, and economic progress, the time is now to protect student-athletes from exploitation by simply allowing them to receive appropriate compensation. We have all the tools in front of us to get it right this time around, or at least to take the step in the right direction. Amateurism does not and should not bar student-athletes from receiving compensation or from commercializing their own names, images, and likenesses.

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610. See *id.* at 1076–79 (discussing the “meager evidence in the record” demonstrating whether payments will preserve amateurism and consumer demand).