



1-1-2015

## O'Bannon v. National Collegiate Athletic Association: A Cinderella Story

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### Recommended Citation

Meghan R. Price, *O'Bannon v. National Collegiate Athletic Association: A Cinderella Story*, 22 Jeffrey S. Moorad Sports L.J. 179 (2015).

Available at: <https://digitalcommons.law.villanova.edu/mslj/vol22/iss1/5>

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O'BANNON V. NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION: A CINDERELLA STORY

*"I don't remember the last time 70,000 people packed into the Orange Bowl to watch a chemistry experiment."*<sup>1</sup>

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") generated annual revenue of over \$912 million dollars in 2013, a nearly five-percent year-over-year growth.<sup>2</sup> NCAA student-athletes, who are the main attraction at the sporting events that generate much of the NCAA's revenue through television contracts, ticket sales, and merchandise sales,<sup>3</sup> do not receive any of this

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1. See Jim Like, *It's Time the Players Shared in the Bounty*, ASSOCIATED PRESS (Jan. 5, 1995, 7:19PM), available at <http://www.apnewsarchive.com/1995/Its-Time-The-Players-Shared-In-The-Bounty/id-b38bc45c378523d34ee9f8509aa0bc08> (quoting former University of Miami football player, Randy Bethel, discussing profit of college football programs and coaches, and arguing that players should get share of profits). Former Miami tight end Randy Bethel argued that the National Collegiate Athletic Association (NCAA), schools, and athletic programs want the players to be like regular students, but noted, "regular students don't generate revenue like we do." See *id.* Additionally, the article referred to Miami safety, Charles Pharms, who said that he "can't even afford to buy a \$40 Hurricanes sweatshirt." See *id.* He argued that to "expect athletes to stand by while everyone else around them cashes in" is "increasingly unrealistic." See *id.* See also Alexander Wolff, *An Honest Wage*, SPORTS ILLUSTRATED, May 30, 1994, at 98 (quoting Bethel regarding accepting money for play).

2. Letter from Deloitte & Touche LLP, Independent Auditor, to Nat'l Collegiate Athletic Ass'n and Subsidiaries (NCAA), Consolidated Financial Statements as of and for the Years Ended August 31, 2013 and 2012, Supplementary Information as of and for the Year Ended August 31, 2013, and Independent Auditors' Report 4 (Dec. 4, 2013) [hereinafter "NCAA Consolidated Statements 2012-2013"], available at [http://www.ncaa.org/sites/default/files/NCAA\\_FS\\_2012-13\\_V1%20DOC1006715.pdf](http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf) (reporting consolidated financial statement of activities, revenue, and revenue growth rate for years ended August 31, 2013, and August 31, 2012 based on independent audit conducted by Deloitte & Touche LLP).

3. See GLENN M. WONG, ESSENTIALS OF SPORTS LAW, 20-21 (4th ed. 2010) (discussing major sources of revenue for NCAA). Wong notes that most of the revenue comes from a few sports and sporting events, particularly the Division I Men's Basketball Championship Tournament. See *id.* at 19. Wong states that "football is one of the largest revenue generators for its member schools," but the NCAA does not benefit financially as an entity from the Division I Football Bowl Subdivision ("FBS"), because there is no tournament. See *id.* at 21. However, the 2014-2015 FBS season marked the first season with a FBS "College Football Playoff." See *Answers About Football's New Playoff*, NCAA (Sept. 17, 2014), available at <http://www.ncaa.com/news/football/article/2012-06-30/answers-about-footballs-new-playoff> (giving more information on College Football Playoff). The Playoff, expected to be worth "at least double what the [Bowl Championship Series] was worth," will likely generate "\$300 million easy, probably more like \$400 or \$500." See *id.*

revenue.<sup>4</sup>

The NCAA dedicates an entire section of its Bylaws to amateurism.<sup>5</sup> The NCAA requires that only amateur student-athletes participate in NCAA athletics, and strives to maintain a “clear line of demarcation” between college and professional athletics.<sup>6</sup> Should a student-athlete violate the NCAA’s amateurism principle, that athlete will lose eligibility.<sup>7</sup>

In *O’Bannon v. National Collegiate Athletic Association*, current and former Division I Football Bowl Subdivision (“FBS”) players and Division I basketball players, led by former University of California Los Angeles (“UCLA”) national basketball champion Ed O’Bannon,<sup>8</sup> alleged that the NCAA violated the Sherman Antitrust Act by fixing the price of the student-athletes’ names, images, and likenesses (“NIL”) and, thus, that the NCAA illegally restrained competition in the marketplace.<sup>9</sup> The outcome of the case impacts the NCAA, its member schools, college sports fans, and most importantly Division I basketball and FBS football players.<sup>10</sup>

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4. See NCAA DIV. I OPERATING BYLAWS, art. 12.02.8, in 2014-2015 DIV. 1 MANUAL (2014), available at <https://www.ncaapublications.com/p-4355-2014-2015-ncaa-division-i-manual-august-version.aspx> [hereinafter “OPERATING BYLAWS”] (defining pay and noting a student-athlete cannot accept pay if he or she participates in NCAA athletics). See also *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 971-73 (N.D. Cal. 2014) (discussing NCAA rules restricting student-athlete compensation).

5. See OPERATING BYLAWS, *supra* note 4, art. 12 (defining amateurism and eligibility requirements of NCAA members).

6. See NCAA CONSTITUTION, arts. 1.3.1, 2.9, in 2014-2015 DIV. 1 MANUAL (2014), available at <https://www.ncaapublications.com/p-4355-2014-2015-ncaa-division-i-manual-august-version.aspx> (noting basic purpose of NCAA and defining NCAA’s amateurism principle); OPERATING BYLAWS, *supra* note 4, art. 12.01.2 (defining “clear line of demarcation” that student-athletes must maintain to remain eligible for NCAA member schools). For a further look at the NCAA’s amateurism principle, see *infra* note 51 and accompanying text. But see *O’Bannon*, 7 F. Supp. 3d at 973-78 (discussing inconsistencies in NCAA’s definition of amateurism from NCAA’s inception in 1906 until today). In *O’Bannon*, the court noted that the NCAA’s initial rules in 1906 would have prohibited the types of athletic scholarships that schools offer recruits today. See *id.* at 974. The *O’Bannon* court discussed other changes to the NCAA’s amateurism policy and determined that the NCAA cannot be so dedicated to a specific, blanket definition of amateurism if it has changed the nuances of the bylaws multiple times. See generally *id.* at 975 (discussing obvious and substantial differences in definition throughout NCAA history).

7. See OPERATING BYLAWS, *supra* note 4, art. 12.1.2 (listing violations from which student-athlete will lose amateur status and intercollegiate athletic eligibility).

8. See Alan Shipnuck, *Closing the Deal*, SPORTS ILLUSTRATED, Dec. 8, 2014, at 53 (describing former UCLA power forward Ed O’Bannon).

9. See *O’Bannon*, 7 F. Supp. 3d. at 962-63 (providing overview of plaintiffs’ claims against NCAA).

10. For a further discussion of the impact of *O’Bannon*, see *infra* notes 222-262 and accompanying text.

This Note discusses and analyzes the United States District Court for the Northern District of California's ruling in *O'Bannon v. NCAA* and asserts that the court's decision will have a substantial, long-term impact on the future of NCAA athletics.<sup>11</sup> Part II introduces the background of *O'Bannon v. NCAA*.<sup>12</sup> Part III outlines relevant background information including, a deeper look at the NCAA's Bylaws, NCAA student-athletes' time commitments, and past NCAA violations.<sup>13</sup> Part IV discusses antitrust law.<sup>14</sup> Part V provides a narrative analysis of the *O'Bannon* decision, and Part VI critically analyzes that decision.<sup>15</sup> Finally, Part VII concludes by discussing the impact *O'Bannon* will have on the future of collegiate athletics.<sup>16</sup>

## II. FACTS

In 2009, Ed O'Bannon and Craig Newsome, a former Arizona State University football player, filed suits against the NCAA and the Collegiate Licensing Company ("CLC") alleging that the NCAA and CLC were "engaging in anti-competitive conduct in violation of the Sherman Act."<sup>17</sup> The court certified the class action, following

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11. For a further discussion of the court's opinion in *O'Bannon*, see *infra* notes 122-220 and accompanying text. For a further discussion of the impact, see *infra* notes 235-262, and the text accompanying each note.

12. For a further discussion of *O'Bannon*, see *infra* notes 17-33 and the text accompanying the notes.

13. For a further discussion of the relevant NCAA Bylaws, student-athletes' time commitments, and past NCAA violations, see *infra* notes 35-89 and the text accompanying the notes.

14. For a further discussion of the antitrust law, see *infra* notes 90-121 and their accompanying text.

15. For a further discussion of the court's opinion in *O'Bannon*, see *infra* notes 221-234 and accompanying text. For a critical analysis, see *infra* notes 221-234 and the accompanying text.

16. For a further discussion of the impact of *O'Bannon*, see *infra* notes 235-262 and accompanying text.

17. See *O'Bannon*, 7 F. Supp. 3d. at 962-65 (providing background information on lawsuit). The court consolidated Newsome's and O'Bannon's actions along with another complaint which alleged that Electronic Arts ("EA"), a video game developing and production company, designed the football players in the video game "NCAA Football" to resemble real college athletes. See *Keller v. Electronics Arts, Inc.*, C 09-1967 CW, 2010 WL 530108, at \*1 (N.D. Cal. Feb. 8, 2010) *aff'd sub nom.* In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013) (discussing similarities between videogame characters and "real-life college football athletes"). Keller claimed, "that these virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics and come from the same home state." See *id.* Keller charged the NCAA, CLC, and EA with variations of improper use of his image and likeness. See *id.* at \*2 (discussing Keller's claims). See also Ben Bolas, *EA Sports: If It's In the Game, It's In the Courtroom*, MOORAD SPORTS L. J. BLOG (Aug. 27, 2013), <http://lawweb2009.law.villanova.edu/sportslaw/?p=2312> (discussing implications

the plaintiffs' amendment to include current NCAA athletes.<sup>18</sup> The former athletes believed that once an athlete leaves a university, the amateur tag disappears; therefore, former NCAA athletes should receive compensation for use of their NIL.<sup>19</sup> However, by including current NCAA players in the suit, the issue shifted to compensating

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of lawsuit against EA and NCAA's decision not to renew contract with EA). *But see O'Bannon*, 7 F. Supp. 3d. at 965 (describing EA and CLC defendants and noting that plaintiffs settled claims with both defendants); Press Release, NCAA, NCAA Reaches Settlement in EA Video Game Lawsuit (June 9, 2014) (on file with author) (discussing \$20 million dollar settlement to end Keller litigation and compensate plaintiffs).

18. *See O'Bannon*, 7 F. Supp. 3d. at 965 (explaining plaintiffs in class action). The court cited to the class action certification on April 11, 2014:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as "University Division" before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.

*Id.* (citation omitted). *See also* Chuck Haven, *Will the O'Bannon Lawsuit Change Finally Change the NCAA?*, MOORAD SPORTS L. J. BLOG (Nov. 9, 2012), <http://law-web2009.law.villanova.edu/sportslaw/?p=1059> ("According to the suit the NCAA deprives current and former athletes of publicity rights and compensation while exploiting a \$4 billion market with their licensing arm[.]"). U.S. District Judge Wilken partially granted the class action status of the lawsuit, but denied plaintiffs' bid for a class that could seek monetary damages against the NCAA because of the difficulty in determining who was actually harmed. *See* Steve Berkowitz, *Judge Allows Challenge of NCAA Amateurism Rules*, USA TODAY SPORTS (Nov. 9, 2013), <http://www.usatoday.com/story/sports/college/2013/11/08/ncaa-class-action-lawsuit-obannon-amateurism/3479501/> (discussing Judge Wilken's ruling).

19. *See* Haven, *supra* note 18 ("The plaintiffs believe that it follows logically that once the player leaves, he or she no longer has an amateur status to protect, and should be rightfully compensated from that day forward."). *See also* Shipnuck, *supra* note 8, at 55 (describing Ed O'Bannon's reaction to NCAA's perpetual use of rights to his identity when he saw himself on EA's video game). In Shipnuck's article, O'Bannon recounts how he saw his friend's son playing EA Sports' NCAA Basketball '09 with the 1995 Bruins and noticed the similarity between himself and the player in the video game wearing his old number. *See* Shipnuck, *supra* note 8, at 55. O'Bannon's initial excitement subsided when a friend raised the following point: "You know what's crazy, Ed? They spent 60 bucks on this game but you're not getting a penny." *See* Shipnuck, *supra* note 8, at 55. His friend's comments brought back his "old frustrations" with the NCAA and angered him that although it had been years since he left UCLA the NCAA was "still exploiting" him. *See* Shipnuck, *supra* note 8, at 55. Shipnuck quotes O'Bannon as stating the following: "If somebody took your face and made you the star of a video game, you'd expect to get compensated, right? In no other walk of life can your identity be stolen like that." *See* Shipnuck, *supra* note 8, at 55.

student-athletes.<sup>20</sup> Compensating student-athletes would be a gross deviation from the NCAA's principles.<sup>21</sup>

Specifically, the plaintiffs alleged that the NCAA unlawfully restrained trade in the marketplace by fixing the price that NCAA Division I basketball and FBS football schools could offer recruits.<sup>22</sup> Also, the *O'Bannon* plaintiffs sought other revenue generated through the use of their NIL, such as in television licensing contracts and archival footage played on commercials, advertisements, and re-broadcasts.<sup>23</sup> Plaintiffs attempted to prove that the NCAA conspired to unreasonably restrain trade in the relevant markets.<sup>24</sup> Under the burden-shifting rule of reason analysis,<sup>25</sup> the student-ath-

20. See Haven, *supra* note 18 (discussing change in relief expected with addition of current NCAA athletes).

21. See generally OPERATING BYLAWS, *supra* note 4, art. 12 (outlining NCAA amateurism and athletics eligibility).

22. See generally *O'Bannon*, 7 F. Supp. 3d. at 962, 971-73 (providing general and in depth look at plaintiffs' claims against NCAA, specifically "undervaluing" price of student-athletes' NIL). See also Haven, *supra* note 18 (discussing background of *O'Bannon* case); Robert Wheel, *Ed O'Bannon vs. the NCAA: The Antitrust Lawsuit Explained*, SB NATION (Jan 31, 2013), <http://www.sbnation.com/college-football/2013/1/31/3934886/ncaa-lawsuit-ed-obannon> (explaining *O'Bannon v. NCAA*).

23. See *O'Bannon*, 7 F. Supp. 3d. at 963, 968-73 (providing overview of plaintiffs' claims, as well as detail into video games market and challenged restraint). See also Bolas, *supra* note 17 ("While other college-athletes have also sued EA recently, the *O'Bannon* case seems to have the broadest implications because the *O'Bannon* plaintiffs seek to include other revenue generated from college athletics (such as television and memorabilia revenue) under the purview of their complaint."). The NCAA requires student-athletes to sign "Form 08-3a" as part of the "Student-Athlete Statement" as required by the NCAA Constitution before participating in athletics, which gives the NCAA the right to use and license out student-athletes' NIL. See NCAA CONSTITUTION, *supra* note 6, art. 3.2.4.6 (prescribing rule for administration of form that student-athletes must sign). See also Gregory Sconzo, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737, 746 (2013) (discussing Form 08-3a). One part of the form requires student-athletes to authorize the NCAA or a third party acting on behalf of the NCAA to use their NIL. See *id.* The NCAA can profit off of student-athletes' NIL, but the students themselves have no right to such profits. See *id.* There are limitations on the use of student-athletes' NIL, however, there is no time limit on the right to use the NIL. See Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SPORTS ILLUSTRATED (July 21, 2009), <http://www.si.com/more-sports/2009/07/21/ncaa> (explaining antitrust restraint). McCann argues that when the NCAA requires a student-athlete to forego his or her own rights to his or her own image and likeness, the NCAA restrains trade, because if those student-athletes had not foregone their rights, "they would be able to negotiate their own licensing deals after leaving college." See *id.*

24. See *O'Bannon*, 7 F. Supp. 3d at 962-93, 984-85 (stating and applying plaintiffs' contentions to Sherman Antitrust Act). For a further discussion of the Sherman Antitrust Act analysis, see sources cited *infra* notes 93-106 and accompanying text.

25. See *id.* at 985 (noting that Rule of Reason analysis is standard and explaining analysis). "The Supreme Court has specifically held that concerted actions un-

letes argued that the NCAA's rules had anticompetitive effects in the relevant markets.<sup>26</sup> The NCAA attempted to rebut those arguments with four procompetitive effects of the restrictions.<sup>27</sup> The court accepted two procompetitive effects, and the student-athletes countered by arguing that the NCAA could achieve those in a less restrictive manner.<sup>28</sup>

The plaintiffs' main goal was change.<sup>29</sup> On August 8, 2014, District Judge Claudia Wilken ruled, in an unprecedented opinion, that Division I basketball and FBS schools may pay student-athletes a share of the revenue made from licensing student-athletes' NIL.<sup>30</sup> Judge Wilken enjoined the NCAA from prohibiting student-athlete compensation.<sup>31</sup> However, Judge Wilken determined that the NCAA did not have to pay student-athletes, and the NCAA could also cap the amount at five thousand dollars.<sup>32</sup> Although the NCAA is appealing Judge Wilken's ruling out of the Northern District of

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dertaken by joint ventures should be analyzed under the rule of reason." *See id.* (citing *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010)). *See also id.* ("Courts typically rely on a burden-shifting framework to conduct this balancing."). For a further discussion of standard antitrust analysis in the sporting context, see *infra* notes 102-109 and accompanying text.

26. *See O'Bannon*, 7 F. Supp. 3d at 985 (elaborating on plaintiff's burden in case against NCAA related to Sherman Antitrust Act).

27. *See id.* (citations omitted) (citing *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)) (explaining rule of reason balancing test further).

28. *See id.* (citations omitted) (citing *Tanaka*, 252 F.3d at 1063) (explaining plaintiff's job if defendants meet initial burden of showing procompetitive effects).

29. *See* Greg Bishop, *Lawsuit Name for O'Bannon Has Other Critical Participants*, N.Y. TIMES, June 19, 2013, <http://www.nytimes.com/2013/06/20/sports/lawsuit-named-for-obannon-has-other-critical-participants.html?pagewanted=all&r=1> (noting members of lawsuit and their reasons for joining). Bishop quotes O'Bannon as stating the following: "I want systemic change. That's what we're here for." *See id.* Bishop also discusses other notable members of the lawsuit, Harry Flournoy and Sam Keller, who also wanted to see change happen. *See id.* Flournoy, the former captain of Texas Western College's basketball team—the first all-black starting lineup to win a NCAA Championship—simply wanted fairness. *See id.* Additionally, Sam Keller adamantly noted that NCAA athletes are "not amateurs" and have never been. *See id.* *See also* Shipnuck, *supra* note 8, at 55 ("O'Bannon says the lawsuit is not about changing the game but rather about leveling the playing field financially.").

30. *See O'Bannon*, 7 F. Supp. 3d at 1007-09 (emphasis added) (concluding and discussing plaintiffs' remedy).

31. *See id.* at 1007-08 ("[T]he Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their [NIL] in addition to full grant-in-aid.").

32. *See id.* at 1008 (emphasis added) (noting Judge Wilken's conclusion in case). Judge Wilken noted that the NCAA may still "implement[ ] rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school" and that "the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust." *See id.* However, the NCAA "will not be permitted to set this cap below the cost of attendance," nor will the NCAA

California, the decision has an immediate and long-term impact on the NCAA, particularly on FBS and Division I schools.<sup>33</sup>

### III. BACKGROUND

“[A] lot of the classes conflict with your time as a football player. You have an engineering class from 2 to 3:30, there’s no way you can do both. You can’t go to meetings and take your engineering class from 2 to 3:30, so what do you do? What do you do? Do you switch your major or do you tell your coach, ‘Hey, I’ve got an engineering class from 2 to 3:30 and I have to go to that.’”<sup>34</sup>

#### A. Students First

The NCAA dedicates itself to protecting student-athletes and preparing them with skills necessary to succeed in sports, academics, and life after college.<sup>35</sup> The NCAA believes that student-athletes should be committed to success and balance in the classroom and on the field.<sup>36</sup> One of the NCAA’s core values states student-athletes “shall participate as an avocation, balancing their academic, social and athletic experience.”<sup>37</sup>

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be permitted to “set[ ] a cap of less than five thousand dollars . . . for every year that the student-athlete remains academically eligible to compete.” *See id.*

33. For a further discussion of the implications of *O’Bannon v. NCAA*, see *infra* notes 222-262 and accompanying text.

34. Peter Volk, *Richard Sherman on NCAA: ‘You’re Not on Scholarship for School’*, SB NATION (Jan. 30, 2015), <http://www.sbnation.com/college-football/2015/1/30/7951529/seahawks-richard-sherman-michael-bennett-slam-ncaa> (quoting Seattle Seahawk cornerback Richard Sherman from Super Bowl XLIV Media Day). For a further discussion of student-athletes’ time commitments, see *infra* notes 45-47 and accompanying text.

35. *See* NCAA CONSTITUTION, *supra* note 6, arts. 1.2(a), 1.3.1 (explaining purpose of NCAA “to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation . . .” and to maintain student-athletes as integral part of student body).

36. *See id.* (inferring that to maintain student-athletes as integral part of student body, they must balance school and sport life). Further, the NCAA relied on ‘integration’ as a procompetitive effect of the NCAA’s compensation restrictions in *O’Bannon*. *See O’Bannon*, 7 F. Supp. 3d. at 979-981 (discussing NCAA’s proposed justification for compensation restrictions).

37. *See* NCAA CONSTITUTION, *supra* note 6, art. 2.9 (stating NCAA’s principle on amateurism). *See also* Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 559 (2009) (describing ideal of amateurism). As Fitt points out, the NCAA’s amateurism principle is ironic in its own language. *See id.* She notes that the student participation in the NCAA is called an “avocation,” which has two meanings: “[a]n activity taken up in addition to one’s regular work or profession, usually for enjoyment” and “[o]ne’s regular work or profession.” *See id.*



Student-athletes are meant to be students first and athletes second, however, they arguably spend all of their time outside the classroom training for their respective sports.<sup>38</sup> Further, student-athletes attract money to their schools through athletics, not necessarily academics.<sup>39</sup> The term “student-athlete” implies that the sport is an extra-curricular activity.<sup>40</sup> However, for student-athletes, the extra-curricular activity is likely their schoolwork.<sup>41</sup>

A 2011 NCAA “GOALS” Study calculated responses of 19,967 Division I, II, and III student-athletes regarding their athletic, academic, and social experiences; their decisions to attend their current college; and their time commitments.<sup>42</sup> Over 600 Divisions I, II, and III schools participated in the survey.<sup>43</sup> For the purposes of this Note, analysis of the study results will focus on those groups relevant in *O’Bannon*: Division I men’s basketball players and FBS players.<sup>44</sup>

According to the survey, in 2010, Division I basketball players spent over thirty-nine hours per week in-season on athletic activities

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38. For a further discussion of student-athletes’ time commitments, see sources cited *infra* notes 45-47 and accompanying text.

39. See NCAA Consolidated Statements 2012-2013, *supra* note 2 (showing NCAA revenues); WONG, *supra* note 3, at 20-21 (discussing NCAA’s revenues). Wong created a table noting the NCAA’s total revenues per year from 2004-2010. See *id.* Exhibit 1.6, at 21 (organizing annual revenue by total revenue and television revenue). Wong explains that the NCAA’s television contracts provide the NCAA’s main source of income. See *id.* See also Katherine Tohanczyn, Note, *Fumble! How the North Carolina Courts Dropped the Ball in McAdoo v. University of North Carolina at Chapel Hill*, 21 MOORAD SPORTS L. J. 385, 385 (2014) (stating that college athletics is multibillion-dollar business); Michael Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA’s Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 388-94 (2012) (elaborating on NCAA commercialization).

40. See Gary Gutting, *The Myth of the ‘Student-Athlete’*, N.Y. TIMES OPINIONATOR BLOG, (Mar. 15, 2012, 8:30PM), [http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&\\_r=](http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/?_php=true&_type=blogs&_php=true&_type=blogs&_r=) (“The term ‘student-athletes’ implies that all enrolled students who play college sports are engaged in secondary (‘extra-curricular’) activities . . .”). See also sources cited *supra* note 37 and accompanying text.

41. For a further discussion of the amount of time student-athletes report spending on schoolwork compared to athletics, see *infra* notes 45-47 and accompanying text.

42. See generally NCAA CONVENTION, *Examining the Student-Athlete Experience Through the NCAA GOALS and SCORE Studies*, NCAA 2-5 (Jan. 13, 2011), available at <http://www.ncaa.org/sites/default/files/Examining%20the%20Student-Athlete%20Experience%20Through%20the%20NCAA%20GOALS%20and%20SCORE%20Studies.pdf> [hereinafter “GOALS Study”] (explaining GOALS Study’s purpose and expanding on its response).

43. See GOALS Study, *supra* note 42, at 4 (discussing how many schools participated in survey).

44. For a further discussion of who *O’Bannon* affects, see *supra* note 18, *infra* note 122, and each note’s accompanying text.

and FBS players spent over forty-three hours per week.<sup>45</sup> Division I basketball players reported just above thirty-seven hours on academic work compared to the thirty-nine spent on athletic activities.<sup>46</sup> FBS football players reported thirty-eight hours spent on academics versus forty-three hours spent on athletics.<sup>47</sup>

The survey also included a “Student-Athlete Identity” test, in which the NCAA student-athletes were asked on a scale of one to six—six indicating strongly agree and one indicating strongly disagree—whether they identify with the statements asked.<sup>48</sup> Student-athletes responded that they identify themselves more as dedicated athletes than dedicated students.<sup>49</sup> Strikingly, however, only about 1% of student-athletes in the most popular and highest grossing NCAA sports, men’s basketball and football, will become professional athletes.<sup>50</sup> This disparity begs for change in the way that NCAA schools compensate their student-athletes.

## B. NCAA Rules

The NCAA’s amateurism principle states:

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated prima-

45. See GOALS Study, *supra* note 42, at 17 (listing survey responses regarding time spent on athletic activities). For comparative purposes, Division I football players in the Football Championship Series, or “FCS,” spent over 41 hours on athletics. See *id.* The basketball players showed more than a two-hour increase in the amount of time they spent on athletic activities since the previous study in 2006. See *id.* (explaining color of boxes on chart signifies either decrease or increase of time spent on athletic activities since 2006 study). Only Division III athletes, who are not offered athletic scholarships, spent more time on academic activities versus athletic activities. See *id.* at 18. Division I men’s basketball and football show a negative difference in time spent on academics versus athletics during the season. See *id.*

46. See GOALS Study, *supra* note 42, at 17-18 (listing Division I men’s basketball survey averages).

47. See GOALS Study, *supra* note 42, at 17-18 (listing FBS Football survey averages).

48. See GOALS Study, *supra* note 42, at 30-31 (explaining “Student-Athlete Identity” test measures and listing survey response results).

49. See GOALS Study, *supra* note 42, at 31 (listing “Student-Athlete Identity” test findings). When asked if the NCAA participant considered himself or herself a dedicated athlete, the mean response was 5.40. See *id.* In contrast, when asked whether the NCAA participant considered himself or herself a dedicated student, the mean response was 4.98. See *id.*

50. See *Probability of Competing Beyond High School*, NCAA (Sept. 2013), available at <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (charting probability of competing beyond high school in men’s and women’s basketball, football, baseball, men’s hockey, and men’s soccer). Approximately 1.2% of men’s basketball players and 1.6% of NCAA football players will become professional athletes. See *id.*

rily 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>51</sup>

Through the enactment of these amateurism provisions, the NCAA wishes to ensure that a student-athlete is a student first.<sup>52</sup> Thus, the NCAA restricts student-athlete compensation for the use of their own NIL.<sup>53</sup> However, there seems to be an inequality in Division I college sports because NCAA Division I athletics is a lucrative business for schools.<sup>54</sup> The Division I men's basketball and FBS athletes, who raise money for and gain exposure to their schools with wins and television contracts, receive little compared to the time and effort they put into their respective programs.<sup>55</sup> College athletics draw "publicity in a way few schools could duplicate with a more traditional marketing campaign."<sup>56</sup>

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51. See OPERATING BYLAWS, *supra* note 4, art. 2.9 (noting amateurism principle).

52. See OPERATING BYLAWS, *supra* note 4, art. 12.01.2. ("The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

53. See generally OPERATING BYLAWS, *supra* note 4, art. 12.1.2 (noting requirements for student-athletes to maintain amateur status and prohibiting student-athletes from accepting compensation for their athletic skill). See also Corgan, *supra* note 39, at 376-78 (discussing NCAA Bylaws and restrictions on student-athlete compensation); Marc Edelman, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 862 (2002) (noting how NCAA's amateurism principle restricts student-athletes from making money off of their NIL, but allows colleges and universities to make money off of student-athletes' NIL).

54. For a further discussion of the NCAA's big business, see *supra* note 39 and accompanying text.

55. See KRISTI DOSH, SATURDAY MILLIONAIRES: HOW WINNING FOOTBALL BUILDS WINNING COLLEGES, 3-4 (2013) (discussing important role college athletics plays in bringing attention to schools). Dosh makes the following inquiry about how athletics play a major role in schools' marketing: "When I say Boise State University, what's the first thing you think of? Unless you're part of the small minority who attended school there, I'm guessing it's the blue football field. Or perhaps the Statue of Liberty play the Broncos used to win the 2007 Fiesta Bowl." See *id.* at 3. She continues: "As sure as I am that it wasn't their 13th-ranked public undergraduate engineering program that caught your eye, I'm positive it was something football-related." See *id.*

56. See Dosh, *supra* note 55, at 4 (discussing million dollar impact that college football has on schools). "Let's say you're University of Alabama. Are you going to receive more applicants from a billboard . . . or from knocking [Louisiana State University] out of national championship contention . . . ?" See *id.* A study showed that exposure to a university from ESPN's College Gameday had a "\$5 million publicity impact." See *id.* For a further discussion of the money raised by football programs, see *infra* note 73 and accompanying text.

The NCAA awards student-athletes with scholarships to cover tuition, but which only cover the cost of attendance.<sup>57</sup> The “cost of attendance” includes the “total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”<sup>58</sup> A NCAA member institution must not award a student-athlete financial aid beyond the cost of attendance that the institution usually charges students in comparable programs at the institution.<sup>59</sup> Because of these provisions, student-athletes must pay for the “incidental” costs of attending a university.<sup>60</sup> The NCAA argues that the student-athletes receive a free education in exchange for the use of their NIL in connection with football or basketball.<sup>61</sup> But full tuition is not enough in relation to the amount of time student-athletes can actually spend on their schoolwork.<sup>62</sup>

Further, the amateurism principle prohibits student-athletes from receiving compensation, or any type of “improper benefits” while playing in the NCAA.<sup>63</sup> For example, a student-athlete will lose his amateur status if he uses his athletic skills for any type of pay.<sup>64</sup> A student-athlete cannot enter into an agreement with an agent, commit to play any kind of professional athletics, or compete on a professional team, even if he receives no payment.<sup>65</sup> A student-athlete cannot receive any type of compensation, benefits, or pref-

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57. See OPERATING BYLAWS, *supra* note 4, art. 15.1 (noting maximum limit on financial aid allowed to individual student is capped at “cost-of-attendance as defined in Bylaw 15.02.2”). For a further explanation on the “cost-of-attendance,” see *infra* note 58 and accompanying text.

58. OPERATING BYLAWS, *supra* note 4, art. 15.02.2 (defining “cost of attendance” at NCAA Div. I school). The Bylaws detail how to calculate the cost of attendance. See OPERATING BYLAWS, *supra* note 4, art. 15.02.2.1.

59. See OPERATING BYLAWS, *supra* note 4, art. 15.01.6 (defining maximum amount of financial aid student-athletes may receive). There are limitations on the financial aid that NCAA institutions can provide to student-athletes. See *generally* OPERATING BYLAWS, *supra* note 4 at art. 15.2.

60. See *O'Bannon*, 7 F. Supp. 3d at 988 (discussing fees student-athletes must pay beyond scholarship money).

61. See *generally* OPERATING BYLAWS, *supra* note 4, art. 15 (defining financial aid policies); *O'Bannon*, 7 F. Supp. 3d. at 965-66 (discussing NCAA's reliance on full-tuition scholarships as justification for not compensating student-athletes).

62. For a further discussion of a student-athlete's time commitments, see *supra* notes 45-47 and accompanying text.

63. See *generally* OPERATING BYLAWS, *supra* note 4, art.12.1.2 (listing compensation restrictions).

64. See OPERATING BYLAWS, *supra* note 4, art.12.1.2 (a) (specifying restrictions on student-athlete compensation).

65. See OPERATING BYLAWS, *supra* note 4, art.12.1.2 (e)(f)(g) (specifying additional restrictions on student-athlete compensation).

erential treatment because of his student-athlete status.<sup>66</sup> Nor can a student-athlete receive more money because of his reputation.<sup>67</sup>

A student-athlete may have a paying job as long as he is paid only for the work he performs and is paid the rate for similar services in that region.<sup>68</sup> However, with the amount of time spent on athletics and academics, Division I basketball and FBS athletes may not have time to maintain a paying job.<sup>69</sup> Although an athlete may be compensated for instructions or camps, there are compensation limitations.<sup>70</sup> Curiously, a student-athlete may not use his name to promote a lesson, camp, or his own business.<sup>71</sup> However, an institutional, charitable, educational, or nonprofit organization can use a student-athlete's NIL "to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics" as long as certain conditions are met.<sup>72</sup>

Nearly everyone but the student-athlete and his family members can profit from his NIL and the exposure that his NIL brings

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66. See generally OPERATING BYLAWS, *supra* note 4, art. 12.1.2.1 (noting non-comprehensive list of prohibited forms of pay). The Bylaws list different types of improper payments such as: salary, gratuity or compensation; division or split of surplus; educational expenses; expenses, awards and benefits; payment based on performance; preferential treatment, benefits or services; and prize for participation in institution's promotional activity. See *id.* arts. 12.1.2.1(1)-(7).

67. See OPERATING BYLAWS, *supra* note 4, art. 12.4.1.1 (ruling that student-athletes cannot make more money because they are student-athletes).

68. See OPERATING BYLAWS, *supra* note 4, art. 12.4.1 (discussing limitations on student-athlete employment compensation). See also sources cited, *supra* note 69 (expanding upon language in article 12.4.1).

69. For a further discussion of a student-athlete's time commitments, see *supra* notes 45-47 and accompanying text.

70. See OPERATING BYLAWS, *supra* note 4, art. 12.4.2.1 (listing limitations on compensation for camps and other instructional activities).

71. See OPERATING BYLAWS, *supra* note 4, art. 12.4.2.1-12.4.4 (expanding on limitation of student-athletes' use of image and likeness). For example, the Bylaws state that "[a] student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business." See *id.* art. 12.4.4.

72. See OPERATING BYLAWS, *supra* note 4, art. 12.5.1.1. (listing guidelines that specific types of organizations and student-athletes must follow when student-athlete's NIL will be used to promote specific activities for organizations).

to the football or basketball program.<sup>73</sup> The revenue discrepancy is “inequitable.”<sup>74</sup>

### C. NCAA Violations

With stringent rules come violations, and for years, the NCAA has dealt with seemingly petty violations in different ways.<sup>75</sup> Boosters have plagued the NCAA, leading to program closures, wiping away of seasons, and game suspensions in the cases of Southern Methodist University football, Michigan basketball, and Miami football, to name a few.<sup>76</sup> Interestingly, penalties seem to be handed down on a case-by-case basis.

For example, when members of the Ohio State University football team, including the star quarterback, received tattoos in exchange for signed memorabilia, the suspension was postponed so the players could play in the 2011 Sugar Bowl.<sup>77</sup> Interestingly, the

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73. See, e.g., DOSH, *supra* note 55, at 14 (discussing different college football programs' licensing agreements). In 2012, Boise State University, after appearing in the 2007 and 2010 Fiesta Bowl games, “had grown to having over 350 licensees and generated more than \$1 million in royalties.” See *id.* (discussing Boise State's increase in licensing revenue). Another major example is the University of Oregon: “Currently the University shares 50 percent of net revenue from licensing with the athletic department. . . . Total licensing revenue for the University has grown from \$750,000 to \$2.25 million from fiscal year 2005 to fiscal year 2011, coinciding with successful football seasons.” See *id.* (discussing Oregon's 50% split between football program and school of athletic department licensing profits). For a further discussion of the use of a student-athletes' NIL, see *supra* notes 67-72 and accompanying text.

74. See Lee Goldman, Note, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 207 (1990) (“It is inequitable that student-athletes, who generate millions of dollars for the university, must scrounge for basic expenses and struggle through their classes. It is hypocritical for the NCAA to restrict payments to student-athletes when its member universities continue to seek new ways of increasing revenues . . . .” (citations omitted)).

75. For a discussion of some past NCAA violations ways the NCAA has addressed the violations, see *infra* notes 76-79, 82-83, and the text accompanying those notes.

76. See *A List of the Worst Scandals in College Sports*, ESPN (July 22, 2012), <http://sports.espn.go.com/espn/wire?id=8189312> (listing worst NCAA scandals from 1947-2012). For example, Southern Methodist University (“SMU”) received the “death penalty” in 1987 for an under-the-table fund—of which SMU's then Athletic Director was aware—it had used to pay football players. See *id.* Another booster-laden scandal lost the University of Michigan five basketball seasons including two NCAA Division I Championship games. See *id.* Nevin Shapiro, a booster for the University of Miami, allegedly gave players money, cars, vacations, and paid for prostitutes. See *id.*

77. See *Ohio State Football Players Sanctioned*, ESPN (Dec. 26, 2010), <http://sports.espn.go.com/ncf/news/story?id=5950873> (reporting that quarterback Terrelle Pryor and four of his teammates were suspended by NCAA for first five games of subsequent season for selling rings, jerseys, and awards for tattoos, however, could still play in Sugar Bowl). See also Dan Wetzel, *Pryor's Acts Expose Charade of College Athletics*, YAHOO! SPORTS (Jan. 3, 2011), <http://sports.yahoo.com/news/>

CEO of the Sugar Bowl “lobb[ie]d hard” to ensure the star student-athletes played in his bowl game.<sup>78</sup> Further, when Johnny Manziel inadvertently violated the rules, Texas A&M University proposed penalties to the NCAA for the violation, likely preventing the NCAA from a possible tougher sanction.<sup>79</sup>

As quarterback, Manziel led a Texas A&M football team that brought in over \$52 million dollars of revenue in 2012.<sup>80</sup> Manziel’s winning of the Heisman Trophy “produced more than \$1.8 million media impressions, which translates into \$37 million in media exposure for A&M,” not including the “increases from merchandise sales, ticket requests or donations to the school.”<sup>81</sup> Unfortunately

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pryor-acts-expose-charade-college-212300587—ncaaf.html (discussing Pryor’s NCAA violations). See also, Dan Wetzel, *Focus on OSU, Big Ten Brass, Not Pryor*, YAHOO! SPORTS (June 1, 2011), <http://sports.yahoo.com/news/focus-osu-big-ten-brass-205000210—ncaaf.html> (arguing that Pryor was scapegoat in Ohio State scandal). Wetzel goes through a history of what happened in the Ohio State scandal, arguing that someone in the Ohio State Athletic Department leaked information about the improper benefits that Pryor and other members of the football team had received. See *id.* He notes how most of the news reporting the situation focused on Pryor’s future at Ohio State, not “the men in charge . . . all of whom mishandled the case.” See *id.*

78. See Dan Wetzel, *Johnny Manziel’s Suspension Exposes Ridiculousness of NCAA’s Double Standards*, YAHOO! SPORTS (Aug. 28, 2013), <http://sports.yahoo.com/news/ncaaf—johnny-manziel-s-suspension-exposes-ridiculousness-of-ncaa-s-double-standards-012517037.html> (discussing irony behind Terrelle Pryor and Ohio State player’s sanctions). Sugar Bowl CEO Paul Hoolahan said “not only did he lobby hard for Pryor and the others to get a reprieve but also that the powers that be listened to him.” See *id.*

79. See *Joint Statement from Texas A&M and the NCAA*, AGGIE ATHLETICS (Aug. 28, 2013), available at <http://www.aggieathletics.com/ViewArticle.dbml?ATCLID=209242479> [hereinafter “Joint Statement”] (discussing penalties proposed by A&M). Texas A&M proposed to the NCAA three “penalties” as punishment for Manziel and the Texas A&M football program: (1) Manziel could not play in the first half of A&M’s season opener against Rice University; (2) Manziel had to address his team about the situation and what he learned; and (3) Texas A&M had to revise its future education “concerning student-athlete autographs for individuals with multiple items.” See *id.* When asked about the punishment, the NCAA Vice President of Academic and Membership Affairs stated the following: “unfortunately, some individuals’ sole motivation in seeking an autograph is for resale. It is important that schools are cognizant and educate student-athletes about situations in which there is a strong likelihood that the autograph seeker plans to resell the items.” See *id.*

80. See Sean Gregory, *Johnny Manziel “Suspension” Is The World’s Most Confusing Punishment*, TIME (Aug. 29, 2013), <http://keepingscore.blogs.time.com/2013/08/29/johnny-manziel-suspension-the-worlds-most-confusing-punishment/#ixzz2sGf4nAd> (discussing double-standard of NCAA penalty).

81. See *A&M football Season, Manziel Generate \$37 Million in Media Exposure Revenue*, THE BATTALION ONLINE (Jan. 18, 2013), <http://www.thebatt.com/a-m-football-season-manziel-generate-37-million-in-media-exposure-revenue-1.2973571#.Uu-jEHl9lg1> (noting how much money Texas A&M made from Manziel winning Heisman Trophy).

for Johnny Manziel, the NCAA penalized him for signing autographs regardless of whether or not he profited.<sup>82</sup>

In 2013, the NCAA investigated Manziel for allegedly accepting payment for signing autographs.<sup>83</sup> Under the NCAA Bylaws, a student-athlete cannot participate in his respective sport if he “[a]ccepts any remuneration for or permits the use of [his] name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind” or “[r]eceives remuneration for endorsing a commercial product or service.”<sup>84</sup> In addition, if a student-athlete’s photo or name appears on commercial items “or is used to promote a commercial product sold by an individual or agency,” the student-athlete must “take steps to stop such an activity,” unless the photograph is sold by an individual or agency for “private use.”<sup>85</sup> In other words, Manziel should have known that the autographs he signed would be sold for money and he should have stopped signing or told the people for whom he signed not to sell them.<sup>86</sup> Unfortunately, determining whether a person asking for an autograph will turn around and sell it is not that simple.<sup>87</sup>

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82. See Wetzels, *supra* note 78 (“In other words, the NCAA couldn’t prove Manziel was paid by memorabilia dealers to sign his own name on pictures of himself. They instead hit him because it was obvious that the thousands of items he autographed were certainly going to be sold.”). See also Joint Statement, *supra* note 79 (discussing penalties A&M proposed).

83. See Zac Ellis, *Autograph Broker Says Johnny Manziel Accepted \$7,500 for Signing Helmets*, SPORTS ILLUSTRATED (Aug. 6, 2013), <http://college-football.si.com/2013/08/06/johnny-manziel-autograph-broker-ncaa/> (discussing Manziel investigation).

84. See OPERATING BYLAWS, *supra* note 4, art. 12.5.2.1 (a)(b) (explaining NCAA’s rule against student-athletes profiting off of their NIL).

85. See OPERATING BYLAWS, *supra* note 4, art. 12.5.2.2 (explaining student-athletes obligations regarding improper use of image and likeness on promotional products).

86. See Gregory, *supra* note 80 (“Texas A&M . . . and so many others already profit off of Manziel. At the same time, if Manziel inadvertently permits another person to profit off his name, he gets punished. And how, exactly, do you inadvertently offer someone permission to do something? Stubbing my toe: that’s inadvertent . . .”).

87. See Wright Thompson, *The Trouble With Johnny*, ESPN (July 30, 2013), [http://espn.go.com/espn/otl/story/\\_/id/9521439/heisman-winner-johnny-manziel-celebrity-derail-texas-aggies-season-espn-magazine](http://espn.go.com/espn/otl/story/_/id/9521439/heisman-winner-johnny-manziel-celebrity-derail-texas-aggies-season-espn-magazine) (discussing frequency that Manziel was sought for autographs). For example, Johnny Manziel’s parents always seemed to have piles of items for him to sign for other people. See *id.* (describing amount of objects Manziel would be asked to sign). One time Manziel signed helmet decals for a man who “accosted” him and told him they were for deployed troops, only to find later that the decals had been affixed to helmets and sold on eBay. See Andy Staples, *Johnny Manziel Discussed Autograph Incident in July SI Interview*, SPORTS ILLUSTRATED (Aug. 5, 2013), <http://sportsillustrated.cnn.com/college-football/news/20130805/johnny-manziel-ncaa-autograph-probe/#ixzz2sGnez5bc> (elaborating on Manziel’s story and inadvertent violation). Addi-



Manziel's penalty exposed more of the double standard behind the NCAA's use of student-athletes' NIL.<sup>88</sup> With the amount of money and exposure that college athletes bring to their schools, shouldn't they have a stake in the profit?<sup>89</sup>

#### IV. ANTITRUST

In 1890, Congress passed the Sherman Antitrust Act to promote competition and prevent monopolies in trade and commerce throughout the United States.<sup>90</sup> Antitrust practices harm competi-

tionally, when Johnny and his roommate were in a Tuscaloosa hotel before their game against Alabama in 2012, a man with a duffle bag full of items shoved his foot in the door and walked in the room with Johnny, and asked him to sign autographs for him, which Manziel did for free. *See id.* (telling another story about someone hounding Manziel for autographs).

88. *See* Michael Rosenberg, *NCAA Amateuism Rules Unfair, But Manziel Not One to Challenge Them*, SPORTS ILLUSTRATED (Aug. 5, 2013), <http://sportsillustrated.cnn.com/college-football/news/20130805/johnny-manziel-ncaa/#ixzz2sGoFQuqU> (discussing discrepancies in rules). "NCAA rules are antiquated, grossly unfair, absurd and almost offensive. If a coach can make \$5 million a year because he has great players, a player should be allowed to sell his autograph, his picture, a pint of blood or tattoo space on his left arm." *See id.* (alluding to past scandals calling into question NCAA's amateurism policies). Donors paid \$20,000 to sit at a table with Johnny Manziel; the \$20,000 went right back into Texas A&M's football team. *See* Chris Eichelberger, *Manziel's Heisman Brought Texas A&M About \$20,000*, SCHOOL SAYS, BLOOMBERG (Nov. 1, 2013), <http://www.bloomberg.com/news/2013-11-01/manziel-s-heisman-brought-texas-a-m-about-20-000-school-says.html> (elaborating on amount of money Manziel's Heisman victory brought into Texas A&M). In addition, "Texas A&M received \$9.7 million in TV revenue for the 2012 season, and annual increases have already been determined through the end of the SEC's contract in 2023-2024 with CBS and 2033-2034 with ESPN." *See id.* Texas A&M raised \$740 million dollars in donations and pledges in 2012-2013. *See* Allen Reed, *Texas A&M Breaks Fundraising Record With \$740 Million in Donations*, THE EAGLE (Sept. 17, 2013), [http://www.theeagle.com/news/local/article\\_82266d1a-11c0-543b-b75a-4c3613357abe.html](http://www.theeagle.com/news/local/article_82266d1a-11c0-543b-b75a-4c3613357abe.html) (discussing Texas A&M's profit and reason for profit including, grants to research, library, and alumni foundations). *See also* Chris Hutson, *Football, Manziel Credited For Record Texas A&M Fundraising Windfall*, NBC SPORTS (Sept. 17, 2013), <http://collegefootballtalk.nbcsports.com/2013/09/17/football-manziel-credited-for-record-texas-am-fundraising-windfall/> (discussing money raised by Texas A&M in 2012-2013). When asked about the money raised, the Texas A&M Foundation President, Ed Davis stated the following:

People ask me all the time if you have a winning football team, do you raise more money . . . in an era where we are in, effectively, in the news everywhere and you have a young man like our quarterback who has been a media magnet and you have the success you have, I do think that euphoria does spill over into success in fundraising.

*See id.*

89. For a further discussion of the money that college athletes make for their schools, see *supra* notes 73, 80-81 and accompanying text.

90. *See* 15 U.S.C.A. §§ 1-2 (2004). Section 1, restricting trusts and restraints of trade, states the following:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any

tion in the market, which harms the consumers in that market.<sup>91</sup> Some examples of antitrust or anticompetitive behavior include price-fixing and boycotting.<sup>92</sup> Section 1 of the Sherman Antitrust Act prevents two or more entities from making any agreement, acting in concert, or engaging in any conspiracy that unlawfully restrains trade.<sup>93</sup> Section 2 of the Sherman Act prohibits monopolization and attempted monopolization of market power.<sup>94</sup> In both instances, there must be a defined market.<sup>95</sup>

In *O'Bannon*, the plaintiffs alleged that the NCAA violated Section 1 of the Sherman Act.<sup>96</sup> To prove a violation of Section 1, plaintiffs must show: (1) an agreement among two or more persons

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contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*See id.* § 1 (preventing unlawful restraints on trade). Section 2, restricting monopolies, reads as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

*See id.* § 2 (preventing monopolies).

91. *See WONG, supra* note 3, at 453 (discussing effects of antitrust practices).

92. *See id.* (listing examples of antitrust behavior).

93. *See* 15 U.S.C.A. § 1 (stating elements of Section). For the language of Section 1, *see supra* note 90.

94. *See* 15 U.S.C.A. § 2 (stating elements of Section). For the language of Section 2, *see supra* note 90.

95. *See O'Bannon*, 7 F. Supp. 3d at 985-86 (citations omitted) (citing *Supermarket of Homes v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1405 (9th Cir., 1986)) (noting importance of defining a market). In *Supermarket*, the Ninth Circuit ruled that the “[p]roof that defendant’s activities had an impact upon competition in the relevant market is ‘an absolutely essential element . . . .’” *See id.* In *O'Bannon*, the Court elaborates on how to define a market. *See id.* at 986 (noting that relevant market “encompasses notions of geography as well as product use, quality, and description.” (citations omitted)) (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

96. *See generally* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (discussing lawsuit against NCAA). This Part discusses how to prove a violation of Section 1. *See* sources cited and accompanying text, *infra* notes 91-114. For purposes of a thorough antitrust analysis, to prove a Section 2 violation, plaintiffs must establish that (1) one entity controls or attempts to control the market power and (2) that the entity has used unlawful means to dominate the market power. *See* 15 U.S.C.A. § 2 (stating elements of monopolization); *WONG, supra* note 3, at 455-56 (discussing elements of monopolization). The purpose of Section 2 is not to punish those companies with a natural monopoly, but to prevent those companies from discouraging the rise of similar products in the market that may compete with them. *See WONG, supra* note 3, at 455-56.

or entities; (2) the agreement unlawfully restrains trade; and (3) the activity affects interstate commerce.<sup>97</sup> Courts apply one of three tests when determining whether a Section 1 violation exists: a *per se* analysis, a rule of reason analysis,<sup>98</sup> or a quick-look analysis.<sup>99</sup>

A *per se* analysis applies when an agreement so obviously restrains trade in the market, such as one setting the price of a certain product.<sup>100</sup> If they show existence of an agreement that destructively restrains trade, the plaintiffs need not show harm, and the defendants do not have the opportunity to show justifications, or procompetitive effects, of the restraint.<sup>101</sup>

Courts apply a rule of reason analysis for less obvious restraints on trade.<sup>102</sup> To succeed under the rule of reason analysis, the

97. See O'Bannon, 7 F. Supp. 3d at 984 (citing Tanaka, 252 F.3d at 1062 (internal citations omitted)).

98. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103-04 (1984) (noting when to use *per se* analysis versus rule of reason test). In *Board of Regents*, the Court stated that when there are restraints on trade, a rule of reason test must be used to conduct "a fair evaluation of the competitive character" of the restraints. See *id.* at 103. The Court ruled that a *per se* analysis should be used when "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." See *id.* at 103-04.

99. See Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999) (discussing previous cases in which "quick-look" analysis was used and giving examples of "quick-look" analysis).

100. See *Board of Regents*, 468 U.S. at 103-04 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct."). See also WONG, *supra* note 3, at 453-53 ("Practices that are deemed illegal *per se* are those that fall within a division of conduct that is inherently anticompetitive, like price-fixing, horizontal agreements, and group boycotts. If the conduct is found to be illegal *per se*, the court will not inquire into the business purpose or the actual effect of the offending practice.").

101. See *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (citing Nat'l Soc'y of Prof'l Eng'rs v. U.S., 425 U.S. 679, 692 (1978) ("*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'"). In *Texaco*, the Supreme Court states that they have "generally expressed reluctance to adopt *per se* rules" when the impact of the alleged anticompetitive practices is "not immediately obvious." See *id.* (internal citations omitted) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)). See also WONG, *supra* note 3, at 453-54 ("In cases where the *per se* analysis is used, the defense does not have an opportunity to defend the offending agreement the defense's emphasis is on requesting that the rule of reason analysis be applied instead."). In his book, Wong cites an excerpt from *Northern Pacific Railway Company v. U.S.* in which the Supreme Court elaborates on those activities that are subject to a *per se* analysis: "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." See *id.* at 454 (citing *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958)).

102. See, e.g., *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (citations omitted) (noting that rule of reason analysis should be used

plaintiffs must to show: (1) that there is an agreement between two entities, (2) that the agreement adversely affects competition in the defined market, and (3) that the anticompetitive effects of the agreement outweigh the procompetitive goals of the restraint.<sup>103</sup> After the plaintiffs show an unlawful agreement in the defined market and that the agreement has anticompetitive effects, the burden shifts to the defendant to assert procompetitive effects of the alleged restraint.<sup>104</sup> Then, the court will weigh the anticompetitive effects against the procompetitive effects.<sup>105</sup> If the court finds that the defendant has shown adequate procompetitive effects, the burden will shift back to the plaintiffs to show that the procompetitive goals can be achieved in a less restrictive manner.<sup>106</sup>

Plaintiffs have challenged sports leagues under Sections 1 and 2 of the Sherman Act.<sup>107</sup> However, competition drives sports leagues; therefore, some restraints on competition are necessary to

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when restraints on competition are necessary); *Board of Regents*, 468 U.S. at 100-04 (determining proper time to use *per se* analysis or rule of reason analysis); *Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 244 (1918) (providing rule of reason analysis). See also WONG, *supra* note 3, at 454 (“The rule of reason analysis applies to conduct that is not manifestly anticompetitive.”).

103. See WONG, *supra* note 3, at 454 (outlining burden-shifting rule of reason analysis). For a further discussion of the rule of reason analysis, see sources cited *supra* note 102 and accompanying text.

104. See WONG, *supra* note 3, at 454 (discussing defendants’ burden in rule of reason analysis). A defendant “will attempt to prove that there is a legitimate business reason for the restraint, and that the restraint in question is in the least restrictive form. The defense will argue that without such restrictions, the business will be adversely affected and there will be a negative impact on the welfare of the consumer.” See *id.*

105. See *City of Chicago*, 246 U.S. at 244 (“[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.”).

106. See *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (citing *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991)) (noting burden shift to plaintiffs to show least restrictive means).

107. Commonly, athletes or owners challenge a league under Section 1, alleging that the league is acting in a way to restrain trade. See, e.g., *Clarett v. National Football League*, 369 F.3d 124 (2nd Cir., 2004) (ruling that NFL’s eligibility rules are exempt from antitrust scrutiny); *Smith v. Pro Football Inc.*, 593 F.2d 1173, 1189 (D.C. Cir. 1978) (determining NFL draft was illegal restraint on trade as it existed in 1968); *Mackey v. Nat’l Football League*, 543 F.2d 606 (determining that Rozelle Rule was unreasonable restraint on free agency in NFL); *Professional Baseball Clubs*, 66 Lab. Arb. Rep. (BNA) 101 (1975) (Seitz, Arb.) (creating free agency in professional baseball). Alternatively, rival leagues have challenged established leagues under Section 2. See, e.g., *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1340-41 (2nd Cir. 1988) (affirming decision that NFL did not have monopoly power over television networks); *American Football League v. Nat’l Football League*, 323 F.2d 124 (4th Cir. 1963) (determining that NFL did not have monopoly power over relevant market).

have a successful league and maintain the proper competitive balance.<sup>108</sup> Thus, courts will apply a rule of reason analysis to antitrust claims against sports leagues to weigh the anticompetitive effects of the restraint against the procompetitive justifications of the restraint.<sup>109</sup>

The NCAA, whose mission is academic in nature, is recognized as a nonprofit organization.<sup>110</sup> Interestingly, however, the NCAA dominates intercollegiate athletics.<sup>111</sup> NCAA members are bound by the NCAA Bylaws.<sup>112</sup> This situation is very profitable for the NCAA and its “current revenues total approximately \$800 million.”<sup>113</sup> The NCAA’s unrestricted assets currently total around \$530 million.<sup>114</sup> By exerting dominant control over intercollegiate

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108. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984) (discussing NCAA’s restraint, Court says: “a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.”).

109. See *generally id.* at 101 (discussing why rule of reason analysis is appropriate analysis of antitrust in sports). The Court notes, that sports leagues, the NCAA in this case, “would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed.” See *id.* The Court goes on to list many agreements that restrain competition in the NCAA such as, “the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed . . . .” See *id.*

110. See NAT’L COLLEGIATE ATHLETIC ASS’N, *The NCAA Budget: Where the Money Goes*, NCAA, <http://www.ncaa.org/health-and-safety/ncaa-budget-where-money-goes> (last updated Oct. 15, 2013) [hereinafter “NCAA Budget”] (“The NCAA maintains its nonprofit status because it is an association of colleges and universities sharing a common academic mission.”). See also WONG, *supra* note 3, at 504 (discussing college organizations common “nonprofit” defense against antitrust claims).

111. See *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850, 852 (N.D. Ind. 1990) (discussing NCAA’s purpose and prestige). See also NAT’L COLLEGIATE ATHLETIC ASS’N, *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Dec. 1, 2014) (“More than 1,200 schools, conferences and affiliate organizations collectively invest in improving experiences of student-athletes—on the field, in the classroom, and in life.”). When determining the relevant market in *O’Bannon*, the Court discusses the NCAA’s prowess. See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 965-68 (N.D. Cal. 2014) (discussing FBS and Division I basketball in NCAA).

112. See NCAA CONSTITUTION, *supra* note 6, art. 1.3.2 (“Member institutions shall be obligated to apply and enforce this legislation . . . .”). See also Marc Edelman, Note, *Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE WESTERN L. REV. 61, 66 (2013) (“Members do not have the chance to opt out of rules based on their financial preference, nor do they have the right to opt out on moral grounds.” (citations omitted)).

113. See NCAA Budget, *supra* note 110 (discussing NCAA’s budget and revenue). The site notes that the NCAA’s revenue comes mainly from television and marketing rights fees. See *id.* (elaborating on revenue). See also WONG, *supra* note 3, at 20 (noting majority of NCAA revenue comes from television contracts and ticket sales).

114. See NCAA Budget, *supra* note 110 (describing assets).

athletics while reaping significant revenues, does the NCAA illegally restrain competition because student-athletes cannot receive compensation?<sup>115</sup>

Before the 1970s, the NCAA essentially avoided liability for antitrust claims, arguing its primary purpose is educational and non-commercial.<sup>116</sup> In 1984, the University of Oklahoma and the University of Georgia filed a lawsuit against the NCAA after the NCAA threatened to discipline the schools for negotiating independent television contracts.<sup>117</sup> The Supreme Court upheld the lower court's decision that the NCAA violated Section 1 and was operating as a "classic cartel" and conducted unlawful restriction of trade in violation of the Sherman Act.<sup>118</sup> The *Regents* decision was the first successful antitrust challenge of the NCAA.<sup>119</sup> Since 1984, the

115. See OPERATING BYLAWS, *supra* note 4, art. 12.1.2.1 (listing and elaborating on prohibited forms of pay for NCAA student-athletes).

116. See WONG, *supra* note 3, at 504 (laying foundation for role of Sherman Act in NCAA). In the past, "college athletic organizations have been successful in arguing that the antitrust laws were not applicable to them because college athletics are not 'trade' or 'commerce' as defined by the Sherman Act." See *id.* See also MATTHEW J. MITTEN, ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 224-25 (3d ed. 2013) (discussing history behind NCAA's lack of antitrust regulation). Mitten quotes former Ohio State University football coach Woody Hayes as stating that "the man who plays college football and does not graduate has been cheated." See *id.* (internal citations omitted).

117. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 95 (1984) (discussing history of case). The schools, part of the College Football Association ("CFA"), negotiated a television contract with the National Broadcasting Company ("NBC"), independent of the NCAA's television deal. See *id.* After that contract, the NCAA "publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract." See *id.*

118. See *id.* at 95-96 ("The District Court then concluded that the NCAA controls over college football are those of a 'classic cartel'. . ."). The Court of Appeals for the Tenth Circuit affirmed the District Court's decision in part, and reversed in part, and the Supreme Court affirmed the Court of Appeals decision. See generally *id.* "Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life." See *id.* at 120. See also WONG, *supra* note 3, at 506 (noting how Supreme Court affirmed lower court's decision that NCAA policy violated Sherman Act).

119. See WONG, *supra* note 3, at 506. Wong states the following about the Court's decision in *Board of Regents*:

This decision was important for three reasons: (1) it was the first successful challenge of the NCAA based on antitrust theory; (2) it had a significant impact on the NCAA and intercollegiate athletic departments by reducing television revenues for most institutions; and (3) the U.S. Supreme Court rendered the decision, and this it has served as a precedent for future cases.

*Id.*

NCAA tends to settle claims alleging antitrust violations.<sup>120</sup> However, recent cases, especially after *O'Bannon*, have definite potential to change the NCAA because plaintiffs are able to taste victory.<sup>121</sup>

## V. *O'BANNON* V. NCAA: A NARRATIVE ANALYSIS

Current and former student-athletes sued the NCAA in the Northern District of California under Section 1 of the Sherman Act, arguing that the NCAA exercises an unlawful restraint of trade over Division I basketball and FBS student-athletes' NIL.<sup>122</sup> The following subsections provide an in-depth look into the court's antitrust analysis and decision.

### A. Relevant Markets and Restraints

The plaintiffs alleged that the NCAA restrained trade in two markets: the college education market and the group licensing market.<sup>123</sup> Specifically, the plaintiffs argued, because the NCAA does not allow student-athletes to receive compensation for the licensed use of their NIL in the two markets, the NCAA unlawfully restrains trade.<sup>124</sup>

#### 1. *The College Education Market*

According to the plaintiffs, the college education market is the market in which the Division I and FBS schools compete to recruit the elite high school athletes.<sup>125</sup> These NCAA schools "sell" the students on a "unique bundle of goods and services," such as room, board, tuition, meals, medical treatment, top-of-the-line facilities,

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120. For a further discussion of the NCAA and the Sherman Act, see cases cited *infra* notes 223-224 and accompanying text.

121. For a further discussion of the impact of *O'Bannon*, see *infra* notes 213-220, 236-262 and the text accompanying the notes.

122. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014) (introducing background of case).

123. See *id.* at 965 (stating two markets in which plaintiffs challenge NCAA's restraint).

124. See *id.* at 985. (discussing plaintiffs' claims specifically).

125. See *id.* at 965-68, 986 (explaining and defining college education market).

and academic tutoring.<sup>126</sup> In return, the student-athletes give their athletic services and the use of their NIL.<sup>127</sup>

The plaintiffs established the uniqueness of Division I and FBS schools through testimony providing that high school recruits skilled enough to play Division I basketball or FBS football, do.<sup>128</sup> In rebuttal, the NCAA, hoping to expand the market definition,<sup>129</sup> argued that there are other avenues for elite high school recruits to pursue, such as FCS schools, Division II, Division III, non-NCAA schools, or foreign professional leagues.<sup>130</sup> To determine the scope of the market, the court considered whether foreign leagues and other NCAA divisions have “actual or potential ability to deprive” FBS and Division I schools of “significant levels of business.”<sup>131</sup> Concluding that the other schools do not deprive Division I schools of significant business,<sup>132</sup> the court found that Division I basketball

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126. See *O'Bannon*, 7 F. Supp. 3d at 966-68 (describing unique bundle of services NCAA D-I and FBS football schools offer student-athlete recruits). The court notes that the plaintiffs presented evidence at trial, “including testimony from both experts and lay witnesses,” establishing that the schools do compete and that the schools in competition are the only sellers of the unique services in the relevant market. See *id.* at 965-66.

127. See *id.* at 965-66 (discussing exchange between student-athletes and NCAA member schools regarding quid pro quo arrangement, relying on testimony of economic expert Dr. Noll).

128. See *O'Bannon*, 7 F. Supp. 3d at 966 (citing to expert witness testimony of Dr. Noll regarding number of four and five star recruits that accept D-I basketball and FBS football scholarships). Dr. Noll testified that more than ninety-eight percent of four and five star football recruits, between 2007 and 2011, accepted scholarship offers at FBS schools. See *id.* Further, he noted that about ninety-five, five star basketball recruits that were offered D-I scholarships accepted one. See *id.*

129. See generally *id.* at 966-68, 986 (discussing plaintiffs’ definition of market and NCAA’s attempt to expand market to include other intercollegiate leagues, Divisions, foreign leagues, and professional leagues).

130. See *id.* at 966-67 (“The only potential substitutes that the NCAA has identified are the opportunities offered by schools in other divisions, collegiate athletics associations, or minor and foreign professional sports leagues.”).

131. See *O'Bannon*, 7 F. Supp. 3d at 986-87 (noting Court’s process to determine market).

132. See *O'Bannon*, 7 F. Supp. 3d at 987 (refuting NCAA’s claim that FCS and non-Division I schools compete with FBS schools because Division I and FBS schools provide significant differences in level of competition, facilities, coaching salaries, and exposure). Other programs “typically offer a lower level of athletic competition, inferior training facilities, lower-paid coaches, and fewer opportunities to play in front of large crowds and on television.” See *id.* Additionally, the court found that the cost of attending FBS and Division I basketball schools has increased, but student-athletes continue to attend. See *id.* at 988 (citing *Lucas Auto. Eng’g, Inc. v. Bridgestone/Firestone, Inc.*, 275 F.3d 762, 767 (9th Cir.2001)) (refuting NCAA’s argument that other leagues and divisions compete with Division I basketball and FBS schools because recruits accept Division I basketball and FBS offers despite price increase). Further, the court concluded that foreign leagues and relevant professional leagues are not adequate substitutes for FBS and Division I basketball schools, because they do not offer recruits the opportunity to obtain a



schools and FBS schools operate in a distinct college education market.<sup>133</sup>

## 2. *The Group Licensing Market*

The plaintiffs also identified a group licensing market with three submarkets: a submarket to use student-athletes' NIL in live game telecasts, a submarket to use student-athletes' NIL in videogames, and a submarket to use student-athletes' NIL in archival footage—such as rebroadcasting.<sup>134</sup> Generally, the group licensing market is one in which the student-athletes could join together to offer and sell group NIL licenses to schools, third-party licensing companies, or media companies.<sup>135</sup>

### a. Submarket for Live Game Telecasts

First, the plaintiffs argued that without the NCAA's rules, student-athletes could sell group licenses for the use of their NIL to television networks for live game telecasts.<sup>136</sup> The plaintiffs relied on common NIL provisions in contracts between the NCAA and television networks.<sup>137</sup> The NCAA unsuccessfully argued that sports

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higher education or to play regularly on television. *See id.* at 987 (discussing why professional and foreign leagues do not compete in same relevant market). The NCAA's evidence supports the plaintiffs' argument that Division I basketball and FBS schools "command a significantly larger domestic television audience than virtually every other football or basketball league, with the exceptions of the NFL and NBA . . . ." *See id.* *See also* Rock v. NCAA, 2013 WL 4479815, at \*13 (S.D. Ind. Aug. 16, 2013) (concluding that Division II and NAIA football do not compete in same relevant market as Division I football).

133. *See O'Bannon*, 7 F. Supp. 3d at 987-88 (citing Rock, 2013 WL 4479815, at \*13) (concluding that NCAA FBS and Division I basketball schools offer unique goods and services). The court determined that "the qualitative differences between the opportunities offered by FBS football and Division I basketball schools and those offered by other schools and sports leagues illustrate that FBS football schools and Division I basketball schools operate in a distinct market." *See id.*

134. *See O'Bannon*, 7 F. Supp. 3d at 968-71 (elaborating on three types of submarkets in which NCAA member schools license student-athletes' NIL). For a further discussion of the group licensing market, see sources cited *infra* notes 136-149 and accompanying text.

135. *See O'Bannon*, 7 F. Supp. 3d at 968 (providing general overview of group licensing market).

136. *See id.* at 968-69 (discussing plaintiffs' argument regarding submarket for live game telecasts).

137. *See id.* at 968-69 (citing to NIL provisions in television network contracts). The court cites to the NCAA's contract with CBS for the rights to telecast the NCAA March Madness basketball tournament:

The Network, its sponsors, their advertising representatives and the stations carrying the telecasts of the games will have the right to make appropriate references (including without limitation, use of pictures) to NCAA and the universities and colleges of the teams, the sites, the games and the *participants in and others identified with the games* and in the telecast-

broadcasters' "primary reason" for entering into a licensing agreement with an event organizer is to "gain exclusive access to the facility where the event will occur."<sup>138</sup> The NCAA also argued that student-athletes are precluded from asserting any rights of publicity in the use of their NIL under the First Amendment and state laws—an argument which the court rejected.<sup>139</sup> In conclusion, the court noted that a license to a single student-athlete's NIL is not valuable, unless bundled with licenses to other student-athletes' NIL.<sup>140</sup> However, without the NCAA's challenged rules, FBS football and D-I basketball teams and players could create and sell those group licenses.<sup>141</sup>

#### b. Submarket for Videogames

Second, the plaintiffs argued that without the NCAA's rules, a submarket would exist for group licenses to use student-athletes' NIL in videogames.<sup>142</sup> Plaintiffs argued that developers would seek

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ing thereof, provided that the same do not constitute endorsements of a commercial product.

*See id.* (emphasis added) (citing trial Exhibit 2104). The NCAA's contract with CBS for certain basketball games throughout the season contains a "nearly identical" provision. *See id.* Also, part of a provision in an agreement between the FBS teams and Fox Broadcasting Company for the rights of the telecast to several bowl games in recent years states that "the event organizer will be solely responsible for ensuring that Fox has 'the rights to use the name and likeness, photographs and biographies of all participants, game officials, cheerleaders' and other individuals connected to the game." *See id.* (citing trial Exhibit).

138. *See O'Bannon*, 7 F. Supp. 3d at 969 (citing trial transcript and dismissing NCAA's argument because broadcasters must have licensing agreements with visiting teams who do not control access to event facility as well as home teams).

139. *See id.* at 994 (referencing *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 826 (8th Cir., 2007)) ("[E]ven if some television networks believed that student-athletes lacked publicity rights in the use of their names, images, and likenesses, they may have still sought to acquire these rights as a precautionary measure. Businesses often negotiate licenses to acquire uncertain rights.").

140. *See id.* at 969 ("A license to use an individual student-athlete's name, image, and likeness during a game telecast would not have any value to a television network unless it was bundled with licenses to use every other participating student-athlete's name, image, and likeness.").

141. *See id.* at 969, 994 (concluding a demand for group licenses exists with respect to live game telecasts). The court stated, absent the restrictions, student-athletes would sell the licenses directly to the networks or through an intermediate buyer, like a third-party licensing company. *See id.* at 994.

142. *See generally O'Bannon*, 7 F. Supp. 3d at 970 (citing to trial transcript and testimony of EA Sports' executive Joe Linzner). The trial transcript provides evidence that companies, like EA, must negotiate licenses with professional leagues and teams for their intellectual property rights, as well as with the athletes for the use of their NIL. *See id.* The point being, that "EA would be interested in acquiring the same rights from student-athletes . . . to produce college sports-themed videogames, if it were permitted to do so." *See id.* (internal citations omitted).

to acquire group licenses to use the student-athletes' NIL because developers want to make their games authentic.<sup>143</sup> The NCAA argued that a demand for such licenses no longer exists because the NCAA did not renew its license with EA;<sup>144</sup> however, nothing indicated on the record that the NCAA would not enter into a similar videogame agreement in the future, especially because the agreement was profitable, and no NCAA Bylaw prohibits future intellectual property licensing to videogame developers.<sup>145</sup> Thus, the Court agreed with the plaintiffs that a submarket for group licenses to use student-athletes' NIL in videogames would exist without the NCAA's restrictions.<sup>146</sup>

c. Submarket for Re-Broadcasts, Advertisements, and Other Archival Footage

Third, the plaintiffs argued that without the NCAA's rules, there would be a demand for group licenses to use student-athletes' NIL in re-broadcasts, advertisements, and other types of archival footage.<sup>147</sup> During the trial, the plaintiffs detailed the language in the contracts granting the Big 10 Network and Fox Sports Network the right to use student-athletes' NIL to promote games and events on their channels.<sup>148</sup> Although the NCAA licenses its archival footage to third-party licensing company T3Media, and T3Media cannot license footage of current NCAA student-athletes, T3Media acquires current student-athletes' consent to license future footage while the student-athletes are still in college, indicating that a demand for the licenses exists.<sup>149</sup>

## B. Anticompetitive Effects Restraining the Competition

Under the rule of reason test, the student-athletes must show that the NCAA unlawfully restrains the competition in the identi-

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143. See *O'Bannon*, 7 F. Supp. 3d at 970 (noting EA's avatars' similarity to real NCAA student-athletes). The court pointed to evidence from trial discussing the similarities and stating the following: "The EA avatars played the same positions as their real-life counterparts, wore the same jersey numbers and uniform accessories, hailed from the same home state, and shared the same height, weight, handedness, and skin color." See *id.* (citations omitted).

144. See *id.* (noting NCAA's argument).

145. See *id.* (refuting NCAA's argument).

146. See *id.* (agreeing with plaintiffs that a submarket would exist absent NCAA's rules).

147. See generally *O'Bannon*, 7 F. Supp. 3d at 970-971 (summarizing plaintiffs' argument and noting submarket exists after considering plaintiffs' evidence).

148. For a deeper look at the language of discussed contracts, see *supra* note 137.

149. See *id.* (discussing T3Media's role in NCAA licensing).

fied markets, harming the student-athletes.<sup>150</sup> The plaintiffs argued that the NCAA's rules impose strict limits on the compensation that student-athletes may receive for the use of their NIL.<sup>151</sup> The specific rules in contention include: (1) the prohibition on receiving financial aid above the full grant-in-aid for athletic ability; (2) the prohibition on receiving financial aid in excess of the cost of attendance; (3) the prohibition on receiving compensation from third parties based on a student-athlete's athletic skill or ability; and (4) the prohibition on a student-athlete endorsing a product, whether he receives compensation or not.<sup>152</sup> The plaintiffs contend that these restrictions on compensation harm the competition in both markets because the financial cap suppresses the value of athletic scholarships.<sup>153</sup> From the evidence and testimony presented, the court found that the NCAA violated Section 1 within the college education market, but not in the group licensing market.<sup>154</sup>

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150. See *O'Bannon*, 7 F. Supp. 3d at 985 (discussing rule of reason test generally). "Proof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the rule of reason case.'" See *id.* (citations omitted) (citing *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986)) (expressing importance of defined market). For a further discussion of the rule of reason analysis, see *supra* notes 102-106 and accompanying text.

151. See generally *O'Bannon*, 7 F. Supp. 3d at 971-73 (discussing challenged restraint generally). See also OPERATING BYLAWS, *supra* note 4 at art. 12.1.2 (elaborating upon "Amateur Status" and listing prohibited forms of pay). Under the NCAA Bylaws, a student-athlete will lose amateur status if he "uses [his] athletics skill (directly or indirectly) for pay in any form in that sport." See *id.* at art. 12.1.2(a).

152. See generally *O'Bannon*, 7 F. Supp. 3d at 971-72 (citations omitted) (providing overview of plaintiffs' claims against NCAA's restrictions). See also OPERATING BYLAWS, *supra* note 4, arts. 12, 15 (explaining rules on maintaining amateur status and permitted financial aid).

153. See *O'Bannon*, 7 F. Supp. 3d at 972 ("[T]he NCAA has the power to and does suppress the value of athletic scholarships through its grant-in-aid rules . . ."). Scholarships amounts are capped at the cost of attendance, which "includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance" at that school. Because it covers the cost of 'supplies, transportation, and other expenses,' the cost of attendance is generally higher than the value of a full grant-in-aid." See *id.* at 971. The difference "is typically a few thousand dollars." See *id.* at 971-72. The court goes on to explain, if schools lowered the price set by the NCAA for athletic scholarships, "by offering any recruit a cash rebate, deferred payment, or other form of direct compensation—that school may be subject to sanctions by the NCAA." See *id.* at 988.

154. For a further discussion, see *infra* notes 155-175 and accompanying text.

## 1. College Education Market

The student-athletes argued that the recruits are the buyers and the FBS and Division I basketball schools are the sellers in the college education market.<sup>155</sup> Because these two types of NCAA schools are the only sellers, they have the ability to fix the price that the schools offer to the student-athletes for the athletes' athletic services and NIL licensing rights, creating a seller's cartel.<sup>156</sup> Plaintiffs contended, if schools could offer more than the amount currently allowed under the Bylaws, recruits would also consider finances when choosing which college or university to attend.<sup>157</sup> The NCAA argued that its member schools do not technically price-fix because the student-athletes pay close to zero dollars due to the athletic scholarships.<sup>158</sup> The court rejected this argument, stating that the transactions between a Division I basketball or a FBS football school and a student-athlete "are not noncommercial" in nature because each party offers something of value to the other.<sup>159</sup>

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155. See *O'Bannon*, 7 F. Supp. 3d at 986 (discussing how NCAA is supplier in market and recruits "accept [NCAA's] offers"). At trial, the plaintiffs put forth a monopsony theory, arguing that the student-athletes are sellers and the schools are buyers. See *id.* at 991-994 (discussing plaintiffs' monopsony theory). The NCAA argued that this theory fails, because to violate the Sherman Act, the consumer must be harmed; however, the court rejects the NCAA's argument. See *id.* at 922 (stating NCAA's argument is not supported by relevant case law). The court recognized that the plaintiffs' monopsony theory was first introduced at trial, but stated that their expert provided testimony to support this argument. See *id.* at 993 ("The evidence presented at trial and the facts found here, as well as the law, support both theories.").

156. See *O'Bannon*, 7 F. Supp. 3d at 971-73, 988-93 (emphasis added) (discussing plaintiffs' claim of unlawful restraint). The court states, "FBS football and Division I basketball schools are the only suppliers in the relevant market" with the power to price fix. See *id.* at 988. Further, the court references Dr. Daniel Rubinfeld, the NCAA's economic expert, who wrote in one of his books that the NCAA is a cartel, defined as "a group of firms that impose a restraint." See *id.* at 972 (citations omitted). See also OPERATING BYLAWS, *supra* note 4, art. 15.01.6 (defining maximum financial aid allowed to one individual).

157. See *O'Bannon*, 7 F. Supp. 3d at 972 ("If the grant-in-aid limit were higher, schools would compete for the best recruits by offering them larger grants-in-aid. Similarly, if total financial aid was not capped at the cost of attendance, schools would compete for the best recruits by offering them compensation exceeding the cost of attendance.").

158. See *id.* at 988 (examining NCAA's argument that schools do not price-fix because student-athletes pay close to nothing).

159. See *O'Bannon*, 7 F. Supp. 3d at 988 ("This argument mischaracterizes the commercial nature of the transactions between FBS football and Division I basketball schools and their recruits."). The court referenced the Seventh Circuit's opinion in *Agnew v. NCAA*, which observed that "transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act." See *id.* at 988-89 (citing *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012)). Further, the NCAA member schools "can make millions of dollars as a result of these transactions." See

Thus, because the NCAA fixes the scholarship amount member schools may offer recruits, the NCAA exercises an unlawful restraint on the college education market.<sup>160</sup>

## 2. *Group Licensing Market*

The plaintiffs provided testimony that the recruits could also be sellers in the markets for their athletic services and NIL licensing rights.<sup>161</sup> The plaintiffs claimed that but for the NCAA rules, they could join together to offer group licenses for the rights to their NIL for (1) live game telecasts, (2) videogames, and (3) rebroadcasts and other archival footage.<sup>162</sup> The court did not find that the plaintiffs identified any harm to the competition in the group licensing submarkets to use student-athletes' NIL in live game telecasts or videogames.<sup>163</sup> Nor did the court find an unlawful restraint in the submarket to use student-athletes' NIL in re-broadcasts, high-lights, and other archival footage.<sup>164</sup>

More specifically, the court found that the plaintiffs did not show that they would compete against one another to sell their NIL because television networks must obtain NIL licenses of every school and player in whichever conference, tournament, or game the network is broadcasting.<sup>165</sup> Because a single student-athlete's

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*id.* at 989 (citing *Agnew*, 683 F.3d at 340). The court continued by ruling that simply because “this price-fixing agreement operates by undervaluing the name, image, and likeness rights that the recruits provide to the schools—rather than by explicitly requiring schools to charge a specific monetary price—does not preclude antitrust liability here.” *See id.* *See also* *Major League Baseball Properties, Inc. v. Salvo, Inc.*, 542 F.3d 290, 335 (2d Cir. 2008) (Sotomayor, J., concurring) (“While the MLBPA agreement does not specify a price to be charged, the effect of the agreement clearly eliminates price competition between the [teams] for trademark licenses. An agreement to eliminate price competition from the market is the essence of price fixing.”). In *O'Bannon*, the court cites to then-Judge Sotomayor's concurring opinion, which supports Judge Wilken's viewpoint that undervaluing, or setting the price at zero, does not eliminate price-fixing. *See id.* at 990.

160. *See O'Bannon*, 7 F. Supp. 3d at 988 (concluding that price-fixing of student-athletes' athletic scholarships constitutes unlawful restraint of trade).

161. *See id.* 968 (discussing plaintiffs' contention that absent NCAA rules student-athletes would join to sell NIL licenses to their schools, licensing companies, or media companies).

162. *See generally id.* (identifying plaintiffs' claims in group licensing market).

163. *See id.* at 996-98 (concluding that plaintiffs have not identified harm in either submarket for live game telecasts or videogames).

164. *See id.* at 998 (“[Plaintiffs] have not presented sufficient evidence to show that the NCAA has imposed any restraints in this submarket.”).

165. *See O'Bannon*, 7 F. Supp. 3d at 994-95 (suggesting that student-athletes would not compete in relevant market). The court provided an example of how a network would obtain a license to broadcast a game and determined that the teams would not compete to sell the licenses to the networks because “the group

NIL license would not have value alone, the student-athletes would not compete to sell these licenses.<sup>166</sup> Further, the networks already compete to obtain NIL licenses from schools and conferences.<sup>167</sup> Although the student-athletes may suffer because they do not receive compensation, the student-athletes failed to show harm to the competition.<sup>168</sup>

Similarly, the court did not find harm to the competition in the submarket for videogames because the developers would need to acquire the NIL licenses for all student-athletes in specific sets of teams.<sup>169</sup> Accordingly, each team would have an equal interest in “ensuring that the videogame developer acquired each of the group licenses required to create its product.”<sup>170</sup> Therefore, the plaintiffs failed to show harm in the videogame submarket.<sup>171</sup>

Lastly, the court did not find an unlawful restraint in the submarket for rebroadcasts and other archival footage, because the NCAA has designated T3Media as its agent in negotiating and man-

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licenses would constitute perfect complements: that is, every group license would have to be sold in order for any single group license to have value.” *See id.* at 995 (citing Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 *FORDHAM L. REV.* 2471, 2487 (2013)). In addition, the television network would only have to obtain the licenses of those players in that specific conference, tournament, or game. *See id.* Thus, those specific student-athletes would not compete with others outside of that event. *See id.*

166. *See O’Bannon*, 7 F. Supp. 3d at 995 (discussing lack of competition absent NCAA rules).

167. *See id.* at 995-96 (“Like the conferences, these pairs may freely compete against other pairs of schools whose games are scheduled for the same time in order to secure a contract with whatever networks can show games during that time slot.”).

168. *See id.* at 996-97 (concluding that plaintiffs have not showed harm to the competition). The Court did recognize that the plaintiffs showed harm to themselves because they do not receive compensation; however, the Court pointed out that injury to the plaintiffs is not sufficient to show harm to the competition. *See id.* at 997 (citing *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469 (9th Cir. 1986)). The alleged injury must reach beyond the claimant and “reach a field of commerce.” *See id.* at 994 (citing *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1992)).

169. *See O’Bannon*, 7 F. Supp. 3d at 998 (comparing submarket for videogames to submarket for live game telecasts and noting that no harm to competition exists).

170. *See id.* (concluding that teams and conferences would complement each other in this submarket as well). The teams licensing intellectual property to videogame developers would not compete against other teams outside of the “set” required to produce a videogame because “the videogame developer determined that those other teams’ group licenses were not required to produce the videogame.” *See id.*

171. *See generally id.* (determining lack of harm to competition in videogame market).

aging the licensing related to such footage.<sup>172</sup> T3Media is “expressly prohibited from licensing any footage that features current student-athletes” and must acquire licensing rights from former student-athletes; therefore, current and former student-athletes are deprived of nothing.<sup>173</sup> The court determined that the current and former student-athletes would not receive any more compensation absent the rules than they would otherwise receive with rules in effect.<sup>174</sup> Further, even if the plaintiffs proved a restraint, they could not show harm to the competition because, like the other two submarkets, schools lack the incentive to compete.<sup>175</sup>

### C. Procompetitive Justifications

After the court determined that the NCAA rules unlawfully restrained trade in the college education market, the burden shifted to the NCAA to show procompetitive reasons for the restraint.<sup>176</sup> The NCAA asserted the restraint on student-athlete compensation promotes and maintains: (1) its history and dedication to amateurism, (2) a competitive balance, (3) the integration of student-athletes into the academic community, and (4) an increase in the number of Division I basketball and FBS schools, student-athletes, and games.<sup>177</sup> After the NCAA proposed the procompetitive goals of the restraint, the court found that limited restrictions on student-athlete compensation may help schools achieve the goals of ama-

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172. See *O'Bannon*, 7 F. Supp. 3d at 998 (discussing T3Media's role in NCAA licensing). The court notes that T3Media cannot license footage featuring current student-athletes and must obtain the rights to use former student-athletes' NIL if they appear in the footage it licenses. See *id.* Thus, “no current or former student-athletes are actually deprived of any compensation for game re-broadcasts or other archival footage that they would otherwise receive in the absence of the challenged NCAA rules.” See *id.*

173. See *id.* (examining rights of T3Media).

174. See *id.* (discussing why there is lack of unlawful restraint in this submarket). For a further discussion as to why the NCAA does not unlawfully restrain the competition in this submarket, see *supra* note 172 and accompanying text.

175. See *O'Bannon*, 7 F. Supp. 3d at 998-99 (concluding that if restraint existed, still, there is zero harm to competition). Even if the plaintiffs showed unlawful restraint, “they have not presented sufficient evidence to show an injury to competition in this submarket” because “T3Media would have to obtain a group license from every team that has ever competed in FBS or Division I,” and those teams have no reason to compete against each other. See *id.*

176. See *id.* at 999 (introducing NCAA's procompetitive justifications and citing reason why NCAA must put forth procompetitive justifications). For a further discussion of the rule of reason analysis and balancing test, see sources cited *supra* notes 102-106 and accompanying text.

177. See *O'Bannon*, 7 F. Supp. 3d at 999 (noting four procompetitive reasons and introducing court's consideration of each).



teurism and integration.<sup>178</sup> However, the court ruled that the NCAA cannot rely on the asserted procompetitive goals of maintaining a competitive balance and increased output as justifications of the restraint.<sup>179</sup>

### 1. *Amateurism*

First, the NCAA asserted that the consumer demand for FBS football and Division I basketball hinges on the NCAA's preservation of amateurism.<sup>180</sup> The NCAA argued its primary focus is, and has always been, ensuring that student-athletes receive an education.<sup>181</sup> However, the court found contrasting evidence within the language of the NCAA's Bylaws as they were amended through the years, and was not persuaded by this argument.<sup>182</sup> The NCAA also

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178. *See id.* at 1001, 1003 (concluding that limited restrictions may help schools achieve procompetitive justifications of amateurism or student-athlete integration).

179. *See id.* at 1002, 1004 (concluding that challenged restraint does not help to achieve procompetitive justifications of maintaining competitive balance or increased output).

180. *See generally id.* at 973-78 (discussing NCAA's asserted justification that current restrictions on student-athlete compensation serve NCAA's longstanding tradition of amateurism). The NCAA presented and relied on "historical evidence, consumer survey data, and lay witness testimony . . ." *See id.* at 973.

181. *See O'Bannon*, 7 F. Supp. 3d at 973-975 (examining history of NCAA's amateurism principle). The court cites to the NCAA's first bylaw governing amateurism, which allowed "'player subsidies' and other illicit forms of payment." *See id.* at 974 (citations omitted). The court cites to more amateurism policies from the years 1916, 1922, 1948, and 1956, and discusses the changes in NCAA policy related to amateurism during that time. *See id.*

182. *See O'Bannon*, 7 F. Supp. 3d at 974-75 (comparing initial amateurism principle to current amateurism principle). The Court notes the "stark contrast" between the current amateurism policy and the initial policy. *See id.* at 975 ("Indeed, education—which the NCAA now considers the primary motivation for participating in intercollegiate athletics—was not even a recognized motivation for amateur athletes during the years when the NCAA prohibited athletic scholarships."). The court criticized the NCAA's reliance on its "malleable" principle of amateurism. *See id.* at 1000 (discussing ever-changing core principle of amateurism). The court provided examples to the inconsistencies:

The association's current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism. A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of "core principles."

*Id.* (critiquing NCAA's amateurism).

argued that its amateurism principle increases the consumer demand.<sup>183</sup> However, the court concluded that the NCAA's restrictions on compensation have not increased, or even significantly contributed to, the popularity of Division I basketball or FBS football—college sports fans are interested in college sports for other reasons.<sup>184</sup>

In sum, the NCAA did not persuade the court that the preservation of amateurism justifies the “rigid restrictions challenged in this case.”<sup>185</sup> However, the court did agree that limited restrictions would allow the NCAA to achieve this procompetitive goal without restraining competition in the market.<sup>186</sup>

## 2. *Competitive Balance*

Next, the NCAA asserted that the challenged restraints help to maintain a competitive balance throughout Division I basketball and FBS teams.<sup>187</sup> The court disagreed, referencing sports economists' conclusions that “the rules have no discernable effect on the level of competitive balance.”<sup>188</sup> Because schools do not pay more than allowed, they spend the extra profit from athletics on coach-

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183. See *O'Bannon*, 7 F. Supp. 3d at 975 (introducing and examining NCAA's consumer survey on demand of college football in relation to commitment to amateurism). The Court pointed to inconsistent responses in the survey and irrelevance of many questions to the issue of *O'Bannon*. See *id.* For example, an open-ended question in the survey related to student-athletes receiving compensation, which most commonly people thought to mean “receiving some form of illegal or illicit payments.” See *id.* (internal citations omitted) (criticizing survey and its relation to issues in *O'Bannon*). People also reported they would be less likely to watch college sports if student-athletes were paid, but favored paying student-athletes. See *id.* at 976.

184. See *O'Bannon*, 7 F. Supp. 3d at 977-78 (reasoning that college sports fans enjoy watching college sports for other reasons, such as loyalty).

185. *Id.* at 1001 (concluding that NCAA's restrictions are too strict to achieve procompetitive justifications).

186. See *id.* at 100-01 (discussing consumer survey and what survey suggests). Despite its inconsistencies, the relied upon survey did indicate “the public's attitudes toward student-athlete compensation depend heavily on the level of compensation that student-athletes would receive.” See *id.* Therefore, the court concluded that the NCAA's rules “may justify a restriction on large payments to student-athletes while in school . . . .” See *id.* at 1001.

187. See *O'Bannon*, 7 F. Supp. 3d at 978-79 (discussing NCAA's alleged procompetitive justification in depth, including NCAA's evidence from trial).

188. *Id.* at 978 (citations omitted) (referencing witnesses' trial testimony). The court continued by stating that the “consensus among sports economists who have studied the issue . . . is that the NCAA's current restrictions on compensation do not have any effect on competitive balance.” See *id.* at 1001. One witness testified to an article which concluded that NCAA regulations, at best “appear to have had a very limited effect, and at worst they have served to strengthen the position of the dominant teams.” See *id.* at 1002 (citations omitted) (quoting article written by Katie Baird on competitive balance in sports).

ing, recruiting, and training facilities in, what witnesses referred to as, an “arms race.”<sup>189</sup> Therefore, high budgets in other areas eliminate any “leveling effect” of restrictions on student-athlete compensation.<sup>190</sup> Those high revenue schools continuously profit from the NCAA March Madness Tournament and FBS Bowl Games leaving mid-majors and other less competitive conferences to suffer, which “hinders . . . competitive balance.”<sup>191</sup> In sum, the court concluded that the NCAA’s rules are not necessary to maintain a competitive balance.<sup>192</sup>

### 3. *Integration of Academics and Athletics*

The NCAA asserted that the restrictions on student-athlete compensation promote the integration of student-athletes into the general student body, so paying student-athletes “would potentially ‘create a wedge’ between student-athletes and others on campus,” including professors.<sup>193</sup> Specifically, the NCAA argued that the integration of student-athletes into the general academic community benefits the student-athletes because they retain access to programs that foster academic growth.<sup>194</sup> The court stated that the educa-

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189. *See id.* at 1002 (stating that college sports’ revenues have grown since 1980s, which gives college athletic programs ability to spend more money on other areas to improve program and appeal to recruits).

190. *See id.* (noting that changes in revenue that have changed NCAA member schools’ budgeting do not keep competitive balance among schools).

191. *See O’Bannon*, 7 F. Supp. 3d at 979 (discussing NCAA’s “unequal” revenue distribution formula). The court stated that the NCAA’s revenue distribution formula “rewards the schools and conferences that already have the largest athletic budgets” because the revenues are distributed depending on how conferences’ member schools have performed in the NCAA tournament in the past six years. *See id.* (discussing revenue distribution formula). *See also* NAT’L COLLEGIATE ATHLETIC ASS’N, 2013-14 Division I Revenue Distribution Plan, NCAA, <https://www.ncaa.org/sites/default/files/2013-14%20Revenue%20Distribution%20Plan.pdf> (last visited Jan. 2, 2015) [hereinafter “Revenue Distribution”] (charting and discussing different areas where NCAA Division I revenue goes and why). *See also* Chris Smith, *March Madness: A Trip to the Final Four is Worth \$9.5 Million*, FORBES (March 14, 2012), <http://www.forbes.com/sites/chrissmith/2012/03/14/march-madness-a-trip-to-the-final-four-is-worth-9-5-million/> (discussing value of NCAA March Madness Tournament).

192. *See O’Bannon*, 7 F. Supp. 3d at 1002 (concluding that NCAA cannot rely on “competitive balance” as procompetitive justification of student-athlete compensation restrictions).

193. *See O’Bannon*, 7 F. Supp. 3d at 980 (discussing NCAA’s evidence to support integration of student-athletes as procompetitive justification of restraints on compensation). University administrators testified at trial that, depending on how much money student-athletes received, a gap could form in which student-athletes separate themselves from the academic campus. *See id.*

194. *See id.* at 979-80 (discussing beneficial academic and educational support programs available to NCAA student-athletes). An expert witness for the NCAA testified that student-athletes benefit from a “better academic and labor market . . .

tional services are unrelated to the restrictions on compensation, and schools “offer most of these services to their student-athletes independently, uncompelled to do so by the NCAA, especially not by the challenged rules.”<sup>195</sup>

However, the court found that much of the benefits result from the NCAA’s prohibition on allowing all-athlete dorms, its prohibition on allowing student-athletes to practice more than a certain number of hours per week, and because the NCAA rules require student-athletes to attend class and meet certain grade point average requirements for athletic eligibility.<sup>196</sup> In consideration of the NCAA’s arguments, the court concluded that, NCAA schools cannot create a blanket prohibition on student-compensation in the future, but limited restrictions would help the schools prevent a wedge between student-athletes and non-student-athletes.<sup>197</sup>

#### 4. *Increased Output*

Last, the NCAA asserted that the rules restricting student-athlete compensation increase the number of FBS and Division I basketball schools, which increases opportunities to play for these intercollegiate athletic programs, otherwise known as “increased

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as compared to other members of their socioeconomic groups.” *See id.* (citations omitted). However, the court added that the mere participation in intercollegiate athletics with the challenged rules in place does not lead to the beneficial outcomes for students. *See id.* at 980. A “better academic and labor market” for a student-athlete from a disadvantaged background stems from “increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the challenged rules in this case.” *See id.*

195. *See O’Bannon*, 7 F. Supp. 3d at 980 (emphasis added) (disputing NCAA’s argument that challenged rules lead to academic and educational benefits for student-athletes). For a further discussion of the programs and the Court’s disagreement with the NCAA’s purported justification, see *supra* note 194 and accompanying text.

196. *See O’Bannon*, 7 F. Supp. 3d at 980 (remarking on NCAA rules that better foster student-athlete integration). The rules that “mostly” help the student-athletes to interact with faculty and non-student-athletes are not challenged in this case. *See id.*

197. *See id.* at 1003 (“[T]he only way in which the challenged rules might facilitate the ‘integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal.”). The court compared this procompetitive justification to the NCAA’s asserted amateurism justification, stating that “the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation, paid now or in the future, from licensing revenue generated from the use of student-athletes’ names, images, and likenesses.” *See id.*

output.”<sup>198</sup> The court disagreed with the NCAA’s argument that the challenged restraints attract schools with a commitment to amateurism.<sup>199</sup> The court also did not find that the restrictions on student-athlete compensation enable other low-budget schools to participate in Division I athletics.<sup>200</sup> Ultimately, the court ruled that the NCAA restrictions on student-athlete compensation do not result in an increased output, and, subsequently, schools would not leave these divisions if the rules changed.<sup>201</sup>

#### D. Alternatives

Because the NCAA presented enough evidence showing limited restrictions may achieve two procompetitive effects, the burden-shifted to the plaintiffs to prove that the procompetitive effects could be achieved effectively through a less restrictive, financially feasible manner.<sup>202</sup> The plaintiffs presented three less restrictive

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198. See generally *O’Bannon*, 7 F. Supp. 3d at 981-82 (discussing NCAA’s argument that challenged rules help to increase output of Division I basketball and FBS schools).

199. See *id.* at 1004 (noting NCAA’s argument: restrictions on compensation increase number of schools that participate in Division I sports because schools want to join NCAA Division I athletics for its commitment to amateurism). The court refuted this claim with trial exhibits that showed major conference representatives requesting to change the grant-in-aid rules, which shows that the schools are not drawn to Division I for its commitment to amateurism. See *id.* at 981, 1004 (discussing fact that schools wanted to change rules). Further, the NCAA’s amateurism policy is the same at all levels, not just Division I. See *id.* at 981. Schools’ hope for joining Division I likely stems from increased revenue and exposure. See *id.* at 981-82.

200. See *O’Bannon*, 7 F. Supp. 3d at 1004 (concluding that NCAA’s argument that rules enable schools to participate in Division I is “unsupported”). “Neither the NCAA nor its member conferences require high-revenue schools to subsidize the FBS football or Division I basketball teams at lower-revenue schools.” *Id.* Plaintiffs were not “seeking an injunction requiring schools to provide compensation to their student-athletes—they are seeking an injunction to permit schools to do so.” See *id.*

201. See *id.* at 982 (refuting NCAA’s argument). Further, there is no reason to believe that “athletic programs would be driven to financial ruin” if Division I schools could pay student-athletes. See *id.* at 1004.

202. See *O’Bannon*, 7 F. Supp. 3d at 1004-05 (discussing plaintiffs’ next steps and reasons for burden-shift). The court pointed to the NCAA’s evidence “suggesting that preventing schools from paying FBS football and Division I basketball players large sums of money while they are enrolled in school may serve to increase consumer demand for its product” and the evidence that “this restriction may facilitate its member schools’ efforts to integrate student-athletes into the academic communities on their campuses . . . .” See *id.* at 1004. Because the NCAA showed some justifications for the restrictions, “the burden shift[ed] back to Plaintiffs to show that these procompetitive goals can be achieved in ‘other and better ways’ . . . .” See *id.* (quoting *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1410 n.4 (9th Cir. 1991)). The court continued that the proposed alternatives must not have a significant increase on the costs. See *id.* at 1005 (citations omitted).

alternatives: (1) providing student-athletes with stipends; (2) holding in trust limited and equal shares of NIL license revenue; and (3) permitting student-athletes to receive limited compensation for school-approved third-party endorsements.<sup>203</sup> The court found two of the three proposed alternatives legitimate: stipends and trusts.<sup>204</sup>

First, the court found that stipends not exceeding the cost of attendance would “limit the anticompetitive effects of the NCAA’s current restraint without impeding the NCAA’s efforts” to achieve amateurism and athletic-academic integration.<sup>205</sup> A limited stipend would not interfere with the consumer demand for amateur athletics, nor would it hinder student-athlete integration into the general student body.<sup>206</sup>

Second, the court found that deferred payments held in a trust for student-athletes and equally distributed to the athletes upon expiration of NCAA eligibility would not affect amateurism or integration.<sup>207</sup> The NCAA may limit the payments and require the money come from NIL licenses in order to ensure its procompetitive goals are achieved.<sup>208</sup> The court concluded that the stipends and de-

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203. *See id.* at 982 (outlining plaintiffs’ proposed less restrictive alternatives to restraint).

204. *See id.* at 1005 (identifying two proposed alternatives as “legitimate”).

205. *See O’Bannon*, 7 F. Supp. 3d at 982-83 (explaining plaintiffs’ proposed stipends). The stipends “would only cover educational expenses” because they would be “capped at the cost of attendance.” *See id.* at 983. The Court remarked that the NCAA used to provide similar stipends, and NCAA President Mark Emmert testified that covering the full cost of attendance “would not violate the NCAA’s amateurism rules.” *See id.* (internal citations omitted) (referring to deposition and testimony).

206. *See id.* (elaborating on why proposed alternative is legitimate and would not decrease consumer demand or hinder student-athlete integration). In fact, the court believes that allowing stipends “would facilitate [student-athletes’] integration into academic life by removing some of the educational expenses that they would otherwise have to bear, such as school supplies, which are not covered by full grant-in-aid.” *See id.*

207. *See O’Bannon*, 7 F. Supp. 3d at 983 (discussing how plaintiffs’ proposition to hold money in trust for student-athletes would enable NCAA to achieve goals in less restrictive manner). The Court claimed that holding money in a trust would not affect the popularity of college sports, nor would it “erect any new barriers to schools’ efforts to educate student-athletes or integrate them into their schools academic communities.” *See id.* at 984.

208. *See O’Bannon*, 7 F. Supp. 3d at 983-84, 1005-05 (discussing feasibility of stipends and payments in trust). The court concluded that if the stipends did not exceed the cost of attendance and the payments in trust did not exceed five thousand dollars, the NCAA could still achieve its procompetitive goals. *See id.* at 982-984. Specifically, in response to the plaintiffs’ trust proposition, the NCAA witnesses were concerned that student-athletes may attempt to monetize the trust while still enrolled in school or borrow against the trust, to which the court stated that nothing suggests the NCAA’s current rules “would not suffice to prevent student-athletes from borrowing against their future compensation,” nor does any-

ferred payments would actually increase the price competition in the relevant markets and leave the NCAA's goals unharmed.<sup>209</sup>

The court rejected the plaintiffs' third proposition, which would allow student-athletes to receive money from endorsement contracts because the NCAA would not be able to protect student-athletes from commercial exploitation if student-athletes could commercially endorse products.<sup>210</sup> The court believed the NCAA's purposes of amateurism and student-athlete integration would suffer if student-athletes were to receive money from endorsements.<sup>211</sup> Also, the court noted that the plaintiffs did not necessarily wish to enjoin the NCAA from enforcing its rules prohibiting endorsements.<sup>212</sup>

### E. The Court's Game Plan

The *O'Bannon* court concluded that the NCAA's challenged rules unreasonably restrain trade.<sup>213</sup> The court issued an injunction against the NCAA to begin at the start of the next FBS football and Division I basketball recruiting cycles, which must not be stayed pending appeal.<sup>214</sup> The injunction prevents the NCAA from prohibiting its member schools and conferences from offering recruits a share of licensing revenue from student-athletes' NIL through stipends and holding money in a trust.<sup>215</sup> However, the NCAA may cap the amount of revenue offered to the student-athletes at \$5,000, but no less than the cost-of-attendance.<sup>216</sup>

The injunction does not prevent the NCAA from enforcing existing rules or enacting new rules that would prohibit student-ath-

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thing prevent the NCAA from "plac[ing] the money in a special account, such as a spendthrift trust, to prevent such borrowing." *See id.* at 984.

209. For a further discussion of the Court's acceptance of the plaintiffs' proposed alternatives, see *supra* notes 204-208 and accompanying text.

210. *See O'Bannon*, 7 F. Supp. 3d at 984 (ruling that allowing student-athletes to commercially endorse products is not less restrictive way to achieve NCAA's goals).

211. *See id.* (stating endorsement proposal "does not offer a less restrictive way for the NCAA to achieve its purposes.").

212. *See id.* (giving reason for denying third proposed alternative).

213. *See O'Bannon*, 7 F. Supp. 3d at 1007 (concluding that the NCAA's challenged rules unreasonably restrain trade in violation of Section 1 of the Sherman Act).

214. *See id.* at 1007-08 (discussing injunction in general).

215. *See id.* at 1008 (explaining injunction in depth).

216. *See O'Bannon*, 7 F. Supp. 3d at 1008 (noting limitations NCAA and member schools may place on stipends and trust accounts). The court reasoned as to why the schools can cap the trust at \$5,000. *See id.* Further, the court ruled that the schools may not "unlawfully conspire with each other in setting the amounts." *See id.*

letes from using the money held in trust while the student-athletes are in school.<sup>217</sup> Nor does the injunction prevent schools from enacting a rule that would prohibit a school from offering one recruit more than another.<sup>218</sup> Additionally, the NCAA still may limit the amount of football and basketball scholarships.<sup>219</sup> Further, the injunction does not preclude the NCAA from enforcing its current rules on endorsements, academic eligibility, athlete-only dorms, limited practice hours, or any other rule that achieves the NCAA's procompetitive goals.<sup>220</sup>

## VI. CRITICAL ANALYSIS

With the *O'Bannon* decision, the court blazes a new trail in a familiar forest. The court's antitrust analysis played out as expected, however, the decision to allow college athletes to receive compensation is unprecedented.<sup>221</sup> In past decisions, the NCAA has been subject to, and found in violation of antitrust law.<sup>222</sup> More commonly, however, courts find for the NCAA.<sup>223</sup> It is also common for the NCAA to settle lawsuits and avoid a judgment that would potentially disrupt its framework.<sup>224</sup>

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217. *See id.* (explaining injunction).

218. *See id.* (explaining injunction).

219. *See O'Bannon*, 7 F. Supp. 3d at 1008 (explaining injunction).

220. *See id.* (explaining injunction).

221. For a discussion of past decision, see *infra* notes 222-224 and accompanying text.

222. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984) (holding that NCAA's television plan was cartel and unreasonably restrained trade); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1024 (10th Cir. 1998) (affirming district court's order granting permanent injunction prohibiting NCAA from placing compensation limits on certain Division I entry-level coaching jobs).

223. *See, e.g., Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012) (dismissing student-athletes' claims that NCAA regulations capping scholarship numbers violates Sherman Act); *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 186 (3rd Cir. 1998) (finding that Sherman Act does not apply to NCAA's eligibility requirements and affirming grant of motion to dismiss student-athlete's claims for failure to state claim); *Banks v. Nat'l Collegiate Athletic Ass'n*, 746 F.Supp. 850 (N.D. Ind. 1990) (determining that NCAA's eligibility rules are procompetitive and reasonable under Sherman Act); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338 (5th Cir. 1988) (dismissing student-athletes' claim that NCAA's restrictions on compensation constitutes illegal price-fixing in violation of Sherman Act). *See also Tohanczyn, supra* note 39, at 411 (discussing various dismissals of antitrust claims against NCAA by both Supreme Court and circuit courts).

224. *See WONG, supra* note 3, at 509-10 (discussing *White v. National Collegiate Athletic Association*, in which student-athletes and NCAA settled over claims that NCAA's financial aid cap violated Sherman Act). In *White*, the NCAA agreed to pay the student-athletes an additional \$10 million and reimburse them for educational expenses. *See id.* at 510 (discussing *White v. Nat'l Collegiate Athletic Ass'n*,



In *O'Bannon*, the court agreed with the plaintiffs that the NCAA restricts competition to a certain extent, and accepted two of the three proposed less restrictive alternatives—allowing stipends and holding money in trust—but rejected the endorsement proposal.<sup>225</sup> The court feared that allowing student-athletes to receive compensation for endorsements would expose them to commercial exploitation.<sup>226</sup> Indeed, evidence presented to the court indicated that the NCAA has not always done its job in protecting student-athletes from exploitation; however, the court was not convinced that the NCAA would not be able to provide such protection in the future.<sup>227</sup>

Ironically, the *O'Bannon* case revolves around plaintiffs' claim that the NCAA commercially exploits student-athletes. One of the *O'Bannon* plaintiffs, Harry Flourony, stated the following: "[The case is] about human rights. There is an entire class of people—college athletes—who are being exploited by a powerful few. Someone had to take a stand, and [O'Bannon] had the courage and commitment to do so."<sup>228</sup> O'Bannon and the other plaintiffs

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CV06-0999 (C.D. Cal. Jan. 29, 2008)). The NCAA settles many non-antitrust lawsuits, as well. See *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203, 206-08 (Ohio Ct. App. 2009) (describing case background). In *Oliver*, the plaintiff brought an action seeking injunctive and declaratory relief against the NCAA because he wanted to prevent the NCAA from enforcing NCAA eligibility bylaws against him. See *id.* at 206-09. See also Alan C. Milstein, *Court Blows Fastball Down NCAA Pipe*, SPORTS LAW BLOG (Feb. 12, 2009), <http://sports-law.blogspot.com/2009/02/court-blows-fastball-down-ncaa-pipe.html> (discussing basis of Oliver's argument and NCAA's hypocrisy).

225. For a further discussion of the court's decision, see *supra* notes 203-211 and accompanying text. But see Corgan, *supra* note 39, at 415 (arguing that providing student-athletes with stipends will not fix problem). "The risk/reward relationship currently weighs in favor of accepting benefits from sports agents because these student-athletes have no other source of income." *Id.* at 418.

226. See *O'Bannon*, 7 F. Supp. 3d at 984 (rejecting plaintiffs' third proposed less restrictive alternative). According to the Court, allowing student-athletes to receive compensation from endorsement deals would "undermine the efforts of the NCAA and its member schools" to protect student-athletes against commercial exploitation. See *id.* But see Corgan, *supra* note 39, at 415 ("By permitting student-athletes to seek and accept endorsement deals, the NCAA would essentially eliminate the need for student-athletes to improperly accept money from sports agents.").

227. See *id.* (trusting NCAA will work to ensure student-athletes are protected from commercial exploitation in future). For a further discussion concerning incidents of commercial exploitation in the NCAA, see *supra* notes 76-88 and accompanying text.

228. See Shipnuck, *supra* note 8, at 56 (emphasis added) (discussing support O'Bannon has received from his dedication to this lawsuit). O'Bannon told Shipnuck that the suit "is about acknowledging that it's the athletes who make college sports such a big business. They don't need to be given a ton of money, but how about a nice stipend so they can buy some new clothes or take their girl to a decent restaurant?" See *id.*

were taking a stand against the NCAA's exploitation of student-athletes.<sup>229</sup> But, the NCAA argued that allowing student-athletes to personally receive money for the use of their NIL through endorsement contracts would leave the student-athletes open to commercial exploitation—and the court agreed.<sup>230</sup> The court does not address this irony in its opinion.<sup>231</sup>

The NCAA makes a significant amount of money from television contracts, ticket sales, and merchandise sales, which all involve the need for student-athletes' NIL.<sup>232</sup> College athletics would not, and could not, exist without the student-athletes who bring excitement and a sense of school pride to the programs.<sup>233</sup> The NCAA reaps monetary gains, but the student-athletes do not. If student-athletes were permitted to land endorsement contracts, the student-athletes would have the chance to keep the money earned from the use of their NIL.<sup>234</sup>

## VII. IMPACT

*“You’re telling me it’s because the numbers didn’t look right? Because the numbers didn’t look right? And you’ll go home and sleep in a comfortable, big-ass house. But it’s OK. . . . Some of these cats came from 3,000 miles away to play here, to be a part of this. To be a part of all of this. But you say ‘numbers’?”*<sup>235</sup>

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229. See Shipnuck, *supra* note 8, at 54-56 (exposing O'Bannon's reasons for following through with lawsuit). O'Bannon claimed the following: “Reform is coming. I think public opinion has changed dramatically. The NCAA is going to have to change too. Their rules are so outdated, they can’t get away with it forever.” See *id.* at 54.

230. For a further discussion, see *supra* notes 210-211 and accompanying text.

231. See generally *O'Bannon*, 7 F. Supp. 3d 955.

232. For a further discussion into the NCAA's annual revenue and sources of revenue, see *supra* notes 2-3, 39 and each note's accompanying text.

233. See *O'Bannon*, 7 F. Supp. 3d at 977-78 (citing to testimony of three witnesses discussing reasons for consumer demand of NCAA Division I basketball and FBS football, noting loyalty to alma maters and schools in fans' geographical regions).

234. See Corgan, *supra* note 39, at 415 (arguing that allowing student-athletes to accept endorsement deals would eliminate many problems with NCAA's compensation rules). Corgan argues that paying student-athletes “thirty to fifty dollars per month (or \$360 to \$600 a year) would not lessen the desire for poor student-athletes to accept thousands of dollars from sports agents.” See *id.* Extra-collegiate boosters and agents involvement in NCAA athletics consistently tends to plague the NCAA's amateurism system and causes commercial exploitation of student-athletes, which the NCAA seeks, and is seeking, to avoid. See *supra* note 76-88, 210-212, and accompanying text.

235. Braylon Rumph, UAB Football Players in Disgust #FREEUAB, YouTube (Dec. 2, 2014), <https://www.youtube.com/watch?v=eAvSuQEh6II&app=desktop>

Should the court's decision in *O'Bannon* withstand the NCAA's appeal, the impact of this decision will reach far into the future of college athletics. The court's decision will significantly impact college basketball, women's and lower-revenue sports, and the structure of the NCAA as an organization. If the court allowed for student-athletes to receive money from licensing their own NIL, they would be paid by the third-party companies, such as Nike or Adidas, and the following issues may not be as imminent.

### A. NCAA Structure

The spillover effect from the court's decision in *O'Bannon* has potential to change the entire structure of the NCAA. Ed O'Bannon and his team of plaintiffs fought this case to trial, which many other plaintiffs did not do.<sup>236</sup> With their victory, albeit currently in the appellate process,<sup>237</sup> the plaintiffs are giving hope to those involved in other lawsuits against the NCAA.<sup>238</sup>

The court's order cannot be stayed pending appeal.<sup>239</sup> Thus, if the appellate process is not complete prior to the next recruiting

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(documenting Tristan Henderson's, a University of Alabama at Birmingham football player, emotional reaction to University shutting down its football program).

236. For a further discussion, see *supra* notes 223-224 and accompanying text.

237. See Steve Berkowitz, *NCAA Files Reply in O'Bannon Appeal*, USA TODAY (Feb. 11, 2015), available at <http://www.usatoday.com/story/sports/college/2015/02/11/ncaa-ed-obannon-appeal-1984-supreme-court-ruling/23267753/> (discussing history of NCAA's appeal and current state of appeal).

238. Other recent lawsuits involve student-athletes and those on their behalf fighting against the NCAA's traditional structure. For example, lawyer Jeffrey Kessler filed a suit against the NCAA seeking an open market instead of the restrictions on compensation also fought in *O'Bannon*. See Steve Eder, *How Kessler's Lawsuit Could Change College Sports*, N.Y. TIMES, Aug. 27, 2014, [http://www.nytimes.com/2014/08/28/sports/how-jeffrey-kesslers-lawsuit-could-change-college-sports.html?\\_r=0](http://www.nytimes.com/2014/08/28/sports/how-jeffrey-kesslers-lawsuit-could-change-college-sports.html?_r=0) (transcribing conversation with Kessler regarding lawsuit). He envisions an open market where the price is not fixed at scholarship money, or even \$5,000 over the scholarship amount. See *id.* Additionally, in March 2014, the National Labor Relations Board Regional Chicago Office held that the Northwestern University football players were employees under the National Labor Relations Act. See generally, e.g., Jon Solomon, *NCAA and Others File Briefs in Northwestern Football Union Effort*, CBS SPORTS (July 3, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24606865/ncaa-and-others-file-briefs-in-northwestern-football-union-effort> (discussing Northwestern lawsuit and NCAA's brief in support of University's efforts to combat unionization ruling); Patrick Vint, *Explaining What the Northwestern College Football Union Decision Means*, SB NATION (Mar. 27, 2014), <http://www.sbnation.com/college-football/2014/3/27/5551014/college-football-players-union-northwestern-nlrb> (explaining NLRB's ruling that student-athletes can unionize).

239. For a further discussion of the court's ruling in *O'Bannon*, see *supra* note 214 and accompanying text.

cycle, eligible schools will likely promise top recruits money.<sup>240</sup> Should schools choose to pay student-athletes, the schools might not be able to use the money made from Division I basketball and FBS football to fund other aspects of the university.<sup>241</sup> Paying student-athletes will likely lead to less money made from the athletics department finding its way into a university's general budget, coaches' salaries, athletic facilities, or other amenities.<sup>242</sup>

If the court's decision is overturned after a recruiting class has been promised money, and members of that recruiting class have signed National Letters of Intent,<sup>243</sup> the NCAA member schools should allow those student-athlete recruits to be released from the contract, if they chose a school because of the monetary incentive, much like when a coach leaves a school after student-athletes have signed National Letters of Intent.<sup>244</sup>

In respect to future antitrust lawsuits, in *O'Bannon*, the NCAA posed four procompetitive defenses, of which the court accepted

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240. For a further discussion of the court's ruling in *O'Bannon*, see *supra* notes 213-220 and accompanying text.

241. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014) ("revenues from FBS football and Division I basketball have grown exponentially since *Board of Regents* was decided and that, as a result of this growth, many schools have invested more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes."). For a further discussion of how schools spend money made from athletics, see *supra* notes 55-56, 73, 80-81, and 88 and their accompanying texts.

242. For a further discussion of money made from athletics, see *supra* notes 55-56, 73, 80-81, and 88 and their accompanying texts.

243. See generally OPERATING BYLAWS, *supra* note 4, art. 13 (noting NCAA recruiting rules). Student-athletes sign National Letters of Intent in order to be given written scholarship offers to play at a NCAA member school. See OPERATING BYLAWS, *supra* note 4, art. 13.9.1.

244. Because the National Letter of Intent is a contract between the prospective student-athlete and the NCAA member school, the prospective student-athlete cannot simply break the contract because the coach who recruited him left the school before the student-athlete began his enrollment at the NCAA member school. See NCAA, *The National Letter of Intent*, NCAA, <http://www.ncaa.org/about/resources/media-center/national-letter-intent> (last visited Dec. 1, 2014) (answering frequently asked questions regarding National Letters of Intent). See also National Letter of Intent, *NLI Provisions: Coaching Changes*, NATIONAL LETTER, <http://www.nationalletter.org/nliProvisions/coachingChange.html> (last visited Dec. 1, 2014) ("I understand I have signed this NLI with the institution and not for a particular sport or coach. If a coach leaves the institution or the sports program (e.g., not retained, resigns), I remain bound by the provisions of this NLI."). However, the student-athlete can request a release, which the school can choose to grant. See NCAA, *supra* this note ("The release process consists of a prospective student-athlete submitting a release request to his or her school. If the school declines the release, the prospective student-athlete may appeal to an NLI review committee.").

two.<sup>245</sup> Therefore, with *O'Bannon* as precedent, and assuming the decision is upheld on appeal, the NCAA will likely be unable to rely on all four procompetitive effects in future lawsuits, depending on the claims alleged against the NCAA.

## B. Budgeting and Basketball

*O'Bannon* will have a large impact on Division I college basketball. The NCAA March Madness Tournament produces significant revenue for the NCAA.<sup>246</sup> The NCAA has a "Basketball Fund" that is distributed to Division I conferences based on a conference's NCAA March Madness Tournament performance over six years.<sup>247</sup> Each game is worth a monetary amount, which has increased at a steady rate since 2009, and it is estimated that one single game played in the 2017 Tournament will be worth \$1.9 million.<sup>248</sup> This revenue distribution structure benefits mid-major schools and Cinderella teams who seem to have smaller programs and come from less-dominant conferences.<sup>249</sup> Schools put a large amount of money into their basketball programs, hoping to score a generous payout from the NCAA Tournament.<sup>250</sup>

However, after *O'Bannon*, mid-major schools and other schools with historically smaller football programs may slowly become memories in the NCAA Basketball Tournament.<sup>251</sup> With the introduc-

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245. For a further discussion of the NCAA's proposed procompetitive justifications and the court's decision to accept two, see *supra* notes 177-201 and accompanying text.

246. See WONG, *supra* note 3, at 19 (discussing profitability of NCAA Men's March Madness Tournament).

247. See Revenue Distribution, *supra* note 191, at 7-9 (discussing "Basketball Fund"). "In 2014, each basketball unit will be approximately \$250,100 for a total \$193.58 million distribution." See *id.* at 7.

248. See Smith, *supra* note 191 (discussing steady increase in worth of NCAA Basketball Tournament). At the rate the monetary amount of a single game in the NCAA Tournament is increasing, "a team in the Final Four, after having played in five Tournament games, will make approximately \$9.5 million." See *id.*

249. See Smith, *supra* note 191 (discussing "immense value" of Tournament). The Tournament benefits smaller schools "that manage multiple underdog victories." See *id.* For example, "VCU spent just \$2.8 million on basketball last year, but the Rams' Final Four run will earn the Colonial Athletic Association about \$8.75 million over the next few years." See *id.* See also Revenue Distribution, *supra* note 191, at 9 (listing distribution of basketball fund to different conferences).

250. See Smith, *supra* note 191 (arguing that because Tournament is so successful, schools put large amounts of money into their basketball programs).

251. See generally Alexander Wolff, *Members Only: By 2039, the NCAA Tournament Will Look Very Different*, SPORTS ILLUSTRATED (Aug. 18, 2014), <http://www.si.com/college-basketball/2014/08/18/ncaa-tournament-future> (posing hypothetical future of college basketball where five powerful conferences ran other conferences out of relevance because five conferences could afford to pay student-athletes and others could not). Writing from the anticipated year 2039, Wolff

tion of stipends and trusts, schools with historically smaller football programs will unlikely be able to keep up with schools that also profit from football.<sup>252</sup> Competition for top football recruits will begin to have a monetary aspect, because schools may begin promising recruits stipends or trust payments, until the appeals court determines otherwise.<sup>253</sup> This competition will likely cause a ripple effect, and schools with bigger budgets from football will be able to offer basketball recruits money, thus, will be able to maintain a competitive basketball program and continue post-season play. However, schools that make money solely from basketball will slowly lose competitiveness as bigger schools begin dominating the recruiting field in the rich-get-richer fashion.

### C. Women's and Lower Revenue Sports

Because the *O'Bannon* decision only affects Division I men's basketball players and FBS football players, it will impact other sports, including women's sports. The demands of maintaining a Division I program are high.<sup>254</sup> Schools with lower budgets allotted to sports may have to cut programs that do not produce revenue to maintain sports teams.<sup>255</sup>

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states, "former mid-major powers as Butler, Gonzaga and VCU, with no football revenue or windfall from massive TV contracts, lapsed into mediocrity." *See id.* He writes that schools like Villanova and Georgetown, who do not have a football television deal (both play in FCS), could no longer "afford to take a priest for the bench on road trips and both fell into irrelevancy." *See id.* He predicts that by 2031 most of the "lesser leagues" will flee to Division II or Division III. *See id.*

252. *See* Wolff, *supra* note 251 (discussing eventual decline of athletic programs at schools with historically smaller football programs). For a further discussion of Wolff's article, see *supra* note 251.

253. For a further discussion of the court's decision in *O'Bannon*, see *supra* notes 205-209, 215-216, and accompanying text.

254. *See* KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, COLLEGE SPORTS KNIGHT COMMISSION 101, 9-12 (2009), available at <http://www.knightcommission.org/collegesports101/table-of-contents> (discussing expenses of Division I athletics, particularly FBS football). In its chapter titled "Expenses," the Knight Commission discusses why maintaining an FBS football program costs so much. *See id.*

255. *See, e.g., UAB Shutting Down Football Program*, ESPN (Dec. 3, 2014), [http://espn.go.com/college-football/story/\\_/id/11967626/uab-blazers-shut-football-program](http://espn.go.com/college-football/story/_/id/11967626/uab-blazers-shut-football-program) (discussing University of Alabama at Birmingham's reason for cutting football program); Jeff Blumenthal, *Experts: Temple Cut Sports Because Football Not Producing Enough Revenue*, PHILADELPHIA BUSINESS JOURNAL (Dec. 10, 2013), <http://www.bizjournals.com/philadelphia/news/2013/12/10/experts-temple-cut-sports-because.html?page=all> (discussing Temple University's decision to cut seven varsity sports to save approximately \$3 million).

Additionally, this decision may affect Title IX compliance at the schools.<sup>256</sup> Title IX, enacted in 1972, requires gender equality in educational programs, including sports scholarships and opportunities.<sup>257</sup> Because *O'Bannon* permits schools to offer male basketball and football recruits money,<sup>258</sup> a potential for inequality to women exists, because under Title IX, no person shall suffer discrimination on the basis of gender under any education program or activity that receives Federal financial assistance.<sup>259</sup> Athletic scholarships are part of a school's financial aid, falling under Title IX regulations; therefore, men cannot receive more benefits or opportunities than women in the realm of intercollegiate athletics.<sup>260</sup>

Under a trust program, male athletes will receive the trust money upon surrendering their eligibility, which might be a problem because the schools will have enticed the student-athletes to come to the school for the money and will have saved the money for them, providing them with a greater benefit than the female student-athletes.<sup>261</sup> The stipends, however, may pose a larger issue because the money will cover the cost of attendance and will be

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256. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (1972).

257. See *id.* (“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 . . .”). See also *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (noting that Title IX prohibits gender inequity in athletics).

258. For a further discussion of the court's decision in *O'Bannon*, see *supra* notes 205-209, 215-216, and accompanying text. Note that *O'Bannon* concerned male student-athletes who play Division I basketball and FBS football. See *O'Bannon*, 7 F. Supp. 3d at 965 (describing plaintiffs in case).

259. See 20 U.S.C.A. § 1681 (prohibiting sex discrimination). But see Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward For College-Athlete Rights, And A Gateway For Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2355-58 (arguing that Title IX claim may fail under certain court decision in *Stanley v. University of Southern California* (citing *Stanley v. S. Cal.* 13 F.3d 1313 (9th Cir. 1994))). *Stanley* is a Ninth Circuit case in which the court rejected a motion to enjoin USC from paying its men's basketball coach more than its women's basketball coach. See *Stanley*, 13 F.3d at 1316 (summarizing case). See also Edelman, *supra* this note, at 2358 (discussing facts of *Stanley* and its relation to Title IX and *O'Bannon*).

260. See *Haffner v. Temple Univ. of the Com. System of Higher Educ.*, 678 F.Supp. 517, 538 (E.D.Pa. 1987) (“[A]thletic scholarships are a part of the University's financial aid program, and are within the ambit of Title IX.”).

261. See Michael McCann, *What Ed O'Bannon's Victory Over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED (Aug. 9, 2014), <http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (arguing that *O'Bannon* outcome “will not necessarily lead colleges to violate Title IX” because student-athletes will not receive payment until expiration of eligibility, but might because funds “accrued while they were in school.”).

immediately realized for the male student-athletes.<sup>262</sup> Schools must plan accordingly.

### VIII. CONCLUSION

The *O'Bannon* decision will have a positive effect on the future for NCAA Division I men's basketball and FBS football players. The decision has the potential to change the entire landscape of the NCAA. Because the court ruled in favor of allowing for stipends and trusts, colleges and universities will have to reevaluate their recruiting processes, adhering strictly to their financial limitations and compliance policies, should *O'Bannon* withstand appeals.

*Meghan Rose Price\**

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262. *See id.* (stating that trusts may not be issue for Title IX purposes). However, schools are allowed to provide stipends to the eligible student-athletes, which may pose a problem for Title IX compliance. *See O'Bannon*, 7 F. Supp. 3d at 1008.

\* J.D. Candidate, May 2015, Villanova University School of Law; B.A., Villanova University, 2011. I dedicate this Castenote to my grandfather. Thank you for encouraging me to research and learn about as much as I can. Thank you to my parents, family, friends, and angels in Heaven for your unconditional and eternal support. Joey, thank you for showing me what it means to be a hardworking student-athlete. Colleen, thank you for being my biggest fan. God Bless America.