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Student is a Nice Name for Free Labor

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STUDENT IS A NICE NAME FOR FREE LABOR

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The National Collegiate Athletic Association (NCAA) contends that the principle of amateurism protects student-athletes and ensures that their number one priority is education. Although this may have been true when the NCAA was formed, the commercialization of college sports and accompanying monetary incentives have enticed the NCAA to enforce rules that exploit student-athletes at the detriment of their education.

The NCAA's impure motives are no longer going unnoticed. The public is disgusted by what it sees in the media. Student-athletes are rebelling by suing the NCAA for violating federal antitrust laws. The states are passing laws that give the NCAA no choice but to make a change. Courts are chipping away at the principle of amateurism one case at a time.

The NCAA must be held accountable. This note proposes a three-part, student-centered solution to reform the current state of affairs. First, the United States Supreme Court should definitively hold that the principle of amateurism is not a legitimate procompetitive purpose for the NCAA to pursue. Second, the NCAA should abolish the principle of amateurism and create a line of demarcation between college and professional athletics by redefining the term "student-athlete" to place an appropriate emphasis on education. Third, the universities should improve the current curriculum options offered to student-athletes.

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I. INTRODUCTION

The National Collegiate Athletic Association (NCAA) claims that the number one priority of a Division I student-athlete is education, while the competitive sport is an extracurricular activity.[1] The NCAA contends that its rules protect student-athletes from dangerous athletic practices and exploitation.[2] Although these claims may have been true when the NCAA was formed, the commercialization of college sports and accompanying monetary incentives have enticed the NCAA to enforce rules that exploit student-athletes at the detriment of their education.[3]

Student-athletes provide free labor to the NCAA and member universities, while the NCAA rakes in millions of dollars in revenue.[4] The NCAA has strict rules prohibiting student-athletes from seeking representation, receiving compensation, entering a professional draft, benefiting from their own name, image, or likeness, etc.[5] Student-athletes who disagree with the anticompetitive effects of these rules have filed numerous lawsuits against the NCAA.[6] The NCAA has continued to fight back by arguing that the principle of amateurism justifies the anticompetitive rules.[7]

The NCAA has successfully exploited student-athletes under the guise of amateurism for years, but as of late, "[t]hreats [against the NCAA] loom on multiple fronts: in Congress, the courts, breakaway athletic conferences, student rebellion, and public disgust."[8] In response to these threats, the NCAA will likely modernize the name, image, and likeness rules.[9] However, the NCAA has made it clear that it will not abandon the principle of amateurism.[10]

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1. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2020-2021 DIVISION I MANUAL §§ 2.9, 2.15 (2020) [hereinafter NCAA MANUAL].

2. *See id.*

3. *See* Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

4. *See id.*

5. NCAA MANUAL, *supra* note 1, § 12.1.2.

6. *See* Branch, *supra* note 3.

7. *See id.*

8. *Id.*

9. *See* Michelle Brutlag Hosick, *DI Council grants waiver to allow transfer student-athletes to compete immediately*, NCAA (Dec. 16, 2020, 6:31 PM), https://www.ncaa.org/about/resources/media-center/news/di-council-grants-waiver-allow-transfer-student-athletes-compete-immediately.

10. *See* Donald M. Remy, *NCAA statement regarding Supreme Court petition for Alston case*, NCAA (Oct. 15, 2020, 10:32 AM), https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-regarding-supreme-court-petition-alston-case.

Part II of this Note provides the necessary background information, including discussing the evolution of the NCAA and its path to becoming the economic powerhouse it is today.[11] The section then discusses the NCAA's expansion of the term "student-athlete," and how it avoided classifying student-athletes as employees.[12] Next, the section explains the rule, rationale, and reality behind the principle of amateurism.[13] The section then discusses the Sherman Antitrust Act and how it is relevant to NCAA litigation and provides a deeper analysis of amateurism.[14] Finally, the section outlines the major points of the name, image, and likeness debate[15] and Fair Pay to Play legislation.[16]

Part III of this Note identifies the legal problem associated with the vague and inconsistent principle of amateurism.[17] Part IV conducts an analysis of the legal problem and explains why the principle of amateurism should not be upheld.[18] The analysis section explains why the principle of amateurism is no longer consistent with reality.[19] The section then refutes the NCAA's procompetitive justifications for amateurism by detailing why amateurism does not keep college sports pure,[20] why amateurism is not essential for college sports to remain popular,[21] and why amateurism is more detrimental to education than helpful.[22] Next, the section analyzes the difficulties associated with making student-athletes employees.[23] The section then explains why allowing student-athletes to accept compensation from third-parties for the use of name, image, and likeness is a step in the right direction.[24] Lastly, the analysis section illustrates the concept of allowing professional athletes to compete at the intercollegiate level.[25]

The final portion of this Note, Part V, proposes a three-part, student-centered solution to reform the current state of affairs.[26] First, this section urges the United States Supreme Court to definitively hold that the principle of amateurism is not a legitimate procompetitive

11. *See infra* Part II.A.
12. *See infra* Part II.B.
13. *See infra* Part II.C.
14. *See infra* Part II.C.2.
15. *See infra* Part II.C.3.
16. *See infra* Part II.D.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part IV.A.
20. *See infra* Part IV.A.1.
21. *See infra* Part IV.A.2.
22. *See infra* Part IV.A.3.
23. *See infra* Part IV.B.
24. *See infra* Part IV.C.
25. *See infra* Part IV.D.
26. *See infra* Part V.

purpose for the NCAA to pursue.[27] Second, this section encourages the NCAA to abolish the principle of amateurism and create a line of demarcation between college and professional athletics by redefining the term "student-athlete" to place an appropriate emphasis on education.[28] Third, this section proposes improvements to the current curriculum options offered to student-athletes.[29]

II. BACKGROUND

A. The Evolution of the NCAA

The NCAA is an association that functions as a governing body for varsity-level competition in intercollegiate sports for men and women.[30] The association was founded in 1906 to protect student-athletes from dangerous athletic practices and exploitation.[31]

In the late 1800s and early 1900s, the brutality of college football caused numerous fatalities.[32] "A reported 18 boys were killed and 149 seriously hurt during the 1905 football season."[33] Public outrage and talk of ending the sport for good prompted the creation of the NCAA.[34] While the NCAA tried to enforce rules, it remained powerless for many years.[35]

It was not until 1951, when the NCAA hired Walter Byers to act as the first full-time executive director, that the NCAA was able to assert any force.[36] Byers created a small infractions board to set penalties against schools who did not comply with NCAA rules.[37] To put the NCAA back on the map, he used a scandal involving the University of Kentucky,[38] a reigning national basketball champion.[39]

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27. *See infra* Part V.A.

28. *See infra* Part V.B.

29. *See infra* Part V.C.

30. *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/National-Collegiate-Athletic-Association (last visited Jan. 25, 2021); *see also What is the NCAA*?, NCAA, https://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa (last visited Dec. 18, 2020) (noting that NCAA members include 1,098 colleges and universities and 102 athletic conferences).

31. ENCYCLOPEDIA BRITANNICA, *supra* note 30; *see* WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 7, 38-39 (1995).

32. *See id.*

33. *Id.*

34. *See* Branch, *supra* note 3.

35. *Id.* (explaining how the NCAA could not even successfully mandate helmets until 1939).

36. *See* BYERS & HAMMER, *supra* note 31, at 17, 56; *see also* Branch, *supra* note 3.

37. *See* Branch, *supra* note 3.

38. *See* BYERS & HAMMER, *supra* note 31, at 17 (noting a scandal involving illegal payments and point manipulation).

39. *See* Branch, *supra* note 3.

By lobbying and gaining the support of a Dean at the University of Kentucky, Byers successfully suspended the Kentucky basketball team for the entire 1952-53 season.[40] As a result, schools began to take the NCAA more seriously and comply with its rules.[41]

In the same year, the NCAA voted to outlaw televised games, but to retain the right to license a specific few through the association, including licensing certain football games to NBC for $1.14 million.[42] The NBC contract marked the start of rapid growth in revenue and power for the NCAA.[43] Byers went on to negotiate nearly fifty sports television contracts, securing a several multi-million dollar deals for the NCAA.[44]

By 1973, the NCAA was large enough to reorganize and create three levels of competition: Division I (most competitive), Division II, and Division III (least competitive).[45] Despite the three levels of competition, most of the NCAA's time and resources are spent on Division I athletics.[46]

The NCAA of today generates the majority of its revenue from "[t]elevision and marketing rights fees, primarily from the Division I men's basketball championship. Championship ticket sales provide most of the remaining dollars."[47] The NCAA generates $867.5 million in revenue from the Division I Men's Basketball Championship and $177.9 million in revenue from ticket sales for championships.[48] The NCAA distributes these funds in the following ways: $222 million is "[d]istributed to Division I schools to help fund NCAA sports and provide scholarships for college athletes[;]" $168.8 million is "[d]istributed to Division I conferences and independent schools[,] based on their performance in the men's basketball tournament over a six-year rolling period[,]" "to fund NCAA sports and provide scholarships for college athletes[;]" $153.8 million "[p]rovides college athletes the opportunity to compete for a championship and includes support for team travel, food, and lodging[;]" $86.6 million is "[d]istributed to Division I student-athletes for essential needs that arise

40. *Id.*; *see also* BYERS & HAMMER, *supra* note 31, at 17.
41. *See* Branch, *supra* note 3.
42. *Id.*
43. *Id.*
44. *See* BYERS & HAMMER, *supra* note 31, at 9.
45. *See* ENCYCLOPEDIA BRITANNICA, *supra* note 30.
46. *See Where Does the Money Go?*, NCAA, https://www.ncaa.org/about/where-does-money-go (last visited Dec. 22, 2020).
47. *See Finances*, NCAA, https://www.ncaa.org/about/resources/finances (last visited Dec. 22, 2020).
48. *See Where Does the Money Go?*, NCAA, https://www.ncaa.org/about/where-does-money-go (last visited Dec. 22, 2020).

during their time in college[;]" $64.5 million funds "catastrophic injury insurance, drug testing, student-athlete leadership programs, post graduate scholarships and additional Association-wide championships support[;]" $53.6 million is "[d]istributed equally among Division I basketball-playing conferences[,] that meet athletic and academic standards to play in the men's basketball tournament," "to fund NCAA sports and provide scholarships for college athletes[;]" $49.2 million is "[d]istributed to Division I schools to assist with academic programs and services[;]" $53.3 million "[f]unds championships, grants and other initiatives for Division II college athletes[;]" $23.3 million "[c]overs costs related to NCAA governance committees and the annual NCAA Convention[;]" $35.2 million "[f]unds championships, grants and other initiatives for Division III college athletes[;]" $10 million is "[d]istributed to Division I conferences for programs that enhance officiating, compliance, minority opportunities and more[;]" $3.8 million "[s]upports various educational services for members to help prepare student-athletes for life, including the Emerging Leaders Seminars and the Pathway Program[;]" $58.4 million "[i]ncludes support for Association-wide legal services, communications and business insurance[;]" and $ 44.8 million "[f]unds the day-to-day operations of the NCAA national office, including administrative and financial services, information technology and facilities management."[49]

In addition to growth of the NCAA's revenue, its body of rules has increased in complexity.[50] According to Byers, the NCAA evolved from "simple rules and personally responsible officials to convoluted, cyclopedic regulations;"[51] now, student-athletes are expected to comply with a 450-page manual.[52]

B. The NCAA's Carefully Crafted "Student-Athlete"

Walter Byers is known as "the man who built the NCAA, then tried to tear it down."[53] In his book, *Unsportsmanlike Conduct: Exploiting College Athletes*, Byers apologized for the mess he created.[54] He admitted that the NCAA purposely "crafted the term *student-athlete*" to

49. *Id.* ("The distributions listed are recurring, and the information does not include any one-time distributions.").

50. *See* BYERS & HAMMER, *supra* note 31, at 17.

51. *Id.*

52. *See generally* NCAA MANUAL, *supra* note 1.

53. Karen Given, *Walter Byers: The Man Who Built The NCAA, Then Tried to Tear it Down*, WBUR (Oct. 13, 2017), https://www.wbur.org/onlyagame/2017/10/13/walter-byers-ncaa.

54. *Id.*; *see generally* BYERS & HAMMER, *supra* note 31.

be ambiguous to avoid paying students workers' compensation.[55] Despite its ambiguity, the term student-athlete was cited by the courts in favor of the NCAA during workers' compensation cases.[56] For example, in the 1950s, Ray Dennison's widow filed for workers' compensation death benefits after her husband died from a head injury received while playing football for his college team.[57] The NCAA avoided liability in this case because Dennison was classified as a "student-athlete" and the university was not "in the football business."[58] After this case, "[*s*]*tudent-athlete* became the NCAA's signature term, repeated constantly in and out of courtrooms."[59]

A similar lawsuit was filed in the 1990s by Kent Waldrep, a running back at Texas Christian University (TCU), who became paralyzed after being tackled in a game.[60] TCU stopped paying his medical bills after nine months, leaving his family to rely on charity money.[61] The appeals court rejected Waldrep's workers' compensation claim because he could not be classified as an employee.[62] Their justification relied on the fact that he had not paid taxes on the financial aid he received.[63] The NCAA successfully crafted and implemented the term "student-athlete" and they justified it with the "principle of amateurism."[64]

C. The Principle of Amateurism

At the core of the NCAA is the "principle of amateurism," the idea that a professional athlete is prohibited from competing at the intercollegiate level.[65] The NCAA defines a professional athlete as "one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association."[66] The definition of compensation has evolved over time to allow students to be awarded "full cost of tuition" scholarships while

55. BYERS & HAMMER, *supra* note 31, at 69 (explaining that university's workers' compensation plans provide no coverage for disabling injuries student-athletes may suffer).
56. *See* Branch, *supra* note 3; *see also* BYERS & HAMMER, *supra* note 31, at 70.
57. *See* Branch, *supra* note 3; *see also* BYERS & HAMMER, *supra* note 31, at 70.
58. *See* Branch, *supra* note 3.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *See* Branch, *supra* note 3.
64. *See* BYERS & HAMMER, *supra* note 31, at 68-69.
65. *See* NCAA MANUAL, *supra* note 1, §§ 12.01.1, 12.01.2.
66. *Id.* § 12.02.11.

still being considered an amateur.[67] Under the "principle of amateurism," the NCAA Constitution states that:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[68]

The amateur status can be lost when the individual gets paid or accepts a promise of pay based on athletic skill, makes any commitment to play professional athletics, enters into a professional draft, or enters into an agreement with an agent.[69] If an individual loses the "amateur status," he or she becomes ineligible to compete in that particular intercollegiate sport.[70]

The NCAA is so adamant that student-athletes remain amateurs that the word "amateur" appears 191 times in the 2020-21 Manual.[71] The NCAA has articulated several justifications for upholding amateurism: (1) amateurism keeps college sports "pure;"[72] (2) amateurism is essential for college sports to remain successful and popular;[73] and (3) amateurism allows student-athletes to receive an education.[74]

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67. Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES (Jan. 17, 2015), https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html (reporting that in January 2015, the NCAA agreed to permit increased scholarships up to the full cost of attendance).

68. NCAA MANUAL, *supra* note 1, §2.9.

69. *See id.* § 12.1.2 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) Competes on any professional athletics team per Bylaw 12.02.12, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or (g) Enters into an agreement with an agent.").

70. *Id.*

71. *See generally* NCAA MANUAL, *supra* note 1.

72. *See* Branch, *supra* note 3.

73. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101-02 (1984); *see also* Thomas Baker, *Why The Latest NCAA Lawsuit Is Unlikely To Change Its Amateurism Rules—But Should*, FORBES (Sept. 11, 2018, 12:40 PM), https://www.forbes.com/sites/thomasbaker/2018/09/11/the-economics-of-amateurism-breaking-down-the-latest-lawsuit-against-the-ncaa/?sh=b13acd824788.

74. *See Bd. of Regents*, 468 U.S. at 124 (White, J., dissenting).

1. Amateurism in Practice

While justifications for amateurism sound reasonable, in practice they have led to absurd results. For example, A.J. Green, a Division I wide receiver, was penalized with a four-game suspension because he sold an old jersey to raise money for a spring-break trip.[75] According to the NCAA, the profit generated by the sale violated Green's amateur status.[76] "While he served the suspension, the Georgia Bulldogs store continued legally selling replicas of Green's No. eight jersey for $39.95 and up."[77] Similarly, the NCAA imposed a five-game suspension on Terrelle Pryor, Ohio State quarterback, for getting a tattoo that was discounted as a result of his football popularity.[78] Critics of the NCAA's strict policy argue that the fact that the sale of a jersey received a four-game suspension and getting a discount deserved a five-game suspension is evidence of the arbitrary nature of these penalties.[79]

James Paxton, a pitcher for the University of Kentucky, rejected a $1 million contract from the Toronto Blue Jays because he wanted to pitch for his team in the College World Series.[80] However, because Paxton used an agent to negotiate with the Blue Jays, he was in violation of the NCAA bylaws.[81] Paxton was suspended from the team because the University did not want to be reprimanded by the NCAA and jeopardize its chance to compete.[82] Paxton lost the opportunity to play for both the Blue Jays and his University.[83]

2. The Sherman Antitrust Act and NCAA Litigation

Section 1 of the Sherman Anti-Trust Act (hereinafter "Sherman Act") prohibits unreasonable restraints on trade.[84] In order to establish a Section 1 violation, a plaintiff must show: "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a

75. Branch, *supra* note 3.
76. *Id.*
77. *Id.*
78. *Id.*
79. *See id.*
80. *Id.*
81. Branch, *supra* note 3.
82. *Id.*
83. *Id.*
84. Sherman Antitrust Act of 1890, 15 U.S.C § 1 (2004) ("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."); *see* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (recognizing the Sherman Act as only prohibiting unreasonable restraints of trade).

rule of reason analysis; and (3) that the restraint affected interstate commerce."[85] The NCAA has been forced to defend its compensation and eligibility rules against antitrust challenges on numerous occasions.[86] Presently, only one Sherman Act violation claim filed against the NCAA has been heard by the Supreme Court of the United States, *NCAA v. Board of Regents of the University of Oklahoma.*[87]

In 1981, the NCAA's television plan limited the number of games a university could televise as well as the amount available to the public.[88] Frustrated by the NCAA's tight hold on this major revenue stream, several universities decided to disregard the contract plan and negotiate with a television network on their own.[89] The NCAA threatened to impose sanctions on the universities as punishment for entering into an independent contract.[90] Two universities, the University of Oklahoma and the University of Georgia, filed suit, alleging that the NCAA's control over the television rights was anticompetitive and an unreasonable restraint on trade.[91]

The district court sided with the universities and "defined the relevant market as 'live college football television.'"[92] The district court compared the NCAA's control to a "classic cartel."[93] The court of appeals affirmed, finding that the NCAA's plan constituted illegal per se price fixing.[94] The court of appeals rejected all three of the NCAA's arguments: the television plan promoted live attendance, athletically

85. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (quoting Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)).

86. Petition for a Writ of Certiorari at 29, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 2020 WL 6150345 (U.S. Oct. 15, 2020) (No. 20-512).

87. Jessica Gresko, *High court agrees to hear NCAA athlete compensation case*, AP NEWS (Dec. 16, 2020), https://apnews.com/article/athlete-compensation-basketball-elena-kagan-football-us-supreme-court-4fa2fc30e1a3f21329f4ec22cc55bb28. However, this will no longer be the case after the Supreme Court hears *Alston* in the Spring of 2021. Petition for a Writ of Certiorari, *supra* note 86; *see also* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 85 (1984).

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

89. *Id.* at 94-95.

90. *Id.* at 95.

91. *Id.* at 88.

92. *Id.* at 95.

93. *Id.* at 96 (making this comparison because the NCAA had "almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public."). Author Taylor Branch, also referred to the NCAA's control as a "classic cartel." *See* Branch, *supra* note 3. Branch explains that it was the influence of Walter Byers that made the NCAA the classic cartel it is today. *Id.* ("Byers, having negotiated the NCAA's television package up to $3.1 million per football season—which was higher than the NFL's figure in those early years—had made the NCAA into a spectacularly profitable cartel.").

94. *Bd. of Regents*, 468 U.S. at 97.

balanced competition, and effective competition with other television programming.[95]

The Supreme Court heard the case and made note that the issues in the case,[96] horizontal price fixing and output limitation, are usually viewed by the Court under a *per se* rule of illegality,[97] where an inquiry into a particular market is not necessary.[98] However, the Court found that it would be "inappropriate to apply a *per se* rule in this case [as] it involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."[99] Accordingly, the Supreme Court used the rule of reason standard to evaluate whether or not the restraint was unreasonable.[100] Under this standard, the Court is required to consider the impact of the competitive conditions.[101] The rule of reason analysis consists of three steps.[102] In step one, the plaintiffs produce evidence of "significant anticompetitive effects within a relevant market."[103] If the plaintiffs meet the burden set forth in step one, step two requires the defendants to provide "evidence of the restraint's procompetitive effects."[104] In step three, the plaintiffs must show that substantially less restrictive alternatives exist to achieve legitimate objectives.[105]

In *Board of Regents*, the NCAA was unable to convince the Supreme Court that maintaining a competitive balance was a procompetitive justification because in this situation, consumption would increase if controls were removed.[106] The NCAA was also unable to convince the Court that the broadcasting restraint was essential for the

95. *Id.*

96. *Id.*

97. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979) (explaining that the *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.").

98. *Bd. of Regents*, 468 U.S. at 100 (noting that when a *per se* rule is appropriate, restraint is presumed to be unreasonable without considering market context).

99. *Id.* at 86. ("The NCAA and its members market competition itself—contests between competing institutions," thus a rule of reason standard should be applied).

100. *Id.*; *see also* O'Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015) (stating the rule of reason three-step framework: (1) plaintiff must produce evidence of "significant anticompetitive effects within a relevant market" (2) if plaintiff meets burden, defendant provides evidence of "restraint's procompetitive effects" (3) plaintiff must show substantially less restrictive alternatives exist to achieve legitimate objectives).

101. *Bd. of Regents*, 468 U.S. at 103 (explaining that reasonableness can be determined on nature or character of contract or on surrounding circumstances).

102. *O'Bannon*, 802 F.3d at 1070.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Bd. of Regents*, 468 U.S. at 119-20.

preservation of amateurism by spreading revenues among the schools.[107] In dicta, the Supreme Court recognized the value of amateurism, but did not find this role consistent with rules that restrict output.[108] Ultimately, the Supreme Court affirmed the judgments of the lower courts, holding that the NCAA "restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."[109]

Student-athletes saw this holding as an opportunity to use the Sherman Act to put an end to amateurism. However, lower courts have continued to uphold the principle of amateurism by citing one line of dicta from *Board of Regents*, "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[110] In a string of federal appeals in 1988, 1992, and 2012, the NCAA successfully defended amateurism from the Sherman Act.

In 1988, a class action lawsuit was filed against the NCAA, *McCormack v. NCAA*,[111] alleging the NCAA violated antitrust and civil rights laws by restricting benefits awarded to student-athletes.[112] The NCAA distinguished this case from *Board of Regents* by arguing that, unlike the television restrictions, the eligibility rules have primarily noncommercial objectives, as they are intended to promote amateurism.[113] The Fifth Circuit applied the rule of reason and determined that the NCAA's eligibility requirements rationally furthered the goal of amateurism and did not pose an unreasonable restraint on trade.[114]

In 1992, a Notre Dame football player sued the NCAA in *Banks v. NCAA*,[115] on the grounds that the no draft and no agent rules constituted an illegal restraint on trade in violation of the Sherman Act.[116] Banks suffered from recurring football related injuries throughout his college

107. *Id.* at 87.

108. *Id.* at 120 ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics.").

109. *Id.* This decision "freed the football schools to sell any and all games the markets would bear. Coaches and administrators no longer had to share the revenue generated by their athletes with smaller schools outside the football consortium." Branch, *supra* note 3. Even though this was a major loss of revenue for the NCAA, "a rising tide of money from basketball concealed the structural damage of the Regents decision." *Id.*

110. *Id.* at 102.

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

112. *Id.* at 1340.

113. *Id.* at 1343.

114. *Id.* at 1343-45.

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

116. *Id.* at 1084.

career.[117] In an effort to fully recover, he decided to sit out for the football season of his fourth year.[118] During that time, he entered the National Football League (NFL) draft and contracted an agent to represent him.[119] He was not drafted but was informed "that he would have been invited to the regular NFL scouting try-outs if he had completed his collegiate eligibility."[120] He then decided to exercise his final year of eligibility,[121] but was barred by the NCAA for breaching the no draft[122] and no agent[123] bylaws.[124] The Seventh Circuit applied the rule of reason standard and ruled in favor of the NCAA, holding that Banks failed "to allege an anti-competitive impact on a discernible market."[125]

Circuit Judge Flaum dissented, acknowledging that the nationwide labor market for college football players does exist.[126] He explained that NCAA member colleges do in fact purchase the labor of players; "[t]he players agree to compete in football games sponsored by the colleges, games that typically garner the colleges a profit, in exchange for tuition, room, board and other benefits."[127] He further reasoned that the no draft rule is anticompetitive because a university offering students the ability to return to intercollegiate athletics if the draft proves unsuccessful would be more attractive to an elite student-athlete than a university declining to offer that opportunity.[128] Judge Flaum recognized that the principles of amateurism are not consistent with reality; while college football generates nonpecuniary benefits, it is also highly commercialized and profitable.[129]

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117. *Id.* at 1083.
118. *Id.*
119. *Id.*
120. *Id.*
121. Banks v. NCAA, 977 F.2d 1081, 1083 (7th Cir. 1992) (noting that NCAA rules only allow an athlete to play four seasons of an intercollegiate sport within five years of entering college).
122. *See* NCAA MANUAL, *supra* note 1, § 12.2.4.2 ("After initial full-time collegiate enrollment, an individual loses amateur status in a particular sport when the individual asks to be placed on the draft list . . . of a professional league in that sport.").
123. *Id.* § 12.3.1 ("An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.").
124. Banks v. NCAA, 977 F.2d 1081, 1084 (7th Cir. 1992).
125. *Id.* at 1094.
126. *Id.* at 1095 (Flaum, J., dissenting).
127. *Id.*
128. *Id.*
129. *Id.* at 1099 (7th Cir. 1992).

In 2012, *Agnew v. NCAA*[130] involved the NCAA's scholarship restrictions.[131] Two former college football players, Agnew and Courtney, had been highly recruited high school football players who received offers from a number of college football teams.[132] Agnew, in 2006, and Courtney, in 2009, accepted one-year full athletic scholarships to play football for their respective universities.[133] At the time, the NCAA bylaws prohibited member universities from offering student-athletes multi-year scholarships.[134] Both Agnew and Courtney suffered injuries that resulted in the loss of their scholarships.[135] They filed a lawsuit against the NCAA, alleging that the NCAA's one-year maximum scholarship requirement as well as the cap on scholarships available violated the Sherman Act.[136] The plaintiffs argued that the relevant trade market being restrained was "the labor market for student-athletes and the product market for bachelor's degrees."[137]

The dissenting judge in *Banks*,[138] Seventh Circuit Judge Flaum, presided over *Agnew* as well, but this time he wrote for the majority siding with the NCAA.[139] The district court did not consider whether the NCAA bylaws were unreasonably restricting trade because they dismissed the case on grounds that the plaintiffs *could not* "allege a relevant cognizable market under the Sherman Act."[140] Judge Flaum and the Seventh Circuit agreed with the district court that these plaintiffs *did not* allege a relevant cognizable market; however, they did not agree that the plaintiffs *could not* allege such a market.[141] The Court recognized that "[i]t is undeniable that a market of some sort is at play in this case,"[142] but the Sherman Act only applies to commercial transactions.[143]

130. Agnew v. NCAA, 683 F.3d 328 (7th Cir. 2012).

131. *Id.* at 332.

132. *Id.*

133. *Id.*

134. *Id.* at 333 (noting that plaintiffs challenged two NCAA Bylaws from the 2009-10 NCAA DIVISION I MANUAL—the one-year scholarship limit in bylaw 15.3.3.1 and the cap on the amount of athletic scholarships colleges are allowed to offer in bylaw 15.5.4).

135. *Id.* at 332 (stating that Courtney's financial circumstances and loss of scholarship forced him to transfer schools and pay tuition out-of-pocket).

136. Agnew v. NCAA, 683 F.3d 328, 333 (7th Cir. 2012).

137. *Id.* at 334 (stating plaintiffs' argument that if allowed, schools would offer multi-year scholarships to remain competitive in the market for premier student-athletes).

138. Banks v. NCAA, 977 F.2d 1081, 1094 (7th Cir. 1992).

139. *Agnew*, 683 F.3d at 332.

140. *Id.* at 345 (7th Cir. 2012).

141. *Id.*

142. *Id.* at 338.

143. *See id.* at 340 ("Despite the nonprofit status of NCAA member schools, the transactions those schools make with premier athletes—full scholarships in exchange for athletic services—are not noncommercial, since schools can make millions of dollars as a

This opinion invited future plaintiffs to be creative and identify the proper market.

In a string of cases in 2006, 2009, and 2013, the NCAA took a step back in terms of protecting the principle of amateurism. In 2006, a class action lawsuit, *White v. NCAA*,[144] was filed against the NCAA by Division I football and basketball student-athletes.[145] The plaintiffs alleged that the NCAA's grant-in-aid (GIA) cap requirement, prohibiting member institutions from covering expenses other than tuition, room and board, and books,[146] violated the Sherman Act because if given the opportunity, member institutions would compete to offer better financial aid packages to desirable prospective athletes.[147] The NCAA settled the case for $10 million and dedicated $218 million to student-athletes in financial or academic need.[148] Although the settlement did not require the NCAA to admit any fault or wrong doing,[149] it was a foothold for future litigation.

In 2009, *Oliver v. NCAA*[150] involved a challenge to the NCAA's bylaws prohibiting student-athletes from hiring attorneys or agents to be present at negotiations with professional organizations.[151] Oliver, a baseball player for Oklahoma State University, was suspended indefinitely after the NCAA found out he had hired a sports agent and entered the Major League Baseball (MLB) draft prior to entering college.[152] The Minnesota Twins offered him a contract while his agent was present, but he ultimately decided he would rather go to college.[153] In response to the suspension, Oliver sought a declaratory judgment and injunctive relief enjoining the NCAA bylaws prohibiting representation by a lawyer or agent as unenforceable.[154]

The district court found the rule contravened the NCAA's goal of protecting student-athletes because it "allows for exploitation of the

result of these transactions."). The Court is suggesting that the transaction is commercial and the Sherman Act could apply if litigated properly. *Id.*

144. White v. NCAA, No. CV 06-0999-RGK (MANx), 2006 U.S. Dist. LEXIS 101374, at *1 (C.D. Cal. Oct. 19, 2006).

145. *Id.*

146. *Id.* (explaining that expenses not covered include travel costs, insurance, laundry, incidental costs, etc.).

147. *Id.*

148. Verdict and Settlement Summary, White v. NCAA, No. CV 06-0999 RGK (MANx), 2006 U.S. Dist. LEXIS 1013741 (C.D. Cal. Oct. 19, 2006) (No. CV 06-0999 RGK), 2008 WL 612046 (C.D. Cal. Jan. 28, 2008).

149. *Id.*

150. Oliver v. NCAA, 920 N.E. 2d 203 (Ohio Ct. Com. Pl. 2009).

151. *Id.* at 207-08.

152. *Id.* at 207.

153. *Id.*

154. *Id.*

student-athlete 'by professional and commercial enterprises.'"[155] The court was also not convinced that the rules rationally promoted amateurism.[156] The court ruled in favor of Oliver, but ultimately vacated the judgment in exchange for a settlement of $750,000.[157]

3. Name, Image, and Likeness

In order to protect the sanctity of Amateurism, the NCAA requires every Division I student-athlete to authorize use of their "name or picture . . . to generally promote NCAA championships or other NCAA events, activities or programs."[158] Not only are student-athletes required to authorize the NCAA to use their name or picture at no cost, but they have been prohibited from profiting in any way from their own name, image, or likeness.[159] A recent court case brought this rule to the attention of the media and public.

Ed O'Bannon, a former All-American basketball player at UCLA, played professional basketball for several years before settling down and eventually working for a car dealership in Nevada.[160] In 2008, a friend's son told O'Bannon that he was a character in a college basketball video game.[161] The boy turned on the video game and showed O'Bannon the virtual version of himself.[162] This player wore a UCLA jersey with the same number O'Bannon wore at UCLA[163] and displayed O'Bannon's physical characteristics.[164] O'Bannon was shocked; he had never given permission for the use of his likeness in a video game and he had not been compensated for it.[165]

In 2009, O'Bannon sued the NCAA, the Collegiate Licensing Company (CLC),[166] and multiple member schools for commercial use.[167]

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155. *Id.* at 214.

156. Oliver v. NCAA, 920 N.E. 2d 203, 214-15 (Ohio Ct. Com. Pl. 2009).

157. *Id.* at 218-19; Aaron Sorenson, *Oliver vs NCAA Settled*, NCSA, https://www.ncsasports.org/blog/2009/10/12/3456/ (last visited Jan. 25, 2021).

158. *See* NCAA MANUAL, *supra* note 1, § 12.5.1.1.1 (Promotions Involving NCAA Championships, Events, Activities, or Programs).

159. *Id.* § 12.1.2 (prohibiting athletes from accepting payments "in any form").

160. Associated Press, *Ex-UCLA star Ed O'Bannon selling cars, taking on NCAA over pay*, INDY STAR (Feb. 19, 2014, 1:27 PM), https://www.indystar.com/story/sports/2014/02/19/ex-ucla-star-ed-obannon-selling-cars-taking-on-ncaa-over-pay/5609947/.

161. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015) (noting that video game was produced by software company Electronic Arts (EA)).

162. *Id.*

163. *Id.* (explaining that O'Bannon wore number 31 jersey while on UCLA basketball team).

164. *Id.*

165. *Id.*

166. *Id.* (CLC licenses trademarks of NCAA).

167. *O'Bannon*, 802 F.3d at 1055.

O'Bannon alleged that the defendants violated the Sherman Act by preventing student-athletes from being compensated for the use of their name, image, and likeness.[168] O'Bannon argued that the NCAA had been successful at carrying out this exploitation because student-athletes were required to sign agreements that relinquished all rights in perpetuity to the commercial use of their name, image, and likeness.[169] The district court ruled in favor of O'Bannon[170] and the decision was appealed to the Ninth Circuit.

The Ninth Circuit applied the rule of reason standard and agreed with the district court's recognition of the relevant cognizable market, a "college education market" where colleges compete for athletic services by offering recruits scholarships, amenities, facilities, and coaching staff.[171] They further agreed with the finding that the NCAA's compensation rules function to "extinguish" a form of competition among schools seeking elite recruits.[172] However, restricting trade is only unreasonable under the rule of reason standard when there are no legitimate procompetitive justifications or substantially less restrictive means to achieve the goal.[173]

The NCAA's procompetitive justifications for the compensation rules were "(1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education market."[174] The Ninth Circuit recognized promoting amateurism as a legitimate procompetitive purpose for the NCAA to pursue.[175] The Ninth Circuit did not find substantially less restrictive means to promote amateurism than the rule prohibiting compensation for name, image, and likeness.[176] The court ultimately held that the NCAA must allow colleges to pay for the full cost of attendance,[177] but

168. *Id.*

169. O'Bannon v. NCAA, No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 19170, at *3 (N.D. Cal. Feb. 8, 2010).

170. *O'Bannon*, 802 F.3d at 1056 (recounting the district court's conclusion that prohibiting student-athletes from receiving compensation for their name, image, and likeness violates the Sherman Act).

171. *Id.* at 1070.

172. *Id.* at 1071.

173. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 88, 90 (1984).

174. *O'Bannon*, 802 F.3d at 1072.

175. *Id.*

176. *Id.* at 1074.

177. *Id.* at 1078-79; *see also* Michael McCann, *Stakes and Stakeholders in* Alston v. NCAA*, the Latest College Sports Antitrust Case*, SPORTS ILLUSTRATED (Sept. 4, 2018), https://www.si.com/college/2018/09/04/alston-v-ncaa-trial-news-updates-ncaa-cost-attendance ("[C]ollege athletes can now accept athletic performance bonuses related to

that the rule of reason did not require allowing students to receive cash for use of their name, image, and likeness.[178]

Division I football and basketball players filed several antitrust actions against the NCAA and multiple Division I conferences during the course of the O'Bannon litigation.[179] These actions were consolidated into one action known as "The *Alston* Litigation."[180] The *Alston* district court concluded that the NCAA's compensation rules have severe anticompetitive effects in the Division I market.[181] The district court relied on NCAA testimony, student-athlete survey evidence, and demand analyses to conclude that "caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification."[182] The district court held that "NCAA compensation limits preserve demand to the extent they prevent unlimited cash payments akin to professional salaries, but not insofar as they restrict certain education-related benefits."[183]

On appeal, the NCAA urged the Ninth Circuit to vacate the injunction because the ruling illegally encroached upon the NCAA's role as the "superintendent of college sports" and was impermissibly vague.[184] On cross-appeal, the student-athletes urged the Ninth Circuit to broaden the injunction because the "district court should have enjoined all NCAA compensation limits, including those on payments untethered to education."[185] The Ninth Circuit affirmed the holdings and injunction from the district court, finding that the "district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to [s]tudent-[a]thletes while serving the procompetitive purpose of

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Olympic participation, obtain unlimited snacks and meals, and finance the purchase of loss-of-value insurance through borrowing against future earnings.").

178. *O'Bannon*, 802 F.3d at 1079; *see also* McCann, *supra* note 177 ("As a separate component of O'Bannon's litigation, Electronic Arts agreed to a settlement whereby the video game publisher paid about $40 million to more than 29,000 current and former college players.").

179. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston II*), 958 F.3d 1239, 1247 (9th Cir. 2020).

180. *Id.*

181. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston I*), 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020) ("[E]lite student-athletes lack any viable alternatives to Division I, they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.").

182. *Alston II*, 958 F.3d at 1257-58.

183. *Id.* at 1260.

184. *Id.* at 1263.

185. *Id.*

preserving the popularity of college sports."[186] On October 15, 2020, the NCAA petitioned the U.S. Supreme Court to grant review of the Ninth Circuit's holding.[187] On December 16, 2020, the Supreme Court of the United States granted the NCAA's petition for writ of certiorari.[188]

D. Fair Pay to Play Legislation

At the state level, California decided to be the first state to make a legislative move in the name, image, and likeness debate.[189] California Senator, Nancy Skinner, introduced Senate Bill 206, known as the "Fair Pay to Play Act" in February of 2019.[190] The bill allows college athletes in California to profit off their name, image, and likeness, sign endorsement deals, and seek representation without being penalized by their university or the NCAA.[191] The bill passed unanimously through both the California Assembly and Senate,[192] and Governor Gavin Newsom publicly signed the bill on September 27, 2019 on LeBron James' HBO show, *The Shop*.[193] The bill will go into effect on January 1, 2023, giving the NCAA time to work with California and other states alike.[194]

Advocates for the bill argue that "restricting compensation amounts to discrimination against college athletes—it's near impossible to name another group of people who are prohibited from financially benefiting

186. *Id.*

187. Remy, *supra* note 10. According to Donald Remy, NCAA Chief Legal Officer,

> The ruling blurs the line between student-athletes and professionals, conflicts with prior appellate court decisions, appoints a single court to micromanage collegiate sports, and encourages never-ending litigation following every rule change. The decision extends beyond the NCAA's ability to govern college sports throughout the country, affecting how other joint ventures operate. It is critical for the Supreme Court to address the consequential legal errors in this case so that college sports can be governed, not by the courts, but by those who interact with and lead students every day. Together with our conferences that were individually sued in this matter, we will continue to defend the line between professional sports and college sports.

Id.

188. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 2020 WL 7366281 (U.S. Dec. 16, 2020) (No. 20-512).

189. *See* Sean Gregory, *How California's Historic NCAA Fair Pay Law Will Change College Sports for the Better*, TIME (Oct. 1, 2019, 8:16 AM), https://time.com/5689548/california-ncaa-law/.

190. Press Release, Senator Nancy Skinner, Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act,' (Sept. 30, 2019), https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99 [hereinafter CA Senate News].

191. *See generally* S.B. 206, 2019-2020, Reg. Sess. (Cal. 2019), CAL. EDUC. CODE § 67456 (effective Jan. 1, 2023).

192. Gregory, *supra* note 189.

193. *Id.*

194. *See* CA Senate News, *supra* note 190.

from their unique talents."[195] Senator Skinner used Katelyn Ohashi, former UCLA gymnast, as the prime example;[196] a video of Ohashi's gymnastics floor routine went viral and unlike her non-athlete classmates, she was prohibited from monetizing her sixty million YouTube followers.[197]

Even though the NCAA and PAC-12 initially pushed back on California, other states followed California's lead.[198] Florida filed a bill that mimics SB206.[199] New York passed the "New York Collegiate Athletic Participation Compensation Act," which embodies the same goals as California's "Fair Pay to Play Act," but takes it one step further.[200] The New York law stipulates that fifteen percent of the revenue must be distributed back to student-athletes.[201] Colorado's bill gives student-athletes a right to sue if the NCAA pushes back against name, images, and likeness rights granted by the bill.[202] South Carolina and Pennsylvania have plans of enacting similar bills.[203]

The NCAA said it has been backed into a corner because a patchwork of state laws will make it impossible for NCAA members to compete on a level playing field.[204] When the NCAA realized that California and other states would not back down, the NCAA Board of Governors created a federal and state legislation working group to conduct an investigation and make recommendations.[205] The working

195. Gregory, *supra* note 189.

196. *See* CA Senate News, *supra* note 190.

197. *Id.*; Katelyn Ohashi, Opinion, *Everyone Made Money Off My N.C.A.A Career, Except Me*, N.Y. TIMES (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/opinion/katelyn-ohashi-fair-play-act.html.

198. Gregory, *supra* note 189.

199. *Id.*

200. *Id.*

201. Gregg Clifton, *New York Senate Bill To Require Student Athletes To Share In University Ticket Revenue*, JDSUPRA (Sept. 23, 2019), https://www.jdsupra.com/legalnews/new-york-senate-bill-to-require-student-76744/ (reporting that Senator Parker envisions the revenue being divided equally among all student-athletes because he thinks that the money represents the value of the labor.).

202. Charlotte Carrol, *Tracking NCAA Fair Play Legislation Across the Country*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/tracking-ncaa-fair-play-image-likeness-laws.

203. Gregory, *supra* note 189.

204. *See* NCAA Media Center, *NCAA responds to California Senate Bill 206*, NCAA (Sept. 11, 2019, 10:08 AM), https://www.ncaa.org/about/resources/media-center/news/ncaa-responds-california-senate-bill-206.

205. NCAA BD. OF GOVERNORS FED. & STATE LEGISLATION WORKING GRP., FINAL REPORT AND RECOMMENDATIONS 1, 4 (2020) [hereinafter FINAL REPORT AND RECOMMENDATIONS] ("The Board created the working group to study whether the Association should maintain its opposition to the proposed state and federal legislation, or whether it should work to develop a process whereby a student-athlete could be compensated for use of his or her [name, image, or likeness] in a fashion that would be consistent with the NCAA's core values, mission and principles.").

group's report indicated that, "[w]hile there was significant desire to modernize the NCAA's rules related to student-athlete [name, image, and likeness], NCAA members overwhelmingly indicated that the Association should not make rules changes that would undermine, or fundamentally change, the NCAA's overall model of amateur intercollegiate athletics."[206] On April 17, 2020, the working group released its final report and recommendations.[207] The Division I council was set to vote on the proposed measures in January 2021.[208] However, "[d]ue to recent judicial, political and governmental enforcement events, all three divisions tabled or withdrew votes on changes to how student-athletes can use their name, image and likeness."[209] If the NCAA eventually adopts the measures proposed by the working group, the measures will:

> Allow student-athletes to use their name, image and likeness to promote camps and clinics, private lessons, their own products and services, and commercial products or services.[210]
>
> Allow student-athletes to be paid for their autographs and personal appearances.[211]
>
> Allow student-athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance.[212]
>
> Allow student-athletes the opportunity to use professional advice and marketing assistance regarding name, image and likeness activities, as well as professional representation in contract negotiations related to name, image and likeness activities, with some restrictions.[213]
>
> Prohibit schools from being involved in the development, operation or promotion of a student-athlete's business activity, unless the

206. FINAL REPORT AND RECOMMENDATIONS, *supra* note 205, at 1, 6.

207. *See generally id.*

208. NCAA Media Center, *DI Council introduces name, image and likeness concepts into legislative cycle*, NCAA (Oct. 14, 2020, 3:05 PM), https://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle [hereinafter NCAA Media Center, *DI Council*].

209. NCAA Media Center, *Student-athlete committees issue joint statement on name, image, likeness legislation delay*, NCAA (Jan. 15, 2021, 1:36 PM), https://www.ncaa.org/about/resources/media-center/news/student-athlete-committees-issue-joint-statement-name-image-likeness-legislation-delay?division=d1.

210. NCAA Media Center, *DI Council*, *supra* note 208.

211. *Id.*

212. *Id.*

213. *Id.*

activity is developed as part of a student's coursework or academic program.[214]

Prohibit schools from arranging or securing endorsement opportunities for student-athletes.[215]

III. THE LEGAL PROBLEM

Even though the NCAA is finally considering modernizing the name, image, and likeness rules, the NCAA is not doing enough to end the Sherman Act debate. There is still a lingering problem that the NCAA refuses to address: the inconsistent and unnecessary principle of amateurism.[216] NCAA officials themselves have conceded that there is no fixed definition for amateurism.[217] Mike Slive, former SEC Commissioner, "testified that amateurism is 'just a concept that I don't even know what it means. I really don't.'"[218] Justice Thomas, in his dissenting opinion in *O'Bannon*, referred to amateurism as a "nebulous concept prone to ever-changing definition."[219] Courts, including the Ninth Circuit, have recognized promoting amateurism as a legitimate procompetitive purpose for the NCAA to pursue.[220] Yet how can that be accepted when no one really knows what amateurism is? Allowing the NCAA to use the principle of amateurism as a procompetitive justification for anticompetitive rules is allowing the NCAA to commercially exploit student-athletes by taking advantage of an ambiguous and malleable term.

Even though the principle of amateurism purports to prioritize education for student-athletes, that is not the reality.[221] Practices of fraud and deceit run rampant at the top intercollegiate football and basketball schools.[222] Coaches are paying players under the table and professors are being pressured to give certain athletes grades they do not deserve.[223] The pressure to perform as an athlete is greater than the expectation to

214. *Id.*
215. *Id.*
216. FINAL REPORT AND RECOMMENDATIONS, *supra* note 205, at 1, 6 ("NCAA members overwhelmingly indicated that the Association should not make rules changes that would undermine, or fundamentally change, the NCAA's overall model of amateur intercollegiate athletics.").
217. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston II*), 958 F.3d 1239, 1259 (9th Cir. 2020).
218. *Id.*
219. O'Bannon v. NCAA, 802 F.3d 1049, 1083 (9th Cir. 2015) (Thomas, C.J., dissenting).
220. *Id.* at 1073.
221. *See* Branch, *supra* note 3.
222. *Id.*
223. *Id.*

perform as a student and, to make matters worse, students are commonly expected to play through injuries.[224]

IV. ANALYSIS

A. The Principle of Amateurism is Not Consistent with Reality

Now that Courts have successfully established a relevant cognizable market, the college education market, it is clear that the Sherman Act applies to the transactions made between colleges and prospective student-athletes.[225] Within the college education market, colleges compete for athletic services by offering recruits scholarships, amenities, facilities and coaching staff.[226] Many of the NCAA's rules function to extinguish a form of competition among the schools seeking elite recruits.[227] Although some rules may be necessary to promote education and create a level playing field for the universities involved, the NCAA should not be permitted to hide behind the principle of amateurism for anticompetitive rules.

1. Amateurism Does Not Keep College Sports "Pure"

The NCAA's argument that the principle of amateurism keeps college sports "pure" is contradicted by the NCAA's commercial practices.[228] The origin of the word amateur is the Latin word *amator*, meaning 'lover.'[229] The principle of amateurism derives from the notion that a sport is "pure" when people play for the love of the game, rather than compensation.[230] As pleasant as this may sound, the NCAA's dream of purity is hypocritical given the millions of dollars in revenue it receives each year through the free labor of student-athletes.[231] In 2019, the NCAA reported spending more than $18.8 billion on athletics, "[o]f that figure, $3.6 billion went toward financial aid for student-athletes,

224. *Id.*; *see generally* Stephanie A. Stadden, The Influence of Athletic Identity, Expectation of Toughness, and Attitude Toward Pain and Injury on Athletes' Help-Seeking Tendencies (2007) (unpublished Pd.D. dissertation, University of North Carolina at Greensboro), https://libres.uncg.edu/ir/uncg/f/umi-uncg-1396.pdf.

225. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015).

226. *Id.*

227. *Id.* at 1071.

228. *See* Branch, *supra* note 3 ("Big-time college sports are fully commercialized. Billions of dollars flow through them each year. The NCAA makes money, and enables universities and corporations to make money, from the unpaid labor of young athletes.").

229. Ross Andrews, *Push to allow professional athletes took hold in 1968 Olympic Games*, ASU GLOBAL SPORT INST. (Oct. 15, 2018), https://globalsportmatters.com/mexico/2018/10/15/professional-athletes-1968-olympic-games/.

230. *Id.*

231. *See* Branch, *supra* note 3.

and $3.7 billion was spent on coaches compensation."[232] At first glance, this may sound fair because the NCAA commits a similar amount to coaches and students. However, this is unfair considering there are far fewer coaches than student-athletes.[233] Over the years, coaches' salaries have multiplied, yet the student-athletes have only recently been afforded the right to a "full scholarship."[234] The salaries of college football coaches are at a record high; as of November 2020, Alabama's Nick Saban's salary is $9,300,000, Louisiana State's Ed Orgeron's salary is $8,919,500, Clemson's Dabo Swinney's salary is $8,319,775, and Michigan's Jim Harbaugh's salary is $8,036,179.[235] If the NCAA were to dedicate more money to student-athlete financial aid and less to coaches, it would be more difficult for universities to afford these exorbitant coaches' salaries.

The notion of purity is also contradicted by the universities' and NCAA's use of student-athletes to endorse corporate brands.[236] Students have not been allowed to benefit from their own popularity, but the NCAA is allowed to sell that popularity for a large profit.[237] The NCAA and the universities sell corporate advertisement space on the jerseys and helmets of the student-athletes.[238] A further example of the NCAA's hypocrisy can be found in the summary tax form required of nonprofits; in 2006 the NCAA, a "non-profit organization," spent almost $1 million chartering private jets.[239] It is not radical to suggest that these funds could be spent more responsibly, such as contributing to the student-athlete scholarship fund.

2. Amateurism is Not Essential for College Sports to Remain Popular

The NCAA's argument that amateurism is essential for college sports to remain successful and popular is unfounded.[240] The NCAA

232. NCAA Research, *Finances of Intercollegiate Athletics*, NCAA, https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics (last visited Feb. 13, 2021).

233. Players outnumber coaches even at the top college football schools, where there tends to be "one coach for every four to five" football players. *Why College Football Teams Have So Many Coaches*, FOX BUS. (Sept. 9, 2015), https://www.foxbusiness.com/features/why-college-football-teams-have-so-many-coaches.

234. BYERS & HAMMER, *supra* note 31, at 9.

235. *NCAA Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/ (last visited Feb. 13, 2021).

236. *See* Branch, *supra* note 3.

237. *Id.*

238. *Id.*

239. *Id.*

240. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984).

claims that a major reason fans watch college sports is for the "amateur" game, and fans would lose interest if student-athletes were compensated.[241] However, no market research has been presented to support this argument.[242] On the contrary, the Ninth Circuit recognized that "the evidence presented at trial suggests that consumer demand for [Football Bowl Subdivision] football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography."[243]

Just as the NCAA is arguing now, the Olympics initially contended that "the Olympic spirit would be lost once professionals were allowed to participate."[244] In the 1980s, the Olympics started allowing professional athletes to compete and it is still revered by viewers as a pure and enjoyable spectacle.[245] "Olympic officials, who had once disdained the NCAA for offering scholarships in exchange for athletic performance, came to welcome millionaire athletes from every quarter, while the NCAA still refused to let the pro Olympian Michael Phelps swim for his college team at Michigan."[246] Abolishing amateurism actually increased viewership of the Olympics rather than decreased it, in part, because people enjoy watching athletes they know.[247] The Olympics' story not only disproves the NCAA's theory that amateurism and popularity have a positive correlation, but also provides a successful image of what the NCAA could become.[248]

3. Amateurism is More Detrimental to Education than Helpful

The NCAA's argument that amateurism allows student-athletes to receive a proper education is misguided. The NCAA's assertion that "student-athletes derive long term benefits from participating fully in academic life at their schools" is not disputed.[249] The NCAA argues that compensation rules encourage this integration for student-athletes.[250] However, the Ninth Circuit was not convinced by this argument, finding that "these benefits are achieved by other NCAA rules—such as those

241. *Id.*
242. O'Bannon v. NCAA, 802 F.3d 1049, 1082 (9th Cir. 2015).
243. *Id.*
244. Andrews, *supra* note 229.
245. *See id.*
246. Branch, *supra* note 3.
247. Bob Greene, Opinion, *What changed the Olympics forever*, CNN (July 23, 2012, 11:43 AM), https://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/index.html.
248. *See id.*
249. O'Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015).
250. *Id.*

requiring student-athletes to attend class, prohibiting athletes-only dorms, and forbidding student-athletes to practice more than a certain number of hours per week."[251] In reality, student-athletes in financial need are often unable to fully integrate because scholarships do not provide them with enough funds and rigorous practice schedules do not leave time for a job.[252] Green's story is a prime example of this; he sold the jersey in order to afford a spring break trip with friends.[253] The NCAA severely punished him for this act, all the while exploiting his talents by selling their own version of his jersey in the university store.[254]

The NCAA emphasizes that intercollegiate athletes are "students" before "athletes."[255] Universities strive to educate the whole person and competitive athletics are an extracurricular activity directed at achieving that goal.[256] This ideological perspective is not the reality for many college athletes or for the universities.[257] First, if education were the most important objective, the salaries of professors would be comparable to coaches; however, this is not the case. "[T]he average compensation for head football coaches at public universities, now more than $2 million, has grown 750 percent (adjusted for inflation) since the [*Bd. of Regents*] decision in 1984; that's more than 20 times the cumulative 32 percent raise for college professors."[258] Second, although it is not codified, significant pressures often demand that student-athletes place their sport above all else.[259]

Universities with major athletic departments that rely on their football or basketball teams to bring in large streams of revenue are notorious for disregarding academic shortcomings of their student-athletes.[260] In the 1980s, Jan Kemp, an English instructor at the University of Georgia, was fired for refusing to inflate student-athlete grades in her remedial English courses.[261] Just before the 1982 Sugar Bowl, in an effort to ensure eligibility of key players, administrators replaced the failing grades of nine football players with passing

251. *Id.* at 1060.

252. *See* Jasmine Harris, *It's naive to think college athletes have time for school*, CONVERSATION (Oct. 9, 2018, 6:55 AM), https://theconversation.com/its-naive-to-think-college-athletes-have-time-for-school-100942.

253. *See supra* Part II.C.1.

254. *See* Branch, *supra* note 3.

255. *See* NCAA MANUAL, *supra* note 1, § 2.9.

256. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE 70 (2000).

257. *See* Harris, *supra* note 252.

258. Branch, *supra* note 3.

259. *See* Harris, *supra* note 252.

260. Branch, *supra* note 3.

261. *Id.*

grades.[262] Kemp testified that when she refused to fix a grade, a supervisor at the university "bellowed, 'who do you think is more important to this university, you or Dominique Wilkins?'"[263] Kemp was traumatized by the hate she received for turning in the beloved athletics department.[264]

Jasmine Harris, a sociology professor at a Division I football and basketball school, conducted research on the academic experiences of black Division I men's basketball and football players.[265] She found that this group spends roughly "three times as many hours per week on athletics as they do on academics," averaging more than twenty-five hours per week on athletics and only eight hours per week on academics.[266] Harris disagrees with the NCAA's view that Division I student-athletes are students before athletes, she believes, "[r]ecent academic scandals—from fraudulent classes to inappropriate tutor support and administrative cover-ups—reveal that a sports-first mentality permeates college campuses."[267] Dexter Manley, a former college football player, is living proof that education is not a priority for many Division I athletics programs.[268] Later in his life, while playing in the NFL, he admitted that he never learned how to read while in college.[269]

The no draft and no agent rules, justified by the principle of amateurism, are also examples of how the NCAA is anticompetitive at the cost of student-athlete education.[270] If the NCAA truly wanted student-athletes to receive a proper education, it would welcome back student-athletes who were not selected during a professional draft or who negotiated with a professional team but ultimately decided to stay in college. The two baseball players, Paxton and Oliver, who were punished by the NCAA for attempting to make an educated choice between joining a professional baseball team and remaining in college,[271] are living proof that the NCAA would rather scare student-

262. *Id.*

263. *Id.* (describing Dominique Wilkins as a star basketball player at University of Georgia).

264. *Id.*

265. Harris, *supra* note 252.

266. *Id.*

267. *Id.*

268. *See* BYERS & HAMMER, *supra* note 31, at 238.

269. *Id.*

270. Banks v. NCAA, 977 F.2d 1081, 1095 (7th Cir. 1992) (Flaum, J., concurring) (arguing that a university that offers a student the ability to return to intercollegiate athletics if the draft proves unsuccessful would be more attractive to an elite student-athlete than a university declining to offer that opportunity).

271. *See supra* Part II.C.1-2.

athletes out of considering other options than encouraging them to stay and finish their education. The NCAA uses these fear tactics because it does not want to lose profitable athletes to professional sports teams, which is exactly the anticompetitive behavior the Sherman Act should prevent. The NCAA's no draft and no agent bylaws are anticompetitive because the university would be more attractive to an athlete if it allowed students to return to the collegiate team after participating in a professional draft or working with an agent.[272] Further, if the student were allowed to return to their scholarship, that student would be more likely to finish his or her education.

B. It Would be Difficult to Classify Student-Athletes as Employees

Some critics of the principle of amateurism argue that student-athletes should be compensated by the university as employees;[273] however, this is not a simple solution. The workers' compensation cases involving Dennison and Waldrep[274] trigger emotional responses and make the NCAA appear evil, but the NCAA has a practical reason for avoiding recognizing student-athletes as employees. An employee is "[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire."[275] If the NCAA was not tactful with its definition of "student-athlete," the time commitment, coach-to-athlete dynamic, and the expectations of college athletes could have been evidence of an implied contract of hire. There are several reasons why the NCAA would wish to avoid an express or implied contract of hire with student-athletes.

First, workers' compensation laws hold employers strictly liable for their employees' injuries that occur in the scope of employment.[276] Sports-related injuries are inevitable,[277] and there are nearly 500,000 NCAA student-athletes competing in twenty-four sports every year.[278] The cost would be immense to insure workers' compensation benefits to this many people. Based on an analysis of student-athlete

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272. *Banks*, 977 F.2d at 1095.

273. Abigail Johnson Hess, *Majority of college students say student-athletes should be paid, survey finds*, CNBC (Sept. 11, 2019, 12:53 PM), https://www.cnbc.com/2019/09/11/student-athletes-should-get-paid-college-students-say.html.

274. *See supra* Part II.B.

275. *Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

276. *Workers' Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

277. *See* PT in Motion News, *Sports and Recreation-Related Injuries Top 8.6 Million Annually*, APTA (Jan. 4, 2017), https://www.apta.org/news/2017/01/04/sports-and-recreation-related-injuries-top-8.6-million-annually.

278. *Student-Athletes*, NCAA, https://www.ncaa.org/student-athletes (last visited Dec. 18, 2020).

injuries reported in NCAA championship sports, the Centers for Disease Control and Prevention (CDC) estimated that 1,053,370 injuries occurred over a five-year period.[279] The CDC also found that an estimated 176.7 million athletes were exposed to potential injury over that same five-year period.[280]

Second, an employer is subject to vicarious liability for the torts of employees committed while acting in the scope of their employment.[281] This requirement would open the NCAA up to more potential lawsuits and liability on behalf of their players, especially while they are travelling for intercollegiate competition. Imagine a scenario where a football player tackled another player during a game, causing that player to become paralyzed. In this situation, the university could be sued for vicarious liability because their player was acting within the scope of his employment when he injured the other player. It is unpredictable how high the costs could extend when all of the potential damages are considered.

These two reasons for avoiding classifying student-athletes as employees are troubling considering the vast amounts of revenue the NCAA and member universities collect each year. It seems hard to believe that funds could not be reorganized and reallocated to appropriately insure and employ student-athletes. However, there is a third reason that makes it the most difficult to classify student-athletes as employees.

Title IX prohibits any education program or activity that is receiving federal financial assistance from denying participation or benefits to anyone on the basis of sex.[282] Title IX would require universities or the NCAA to give equal pay to both female and male student-athletes.[283] This would be difficult because Division I men's football and basketball programs generate the bulk of the NCAA's revenue.[284] The sports that are not profitable for the universities are funded by the revenue generated from the profitable sports.[285] If a large portion of this money was used to pay student-athletes, less profitable

279. Zachary Y. Kerr et al., *College Sports-Related Injuries—United States, 2009-10 Through 2013-14 Academic Years*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 11, 2015), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6448a2.htm.

280. *Id.*

281. RESTATEMENT (SECOND) OF AGENCY: TORTS OF SERVANT § 219 (AM. LAW INST. 1958).

282. 20 U.S.C. § 1681 (1986).

283. *See id.*

284. *See* Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J.C. & U.L. 297, 320-22 (2015).

285. *See id.* at 320.

sports (often women's sports) would likely be cut entirely.[286] Cutting women's programs while maintaining men's programs violates Title IX.[287] In order to get around this, universities could cut an equal number of less profitable men's and women's sports to increase the budget for the salaries of student-athletes in more profitable sports. This is also problematic because it would help few student-athletes at the detriment of the majority. If intercollegiate sports enhance collegiate life, it is in the NCAA's best interest to provide more opportunities for students to participate in an intercollegiate sport, rather than less.

If the NCAA abolished the principle of amateurism and left the employment decision to the universities, the universities could decide if it were feasible to reorganize funds and employ student-athletes. In this case, the NCAA could create rules that require universities to keep a specific number of sports or prohibit universities from finding funds by cutting sports. This rule might encourage universities to reduce spending on facilities and coaching and redirect those funds to student-athletes.

Lastly, it is relevant to note that employment by the university does not detract from a student's educational experience. Many students work for the university during their time in college, whether it be for the recreation center, library, alumni donation center, etc. If intercollegiate athletes were considered part-time employees of the university, they would still be students and still be required to fulfill the NCAA's class attendance requirements.

C. Allowing Student-Athletes to Accept Compensation from Third-Parties for the use of Name, Image, and Likeness is a Step in the Right Direction

The Fair Pay to Play scheme, as California has created it, does not force the NCAA or universities to recognize student-athletes as employees and it does not require the NCAA to compensate student-athletes out of its own budget.[288]

The Fair Pay to Play laws give student-athletes the right to enter contracts with and be compensated by third parties.[289] Many Division I football and basketball players who come from urban, low-income families feel pressure to quit college in order to financially support their

286. *See id.*

287. *See id.* at 323.

288. *See* S.B. 206, 2019-2020, Reg. Sess. (Cal. 2019), CAL. EDUC. CODE § 67456 (effective Jan. 1, 2023).

289. *See* S.B. 206, 2019-2020, Reg. Sess. (Cal. 2019), CAL. EDUC. CODE § 67456 (effective Jan. 1, 2023).

families.[290] Through third-party compensation, players from lower income communities could have an opportunity to receive income for incidentals as well as the possibility of providing monetarily for their family members.[291]

With the opportunity to receive third-party compensation, student-athletes will have more incentive to finish their education.[292] For example, in the 2017 National Basketball Association (NBA) draft, there were twenty players who had completed only one year of college.[293] Given the opportunity to sign a professional contract, student-athletes may rationally choose to leave their university, where there is no possibility of compensation and a high likelihood of injury. However, if student-athletes were allowed to accept endorsement deals and the university had a better fund to pay medical bills, the athletes may be more inclined to complete their degree before going to the NBA. If the NCAA wants to encourage student-athletes to be students first and take education seriously, this would be a step in the right direction.

Some argue that amateur athletes will not be fiscally responsible,[294] but this argument infantilizes collegiate athletes. No one is required to attend secondary education and any non-athlete student at the university has a right to accept endorsement deals, which are becoming more prevalent in this age of social media influencers. Student-athletes who have gained popularity based on their talent and hard work should not be treated any differently than a theater major who accepts acting gigs while in college or monetizes her YouTube channel.

D. Professional Athletes Competing at the Intercollegiate Level

Imagine a hypothetical situation in which a college football player only uses one year of his collegiate football eligibility before he is drafted by a professional NFL team. After several years, the football player wants to retire from the NFL, but he is not ready to give up competitive football. At age twenty-nine, he wants to finish his education and play for a Division I college football team again. The NCAA's amateurism rules would prohibit him from playing

290. Malcolm Lemmons, *College Athletes Getting Paid? Here Are Some Pros And Cons*, HUFFINGTON POST (Mar. 29, 2017, 10:06 AM), https://www.huffpost.com/entry/college-athletes-getting-paid-here-are-some-pros-cons_b_58cfcee0e4b07112b6472f9a.

291. *Id.*

292. *Id.*

293. *NBA announces early entry candidates for 2017 NBA Draft*, NBA (Apr. 25, 2017, 3:12 PM), https://www.nba.com/news/nba-announces-early-entry-candidates-2017-nba-draft.

294. Lemmons, *supra* note 290.

college football because he has already played on a professional football team.[295] At first look, this seems reasonable; however, it may not seem reasonable after considering a second scenario. Imagine a second scenario in which a Division I college football player enters the Major League Baseball (MLB) draft and signs a professional baseball contract with the Oakland A's for roughly a $4.7 million bonus. This student-athlete would now be considered a professional athlete,[296] but the NCAA's rules still allow him to continue playing for the Division I college *football* team until his baseball team requires him to leave.[297] He also has the option to come back to college football if he decides to leave his MLB career down the road because the NCAA manual explicitly states, "[a] professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport."[298] The second scenario is based on Kyler Murray's story.[299] "In baseball, Murray became a professional the second he signed with the [Oakland Athletics']. Having taken his signing bonus, his college baseball career [was] over. But no NCAA rule prevent[ed] him from playing football."[300] Zach Von Rosenberg was also able to take advantage of this NCAA rule.[301] After Von Rosenberg committed to LSU's baseball team, he was drafted to the MLB.[302] When his baseball career was over, he returned to LSU, but this time, as a twenty-nine-year-old freshman football player.[303]

295. NCAA MANUAL, *supra* note 1, § 12.1.2.

296. *Id.* § 12.02.11 ("A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.").

297. NCAA MANUAL, *supra* note 1, § 12.1.3; *see also* Alex Kirshner, *Why Kyler Murray is NCAA-eligible for Oklahoma despite signing a baseball contract*, SBNATION (Sept. 1, 2018, 11:30 AM), https://www.sbnation.com/college-football/2018/9/1/17432194/kyler-murray-ncaa-eligible-mlb-draft.

298. NCAA MANUAL, *supra* note 1, § 12.1.3.

299. Kirshner, *supra* note 297. Kyler Murray ultimately backed out of his contract with the Oakland A's and committed himself to football. Tyler Kepner, *In the Case of Kyler Murray, the A's Bet Big and Lost*, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/2019/02/11/sports/kyle-murray-oakland-athletics-football.html. Murray, the first NFL draft pick in 2019, signed with the Arizona Cardinals. Jeremy Bergman, *Kyler Murray signs rookie deal with Arizona Cardinals*, NFL (May 9, 2019, 11:53 AM), https://www.nfl.com/news/kyler-murray-signs-rookie-deal-with-arizona-cardinals-0ap3000001030425.

300. Kirshner, *supra* note 297.

301. Howie Kussoy, *How 29-year-old became LSU's punter after MLB dream died*, N.Y. POST (Dec. 27, 2019, 12:31 AM), https://nypost.com/2019/12/27/how-29-year-old-became-lsus-punter-after-mlb-dream-died/.

302. *Id.*

303. *Id.*; *2020 Football Roster*, LSU, https://lsusports.net/sports/football/roster/zach-von-rosenberg/24322 (last visited Jan. 9, 2021).

Murray and Von Rosenberg are not the only professional athletes who have played on NCAA teams.[304]

When considering the first hypothetical, one might find it unfair for a twenty-nine-year-old professional athlete to compete with and against eighteen-year-old college freshman athletes. However, the NCAA rules already allow professional athletes, such as Murray and Von Rosenberg, to do just that.[305] The fact that professional athletes are already allowed to compete begs the question of how much would really change if the first hypothetical described were permissible.

V. PROPOSAL

A. The United States Supreme Court Should Definitively Hold that the Principle of Amateurism is Not a Legitimate Procompetitive Purpose for the NCAA to Pursue

In the Spring of 2021, the United States Supreme Court will decide[306] "whether the Ninth Circuit erroneously held, in conflict with decisions of other circuits and general antitrust principles, that the [NCAA's] eligibility rules regarding compensation of student-athletes violate federal antitrust law."[307] The NCAA contends that the "NCAA eligibility rules designed to ensure that student-athletes are not paid to play their sport should be upheld against antitrust challenge without trial and detailed analysis."[308]

It is appropriate for the Supreme Court to apply a rule of reason analysis, as it did in *Bd. of Regents* because the NCAA's compensation rules have severe anticompetitive effects in the Division I market.[309] The Supreme Court should affirm the lower court's finding that "caps on

304. *See* Scott Jenkins, *Kyler Murray and 4 Other NFL Players Who Picked Football Over Baseball*, SPORTSCASTING (June 14, 2019), https://www.sportscasting.com/kyler-murray-nfl-players-football-over-baseball/.

305. Kirshner, *supra* note 297.

306. Jessica Gresko, *High court agrees to hear NCAA athlete compensation case*, AP NEWS (Dec. 16, 2020), https://apnews.com/article/athlete-compensation-basketball-elena-kagan-football-us-supreme-court-4fa2fc30e1a3f21329f4ec22cc55bb28; *see In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020), *cert. granted*, 2020 WL 7366281 (U.S. Dec. 16, 2020) (No. 20-512).

307. Petition for Writ of Certiorari, *supra* note 86, at (i).

308. *Id.* at 9.

309. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston I*), 375 F. Supp. 3d 1058, 1070 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020) ("[E]lite student-athletes lack any viable alternatives to Division I, they are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by Division I schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services.").

non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification."[310]

While Courts have allowed the NCAA to get away with using the principle of amateurism as a legitimate procompetitive purpose for anticompetitive restraints, the NCAA's justifications for upholding the principle of amateurism can be refuted.[311] Further, the NCAA's definition of amateurism has been inconsistent because the NCAA has been forced to change the rules to address certain realities.[312] For example, student-athletes generally cannot receive any compensation outside of their scholarship, but the NCAA allows tennis players to accept up to $10,000 in prize money before college.[313]

Even though the NCAA will likely modernize the name, image, and likeness rules after the council's vote in January, the NCAA will not voluntarily let go of the principle of amateurism.[314] The ever-changing principle of amateurism has caused confusion and divide in the lower courts.[315] In order to avoid inconsistent rulings and to force the NCAA to change, the Supreme Court of the United States should definitively hold that the principle of amateurism is not a legitimate procompetitive purpose for the NCAA to pursue.

In 1984, the Supreme Court stated, "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[316] As this Note points out, the principle of amateurism has evolved since 1984 and it no longer accomplishes the NCAA's original goals. The Supreme Court for *Alston* should not feel bound by the dicta of the 1984 Supreme Court because the principle of amateurism is no longer necessary to preserve the character and quality of the product.

B. The NCAA Should Stop Adhering to the Principle of Amateurism and Create a Line of Demarcation Between College and Professional Athletics by Redefining the Term "Student-Athlete"

Currently, NCAA Rule 12.01.1 states, "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."[317] The NCAA should remove the word amateur

310. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig. (*Alston II*), 958 F.3d 1239, 1257-58 (9th Cir. 2020).
311. *See supra* Part IV.A.1-3.
312. O'Bannon v. NCAA, 802 F.3d 1049, 1058-59 (9th Cir. 2015).
313. *Id.*
314. Remy, *supra* note 10.
315. *See supra* Part II.C.2.
316. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).
317. NCAA MANUAL, *supra* note 1, § 12.01.1.

from this rule and all rules requiring an adherence to the principle of amateurism. Removing the amateurism requirement does not mean that the NCAA will be unable to establish a clear line of demarcation between college athletics and professional athletics. The NCAA can establish this distinction by redefining the term "student-athlete" to ensure that the education of student-athletes is taken seriously. Rather than focus on compensation as the difference between a student-athlete and a professional athlete, the difference should be that, unlike the professional athlete, the student-athlete is not only dedicated to athletic competition, but is simultaneously focused on receiving a university education.

The NCAA should not care whether someone has previously received compensation as a result of athletic skill, whether someone has entered a draft, or whether someone used an agent to negotiate with professional teams. The NCAA should only worry about whether or not the current student-athlete is following the education and practice related requirements. These changes would redirect the NCAA's rules to a more student-focused approach, rather than an exploitative approach.

C. The Universities Should Improve the Curriculum Options Offered to Student-Athletes

First, universities should be allowed and encouraged to offer all intercollegiate athletes the option to finish their degree with a scholarship, even after maintaining a professional athletic career.

Next, the NCAA should work with universities to implement a curriculum change. Some people use an intercollegiate sport as a way to pay for an education, but other people play a Division I intercollegiate sport as an eligibility requirement for a professional team. For example, a football player cannot enter the NFL draft until he has used up his college eligibility.[318] Similarly, "[t]he NBA's current rules require U.S. players to be 19 and one year removed from high school, which has led many elite high school players to use college basketball as a one-year waypoint before turning pro."[319] Universities should create and offer a

318. *The Rules of the Draft*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/#:~:text=Player%20Eligibility,the%20next%20college%20football%20season (last visited Jan. 4, 2021).

319. Emily Giambalvo, *NCAA to allow more flexibility for college basketball players considering the NBA*, WASH. POST (Aug. 8, 2018, 3:57 PM), https://www.washingtonpost.com/sports/colleges/ncaa-to-allow-more-flexibility-for-college-basketball-players-considering-the-nba/2018/08/08/54a13e5a-9b3c-11e8-8d5e-c6c594024954_story.html.

relevant major for these sport-focused students. If someone wants to become an artist, he or she has the right to major in art or attend a secondary institution dedicated to art.

Similarly, music and theatre are standard majors at most universities. If someone hopes to make it on Broadway, he or she may major in theater and try out for professional roles on the side. An interest in athletics is no different from an interest in art, music, or theater. One could argue that it would be wasteful to offer a major dedicated to athletics because "the likelihood of a . . . college athlete becoming a professional athlete is very low,"[320] but the chances of becoming a profitable artist, musician, or actor/actress are also extremely slim, yet students with these goals have the freedom to choose a major. Individuals have the right to choose a life path, some people choose to give themselves more options and other people put all of their eggs in one basket. Student-athletes are not less capable of making thoughtful life decisions than other students.

The athletics major would still require completion of general education requirements, but would also include classes on coaching, basic money management and investment, understanding taxes, knowing one's rights, etc. If a student has no educational interests, he or she might as well be required to take classes that will benefit his or her life. Rather than continue with the current system, where a large portion of the football team is told to take Swahili[321] or where academic counselors push athletes into fraudulent, no-show classes to keep them eligible to play their sport,[322] universities should embrace a new concept of the student-athlete.

The new curriculum would create a special system for student-athletes, no matter what major they decide, where they are not required to take courses during season (nor prohibited from) and they work with an academic counselor to plan the bulk of their courses during other

320. NCAA Research, *Estimated probability of competing in professional athletics*, NCAA, https://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics (last visited Jan. 4, 2021). The NCAA estimates "that 4.2% of draft-eligible Division I [men's basketball] players were chosen in the 2019 NBA draft (52 / 1,224)" and "that 3.8% of draft-eligible Division I [football] players were chosen in the 2019 NFL draft (249 / 6,490)." *Id.*

321. *See* Joe Nocera, Opinion, *Football and Swahili*, N.Y. TIMES (Apr. 9, 2012), https://www.nytimes.com/2012/04/10/opinion/nocera-football-and-swahili.html (reporting that in 2006, seven of twenty-five freshmen football players at the University of North Carolina took a Swahili course).

322. Jon Solomon, *UNC Investigation: Athletes pushed into fake classes by counselors*, CBSSPORTS.COM (Oct. 22, 2014. 10:36 AM), https://www.cbssports.com/college-football/news/unc-investigation-athletes-pushed-into-fake-classes-by-counselors/ (reporting that 3,100 student-athletes were involved in fake African-American Studies classes during an eighteen-year scheme).

portions of the year. Student-athletes would be given unique unit requirements that allow them to maintain "full-time" student status, even if enrolled in part-time or no units during season. Some of their practice time could constitute units that fulfill general education requirements, such as team building, leadership, experiential learning, etc. Further, student-athletes would be offered a standard five-year plan (if interested), giving them enough time to perform academically, while staying committed to their sport. The five-year plan would not expand their sport eligibility, but would give them an extra year to finish their courses.

VI. CONCLUSION

The NCAA seems adamant about preserving the principle of amateurism, but its methods of keeping the tradition alive have proven inconsistent and exploitative. This Note proposes a three-part, student-centered solution to reform the current state of affairs. First, the Supreme Court should definitively hold that the principle of amateurism is not a legitimate procompetitive purpose for the NCAA to pursue. Second, the NCAA should stop adhering to the principle of amateurism. Removing the principle of amateurism from the NCAA rules does not mean that the NCAA will be unable to establish a clear line of demarcation between college athletics and professional athletics. The NCAA can establish this distinction by redefining the term "student-athlete" to ensure that the education of student-athletes is taken seriously. The difference between an NCAA student-athlete and a professional athlete, is that the student-athlete is not only dedicated to athletic competition, but is simultaneously focused on receiving a university education. Last, the NCAA should work with the universities to improve the curriculum options offered to student-athletes.