

Unnecessary Roughness: Why the NCAA's Heavy-Handed Amateurism Rules Violate the Sherman Antitrust Act

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I. INTRODUCTION

In 1939, the University of Pittsburgh reduced the subsidies it paid to football players, putting freshmen on a lower salary scale than upperclassmen.¹ The freshman football players responded to the subsidy reduction by going on strike for the beginning of the 1939 season.² Inspired by a wave of strikes sweeping through the steel and automobile industries, they successfully shamed the university's administration into restoring their subsidies.³

Such a strike would be unthinkable today. College athletics currently operates under the pretense of amateurism.⁴ The National Collegiate Athletic Association (NCAA), the organization that currently oversees college athletics, maintains strict rules to ensure that college athletes remain "amateurs" rather than "professionals." However, despite a 432-page manual of regulations regarding

1. JOHN SAYLE WATTERSON, COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY 189 (2000).

2. *Id.*

3. *Id.*

4. The modern conception of amateurism in sport has its roots in a Victorian-era misunderstanding that ancient Greek athletes, including the original Olympic athletes, competed for no financial gain or prize. Kate Buford, *Amateurism and Jim Thorpe at the Fifth Olympiad*, GILDER LEHRMAN INST. OF AM. HIST., <http://www.gilderlehrman.org/history-by-era/politics-reform/essays/amateurism-and-jim-thorpe-fifth-olympiad> (last visited Feb. 18, 2015). In the Victorian era, amateurism served as a barrier to keep the lower classes out of sports because only those of independent means could afford to compete without pay. *Id.* See John J. Sewart, *The Meaning of Amateurism*, 2 SOC. OF SPORT J. 77 (1985), available at <http://journals.humankinetics.com/AcuCustom/Sitename/Documents/DocumentItem/9208.pdf>, for a different perspective, defending an amateur ideal of "pure sport."

amateurism, the NCAA never defines the concept.⁵ Rather, it treats amateurism as a nebulous status that exists short of a threshold of professionalism, a status that is lost the instant that threshold is crossed.⁶ Those 432 pages list the various ways in which a college athlete can cross the threshold of professionalism, compromise his amateur status, and bring punishments on himself and his institution.⁷

Pursuant to the NCAA manual, a college athlete may not receive any payment or other benefit from any party in return for his⁸ participation in athletics, save his scholarship.⁹ He may not utilize an agent to advise him or provide representation in the complex decisions affecting his athletic career.¹⁰ He may not license his name,

5. See generally NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2013–14 NCAA DIVISION I MANUAL (July 2013) available at http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2013-14/misc_non_event/ncaa-manual.pdf [hereinafter NCAA MANUAL]. The closest the manual comes to defining amateurism is that student-athletes' participation in intercollegiate athletics "should be motivated primarily by education and by the physical, mental and social benefits to be derived." *Id.* at 4 (Rule 2.9). The manual goes on to discuss the plethora of ways in which amateur status can be lost. *Id.* at 59 (rule 12.1.2). These provide rough boundaries of the NCAA conception of "amateurism;" however, the NCAA provides no core definition of amateurism from which these boundaries may be derived. Perhaps the NCAA is facing the same difficulty that Avery Brundage, former head of the International Olympic Committee and staunch defender of amateurism, faced in 1960 when he remarked "[amateurism] is a thing of the spirit, and hence is very difficult to define." Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012, 8:01 AM), <http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/>.

6. See 2013–14 NCAA DIVISION I MANUAL *supra* note 5, at 59 (Rule 12.1.2). Ostensibly, the NCAA claims that student-athletes must remain amateurs to ensure that intercollegiate athletics remain a part of their educational experience. *Id.* at xiv. However, as this Note will discuss, the investments in and revenues generated by the athletic programs in a class of major universities indicate that athletics at these universities have moved beyond being mere components of the academic programs and educational purposes of the university.

7. *Id.*

8. Although for brevity I will use the male pronoun, the NCAA amateurism restrictions and their accompanying legal issues apply to female athletes as well.

9. *Id.* at 59 (Rule 12.1.2.1). Examples of what is forbidden range from the decadent, see, e.g., *Cam Newton Scandal: Rep Sought Cash from MSU*, CBS NEWS, (Nov. 5, 2010, 8:34 AM), <http://www.cbsnews.com/news/cam-newton-scandal-rep-sought-cash-from-msu>, discussing an offer to pay Cam Newton \$180,000 to play for Mississippi State University, to the petty, see, e.g., *NCAA Approves Unlimited Free Meals: Bagels with Cream Cheese All Day Every Day*, SB NATION (Apr. 15, 2014, 9:31 PM), <http://www.thedailygopher.com/2014/4/15/5618902/ncaa-approves-unlimited-free-meals-bagels-with-cream-cheese-all-day>, noting that, until recently, universities were permitted to give athletes bagels, but providing cream cheese was a violation.

10. NCAA MANUAL, *supra* note 5, at 59 (Rule 12.1.2(g)).

image, or likeness;¹¹ instead he must forfeit his right to publicity to the NCAA. Each of these regulations is highly restrictive of college athletes.

The NCAA's power to enforce these regulations comes from the consent of its member institutions and its control over certain television contracts to broadcast games and other content. The NCAA is an unincorporated organization of approximately 1,200 members, including "virtually all public and private universities and four-year colleges conducting major athletic programs in the United States."¹² Antitrust plaintiffs and economists alike have accused the NCAA and its members of acting like a "cartel" and conspiring to deny compensation to college athletes for their labor.¹³

The NCAA posted revenues of nearly \$872 million in fiscal year 2012 and maintains \$530 million in unrestricted assets, much of it from selling television-licensing rights to the NCAA basketball tournament every spring.¹⁴ Major schools and conferences also sell the right to broadcast their football and men's basketball games for hundreds of millions of dollars.¹⁵ But not every collegiate athletic

11. *Id.* at 12 (Rule 3.2.4.18).

12. NCAA v. Smith, 525 U.S. 459, 462 (1999). A few other college athletic associations currently operate in the United States as well, though none do so on the scale or with the notoriety of the NCAA. The most well known of these associations is the National Association of Intercollegiate Athletics, with about 300 member institutions and a \$6 million annual operating budget. Michael Braude, *NAIA Scores a Win with Carr's Effective Leadership as CEO*, KANSAS CITY BUSINESS JOURNAL (Dec. 24, 2010, 5:00 AM), <http://www.bizjournals.com/kansascity/print-edition/2010/12/24/naia-scores-a-win-with-carrs.html>.

13. Third Consolidated Amended Class Action Complaint at ¶ 356, *In re Student-Athlete Name and Likeness Licensing Litig.*, No. C 09-01967 CW (N.D. Cal. July 19, 2013), 2013 WL 3810438 [hereinafter Class Action Complaint]; see also Robert Barro, *The Best Little Monopoly in America*, BUS. WK., Dec. 9, 2002, at 22, available at http://scholar.harvard.edu/barro/files/02_1209_monopoly_bw.pdf ("[T]he NCAA is the clear choice for best monopoly in America."); McCormack v. NCAA, 845 F.2d 1338, 1343 (5th Cir. 1988) (describing plaintiff's allegations that NCAA eligibility rules constitute price-fixing, cases discussed in more detail below).

14. Steve Berkowitz, *NCAA had Record \$71 Million Surplus in Fiscal 2012*, USA TODAY (May 2, 2013, 8:58 AM), <http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/>.

15. Chris Smith, *College Football's Most Valuable Teams*, FORBES (Dec. 22, 2011, 11:43 AM), <http://www.forbes.com/sites/chris-smith/2011/12/22/college-footballs-most-valuable-teams/>. While the NCAA profits most from licensing the NCAA Tournament, there are also licensing rights to regular season games, bowl games, the College Football Playoff, and other non-NCAA tournaments. These rights are divvied up between the various schools, conferences, and

department turns a high profit, let alone any profit at all; most operate at a financial loss to their university.¹⁶ Notably, however, those schools that report large revenues license the broadcast rights to their games for millions of dollars.¹⁷ Further, the athletes at these schools stimulate the sale of jerseys and other memorabilia,¹⁸ and are depicted (allegedly)¹⁹ in video games based on college sports. Yet college athletes are barred from receiving any compensation relating to their athletic performance or the use of their name and likeness.

Many college athletes have challenged these eligibility rules under the Sherman Antitrust Act.²⁰ Congress enacted the Sherman Act in the late nineteenth century to protect competition and combat the dangers of monopolies.²¹ The plaintiffs in these cases have alleged

associations and then sold to broadcasters. The intricacies of these deals are interesting, but beyond the scope of this Note.

16. See Steve Berkowitz et al., *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finance-subsidies/2142443/>

17. See Smith, *supra* note 15.

18. Amid accusations that it made money off of student-athletes, the NCAA stopped selling jerseys altogether in 2013. Bill Chappell, *NCAA Will Stop Selling Player Jerseys, Takes Web Shop Down*, NAT'L PUB. RADIO (Aug. 9, 2013, 5:16 P.M.) <http://www.npr.org/blogs/thetwo-way/2013/08/09/210566486/ncaa-will-stop-selling-player-jerseys-takes-web-shop-down>. Many schools, however, still sell jerseys with numbers that coincidentally happen to match the numbers of their star players. Jason Kirk, *NCAA President Faces Fact that Colleges Sell Jerseys with Real Player Numbers*, SB NATION (June 20, 2014, 12:20 PM) <http://www.sbnation.com/college-football/2014/6/20/5827802/ncaa-player-jerseys-numbers-mark-emmert-obannon>.

19. This is at issue in the *O'Bannon* case. The plaintiffs allege that virtually every real-life Division I football or basketball player in the NCAA has a corresponding player in video games produced by Electronic Arts (EA) with the same jersey number, along with virtually identical height, weight, build, and home state. In addition, EA matches the player's skin tone, hair color, and often even a player's hairstyle. Class Action Complaint, *supra* note 13, ¶ 269.

20. 15 U.S.C. §§ 1–7 (2004). See generally *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (challenging NCAA rule placing limits on compensation to players); *Banks v. NCAA*, 977 F.2d 1081, 1082–83 (7th Cir. 1992) (challenging NCAA rule prohibiting college athletes from entering professional drafts or using agents); *Smith v. NCAA*, 139 F.3d 180, 181 (3d Cir. 1998) (challenging NCAA rule placing restrictions on post-baccalaureate participation in intercollegiate athletics); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (challenging NCAA rule limiting number of scholarships per team); *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012) (challenging NCAA rule prohibiting multi-year scholarships, limiting number of scholarships per team).

21. See *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners of E. Penn., S. N.J. and Del.*, 93 F.2d 714, 719 (3d Cir. 1937) (“Congress in passing the anti-trust acts intended to free interstate commerce from the evils produced by combinations and conspiracies of all kinds.”).

that many of the NCAA's eligibility rules are illegal restraints of trade.²² The most recent challenge, brought by Ed O'Bannon, a former University of California Los Angeles basketball player, and Sam Keller, a former Arizona State University football player, was recently decided in the Northern District of California.²³ Several current and former college athletes joined Keller and O'Bannon as plaintiffs in the suit against the NCAA, its marketing wing the Collegiate Licensing Company (CLC), and Electronic Arts (EA).²⁴ They alleged that these entities (1) illegally establish as zero the price at which college athletes sell the rights in perpetuity to their image and likeness and (2) refused to deal with former college athletes regarding compensation for the use of their image and likeness after they graduated.²⁵

Historically in antitrust cases against it, the NCAA has relied on amateurism as a procompetitive justification for its actions.²⁶ The theory is that amateurism is an essential aspect of college athletics that differentiates college athletics from professional athletics and preserves college athletics as a unique product.²⁷ Essentially, the NCAA is allowed to fix prices in the input market (the market for the services of student-athletes) in order to preserve the character of its product in the output market (the market for college sports). The NCAA relied on amateurism at trial in the *O'Bannon* case, and will likely do so again on appeal.²⁸

22. See, e.g., *McCormack*, 845 F.2d at 1338; *Banks*, 977 F.2d at 1088; *Smith*, 139 F.3d at 184; *Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1147; *Agnew*, 683 F.3d at 334.

23. *In re Student-Athlete Name and Likeness Licensing Litig.*, No. C 09-01967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013), *decided sub nom.* *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) [hereinafter *O'Bannon*].

24. EA and CLC have since settled with the plaintiffs, leaving the NCAA as the only defendant to the suit. Order Granting in Part and Denying in Part Motion for Class Certification at *1 n.1, *In re Student-Athlete Name and Likeness Licensing Litig.*, (No. C 09-01967 CW), 2013 WL 5979327 at *1 n.1 (N.D. Cal. Nov 8 2013).

25. Class Action Complaint, *supra* note 13, ¶ 552–57.

26. See, e.g., *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984), *McCormack*, 845 F.2d at 1344–45; *Banks*, 977 F.2d at 1089–91; *Walk-On Football Players Litig.*, 398 F. Supp. 2d at 1147–50; *Agnew*, 683 F.3d at 342–6.

27. *McCormack*, 845 F.2d at 1344–45 (“The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures.”).

28. *O'Bannon*, 7 F. Supp. 3d 955.

Regardless of the outcome of that appeal, amateurism is no longer viable as a procompetitive justification for the NCAA's eligibility rules because (1) college sports are not in fact amateur, (2) there are less restrictive alternatives, and (3) in any event, amateurism is not procompetitive as the NCAA claims. Part II will examine American antitrust law, describe the history of amateurism and the NCAA, and explore how the NCAA has survived within the framework of American antitrust law. Part III will analyze the NCAA's proffered procompetitive justification of amateurism against the current state of college athletics. Part IV will propose that amateurism can no longer justify the NCAA's restraints of trade and protect it from antitrust liability. Section V will conclude the whether the NCAA voluntarily relaxes the amateurism rules or a federal court forces the issue, the NCAA's heavy-handed regulation of the amateur status of college athletes is likely to come to an end.

II. HISTORY

Under Section One of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."²⁹ The Sherman Act seeks to protect consumers from injury that results from diminished competition.³⁰ A lack of competition in a given market leads to higher prices and fewer choices for consumers, harming both the market and individual consumers. Thus, an antitrust plaintiff must allege both an injury to himself and an injury to the market.³¹ A plaintiff must prove three elements to succeed under Section One of the Sherman Act: "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury."³² Because all NCAA member schools have agreed to abide by the NCAA bylaws, the first prong,

29. 15 U.S.C. § 1 (2002).

30. *Banks*, 977 F.2d at 1087 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107-08 (7th Cir. 1984)).

31. *Car Carriers, Inc.*, 745 F.2d at 1107.

32. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir.1993) (internal citations omitted).

demonstrating an agreement or contract, is not at issue in NCAA antitrust cases.³³

The Sherman Act seeks to protect the benefits of competition: lower prices and more choices for consumers.³⁴ Therefore, the determination of whether a restraint is unreasonable focuses on the competitive effects of the challenged restraint weighed against less restrictive alternatives or the abandonment of the restraint altogether.³⁵ Courts have established three categories of review—the Rule of Reason, the Per Se framework, and the “quick-look” analysis—for determining whether actions have anticompetitive effects, though the methods often blend together.³⁶ All three methods of analysis seek to answer the same question—whether the challenged restraint enhances competition.³⁷

The Rule of Reason is the standard framework for analyzing an action’s anticompetitive effects on a market.³⁸ Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area.³⁹ First, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly (whether as a monopolist acting alone or as a group of competitors acting in concert) but avoid going out of business—without which the defendant could not cause anticompetitive effects on market pricing.⁴⁰ If the plaintiff meets this burden, the defendant must show that the restraint in question actually has procompetitive

33. *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (“There is no question that all NCAA member schools have agreed to abide by the Bylaws; the first showing of an agreement or contract is therefore not at issue in this case.”).

34. *Id.* at 334–35 (“The purpose of the Sherman Act is to protect consumers from injury that results from diminished competition.”).

35. 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1500 (1986).

36. *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779 (1999) (“The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘Rule of Reason’ tend to make them appear.”); *see also* *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

37. *Cal. Dental*, 526 U.S. at 780 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984)).

38. *Agnew*, 683 F.3d at 335.

39. *See* *Reifert v. S. Cent. Wis. MLS Corp.*, 450 F.3d 312, 321 (7th Cir. 2006).

40. *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.3d 656, 666 (7th Cir. 1987).

benefits that outweigh the anticompetitive effects.⁴¹ The plaintiff then must either dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.⁴² The alleged restraint is unreasonable if there are less restrictive means that achieve the same procompetitive benefits without harming competition.⁴³

The second category of analysis utilized by courts, the Per Se framework, is employed when a “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”⁴⁴ Restraints that would fall under this category are illegal as a matter of law for reasons of efficiency; in essence, it is simply not worth the effort or resources required by a Rule of Reason analysis when “the Court [can] predict with confidence that the Rule of Reason will condemn [a restraint].”⁴⁵ Under the Per Se framework, a restraint is deemed unreasonable without any inquiry into the market context in which the restraint operates.⁴⁶ The two classic examples of behavior that is considered anticompetitive per se are horizontal price-fixing (an agreement between competitors or an action by a monopolist to set the price of a product) and output limitation (an agreement between competitors or an action by a monopolist to artificially limit the amount of product brought to market).⁴⁷

41. Social policy or public welfare concerns may not be weighed in the analysis; only economic arguments are allowed. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 693-94 (1978) (concluding argument that restraint on competition “ultimately inures to the public benefit” does not satisfy the Rule of Reason). Therefore, merely arguing that the system of NCAA regulations is unfair to college athletes would be pointless. A fairness or social policy argument is relevant to an antitrust analysis only if it is repackaged as an argument that the restraint creates a new product that would not otherwise be available. *See Brown Univ.*, 5 F.3d at 677.

42. AREEDA, *supra* note 35, ¶ 1507b.

43. *Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994) (“One basic tenet of the rule of reason is that a given restriction is not reasonable, that is, its benefits cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits as the current restraint.”).

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

45. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990) (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).

46. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100.

47. *Id.*

The third category, the “quick look” analysis, falls in the grey area between the Per Se framework and the full-blown Rule of Reason analysis. The “quick look” analysis is appropriate when a restraint would normally be considered illegal per se, but “a certain degree of cooperation is necessary if the [product at issue] is to be preserved.”⁴⁸ Under this approach, if the court finds no legitimate justifications for facially anticompetitive behavior (such as price-fixing), no market power analysis is necessary and the court “condemns the practice without ado.”⁴⁹ But if it finds justifications, the court may need to apply a full Rule of Reason analysis.⁵⁰

The NCAA’s restraints of trade are analyzed under the Rule of Reason because intercollegiate athletic competition is “an industry in which horizontal restraints [agreements between parties at the same level of a market or industry] on competition are essential if the product [in this case, college sports] is to be available at all.”⁵¹ For example, schools must agree on the size of fields, the rules of gameplay, and the length of games if any intercollegiate games are to be played, much less broadcasted. Therefore, the evaluation of the competitive character of the NCAA’s horizontal restraints of trade, that would normally be per se illegal, require consideration of the NCAA’s justifications for the restraints.⁵² Some mutual agreements between member schools, like those on the field size and rules of gameplay,⁵³ are easily justified because the product would not exist without them. Other agreements, like the amateurism restraints,⁵⁴ are less easy to justify.

The NCAA’s restraints on trade first failed a Rule of Reason analysis in *NCAA v. Board of Regents of the University of Oklahoma*.⁵⁵ In *Regents*, the Supreme Court held that the NCAA’s limit on the number of football games a university could broadcast

48. *Id.* at 117; see also 11 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1911c (1998).

49. *Chi. Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992).

50. *See id.*

51. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 101.

52. *Id.* at 103.

53. *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2014 NCAA FOOTBALL RULES AND INTERPRETATIONS (July 2014), available at <http://www.ncaapublications.com/product/downloads/FR14.pdf>.

54. *See supra* notes 6–11.

55. 468 U.S. at 133–36.

per year was an unreasonable restraint of trade, because it existed only to insulate ticket sales from competition.⁵⁶ In those days, the NCAA believed that no one would come to games if they could simply watch them on television and thus limited the number of games an institution could broadcast.⁵⁷ The Court found that the rule did nothing to preserve the product of college football; instead, it “simply impose[d] a restriction on one source of revenue that [was] more important to some colleges than to others.”⁵⁸ *Regents* established, for the first time, that an action of the NCAA could be an unreasonable restraint of trade.

Regents is significant for another reason. In addition to ruling that the NCAA could not restrict the number of college football games available for broadcast,⁵⁹ the Court also spoke in dicta about the rationale behind the numerous restraints that allegedly keep college athletics amateur.⁶⁰ These few lines of dicta have haunted antitrust plaintiffs for decades:

“[T]he NCAA seeks to market a particular brand of football—college football. The identification of this ‘product’ with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the ‘product,’ athletes must not be paid, must be required to attend class, and the like. And the integrity of the ‘product’ cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling

56. *Id.* at 117. The NCAA began restricting television broadcasts of football games in 1951. In 1979, schools with major football programs, among them the University of Oklahoma, began to agitate for a greater voice in formulating the NCAA’s football broadcast policy and for more televised games. At issue in this case was the NCAA broadcast plan for the 1982–85 seasons, under which no school was allowed to appear on television more than a total of six times total and no more than four times nationally per two-year period. *Id.* at 89–95.

57. *Id.* at 115–16.

58. *Id.* at 119.

59. *Id.* at 119–20.

60. *Id.* at 101–02.

college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”⁶¹

These lines do not contribute to the holding of *Regents*. Rather, they explain how amateurism serves as the primary procompetitive justification for the mutual agreements between the NCAA and its member schools to restrain trade because it preserves college athletics as a distinct product.

After *Regents*, college athletes began to bring antitrust suits challenging the amateurism restraints. The first of these suits challenged the limits on compensation that may be paid to college athletes.⁶² In *McCormack v. NCAA*, the plaintiffs argued that these limits constituted illegal price-fixing by a cartel of buyers.⁶³ The court deferred to the previously-cited dicta in *Regents* and found that the limits on compensation “create[d] the product and allow[ed] its survival in the face of commercializing pressures.”⁶⁴ It quickly upheld the NCAA’s restraints as reasonable, adding that NCAA restraints could be reasonable even where the restraint promoted something less than a perfect form of amateurism.⁶⁵

The NCAA also prohibits college athletes from testing the waters of the professional leagues. An athlete unsuccessfully challenged this no-draft rule as an illegal restraint of trade in *Banks v. NCAA*.⁶⁶

61. *Id.*

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

63. *Id.* at 1342–43. This case was spawned by the infamous “death penalty” suspension of the Southern Methodist University football program for the entire 1987 season. Holding SMU football responsible for multiple NCAA rule violations, most notably compensating football players beyond what was allowed under NCAA restrictions, the NCAA suspended the program for the entire 1987 season and imposed other penalties. *Id.* at 1340.

64. *Id.* at 1345.

65. *Id.* A restraint could still be reasonable even where the NCAA had not “distilled amateurism to its purest form.” *Id.*

66. *Banks v. NCAA*, 977 F.2d 1081, 1083 (7th Cir. 1992). The Seventh Circuit agreed with the District Court’s grant of the NCAA’s motion to dismiss, finding that the plaintiff failed to allege that the restraint had any anticompetitive effect. *Id.* at 1086. The dissent, however, reasoned that the restraint did have an anticompetitive effect because the no-draft rule limited the package of “terms of employment” which a university could offer to an athlete to attract him to that school. *Id.* at 1095. These “terms of employment,” on which schools compete to attract athletes, include tuition, room and board, institutional reputation, and academic programs. *Id.* at 1096. The dissent reasoned that the restraint eliminated competition between schools on this particular term and thus had an anticompetitive effect. The dissent noted what

However, the NCAA has recently added a number of broad exceptions to this rule that swallow much of what was once impermissible conduct.⁶⁷

The most recent effort to challenge the NCAA amateurism rules using the antitrust laws is the *O'Bannon* case discussed above.⁶⁸ The plaintiffs accused the NCAA and its business partners of denying them payment for selling the rights to their image and likeness (by fixing the price to zero) and refusing to deal with former athletes regarding compensation for the continued use of their image and likeness after they graduate.⁶⁹ A federal trial judge agreed in principal with the plaintiffs, but issued a piecemeal and logically inconsistent injunction.⁷⁰ The NCAA's appeal is currently before the Ninth Circuit.⁷¹

The ban on agents is another core tenant of amateurism that, according to the NCAA, preserves the unique character of its product, college athletics.⁷² In theory, no agent can contact a professional sports team on behalf of a player or steer a player toward a particular school.⁷³ However, the NCAA looks the other way with regard to

would happen if college athletics abandoned the no-draft rule: “[C]olleges that promised their athlete the opportunity to test the waters in the NFL draft before their eligibility expired, and returned if things didn’t work out, would be more attractive to athletes than colleges that declined to offer the same opportunity.” *Id.* at 1095.

67. NCAA MANUAL, *supra* note 5, at 65–66 (Rule 12.4.2). These exceptions allow an athlete to enter a professional draft one time in his or her college career without jeopardizing his or her eligibility provided that (1) the athlete is not drafted, and (2) the athlete declares, in writing and within a certain amount of time after the draft, his or her intention to resume intercollegiate competition. *Id.*

68. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

69. Class Action Complaint, *supra* note 13, ¶ 552–57.

70. *O'Bannon*, 7 F. Supp. 3d at 963. The court enjoined the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their Football Bowl Subdivision (FBS) football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses. *Id.* at 1007–08. However, the court allowed the NCAA to cap this amount at the cost of attendance as defined by NCAA bylaws (\$5000 in 2014). *Id.* at 1008. It is difficult to fathom how price-fixing at \$0 is a violation of the per se rule against price-fixing, but price-fixing at \$5000 is not.

71. Steve Berkowitz, *Court to Expedite NCAA's Appeal of the Ed O'Bannon Lawsuit*, USA TODAY (Sept. 24, 2014, 2:20 PM), <http://www.usatoday.com/story/sports/college/2014/09/24/ncaa-lawsuit-case-appeal-ed-obannon-expedited-peter-shaw/16154997/>.

72. NCAA MANUAL, *supra* note 5, at 59, 66.

73. Joe Nocera, *The Hockey Exemption*, N.Y. TIMES (Feb. 13, 2012), http://www.nytimes.com/2012/02/14/opinion/nocera-the-hockey-exemption.html?_r=0.

college hockey.⁷⁴ Talented young hockey players have a plethora of future options; by their mid-teens, they can join an extensive system of junior leagues and farm teams.⁷⁵ By nineteen, they also have to choose whether to play for a college and which college, and become eligible for the professional draft.⁷⁶ At this juncture in their careers, many young hockey players utilize professional agents, called advisors, for advice and assistance in contract negotiation.⁷⁷ The system appears to work well for everyone involved, and the NCAA “averts its eyes” from this systemic violation of its rules.⁷⁸ There are many reasons for the hockey exemption. First, the complex nature of the decisions facing young players often requires the counsel of an experienced advocate.⁷⁹ Second, the players who choose to play in college and subject themselves to the NCAA’s rules often do so because they have been advised that it is their best route to the professional league.⁸⁰ Third, the system is so ingrained in hockey culture that it would be exceedingly difficult for the NCAA to dismantle it.⁸¹ Fourth, one can speculate that, because college hockey is not a big-revenue sport, should college hockey players ever be

74. *Id.*

75. *Id.* See also Chris Peters, *A Beginner’s Guide to the CHL vs. NCAA Recruiting Battle*, THE UNITED STATES OF HOCKEY (July 18, 2012) <http://unitedstatesofhockey.com/2012/07/18/a-beginners-guide-to-the-chl-vs-ncaa-recruiting-battle/> (Describing the differences between NCAA hockey and its primary competitor, the Canadian Hockey League (CHL), their competition for recruits, and their success at sending players to the National Hockey League (NHL). “There isn’t a comparable sport [to college hockey] in college athletics where there is direct competition for the same players by an outside entity.”).

76. Nocera, *supra* note 73.

77. *Id.*

78. *Id.*

79. *Id.* The landscape facing a teenage hockey player is a complex one. By their mid-teens, good hockey players have the option to join various junior leagues of varying levels in both the United States and abroad. *Id.* The primary league that competes with NCAA Hockey is the CHL, which plays an NHL-like schedule and has produced a high volume of NHL players. Peters, *supra* note 75. At nineteen years old, hockey players become eligible for the professional draft, and must decide whether to enter the draft or attend college. Nocera, *supra* note 73..

80. *Id.* For the benefits of choosing NCAA hockey over a junior league like the CHL, see *NCAA College Hockey vs. CHL Major Junior*, COLLEGE HOCKEY INC., <http://collegehockeyinc.com/pages/ncaa-college-hockey-vs-chl-major-junior> (last visited Apr. 10, 2015)

81. Nocera, *supra* note 73.

reclassified as professionals, there is not much money that the NCAA and its member institutions would have to share with them.⁸²

Studies have shown that college athletes, including those who have sued their universities and the NCAA, see themselves as athletes, not students. In Division I football, 59% of student-athletes reported that athletics was the primary reason for attending their college, as opposed to 24% who indicated academics.⁸³ In men's basketball and baseball, the numbers rose to 68% and 79% respectively.⁸⁴ Additionally, 72% of Division I male student-athletes in sports other than football, baseball, or basketball, reported viewing themselves as more of an athlete than a student.⁸⁵ Even 55% of Division III male student-athletes felt the same way, as did 64% of Division I female student-athletes.⁸⁶

Nearly every student-athlete dreams of playing professionally. According to Domonique Foxworth, former cornerback for the University of Maryland and the NFL's Baltimore Ravens, and an executive committee member for the NFL Players Association, "even the second string punter believes a miracle might lift him to the NFL."⁸⁷

Additionally, in those sports with extensive minor leagues and farm systems, namely hockey and baseball, players often attend college because they have been advised that it is their best route to

82. To conclude a discussion on the no-agent rule, it is worth noting that a court has rejected the rule. In *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009), the court permanently enjoined the rule prohibiting agents in all college sports because it violated the duty of good faith implicit in the contract between Oliver, a pitcher on the Oklahoma State University baseball team, and the university itself. *Id.* at 215. Moreover, the court found that the ban on agents "surely does not retain a clear line of demarcation between amateurism and professionalism." *Id.* at 214. That ruling was later vacated by a settlement. Katie Thomas, *N.C.A.A. to Pay Former Oklahoma State Pitcher \$750,000*, N.Y. TIMES (Oct. 8, 2009), <http://www.nytimes.com/2009/10/09/sports/09ncaa.html>. While a vacated ruling from a state trial court is not terribly persuasive authority, it illustrates the problems with the no-agent rule and that it is possible to defeat the no-agent rule through legal argument.

83. Glenn M. Wong et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 556 (2011).

84. *Id.*

85. *Id.*

86. *Id.*

87. Taylor Branch, *The Shame of College Sports*, ATLANTIC (Sept. 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

the professional leagues.⁸⁸ For these student-athletes, attending college is not a decision to further their education, but a decision to forego other paths to the professional leagues.

This “path to the pros” mentality is particularly true for elite players in elite programs. For example, coach John Calipari runs a program at the University of Kentucky, which won a national championship in basketball in 2012 and entered the 2015 NCAA Tournament with a historic 34–0 record, that prepares college athletes for the NBA. Coach Calipari has admitted that all players are aware of their ratings as a professional prospect, and any coach that thinks his players do not worry about going pro is “out of [his] mind.”⁸⁹ With millions of dollars and the fulfillment of a childhood dream at stake, it is not surprising that many college athletes have the dream, and sometimes also the intent, to play professionally.

College coaches have also brought an antitrust suit against the NCAA post-*Regents* and these suits have achieved more success than the suits by student-athletes. In *Law v. NCAA*, the court struck down an NCAA rule limiting the annual salaries of some coaches.⁹⁰ The plaintiffs alleged that the NCAA had been unduly limiting price competition for the services of some coaches and the NCAA countered that the rule was, among other things, necessary to preserve amateurism in college athletics.⁹¹ Using a Rule of Reason analysis, the court found no procompetitive benefits to the rule, but rather that it was a “naked price restraint.”⁹² The court at that time, however, declined to extend their rationale to the amateur status of college athletes.⁹³

Since *Law*, NCAA coaches have become increasingly professionalized. “This is a business,” remarked football coach

88. Nocera, *supra* note 73.

89. Mike DeCourcy, *Kentucky Coach John Calipari: “I’ve got maybe the best job in basketball”*, SPORTING NEWS (Mar. 5, 2012, 11:03 AM), <http://aol.sportingnews.com/ncaa-basketball/story/2012-03-05/kentucky-coach-john-calipari-ive-got-maybe-the-best-job-in-basketball>.

90. *Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998).

91. *Id.* at 1022 n.14. The NCAA also argued that the rule was justified because it reduced the cost of a collegiate athletic programs and maintained competitiveness between college teams. The court rejected both of these arguments on the merits. *Id.* at 1021–24.

92. *Id.* at 1020.

93. *Id.* at 1022 n.14.

Tommy Tuberville about his leaving one program and being hired by another.⁹⁴ The salaries paid to the coaches of major college football and men's basketball programs are on par with, and in some cases surpass, salaries paid to professional football and basketball coaches.⁹⁵ In 2014, seventy-two college football coaches and thirty-nine men's basketball coaches made over \$1 million each in total pay.⁹⁶ The highest paid state employee in thirty-nine states is a college football or basketball coach.⁹⁷ National media recently speculated that the University of Alabama and the University of Texas would get into a bidding war to hire Nick Saban, pushing his annual salary over \$10 million.⁹⁸ Many coaches profit further from their celebrity status by trademarking their names and signing separate licensing deals with their schools.⁹⁹ Moreover, the salaries paid to college coaches far outstrip those paid to college professors, signaling that these coaches are valued beyond their contributions to their universities' academic programs.¹⁰⁰

94. See Josh Kendall, *Tuberville Faces Firing Squad of Questions from Dan Patrick*, COACHINGSEARCH.COM (Dec. 13, 2012), <http://coachingsearch.com/article?a=tuberville-faces-firing-squad-of-questions-from-dan-patrick>. He also referred to college coaches as "CEOs" and "hired guns." *Id.*

95. The highest paid NFL head coach, Sean Payton, earns roughly \$8 million per year, while the highest paid NBA coach, Doc Rivers, earns \$7 million per year. Chris Smith, *The Highest-Paid Coaches in U.S. Sports*, FORBES (May 22, 2013, 10:04 AM), <http://www.forbes.com/sites/chris-smith/2013/05/22/the-highest-paid-coaches-in-us-sports/>. Steve Berkowitz et al., *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> (last visited Apr. 4, 2015).

96. *Id.* The highest paid coaches, each running elite programs and winning multiple championships, are Nick Saban, the head football coach at the University of Alabama, whose total pay in 2014 was \$7,160,187, and John Calipari, the head men's basketball coach at the University of Kentucky, whose total pay in 2014 was \$6,356,756. *Id.*

97. Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013, 3:23 PM), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228>.

98. Pat Forde, *Could Texas Bidding War Make Nick Saban College Football's First \$10 million Coach?*, YAHOO! SPORTS (Sept. 19, 2013, 6:43 PM), <http://sports.yahoo.com/news/ncaaf--could-texas-bidding-war-make-nick-saban-college-football-s-first--10-million-coach--224337644.html>; see also Kevin Sherrington, *Sherrington: If Texas Offers Alabama's Nick Saban \$10 million/year, He Should Listen*, DALL. MORNING NEWS (Sept. 19, 2013, 9:43 AM), <http://www.dallasnews.com/sports/college-sports/headlines/20130918-sherrington-if-texas-offers-alabama-s-nick-saban-10-million-year-he-should-listen.ece>.

99. Steve Berkowitz, *Latest Trend for College Football Coaches: Trademarked Names*, USA TODAY (Nov. 6, 2013, 4:19 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/11/06/college-football-coaches-pay-name-likeness-trademarks/3449829/>.

100. A fully-tenured professor at the University of Alabama earns an average annual salary

Universities can afford high salaries for coaches because major college athletic programs generate high revenues for the schools involved. It is not unusual for the football team at a big-revenue football school to earn between \$40 million and \$80 million in profits each year.¹⁰¹ This category includes the Universities of Florida, Georgia, and Michigan, and Pennsylvania State University, among others.¹⁰² The University of Texas is the most valuable college athletic program, currently valued at \$129 million overall, with a football team that generated \$65 million for the university in 2012.¹⁰³ Notre Dame, the second most valuable program, generated more than \$10 million in additional spending per home football game in 2012.¹⁰⁴ This class of universities operates major athletic programs that rake in tens of millions of dollars for their respective institutions.

In addition to profits from university athletic departments, some universities run their own sports television networks and sign lucrative deals with corporate sponsors. *The Longhorn Network*, which broadcasts athletic content of the University of Texas, is the most prominent of these.¹⁰⁵ On the corporate sponsor side, an example is Cam Newton's 2010 season, when he won the Heisman Trophy and the National Championship while compliantly wearing at least fifteen corporate logos on his jersey and equipment as part of Auburn University's \$10.6 million deal with sports clothing maker

of \$132,900. *2013 AAUP Faculty Salary Survey: University of Alabama at Tuscaloosa*, CHRON. HIGHER EDUC. (Apr. 8, 2013), <http://chronicle.com/article/aaup-survey-data-2013/138309#id=100751>. A fully-tenured professor at Duke earns an average annual salary of \$180,200. *2013 AAUP Faculty Salary Survey: Duke University*, CHRON. HIGHER EDUC. (Apr. 8, 2013), <http://chronicle.com/article/aaup-survey-data-2013/138309#id=198419>. Cf. Berkowitz, *supra* note 95.

101. Branch, *supra* note 87.

102. *Id.*

103. Chris Smith, *College Football's Most Valuable Teams: 1. University of Texas Longhorns*, FORBES (Dec. 22, 2011, 11:43 AM), <http://www.forbes.com/pictures/emdm45el/1-university-of-texas-longhorns/>.

104. Chris Smith, *College Football's Most Valuable Teams: 2. University of Notre Dame Fighting Irish*, FORBES (Dec. 22, 2011, 11:43 AM), <http://www.forbes.com/pictures/emdm45el/2-university-of-notre-dame-fighting-irish/>.

105. Steven Godfrey, *The Eye of Texas: Inside the Longhorn Network as it Continues to Enter Unchartered Territory*, SB NATION (Oct. 3, 2013), <http://www.sbnation.com/longform/2013/10/3/4798078/the-eye-of-texas-inside-the-longhorn-networks-uncharted-television>. Many athletic conferences and a few other schools also operate their own television networks, such as the SEC Network, the Big Ten Network, the Pac-12 Network, and BYUtv.

Under Armour.¹⁰⁶ While the student-athletes remain “amateurs,” the coaches occupy highly professional and well-compensated positions and the industry of college sports has become undeniably commercialized and profitable.

The NCAA is not the only institution to espouse the idea of amateur athletics. The modern Olympic games once had an amateurism code that barred Olympic athletes from being paid for their participation in athletics or accepting commercial endorsements.¹⁰⁷ However, driven by the lure of increased revenue and the fact that most Eastern Bloc athletes were already *de facto* professionals supported by their governments to train and compete full time, the International Olympics Committee abandoned the pretense of amateurism and allowed professional athletes to compete.¹⁰⁸ The word “amateurism” was removed from the Olympic charter in 1974 and, over the next two decades, the International Olympic Committee slowly changed other rules and allowed professionals to compete.¹⁰⁹ By the 1992 Barcelona Games, the “Dream Team” of NBA superstars represented the United States in Olympic basketball (and won gold), even though all played basketball professionally and accepted commercial endorsements.¹¹⁰ While the athletes may have changed, from amateur to professional, the nature of the Olympics as a product did not change: the Olympic spirit of international camaraderie through sport remains and the games are more popular now than ever.¹¹¹

106. Branch, *supra* note 87. Notably, Under Armour also recently agreed to pay \$90 million over ten years for the right to clad Notre Dame athletes in Under Armour equipment and produce Notre Dame athletic apparel; Adidas has a similar ten year deal to pay \$82 million to the University of Michigan. Darren Rovell, *Under Armour Signs Notre Dame*, ESPN.COM (Jan. 21, 2014, 3:06 PM), http://espn.go.com/college-football/story/_/id/10328133/notre-dame-fighting-irish-armour-agree-most-valuable-apparel-contract-ncaa-history.

107. Bob Greene, *What Changed the Olympics Forever*, CNN (July 23, 2012, 11:43 AM), <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs/>.

108. *Id.*

109. MARIE-HÉLÈNE ROUKHADZÉ, INT’L OLYMPIC COMM., THE OLYMPIC WINTER GAMES: FUNDAMENTALS AND CEREMONIES (2002), available at http://www.olympic.org/Documents/Reports/EN/en_report_267.pdf.

110. Greene, *supra* note 107.

111. Hruby, *supra* note 5.

III. ANALYSIS

Amateurism is no longer a viable procompetitive justification for the NCAA's mutual restraints of trade because (1) college sports are not amateur; (2) amateurism is not procompetitive, as the NCAA claims; and, (3) there are less restrictive alternatives than amateurism to maintain the product that is college sports.

A. College Sports Are Not Amateur

First and foremost, college sports are not amateur. While many, if not all, coaches and players participate because they love the sport or their school, college athletics is also a business.

Second, major college football and basketball programs represent major commercial, as opposed to academic, endeavors. Many generate profits in the tens of millions of dollars.¹¹² They operate television networks to disseminate content and sell advertising.¹¹³ They enter into contracts with manufacturers of sporting goods that adorn college athletes in corporate logos.¹¹⁴ These commercial trends do not degrade the product of college sports; if anything they make it more accessible to the public. The investments in and revenues generated by the athletics programs in a class of major universities indicate, however, that athletics at these universities has moved beyond being a mere component of the academic programs and educational mission.¹¹⁵

112. Branch, *supra* note 87.

113. See Godfrey, *supra* note 105.

114. See Rovell, *supra* note 106; see also Branch, *supra* note 87.

115. Some contend that the academic side of college athletics is, itself, a sham because of the special help given to some college athletes (e.g., tutors, less demanding coursework, and leniency from professors not available to the general student body) and the low academic achievement by some athletes (e.g., low test scores and low graduation rates). However, the statistics to support this argument are incomplete, often because the schools and the NCAA refuse to share the necessary information. The evidence remains largely anecdotal. See Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html>.

Second, the salaries of major college coaches far outstrip those of professors at the same university.¹¹⁶ This discrepancy indicates that these coaches are valued for more than their contributions to their universities' academic programs (though as a leader and mentor, a coach likely has impact in this area as well). A university with a major athletic program wants a coach that does more than simply teach a sport and life skills to athletes. These schools want a coach to win championships, garner prestige for their programs, and ultimately increase the demand for their product (college sports) in the eyes of sponsors, broadcasting networks, and fans. If intercollegiate athletics was truly an integral subcategory of a university's scholastic mission, then competition for coaches would not drive their value so far above that of the 'other' educators: college professors.

Coaches and schools can and do profit from college athletics,¹¹⁷ license their names and likeness,¹¹⁸ and accept endorsement deals.¹¹⁹ Athletes, on the other hand, are barred from all of these activities. The stringently enforced amateur status of the athletes themselves is arguably the only thing about major college sports that is actually amateur.

Third, despite the amateurism rules and their enforcement, those same college athletes do not see themselves as amateurs. Across sports, genders, and levels of competition, a majority of student-athletes attended their institution because of athletics, not academics.¹²⁰ Moreover, every athlete is aware of his or her prospects of rising to the top professional league in the sport.¹²¹ Those with good prospects often play college sports to get to these leagues.¹²² For many college athletes, college athletics is not a part of a larger scholastic experience, but rather a stepping-stone on the road to the NFL, NBA, or NHL. For coaches and schools, it is a business.

116. See, e.g., 2013 AAUP Faculty Salary Survey: University of Alabama at Tuscaloosa, *supra* note 100.

117. Branch, *supra* note 87; see also Berkowitz et al., *supra* note 95.

118. Berkowitz, *supra* note 99.

119. *Id.*

120. See Wong et al., *supra* note 83, at 556.

121. See DeCourcy, *supra* note 89.

122. See Nocera, *supra* note 73.

B. Amateurism Has No Procompetitive Effects

Despite NCAA claims, amateurism is not procompetitive. That is, the amateurism restraints do not create a different product that would otherwise be unavailable.¹²³ In theory it is difficult to say that a student-athlete with a little money in his pocket would be any less of a student or that he would be different from a student who worked his way through school with a nonathletic job. Moreover, observers of college sports have noted that the popularity of college sports is more closely tied to location and university than to the idea that such sports are amateur.¹²⁴

In practice, where amateurism restraints have been neglected or abandoned the product has not changed. First, the success of the hockey system indicates that lifting the ban on agents in other sports would not change the nature of the product that the NCAA and its members license to broadcasters.¹²⁵ Second, the Olympics abandoned the pretense of amateurism decades ago and have not become a lecherous, money-grubbing hive of villainy.¹²⁶ The ideals of the Olympic spirit endure and demand for the Olympic product is higher now than ever. Likewise, nothing suggests that college sports would change or that universities and student-athletes would be worse off should all college sports abandon amateurism.

C. Less Restrictive Alternatives to Amateurism

Lastly, there are less restrictive alternatives than the current system of amateurism rules and enforcement. A simple and elegant alternative can be found by looking to the Olympics: lifting the prohibition on endorsements.¹²⁷ This alternative keeps the nature of

123. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 (1984).

124. *See* Hruby, *supra* note 5. Bluntly, “Alabama fans want Alabama wins. Not an association-imposed Alabama player salary cap.” Patrick Hruby, *Court of Illusion*, SPORTS ON EARTH (Oct. 10, 2013), <http://www.sportsonearth.com/article/62747894/>.

125. *See* Nocera, *supra* note 73.

126. *See* Hruby, *supra* note 5.

127. This approach is also endorsed by the National College Players Association (NCPA), a fledgling but largely unrecognized trade association for college athletes. The NCPA has urged Congress to adopt the Olympic model because the NCPA believes that a system that allowed college athletes to “secure endorsement deals, get paid for signing autographs, etc.” is

the product intact because schools still would not issue direct payments to athletes for playing, it solves many of the problems presented by direct payments, and it offers a scheme that is far less restrictive of the rights of college athletes.

The most pressing dilemmas with direct pay for college athletes concern the amounts of the payments and to whom they will be paid. Would schools be obligated to disburse a small blanket payment to all athletes? Or would the payment only go to those in revenue sports? Would a school that paid only its football and men's basketball players violate the anti-gender-discrimination provisions of Title IX? Do superstars get paid more by the school than average athletes? Do schools need to start contract negotiations with recruits? Would direct pay from the school unacceptably divide the athletes from the rest of the student body? Some of these concerns are more valid than others, but none are at issue if college athletes are simply allowed to accept endorsements.

Under a system where endorsements are allowed, the market would decide who gets paid and how much. Superstar college athletes would accept larger endorsements from national brands, and other players would accept smaller endorsements from local businesses. Ideally every athlete would be able to profit from athletics in a way directly tied to the value of his or her name.¹²⁸ Schools could treat all athletes equally and not incur any additional costs to the school. Additionally, student body cohesiveness would remain unaffected because, from the perspective of other students, college athletes would simply join the many other college students—the writer who receives royalties from a book she published, the actor who gets paid to do commercials, or the waiter who works on the side to pay tuition—who receive payments from a third party outside the university. Similarly, relationships between teammates, coaches, and

preferable to the NCAA's impractical and unjust amateurism rules. RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT'L COLL. PLAYERS ASS'N, *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 26, available at <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

128. For example, a talented, prolific, and well-known quarterback could sign a deal with Nike or Under Armour and appear in a nationally disseminated advertising campaign, while a lesser-known player could endorse regional businesses like Belk or promote local events. Under such a system, it would be that business that pays the athlete, not their school or the NCAA.

athletic departments would also not suffer were athletes allowed to accept endorsement deals. These relationships would continue to function, much as they do as the professional level, where all athletes, coaches, and managers have—sometimes wildly—different earning potential, but still collaborate toward their common goal.

Keeping all other rules in place but allowing college athletes to accept endorsements is a small change that leaves schools and the product of college sports unchanged. But it is far less restrictive of the rights of college athletes to contract and to profit from the use of their image and likeness.

IV. PROPOSAL

Because amateurism is no longer a viable procompetitive justification, courts should reject this proffered justification and rule against the NCAA in *O'Bannon* on appeal.

The NCAA can likely escape antitrust suits from college athletes without suffering any financial loss by lifting the prohibition on endorsements. Though the NCAA's potential antitrust liability likely would remain as a technical matter (i.e. the NCAA would still be price-fixing the value of an athlete's labor), few athletes would file suit because commercial endorsement would provide an easier path to compensation than suing the NCAA. Also, any athletes that did pursue antitrust claims against the NCAA would likely find that the ability to seek endorsements makes it more difficult for them to prove an injury to themselves, essential to any antitrust claim,¹²⁹ from the NCAA's restraints. If the athletes are getting paid, a court will have difficulty finding a redressable injury from the amateurism restraints. This path would also alleviate much of the perceived unfairness and hypocrisy that surrounds amateurism and the treatment of college athletes.

129. See *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984).

V. CONCLUSION

Amateurism is no longer a viable procompetitive justification for the NCAA's mutual restraints of trade because college sports are not amateur, amateurism is not procompetitive, and there is a viable alternative that is far less restrictive of the rights of college athletes. Whether the NCAA voluntarily relaxes the amateurism rules or a federal court forces the issue, the NCAA's heavy-handed regulation of the amateur status of college athletes is likely to come to an end.¹³⁰

130. The NCAA has arguably seen the proverbial writing on the wall and begun to gradually relax its amateurism rules in its own. The day before the ruling of the trial court in *O'Bannon* was handed down, the NCAA voted to allow members of the top five college athletic conferences and Notre Dame to make some of their own rules, namely to allow these schools to offer student-athletes not only a scholarship, but the full cost of attendance. Sean Gregory, *Some College Athletes Will Now Get Paid—A Little*, TIME (Aug. 7, 2014), available at <http://time.com/3089288/ncaa-college-athletes-pay/>.