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## Judges Are Not ‘Super-Referees’: Why a Qualified Statutory Exemption to the Sherman Act is Needed to Reform the NCAA and its Exploitive Amateur Model, 49 J. Marshall L. Rev. 125 (2015)

Christopher Sweeney

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# JUDGES ARE NOT ‘SUPER-REFEREES’: WHY A QUALIFIED STATUTORY EXEMPTION TO THE SHERMAN ACT IS NEEDED TO REFORM THE NCAA AND ITS EXPLOITIVE AMATEUR MODEL

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## I. AN INTRODUCTION TO THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (“NCAA”) AND THE CURRENT ECONOMIC REALITIES OF INTERCOLLEGIATE ATHLETICS

“In the court of public opinion, the [NCAA] has been on trial for quite some time now.”<sup>1</sup> Much of the public’s disdain for the NCAA is fueled by the fact that big-time<sup>2</sup> intercollegiate athletics now generate billions of dollars each year,<sup>3</sup> while the student-athletes that produce the revenues are subject to strict rules of amateurism that restrict their compensation and force them to “live hand to mouth.”<sup>4</sup>

Despite almost constant calls for change, the NCAA has stubbornly adhered to its principles of amateurism as justification for the prohibition on student-athlete compensation. As a result, everyone involved in big-time college sports is getting rich, except the student-athletes whose labor creates the value.<sup>5</sup> This seemingly fundamental unfairness has caused tensions to rise within intercollegiate athletics and spawned an unprecedented number of antitrust challenges against the NCAA in recent years.<sup>6</sup>

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<sup>1</sup> Steve Eder & Ben Strauss, *Understanding Ed O’Bannon’s Suit Against the NCAA*, N.Y. TIMES, (June 9, 2014), [www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html?\\_r=0](http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html?_r=0).

<sup>2</sup> For the purposes of this Comment, “big-time” college sports will refer to football and men’s Basketball on the Division I level.

<sup>3</sup> See William B. Gould IV et al., *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 9 (2014) (providing financial records regarding the revenues and expenses of the NCAA). The NCAA reported revenues of \$912,804,046.00 in 2012-13. *Id.* “[T]elevision and marketing rights fees” generate most of that revenue. *Id.* The rest is generated from various sources: championships and tournaments - \$110,631,867.00; investment income - \$41,398,750.00; sales and services - \$27,307,562.00; and contributions from facilities - \$7,074,007.00. *Id.*

<sup>4</sup> See *Players: 0; Colleges: \$10,000,000,000*, THE ECONOMIST (Aug. 16, 2014) available at [www.economist.com/news/united-states/21612160-pressure-grows-let-student-athletes-share-fruits-their-own-labours-players-0](http://www.economist.com/news/united-states/21612160-pressure-grows-let-student-athletes-share-fruits-their-own-labours-players-0) (stating that while college coaches receive millions of dollars a year, “the best players live hand to mouth”).

<sup>5</sup> See *infra* Part II(D).

<sup>6</sup> See *Agnew v. NCAA*, 683 F.3d 328, 335-38 (7th Cir. 2012) (affirming dismissal of a claim challenging NCAA rules on the number of athletic scholarships a school can offer and the prohibition of multi-year scholarships); see also *Rock v. NCAA*, 928 F. Supp. 2d 1020, 1026-27 (S.D. Ind. 2013) (dismissing claim regarding scholarship restriction at the Division III level); Eben Novy-Williams, *NCAA 2nd-Quarter Lobbying Costs Surge as Antitrust Lawsuits Loom*, BLOOMBERG BUSINESS (Aug. 13, 2014, 11:00 AM), [www.bloomberg.com/news/2014-08-13/ncaa-2nd-quarter-lobbying-costs-surge-as-antitrust-lawsuits-loom.html](http://www.bloomberg.com/news/2014-08-13/ncaa-2nd-quarter-lobbying-costs-surge-as-antitrust-lawsuits-loom.html) (stating that because of the pending antitrust

This Comment will analyze the historical application of antitrust laws to the rules and regulations of the NCAA and argue that, in light of a recent shift in judicial treatment, the next round of antitrust litigation threatens to destroy the entire NCAA model.<sup>7</sup>

This Comment will then demonstrate that while reform of the current NCAA model is long overdue, destroying the entire system through antitrust litigation is not the ideal solution because such a result would actually create more problems than it would resolve.<sup>8</sup> Instead, this comment proposes that any pressure to reform should come directly from Congress, in the form of NCAA Reform Legislation. This legislation would provide the NCAA with a strictly enforced, qualified exemption to federal antitrust laws that would allow the NCAA to implement actual, meaningful reform, while promulgating certain rules and restrictions that traditionally would have been vulnerable to antitrust challenges.

## II. NCAA REGULATION: AN OVERVIEW

### A. *The Formation and Evolution of Intercollegiate Athletics*

The scope and complexity of intercollegiate athletics have changed drastically over the last 100 years.<sup>9</sup> When college students first started forming athletic teams in the mid-nineteenth century, the student-athletes organized and controlled the competitions themselves.<sup>10</sup> As the popularity and complexity of intercollegiate athletics grew in the late nineteenth century, this system of student governance proved to be unsuitable.<sup>11</sup> Problems with increasing commercialization and cheating during sporting contests led colleges and universities to assume governance of intercollegiate athletics.<sup>12</sup> For example, the nation's very first

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suits against the NCAA, the organization is spending more money than ever before on congressional lobbying).

<sup>7</sup> See *infra* Parts III & IV.

<sup>8</sup> See *infra* Part IV(B).

<sup>9</sup> Christian Dennie, *Changing the Game: the Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 16 (2012); Jeffrey J.R. Sundram, Comment, *The Downside of Success: How Increased Commercialism Could Cost the NCAA its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 544 (2010). See also JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 9-19 (2006) (discussing the impetus behind the formation, and the subsequent evolution, of the NCAA).

<sup>10</sup> See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10-11 (2000) [hereinafter *Smith 1*] (discussing the early years of intercollegiate athletics and the forces that led to the formation of the NCAA).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* In fact, the very first intercollegiate athletic event, a competition between the rowing teams at Yale and Harvard in 1852, demonstrated the

organized athletic conference – the Big Ten - was formed in 1895 by a group of Midwestern institutions that were simply looking to gain more control over intercollegiate sporting events and student-athletes.<sup>13</sup>

Historians have noted that “[d]espite the shift from student control to faculty oversight . . . intercollegiate athletics remained under-regulated and a source of substantial concern.”<sup>14</sup> Concerns regarding the commercialization of intercollegiate athletics were compounded by worries over the violence and brutality of college football.<sup>15</sup> In 1905 alone, at least eighteen players died playing college football.<sup>16</sup> The rules of the game and the style of play led to much of the violence: “[p]layer substitutions were not allowed, brawls were tolerated and the ball carrier was allowed to crawl along the ground until finally held down.”<sup>17</sup> Brutal injuries became commonplace.<sup>18</sup> As a result, the public urged institutions to reform football, or have it abolished.<sup>19</sup>

In response, President Theodore Roosevelt gathered some of the nation’s top intercollegiate athletic leaders in Washington, D.C. to discuss reform and urge sweeping changes.<sup>20</sup> As a result of

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problems with these issues. *Id.* at 10-11. The event was sponsored by a prominent regional railroad looking to increase traffic on a new route that led to the lake where the contest was held. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 840 (2014).

<sup>13</sup> See Mark Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1023 (2014) (discussing the formation of the earliest athletic conferences). The group called themselves the Intercollegiate Conference of Faculty Representatives. *Id.* In 1899, the group expanded to nine teams and called themselves “the Big Nine Conference.” *Id.* at 1024. When the conference added a tenth team in 1917, “the Big Ten” was born. *Id.*

<sup>14</sup> Smith 1, *supra* note 10, at 12.

<sup>15</sup> *Id.*

<sup>16</sup> See Rodney K. Smith, *The National Collegiate Athletic Association’s Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 990 (1987) [hereinafter *Smith 2*] (stating that eighteen college football players died in 1905 alone); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 8 (2001) (estimating that 330 players died playing college football from 1890-1905).

<sup>17</sup> Amy Ellis Nutt, *How Brutal Injuries Plagued College Football Long Before the Concussion Debate*, NJ.COM (Dec. 15, 2013, 12:04 AM), [www.nj.com/news/index.ssf/2013/12/how\\_brutal\\_injuries\\_plagued\\_college\\_football\\_long\\_before\\_the\\_concussion\\_debate.html](http://www.nj.com/news/index.ssf/2013/12/how_brutal_injuries_plagued_college_football_long_before_the_concussion_debate.html).

<sup>18</sup> See *id.* (presenting a list of injuries tallied by an observer during a Princeton University football game: “four concussions, three ‘kicks in the head,’ three serious spine injuries, a ruptured intestine, seven broken collar bones, four broken noses, three broken shoulder blades, ‘two eyes gouged out,’ one player bitten and another knocked unconscious — three times — in just one game”).

<sup>19</sup> Dennie, *supra* note 9, at 16.

<sup>20</sup> Drew N. Goodwin, *Not Quite Filling The Gap: Why the Miscellaneous*

these meetings, sixty-two colleges and universities joined together in forming the Intercollegiate Athletic Association of the United States (IAAUS).<sup>21</sup> The group changed its name to the National Collegiate Athletic Association in 1910, and the NCAA was born.<sup>22</sup>

Early in its existence, the NCAA played only a small role in the governance of intercollegiate athletics.<sup>23</sup> Essentially, the organization served as a “discussion group that developed rules applicable to intercollegiate athletics.”<sup>24</sup> Two of the NCAA’s most notable early proposals involved allowing the forward pass, and adding the first-down marker in college football, thereby opening up the playing field and reducing player injuries.<sup>25</sup> “With the NCAA serving in this limited capacity, collegiate athletics thrived in the first half of the twentieth century.”<sup>26</sup> Schools started building enormous stadiums to meet the needs of their fan bases,<sup>27</sup> and college football players began to gain celebrity status.<sup>28</sup>

As public interest in college sports continued to grow, the NCAA began searching for ways to increase integrity in the governance of intercollegiate athletics.<sup>29</sup> The NCAA adopted certain eligibility rules and attempted to prevent the “financial remuneration” of student-athletes.<sup>30</sup> These early restraints failed to have any meaningful effect because the NCAA had no enforcement powers; compliance with NCAA rules was strictly voluntary.<sup>31</sup> It became clear that reliance on voluntary compliance was ineffective because of “the dramatic expansion of intercollegiate athletics and the financial opportunities such growth presented.”<sup>32</sup>

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*Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C.L. REV. 1277, 1282 (2013).

<sup>21</sup> *Id.*

<sup>22</sup> Crowley, *supra* note 9, at 12.

<sup>23</sup> Smith 1, *supra* note 10, at 13.

<sup>24</sup> Dennie, *supra* note 9, at 16.

<sup>25</sup> Edelman, *supra* note 13, at 1026.

<sup>26</sup> *Id.*

<sup>27</sup> *See id.* at 1027 (discussing the rapid growth of college football during the 1920s). For example, in 1922, Ohio State opened a 66,210-seat stadium that quadrupled the capacity of the prior stadium. *Id.*

<sup>28</sup> *See id.* (stating that Red Grange, one of the most famous college football players of all time, received as much attention in the 1920s as Babe Ruth and Charles Lindbergh).

<sup>29</sup> *See* Smith 1, *supra* note 10, at 13 (discussing how the commercial ramifications associated with winning led to the recruitment of college athletes “being raised to new heights”).

<sup>30</sup> *See* Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 Or. L. Rev. 329, 331 [hereinafter *Lazaroff 1*] (discussing some of the earliest regulations implemented by the NCAA during the organization’s formative years).

<sup>31</sup> *See id.* at 332 (explaining that the rise in popularity of college football made actual enforcement of the NCAA rules as difficult as enforcing prohibition).

<sup>32</sup> *Id.*

Despite these concerns, the NCAA was unable to develop any meaningful enforcement mechanism until a few decades later.<sup>33</sup> With the advent of national television after World War II, college sports experienced another large growth in popularity,<sup>34</sup> and, for the first time, athletic departments became large revenue generators.<sup>35</sup> “Money, usually tied to winning programs, became the driving force in athletic departments,” and “[a]thlete recruiting abuses, basketball scandals, and other distressing events reached a peak.”<sup>36</sup> The need for institutional control and leadership became clear, so the member-institutions authorized the NCAA to undertake more enforcement powers.<sup>37</sup> This marked the first time in the history of intercollegiate athletics that the NCAA obtained broad authority to sanction wrongdoers for rules violations.<sup>38</sup>

The NCAA’s role in the governance of intercollegiate athletics has continued to evolve and expand since then.<sup>39</sup> Today, the NCAA is “the dominant force in the presentation and regulation of intercollegiate athletics.”<sup>40</sup> The organization currently supervises eighty-nine championships in twenty-three officially sanctioned sports, while monitoring more than 460,000 student-athletes participating at almost 1,100 colleges and universities.<sup>41</sup> The

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<sup>33</sup> See Goodwin, *supra* note 20, at 1282 (discussing the NCAA’s transformation into a “powerful regulatory body with full authority to police and penalize member universities” during the 1950s).

<sup>34</sup> Matthew J. Mitten, James L. Musselman & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 790 (2010). The relationship between intercollegiate athletics and television began in 1938 when the University of Pennsylvania televised the first football game. *NCAA v. Bd. of Regents*, 468 U.S. 85, 89 (1984). According to sources, there were six television sets in Philadelphia at that time, and they were all tuned in to the game. *Id.* at 89 n.3. Ironically, the NCAA and its member-institutions were terrified of the impact that television would have on attendance at college sporting events. *Id.* at 89-90. As a result, strict television restrictions were put in place. *Id.* For example, under early television agreements, only one college football game was broadcast in a certain area each week; and in three of the ten weeks during the season there were “blackouts” where no games would be shown at all. *Id.*

<sup>35</sup> Mitten, Musselman & Burton, *supra* note 34, at 790.

<sup>36</sup> *Id.*

<sup>37</sup> Goodwin, *supra* note 20, at 1282.

<sup>38</sup> *Id.*

<sup>39</sup> See Lazaroff 1, *supra* note 30, at 333-35 (examining various attempts by the NCAA to effectively enforce its regulations after being given the power to do so).

<sup>40</sup> Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 229 (2014) [hereinafter *Lazaroff 2*] (discussing whether the NCAA should be entitled to a blanket exemption from federal antitrust laws enumerated in the Sherman Act).

<sup>41</sup> See NCAA, *Who We Are*, NCAA.ORG [www.ncaa.org/about/who-we-are](http://www.ncaa.org/about/who-we-are) (last visited Oct. 1, 2014) (discussing the general structure and organization of the NCAA). The NCAA is divided into three Divisions of athletic competition: DI, DII, and DIII. See NCAA, *Membership*, NCAA.ORG

NCAA rules over its vast empire by enforcing bylaws pertaining to a wide variety of issues, such as “ethical conduct, amateurism, recruiting, academic eligibility, and practice and playing seasons.”<sup>42</sup>

### B. *Regulating Intercollegiate Athletics through the Principles of Amateurism*

Many of the NCAA’s core bylaws pertain to the rules of amateurism,<sup>43</sup> which provide that “[s]tudent-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 . . . is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”<sup>44</sup> As such, the NCAA asserts that the organization must “maintain intercollegiate athletics as an integral part of the educational program and . . . retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>45</sup>

Essentially, NCAA amateurism means that student-athletes are prohibited from receiving anything of “pecuniary value in exchange for participating in college sports.”<sup>46</sup> Among other restrictions, NCAA rules prohibit student-athletes from accepting compensation in any form,<sup>47</sup> registering for a professional sports

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[www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification](http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification) (discussing the NCAA’s multi-division classification). Each Division has separate championships for its student athletes and is subject to minor variations in certain rules and regulations. *Id.* For example, student-athletes in Divisions I and II are allowed to receive athletic scholarships, while Division III athletes cannot receive scholarships based on athletic ability. Lynn O’Shaughnessy, *Why Athletes Have an Edge at Elite Colleges*, CBS NEWS (June 2, 2009, 12:52 PM), [www.cbsnews.com/news/why-athletes-have-an-edge-at-elite-colleges/](http://www.cbsnews.com/news/why-athletes-have-an-edge-at-elite-colleges/). The Institutions that comprise Division I usually “have the biggest student bodies, manage the largest athletic budgets and offer the most generous number of athletic scholarships.” NCAA, *Division I: About the Division*, NCAA.ORG, [www.ncaa.org/about?division=d1](http://www.ncaa.org/about?division=d1) (last visited Oct. 2, 2014).

<sup>42</sup> Goodwin, *supra* note 20, at 1284.

<sup>43</sup> See Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV 1299 (1992) [hereinafter *Harvard*] (providing that the NCAA regulates college sports through the implementation and enforcement of various constitutional bylaws).

<sup>44</sup> NCAA, *Division I Manual*, at §2.9. (Aug. 1, 2014), available at [www.ncaapublications.com/productdownloads/D115.pdf](http://www.ncaapublications.com/productdownloads/D115.pdf) [hereinafter *Division I Manual*].

<sup>45</sup> *Division I Manual*, at §1.3.1.

<sup>46</sup> Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 274-75 (1994).

<sup>47</sup> In addition to actual monetary compensation, student athletes are prohibited from accepting promises for future payments following the



league draft, or hiring an agent to represent them.<sup>48</sup> Student-athletes who violate these rules will forfeit their eligibility to compete in NCAA sanctioned events and, in some instances, subject their respective schools to severe punishment as well.<sup>49</sup>

While all other forms of compensation are prohibited, the NCAA does allow certain student-athletes to receive athletic scholarships from their respective universities.<sup>50</sup> The bylaws impose limits on athletic scholarships and “[f]or decades, student-athletes have been limited to a ‘full grant-in-aid,’ which [is defined] as ‘financial aid that consists of tuition and fees, room and board, and required course-related books.’”<sup>51</sup> Traditionally, scholarship benefits for student-athletes have been capped at

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conclusion of NCAA eligibility. *Id.* Student athletes are also prevented from accepting compensation from the sale of any commercial product using their names and likenesses. *Id.*

<sup>48</sup> *Id.* at 306. It is worth noting that the NCAA does provide exceptions to some of these rules, but they are very limited. For example, the Manual provides an exception to the “no-draft” rule for men’s basketball players that provides:

In men’s basketball, an enrolled student-athlete may enter a professional league’s draft one time during his collegiate career without jeopardizing eligibility in that sport, provided: . . .

- (a) The student-athlete requests that his name be removed from the draft list and declares his intent to resume intercollegiate participation not later than the end of the day before the first day of the spring National Letter of Intent signing period for the applicable year; . . .
- (b) The student-athlete’s declaration of intent is submitted in writing to the institution’s director of athletics; and
- (c) The student-athlete is not drafted.

Division I Manual, *supra* note 44, at §12.2.4.2.1.1.

<sup>49</sup> See Davis, *supra* note 41, at 305 (discussing the ramifications for violating NCAA amateurism rules). The history of the NCAA is filled with stories of athletes violating the principles of amateurism and facing severe consequences. See *Top 10 Infamous NCAA Sanctions*, REALCLEARSPORTS.COM (May 17, 2013), [www.realclearsports.com/lists/infamous\\_ncaa\\_sanctions/smu\\_football.html](http://www.realclearsports.com/lists/infamous_ncaa_sanctions/smu_football.html) (listing ten of the most infamous scandals and severe sanctions the NCAA has ever imposed on various intercollegiate athletics programs for major rule violations); Ivan Maisel, *The Games Can’t be Unplayed*, ESPN.COM (June 6, 2010), <http://sports.espn.go.com/nfl/columns/story?id=5272888> (discussing the scandal involving former University of Southern California star football player, Reggie Bush, and how the university forfeited wins - and Bush his Heisman trophy - after it was revealed Bush received improper benefits while playing football at the school); David Whitford, *SMU’s Death Penalty: The Recruiting Scandal that Refuses to Die*, FORTUNE.COM (Aug. 29, 2013, 1:00 PM), <http://fortune.com/2013/08/29/smus-death-penalty-the-recruiting-scandal-that-refuses-to-die/>, (addressing the formerly scandal-plagued Southern Methodist University’s football program’s attempts to recover from the one and only “death penalty” ever handed down to a college football program by the NCAA).

<sup>50</sup> Division I Manual, *supra* note 44, at § 15.1.

<sup>51</sup> Goodwin, *supra* note 20, at 1284-85.

amounts that the NCAA acknowledges fall several thousand dollars short of the actual “cost of attendance.”<sup>52</sup>

### C. *The Current Economic Realities of Commercialized Intercollegiate Athletics vs. the Ideals of Amateurism*

As the NCAA has evolved, the organization has “transformed college athletics into a multibillion-dollar industry.”<sup>53</sup> As a result, the NCAA, athletic conferences, individual member-institutions, television networks, and others now reap exorbitant financial benefits through their involvement with intercollegiate athletics.<sup>54</sup> However, benefits for student-athletes have not increased beyond the value of their athletic scholarships.<sup>55</sup> As the money continues to pour into big-time college sports, the NCAA finds itself “caught in a huge contradiction” attempting to justify restrictions on student-athlete compensation under the guise of amateurism.<sup>56</sup>

A detailed look at the NCAA Division I men’s basketball tournament offers a clear example of the current economic

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<sup>52</sup> See *id.* (discussing the differences between “grant-in-aid” and “cost of attendance” financial aid). The NCAA has tried to address this “cost of attendance issue” in the past. Michael Marot, *NCAA’s Strongest Argument Might be Cap Limit*, YAHOO! SPORTS (Aug. 18, 2014, 6:04 PM), <http://sports.yahoo.com/news/ncaas-strongest-argument-might-cap-214156026-spt.html>. In 2011, the NCAA Board of Directors voted to allow an additional stipend for student athletes that would close the cost of attendance gap. *Id.* The rule change was voted down, however, by over 100 smaller member institutions concerned with wealthier schools and programs gaining more control and power. *Id.* More recently, on August 7, 2014, the NCAA Division I Board of Directors voted to allow schools in the “Power Five” conferences to have the authority to “change rules regarding, among other things, athlete welfare.” Cameron Miller, *A Timeline of Events from This Summer’s O’Bannon Case*, THE STANFORD DAILY: STANFORD UNIVERSITY (Sep. 17, 2014) [hereinafter *Miller 1*]. This could potentially have implications in the future, but the Power Five have not yet voted on any new benefits for athletes. *Id.*

<sup>53</sup> Goodwin, *supra* note 20, at 1281. The NCAA reported revenues of approximately \$989 million in 2014. Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015, 4:59 PM) [hereinafter *Berkowitz 1*], [www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/](http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/). The NCAA reported expenses of approximately \$908.6 million, which includes \$547.1 million that the NCAA distributed to Division I schools and conferences. *Id.* Approximately 80 percent of the organization’s revenues are generated from the sale of broadcasting and marketing rights. NCAA REVENUE [www.ncaa.org/about/resources/finances/revenue](http://www.ncaa.org/about/resources/finances/revenue) (last visited Jan. 25, 2015).

<sup>54</sup> See Goodwin, *supra* note 20, at 1281 (stating that many of the entities associated with intercollegiate athletics “have increased their profits exponentially,” while student-athletes cannot receive anything beyond the value of a scholarship).

<sup>55</sup> *Id.*

<sup>56</sup> D. Stanley Eitzen, *Slaves of Big Time College Sports*, USA TODAY, Sept. 2000, at 26.

realities of intercollegiate athletics.<sup>57</sup> The season-ending tournament, commonly referred to as “March Madness,” allows the NCAA to showcase the country’s most talented Division I basketball players, and is “extraordinarily lucrative for many of those involved[.]”<sup>58</sup> The tournament is so valuable that, in 2010, CBS paid the NCAA a staggering \$10.8 billion to obtain the exclusive broadcasting rights to March Madness for fourteen years.<sup>59</sup> The agreement earned the NCAA \$700 million in revenues in 2014, and that number is projected to grow at a rate of about 3 percent per year for the duration of the agreement.<sup>60</sup> The massive expenditure pays dividends for CBS because advertisers are willing to pay the network as much as “\$1.22 million for a thirty-second opportunity to sell their products during the final game.”<sup>61</sup>

The profits associated with March Madness are not limited to the NCAA and television networks. Every win during the tournament can earn a school – and each of its conference members – as much as \$1.5 million from the NCAA; and many coaches have six-figure performance bonuses in their contracts, which are triggered by March Madness wins.<sup>62</sup> None of the money is shared with the student-athletes, however, because the rules of amateurism provide that student-athlete participation is “motivated primarily by education and by the physical, mental and social benefits to be derived.”<sup>63</sup>

March Madness provides just one example of the current exploitive state of big-time college sports, and the NCAA is not the only group reaping the benefits. As one critic puts it, “[e]veryone associated with intercollegiate athletics is getting rich except the people whose labor creates the value.”<sup>64</sup> In addition to the NCAA, individual athletic conferences and member-institutions are now earning unprecedented sums of money as well.<sup>65</sup> It is estimated

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<sup>57</sup> See Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 Buff. L. Rev. 1003, 1003-04 (describing March Madness and demonstrating that everyone involved in the tournament reaps financial benefits except the student-athletes, themselves).

<sup>58</sup> *Id.* at 1003.

<sup>59</sup> *Id.* See also Ben Klayman, *NCAA Signs \$10.8 Billion Basketball Tourney TV Deal*, REUTERS (Apr. 22, 2010, 4:12 PM), [www.reuters.com/article/2010/04/22/us-basketball-ncaa-cbturner-idUSTRE63L4FP20100422](http://www.reuters.com/article/2010/04/22/us-basketball-ncaa-cbturner-idUSTRE63L4FP20100422) (discussing the details of the NCAA’s fourteen-year contract with CBS to broadcast March Madness each spring).

<sup>60</sup> Berkowitz 1, *supra* note 53.

<sup>61</sup> Fram & Frampton, *supra* note 57, at 1003.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1004. See also *Division I Manual*, *supra* note 44, at §2.9.

<sup>64</sup> Dennie, *supra* note 9, at 38 (quoting Michael Lewis, *Serfs of the Turf*, N.Y. Times, Nov. 11, 2007, at 4) (internal citation omitted). [www.nytimes.com/2007/11/11/opinion/11lewis.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2007/11/11/opinion/11lewis.html?pagewanted=1&_r=0) (internal citation omitted).

<sup>65</sup> See Bill Fay, *BCS Bowl Games Bad Business for Colleges*, DEBT.ORG

that athletic conferences and individual schools produce an additional \$6.1 billion annually through “ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions.”<sup>66</sup>

Just like the NCAA, athletic conferences generate most of their revenues by selling broadcasting rights to conference-specific events.<sup>67</sup> All of the “Power 5 Conferences”<sup>68</sup> have contracts that generate hundreds of millions of dollars each year.<sup>69</sup> The Big Ten, for example, has contracts with multiple television networks that produce colossal revenues each year.<sup>70</sup> These contracts include a \$1 billion agreement with ESPN that will produce \$100 million per year through 2017.<sup>71</sup> Additionally, the conference has granted television rights to “the Big Ten Network” through 2032.<sup>72</sup> This agreement will generate an additional \$112 million per year for the conference.<sup>73</sup> In addition to those two contracts, Fox pays the conference \$24.1 million per year just to obtain exclusive broadcasting rights to one game - the Big Ten’s annual championship football game.<sup>74</sup>

Individual member-institutions are filling their coffers as well. Last year, for example, the University of Texas’ athletic department — the wealthiest in the country — generated a record

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(Jan. 7, 2013), [www.debt.org/blog/bcs-bowl-games-bad-business-for-colleges-2/](http://www.debt.org/blog/bcs-bowl-games-bad-business-for-colleges-2/) (discussing the logistics of the payouts and distributions of money earned from participating in BCS bowl games). When schools from specific athletic conferences play in a BCS bowl game, the entire conference splits the profits. *Id.*

<sup>66</sup> NCAA Revenue, *supra* note 53.

<sup>67</sup> See Nitin Bhandari, *The 10 Most Expensive College Sports TV Contracts*, THERICHEST.COM (Dec. 30, 2013), [www.therichest.com/sports/the-10-most-expensive-college-sports-tv-contracts/](http://www.therichest.com/sports/the-10-most-expensive-college-sports-tv-contracts/) (providing the financial details of the ten most lucrative television contracts between networks, the NCAA, and the power-five athletic conferences).

<sup>68</sup> Collectively referred to as the “Power Five” conferences: SEC, Big Ten, Big 12, ACC, PAC 12. See generally Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN.COM (Aug. 8, 2014), [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences).

<sup>69</sup> Bhandari, *supra* note 67. For example: the ACC generates \$240 million annually; The SEC earns \$150 million annually; the PAC 12 earns \$250 million annually; and the Big 12 earns \$200 million annually. *Id.*

<sup>70</sup> See *id.* (listing various agreements between the Big Ten and multiple television networks).

<sup>71</sup> *Id.*

<sup>72</sup> The network is a joint venture between Fox and the Big Ten conference. *Id.* The Big Ten Network is operated almost entirely by Fox, but the conference maintains a 49 percent ownership share in the network. *Id.*

<sup>73</sup> *Id.* Under these agreements, ESPN has “first tier” rights, meaning the network gets first pick of certain games. *Id.* The Big Ten Network is allowed to show more events, but must wait for ESPN to choose games first. *Id.*

<sup>74</sup> *Id.*

\$165 million in revenue.<sup>75</sup> The school took an unprecedented step recently when it launched its own television station, “the Longhorn Network.”<sup>76</sup> The twenty-four hour network will be dedicated solely to University of Texas athletics and will be operated by ESPN.<sup>77</sup> Under the terms of the agreement, the school is guaranteed to earn around \$15 million per year over the next twenty years.<sup>78</sup>

The University of Texas’ athletic department is not an anomaly. Many of the top athletic departments in the country, such as Alabama, Michigan, and Ohio State, report annual revenues well in excess of \$100 million.<sup>79</sup> And because the schools are not required to pay student-athletes, the skyrocketing revenues are being directed towards coaches and lavish athletic facilities in attempts to attract the best players and build winning programs.<sup>80</sup>

As a result, college coaching salaries have skyrocketed, increasing 500 percent since the 1980s.<sup>81</sup> In 2012, the average pay for a head coach at a school with a big-time college football program was \$1.64 million.<sup>82</sup> That amount marked a 12 percent increase from the year before, and a 70 percent increase from 2006.<sup>83</sup> Similarly, the salaries of head coaches of Division I men’s basketball programs increased 112 percent from 2005 through 2012.<sup>84</sup> The University of Alabama’s head football coach, Nick Saban, will make \$7.3 million this year,<sup>85</sup> while Mike Krzyzewski,

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<sup>75</sup> Gould et. al., *supra* note 3, at 18.

<sup>76</sup> See Kristie Chong Adler, *Time Warner Cable Launches Longhorn Network*, ESPN, ESPNMEDIAZONE.COM (Aug. 30, 2013), <http://espnmediazone.com/us/pressreleases/2013/08/time-warner-cable-launches-longhorn-network/> (discussing the creation and launch of the Longhorn Network).

<sup>77</sup> *Id.*

<sup>78</sup> Goodwin, *supra* note 20, at 1283.

<sup>79</sup> Gould et al., *supra* note 3, at 18.

<sup>80</sup> See Tom Farrey & Lester Munson, *Expert: Money Flow Disproportionate*, ESPN.COM (June 10, 2014), [http://espn.go.com/collegesports/story/\\_/id/11063471/ncaa-coaches-reaping-benefits-economist-testifies-obannon-lawsuit](http://espn.go.com/collegesports/story/_/id/11063471/ncaa-coaches-reaping-benefits-economist-testifies-obannon-lawsuit) (presenting the main arguments of an expert witness presented by the plaintiffs in the *O’Bannon* case to demonstrate the disproportionate flow of sports revenues harms competition and is, therefore, a violation of the Sherman Act).

<sup>81</sup> *Id.*

<sup>82</sup> *Pay Rises Yet Again for College Football’s New Coaching Hires*, USA TODAY (Jul. 1, 2013, 4:29 PM), [www.usatoday.com/story/sports/ncaaf/2013/02/11/college-football-coach-salary-changes-ncaa/1907359/](http://www.usatoday.com/story/sports/ncaaf/2013/02/11/college-football-coach-salary-changes-ncaa/1907359/).

<sup>83</sup> *Id.*

<sup>84</sup> Barry Petchesky, *No, Paying Athletes Won’t Bankrupt College Sports*, DEADSPIN (Jan. 16, 2014, 12:22 PM), <http://deadspin.com/no-paying-athletes-wont-bankrupt-college-sports-1502028351>.

<sup>85</sup> See *Top 15 Highest Paid College Football Coaches*, SPORTINGNEWS.COM (last visited Oct. 1, 2015) [www.sportingnews.com/ncaa-football/story/2014-06-24/top-15-highest-paid-college-football-coaches-nick-saban-charlie-strong-bob](http://www.sportingnews.com/ncaa-football/story/2014-06-24/top-15-highest-paid-college-football-coaches-nick-saban-charlie-strong-bob).

head coach of the Duke men's basketball team will receive \$6 million.<sup>86</sup> To put NCAA coaching salaries into perspective, consider that in forty states the highest paid public official is a college football or college basketball coach.<sup>87</sup>

High-ranking NCAA officials and university administrators are also handsomely rewarded under the current system. NCAA President, Mark Emmert, who has said that "it's grossly unacceptable and inappropriate to pay players" because doing so would convert them from "students to employees,"<sup>88</sup> earned approximately \$2 million last year.<sup>89</sup> These large salaries for

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stoops-urban-meyer-photos/ (breaking down the salaries of the highest paid coaches in NCAA football).

<sup>86</sup> See Steve Berkowitz, et al., *NCCA Salaries*, USA TODAY, [www.usatoday.com/sports/college/salaries/ncaab/coach/](http://www.usatoday.com/sports/college/salaries/ncaab/coach/) (last visited Oct. 1, 2015) (providing a table of the highest basketball coaches in the NCAA). There is so much money to be made in big-time college athletics that schools are even willing to pay millions of dollars to make a "bad" coach go away. After the Auburn University's football team recorded one of its worst seasons on record (the team limped to an unacceptable 3-9 record in 2011-12), head coach Gene Chizik and each member of his staff were fired. Chris Smith, *Auburn – Florida State Title Game Is Clash of Financial Giants*, FORBES (Jan. 6, 2014, 12:59 PM), [www.forbes.com/sites/chris-smith/2014/01/06/auburn-florida-state-bcs-title-game-is-clash-of-financial-giants/](http://www.forbes.com/sites/chris-smith/2014/01/06/auburn-florida-state-bcs-title-game-is-clash-of-financial-giants/). The firings will force the university to eat over \$11 million dollars in contracts through the 2015-16 season. *Id.* While coaches are fired regularly for poor performance, it is worth noting that just two years before his termination, Chizik led Auburn University to a National Championship and was rewarded with a lucrative, long-term contract extension. *Head Coach Gene Chizik Given Raise, Contract Extension*, AUBURNTIGERS.COM (June 10, 2011), [www.auburntigers.com/sports/m-footbl/aub-m-footbl-body.html](http://www.auburntigers.com/sports/m-footbl/aub-m-footbl-body.html).

<sup>87</sup> Edelman, *supra* note 13, at 1032. It must be noted that many NCAA member institutions acknowledge the inherent problems with these exorbitant coaching salaries and other expenditures and argue that they would like to be able to provide more benefits to athletes, but are prohibited from doing so. See Farrey & Munson, *supra* note 80 (discussing attempts by large schools and conferences to provide more benefits to players, only to be denied by schools that claim they cannot afford to provide more benefits). While discussing the high revenues generated by football and basketball programs, the chancellor of the University of Nebraska has said,

because of efforts to create 'a level playing field' we can spend these resources in almost any way we want except to improve support for student athletes. Too often, our efforts to improve the lives of student athletes have been deflected because of cost implications that are manageable by our institutions but not by institutions with less resources.

*Id.*

<sup>88</sup> Dennie, *supra* note 9, at 42.

<sup>89</sup> Miles Hinson, *The Valuation of Student Athletes*, THE DAILY PRINCETONIAN (Sept. 30, 2014), available at <http://dailyprincetonian.com/sports/2014/09/the-valuation-of-student-athletes/>.

administrators and coaches are only possible because the NCAA and its member-institutions do not pay the workforce.<sup>90</sup>

The NCAA has simply gone too far in relying on the principles of amateurism as justification for not increasing the financial benefits available to student-athletes. A recent study shows that while the NCAA, athletic conferences, and universities earn billions of dollars each year, more than 85 percent of scholarship student-athletes live at a level below the poverty line because of the strict rules of amateurism.<sup>91</sup> Numbers like this demonstrate that NCAA reliance on the principles of amateurism is nothing more than a “cynical justification for maintaining a lucrative status quo.”<sup>92</sup> The NCAA and its member-institutions seem more interested in generating revenues than protecting the needs of student-athletes, even if it means blatantly breaking NCAA bylaws to do so. Current ESPN analyst and former college basketball star, Jay Bilas, a staunch critic of the NCAA,<sup>93</sup> exposed an example of this last year via his Twitter account.<sup>94</sup> NCAA rules have long prohibited any party from selling merchandise associated with any individual player, including jerseys with a player’s name on the back.<sup>95</sup> Despite this prohibition, the jerseys produced and sold always correspond with the numbers of the most notable players on each team.<sup>96</sup>

The NCAA had always argued this was mere coincidence, but Bilas was able to definitively disprove this contention by paying a visit to the NCAA’s own website.<sup>97</sup> He went to the “NCAA Shop Website” – ShopNCAASports.com – and entered specific players’ names into the search box provided.<sup>98</sup> Each time he searched for a specific player, such as “Johnny Manziel,” the *official website of the NCAA* would take him directly to a page displaying a jersey, from that player’s team, bearing that player’s number, which could be purchased at that time.<sup>99</sup>

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<sup>90</sup> See Petchesky, *supra* note 84 (stating that an “eye-popping” amount of money is paid to NCAA coaches because the NCAA does not have to pay a workforce).

<sup>91</sup> Edelman, *supra* note 13, at 1032.

<sup>92</sup> *Id.*

<sup>93</sup> See *Experts: Political Move Could Help NCAA Avoid More Court Woes*, INDIANAPOLIS BUS. J. (Aug. 11, 2014), [www.ibj.com/articles/48986-experts-political-move-could-help-ncaa-avoid-more-court-woes](http://www.ibj.com/articles/48986-experts-political-move-could-help-ncaa-avoid-more-court-woes), [hereinafter *IBJ*] (providing background on Jay Bilas and his views on NCAA hypocrisy).

<sup>94</sup> Travis Waldron, *ESPN’s Jay Bilas Exposes NCAA’s Hypocrisy on Amateurism with Simple Web Search*, THINKPROGRESS.ORG (Aug. 7, 2013, 8:53 AM), <http://thinkprogress.org/sports/2013/08/07/2425531/ncaa-removes-search-function-after-espns-jay-bilas-exposes-amateurism-myth/>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

Bilas posted the results of each search on his Twitter account and, within days, the NCAA removed the “search” option from the website.<sup>100</sup> Bilas’ postings incited so much public backlash that NCAA President Mark Emmert released a statement saying the NCAA would no longer sell athletes’ jerseys through its website and that doing so in the first place was a “mistake.”<sup>101</sup> The NCAA’s willingness to blatantly violate its own bylaws by selling the jerseys of specific players to generate revenues provides a perfect microcosm of the current state of big-time college sports.<sup>102</sup>

Put simply, big-time college sports are driven by money, and the NCAA has gone too far in relying on outdated traditions of amateurism as justification for failing to share any of the wealth with student athletes.<sup>103</sup> Fundamental inequities like this have caused tensions to rise in intercollegiate athletics and student-athletes have begun to challenge the rules of the NCAA with increased frequency.<sup>104</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> See Jeff Eisenberg, *Mark Emmert Acknowledges Hypocrisy of NCAA Selling Jerseys, Insists it Will Stop*, YAHOO! SPORTS (Aug. 8, 2013, 4:43 PM), <https://sports.yahoo.com/blogs/ncaab-the-dagger/mark-emmert-acknowledges-hypocrisy-ncaa-selling-jerseys-insists-204322822.html> (discussing the Jay Bilas controversy and the NCAA’s decision to stop selling jerseys on its website).

<sup>102</sup> The total retail marketplace for college-licensed merchandise in 2013 was estimated at \$4.59 billion. *CLC Names Top Selling Universities*, LICENSEMAG.COM (Aug. 7, 2014), [www.licensemag.com/license-global/clc-names-top-selling-universities](http://www.licensemag.com/license-global/clc-names-top-selling-universities). The Collegiate Licensing Company represents the NCAA and nearly 200 of the nation’s top colleges and universities by protecting, developing, and promoting their individual brands. See generally *About CLC*, CLC.COM, [www.clc.com/About-CLC.aspx](http://www.clc.com/About-CLC.aspx) (last visited Dec. 10, 2014). The CLC compiles lists of the top selling universities and manufacturers each year and reports the information on its website. *Id.* The fact that there are enough manufacturers and retailers earning money by selling and producing NCAA merchandise that the CLC is able to produce lists of the “Top-25 Non-Apparel Licenses, Top-25 Apparel Licenses, and Top-25 Local Licenses” demonstrates just how many people have their hands in the pot and are earning money from the labor of NCAA student-athletes.

<sup>103</sup> See David Davenport, *Legal Cases are Blowing up the NCAA Big Business Model – Why it Matters*, FORBES (Aug. 11, 2014, 5:17 PM), [www.forbes.com/sites/daviddavenport/2014/08/11/legal-cases-are-blowing-up-the-ncaa-big-business-model-why-it-matters/](http://www.forbes.com/sites/daviddavenport/2014/08/11/legal-cases-are-blowing-up-the-ncaa-big-business-model-why-it-matters/) (discussing some of the NCAA’s common defenses to antitrust claims and how the NCAA can no longer rely on them given the current state of intercollegiate athletics).

<sup>104</sup> See Richard T. Karcher, *The Battle Outside of the Courtroom: Principles of “Amateurism” v. Principles of Supply and Demand*, 3 MISS. L. REV. 47, 75 (2013) (discussing the increased willingness of student-athletes to challenge the NCAA “without fear of the repercussions”). The article refers to amateurism as a “growing, indestructible immense ‘blob’ that is engulfing all sorts of normal, moral, and legal activities” within intercollegiate athletics. *Id.* See generally *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975)(upholding rules against compensating athletes); *Justice v. NCAA*, 577 F. Supp. 356 (D. Ariz. 1983) (ruling in favor of the NCAA regarding rules prohibiting post-



Many have attempted to use the federal antitrust laws of the Sherman Act as the vehicle to challenge the NCAA.<sup>105</sup>

#### *D. The Sherman Act: The Framework for Antitrust Challenges Against the NCAA*

Section 1 of the Sherman Act prohibits “[e]very contract, combination, . . . , or conspiracy, in restraint of trade or commerce.”<sup>106</sup> The purpose of the Act is to thwart anticompetitive economic practices that might otherwise reduce marketplace efficiency and harm consumers.<sup>107</sup> Given the size and substantial market power of the NCAA, “it should not be surprising that the NCAA is no stranger to federal antitrust litigation.”<sup>108</sup> NCAA member-institutions, coaches, student-athletes, and others have challenged a wide variety of NCAA rules and regulations, alleging that they amount to illegal restraints on trade under the Sherman Act.<sup>109</sup> One observer has noted that certain NCAA rules, such as those restricting student-athlete compensation, “can reasonably be interpreted as the very antithesis to the type of competitive markets envisioned by drafters of the Sherman Act.”<sup>110</sup>

In analyzing antitrust challenges under Section I of the Act, the Supreme Court has recognized that almost every binding contract can be seen as a restraint of trade of some sort.<sup>111</sup> Therefore, the application of the Sherman Act is limited to agreements that result in “unreasonable restraints of trade.”<sup>112</sup> Thus, a “rule of reason” test has developed as the default standard for determining the reasonableness of a particular restraint.<sup>113</sup> The analysis requires a two-part test to determine whether a

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season play); *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (denying a challenge to the NCAA’s “no-draft” rules).

<sup>105</sup> See *supra* note 6.

<sup>106</sup> 15 U.S.C. § 1 (2012).

<sup>107</sup> Goodwin, *supra* note 20, at 1288.

<sup>108</sup> Lazaroff 2, *supra* note 40, at 228-29.

<sup>109</sup> *Id.* at 229.

<sup>110</sup> Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 Case W. Res. L. Rev. 61, 70 [hereinafter *Antitrust Treatise*].

<sup>111</sup> See *e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984) (stating that the contract in that case could be seen as a restraint on trade in a sense that every contract could be seen as a restraint on trade in some way).

<sup>112</sup> *Id.* (stating that the Court has repeatedly recognized that the Sherman Act “was intended to prohibit only unreasonable restraints of trade”).

<sup>113</sup> *O’ Bannon v. NCAA*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014). In addition to this standard analysis, courts have also applied a “quick look” or “per se” analysis when determining the reasonableness of a particular restraint. *Id.* These standards will not be addressed herein as courts have been hesitant to apply them in instances similar to the present “where the economic impact of certain practices is not immediately obvious.” *Id.* (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (internal citation omitted)).

Sherman Act violation has occurred.<sup>114</sup> First, “the plaintiff must show that the action has a substantially adverse effect on competition.”<sup>115</sup> If the plaintiff succeeds, the defendant must then demonstrate “any pro-competitive effects that could justify the agreement.”<sup>116</sup> The court will then weigh each party’s showing in determining whether the challenged agreement constitutes an unreasonable restraint on trade.<sup>117</sup>

Put simply, a challenged restraint will survive a rule of reason analysis so long as any harm from the restriction does not outweigh the restriction’s “pro-competitive effects.”<sup>118</sup> The following section of this Comment will analyze the historical application of the Sherman Act to antitrust challenges against the NCAA and explain why judicial attitudes toward the NCAA’s amateur model have changed drastically in recent years.

### III. ANALYZING THE APPLICATION OF THE SHERMAN ACT TO THE NCAA’S TRADITIONS OF AMATEURISM

#### A. *Historically, Judges Have Provided Great Deference to NCAA Rules Involving Amateurism*

Although there have been many antitrust suits against the NCAA throughout the organization’s history, most have been unsuccessful.<sup>119</sup> Courts have historically afforded great deference to the NCAA and its traditions of amateurism.<sup>120</sup> In fact, courts initially refused to apply the Sherman Act to any challenges against the NCAA because courts viewed the activities of the organization as non-commercial in nature.<sup>121</sup> As the nature of intercollegiate athletics changed, courts began to slowly acknowledge that commercial interests did motivate certain NCAA

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<sup>114</sup> Adam R. Schaefer, *Recent Development: Slam Dunk: The Case for an NCAA Antitrust Exemption*, 83 N.C.L. Rev. 555, 557 (2005).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

<sup>119</sup> Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of Big Time College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, [hereinafter *Mitten 2*], 11 MARQ. SPORTS L. REV. 1, 3 (2000).

<sup>120</sup> See *Dennie*, *supra* note 9, at 21 (discussing the long-held view of most courts that the NCAA needs ample latitude to play its “critical role in the maintenance of a revered tradition of amateurism in college sports”).

<sup>121</sup> See *Mitten 2*, *supra* note 119, at 3 (citing *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975)). Courts held that the rules and restrictions imposed by the NCAA were not of a “commercial” nature and, therefore, did not even trigger the rules of the Sherman Act. *Id.*

activities; but even then, courts remained reluctant to find that any of those rules actually violated the Sherman Act.<sup>122</sup>

Judicial deference towards the NCAA's traditions of amateurism can clearly be seen in the seminal NCAA antitrust case of its time, *NCAA v. Bd. of Regents*.<sup>123</sup> Ironically, the NCAA lost this case, but dicta from the Supreme Court's opinion provided the NCAA with fundamental antitrust defenses that the organization and the courts would rely on for the next thirty years. There, "the Supreme Court held that the NCAA does not have a blanket exemption from the antitrust laws . . . because the 'NCAA and its member institutions are in fact organized to maximize revenues.'"<sup>124</sup> The Court applied this logic and invalidated NCAA rules that prevented universities from selling the broadcasting rights to their own football games.<sup>125</sup>

Although the NCAA lost the case, the Court drew an explicitly clear distinction between restrictions involving purely commercial activities of the NCAA — such as brokering broadcasting rights — and restrictions aimed at preserving the traditions of amateurism.<sup>126</sup> In dicta, the majority "strongly suggested that primarily noncommercial NCAA rules to preserve amateurism, academic integrity, and competitive balance do not violate the antitrust laws."<sup>127</sup> The Court stated that "the NCAA plays a critical role in the maintenance of a *revered tradition of amateurism* in college sports" and the NCAA "needs ample latitude to play that role."<sup>128</sup> Although the case had nothing to do with rules pertaining to student-athletes, the Court went as far as to say that "[i]n order to preserve the character and quality of [amateur athletics], athletes must not be paid, must be required to attend class, and the like."<sup>129</sup>

Subsequent court decisions relied on the *Board of Regents* dicta and, generally, "rejected antitrust challenges to NCAA rules by providing great deference and discretion to the NCAA."<sup>130</sup> Since then, certain NCAA restrictions pertaining to business activity

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<sup>122</sup> *See id.* (stating that despite the application of the Sherman Act to certain rules involving the NCAA's business activities, courts were still very reluctant to hold the NCAA liable for violating antitrust laws) (citing *Ass'n of Intercollegiate Ath. for Women v. NCAA*, 735 F.2d 577 (D.C. Cir. 1984); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977)).

<sup>123</sup> *NCAA v. Bd. of Regents*, 468 U.S. 85, 88 (1984).

<sup>124</sup> *Mitten 2*, *supra* note 119, at 3 (quoting *Bd. of Regents*, 468 U.S. at 101).

<sup>125</sup> *Bd. of Regents*, 468 U.S. at 88.

<sup>126</sup> *Id.* at 120.

<sup>127</sup> *Mitten 2*, *supra* note 119, at 4.

<sup>128</sup> *Bd. of Regents*, 468 U.S. at 120 (emphasis added).

<sup>129</sup> *Id.* at 102.

<sup>130</sup> *Mitten 2*, *supra* note 119, at 4.

have been declared antitrust violations,<sup>131</sup> but courts have uniformly upheld any NCAA regulations relating specifically to student-athlete eligibility and amateurism.<sup>132</sup>

*B. Judicial Treatment of the NCAA has Shifted and Threatens the Organization like Never Before*

“[T]he dynamics of intercollegiate athletics [have] changed substantially” in recent years.<sup>133</sup> Commentators have noted that courts are beginning to appreciate the vast commercialization of big-time college sports and are no longer showing deference to historical arguments based on the traditions of amateurism.<sup>134</sup> This shift in judicial treatment is exemplified by the Seventh Circuit Court of Appeals’ changing views of NCAA amateurism over the last twenty years.

In a notorious case from 1992, *Banks v. NCAA*, the Seventh Circuit provided great deference to NCAA amateurism rules in denying a student-athlete’s antitrust challenge against the NCAA.<sup>135</sup> There, a football player challenged the “no-draft” and “no-agent” rules after being declared ineligible to play his senior year because he consulted with an agent and declared for the NFL draft following his junior season at Notre Dame.<sup>136</sup> The *Banks*

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<sup>131</sup> *See Law*, 134 F.3d at 1010 (holding that an NCAA rule that limited coaching salaries for entry level Division I coaches was an unreasonable restraint on trade under the Sherman Act).

<sup>132</sup> *See Mitten 2*, *supra* note 119, at 5 (stating that since *Board of Regents*, courts have treated regulations pertaining to student-athlete eligibility as “virtually per se legal under the antitrust laws”); *see also Banks v. NCAA*, 977 F.2d 1081, 1094 (7th Cir. 1992) (holding that the NCAA’s “no-draft” and “no-agent” restrictions did not violate antitrust laws because they allowed the NCAA to preserve the traditions of amateurism within college athletics); *Rock*, 928 F. Supp. 2d at 1026-27 (S.D. Ind. 2013) (dismissing claim regarding scholarship restriction at the Division III level); *Smith v. NCAA*, 139 F.3d 180, 187 (3d Cir. 1998) (denying challenges to rules that would not allow graduate students to transfer and participate in a sport at a different school); *McCormack v. NCAA* 845 F.2d 1338, 1340 (5th Cir. 1988) (dismissing a challenge that the NCAA violated antitrust laws by promulgating and enforcing rules that restricted the benefits and compensation that a student-athlete may receive).

<sup>133</sup> *See Dennie*, *supra* note 9, at 22 (stating that although the NCAA has fared favorably in the past by relying on the tradition of amateurism, courts are less reluctant to intervene than they have been in the past); *see also Karcher*, *supra* note 104, at 50-51 (arguing that judicial favor seems to be shifting away from the NCAA’s model of amateurism).

<sup>134</sup> *Dennie*, *supra* note 9, at 41. *See also Karcher*, *supra* note 104, at 50-51 (arguing that “[j]udges are giving less deference to the NCAA’s interpretation of amateurism and how amateurism principles should apply to college athletes”).

<sup>135</sup> *Banks*, 977 F.2d 1081.

<sup>136</sup> *Id.* *Banks*, a football player for the University of Notre Dame, was declared ineligible because he registered for the National Football League

court echoed the sentiment of the *Board of Regents* Court and afforded deference to the NCAA, saying the restrictions were necessary to preserve the traditions of amateurism.<sup>137</sup>

In 2006, the court addressed a similar NCAA antitrust challenge in *Agnew v. NCAA*.<sup>138</sup> There, multiple student-athletes brought an antitrust challenge claiming that two NCAA bylaws, “the cap on the number of scholarships given per team and the prohibition of multi-year scholarships,” violated the rules of the Sherman Act.<sup>139</sup> The case was dismissed on procedural grounds,<sup>140</sup> but it remains significant because the court presented a viewpoint towards amateurism that was starkly different from its viewpoint in *Banks* twenty years earlier.<sup>141</sup>

While the court was quick to defend NCAA amateurism in *Banks*,<sup>142</sup> the *Agnew* court felt that the NCAA needed to do more than just baldly assert that a challenged restriction provided procompetitive benefits to protect it from antitrust scrutiny.<sup>143</sup> The court did not think that the challenged bylaws were “inherently or obviously necessary for the preservation of amateurism, the student-athlete, or the general product of college football,” as the NCAA argued.<sup>144</sup> To the court, the challenged bylaws looked like methods to contain costs, not to preserve the “product of college football.”<sup>145</sup> Furthermore, the *Agnew* court

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(“NFL”) draft and consulted with an agent. *Id.* at 1083-84. Banks was barred from playing in his senior year despite the fact that he was not drafted by an NFL team and never received any compensation. *Id.* He then sued the NCAA under the Sherman Act, arguing that the “no-draft” and “no-agent” rules constituted unreasonable restraints on trade. *Id.*

<sup>137</sup> *Id.* at 1089-90.

<sup>138</sup> *Agnew*, 683 F.3d 328.

<sup>139</sup> *Id.* at 332. The plaintiffs argued that the rules had clear anti-competitive effects on the market for student-athletes because, if the bylaws had not been passed, schools would need to offer multi-year scholarships to stay competitive in the market. *Id.* at 333.

<sup>140</sup> See Darren Heitner, *Rock and the Class v. NCAA: Does the NCAA Violate Antitrust Law by Capping Scholarships?*, SPORTINLAW.COM (Aug. 1, 2012), <http://sportinlaw.com/2012/08/01/rock-and-the-class-v-ncaa-does-the-ncaa-violate-antitrust-law-by-capping-scholarships/> (stating that the case was dismissed at the district court level because the plaintiffs failed to establish the “relevant market,” as is required to bring an action under the Sherman Act). The Seventh Circuit affirmed the decision because of the failure in the plaintiffs’ pleadings, but made it clear that the NCAA had done nothing to justify why the rules were necessary. *Id.*

<sup>141</sup> Karcher, *supra* note 104, at 51.

<sup>142</sup> See *Banks*, 977 F.2d at 1091 (stating that the challenged rules were vital to preserve the amateur status of college athletics).

<sup>143</sup> See *Agnew*, 683 F.3d at 346 (stating that simply because a challenged restraint might have legitimate benefits within a given market, that “does not remove that industry from the purview of the Sherman Act altogether”).

<sup>144</sup> Heitner, *supra* note 140 (quoting *Agnew*, 683 F.3d at 344).

<sup>145</sup> *Agnew*, 683 F.3d at 344. The court acknowledged the fact that the NCAA may have been able to present evidence later in the proceeding that

specifically referenced the *Banks* opinion and disagreed with some of its main contentions.<sup>146</sup> *Agnew* may have been dismissed prior to going to trial, but it remains significant because it clearly demonstrated the court's shifting opinion towards NCAA amateurism. And, as evidenced below, these changing viewpoints are not limited to the Seventh Circuit.

In another recent case, *Oliver v. NCAA*,<sup>147</sup> a college baseball player challenged the NCAA's "no-agent" rule.<sup>148</sup> Although this challenge was brought under Ohio law, rather than the Sherman Act, it remains relevant because of the court's treatment of the NCAA. In *Oliver*, the plaintiff asked the court to evaluate the validity of the no-agent rule and enjoin the NCAA from continuing to enforce it.<sup>149</sup> In its opinion, the *Oliver* court "chastised the NCAA for its application of [the no-agent rule]."<sup>150</sup> The court felt that rule "allows for exploitation of the student-athlete 'by professional and commercial enterprises,'" in contravention of the NCAA's stated intentions.<sup>151</sup> Following the decision, the NCAA and Oliver agreed to settle the matter outside of court.<sup>152</sup> The NCAA offered Oliver \$750,000 and, in return, Oliver agreed to vacate the order of the court invalidating the no-agent rule. As a result, the no-agent rule "remains in full force and effect."<sup>153</sup>

The recent ruling in *O'Bannon v. NCAA* further demonstrates the evolution of judicial treatment of NCAA amateurism.<sup>154</sup> In 2009, a group of former college basketball players,<sup>155</sup> led by former

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demonstrated the necessity of the bylaws, but the NCAA had failed to do so at that time. *Id.*

<sup>146</sup> See *id.* at 346-47 (disagreeing with the legal arguments in *Banks*).

<sup>147</sup> *Oliver v. NCAA*, 2009-Ohio-6587, 155 Ohio Misc. 2d 17, 920 N.E.2d 203, vacated pursuant to settlement (Sept. 30, 2009).

<sup>148</sup> Karcher, *supra* note 104, at 55.

<sup>149</sup> See Dennie, *supra* note 9, at 29 (discussing the remedies sought by Andy Oliver in his suit against the NCAA).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See *O'Bannon*, 7 F. Supp. 3d at 963 (holding that the NCAA violates antitrust by not allowing them to share in revenues generated through sales of merchandise using their names and likenesses). Ironically, the judge tasked with issuing the decision is not even a sports fan. John Branch, *Judge in NCAA Case Known as Evenhanded*, N.Y. TIMES (Aug. 10, 2014), [www.nytimes.com/2014/08/11/sports/judge-in-n-c-a-a-case-known-as-fair-and-modest.html?\\_r=0](http://www.nytimes.com/2014/08/11/sports/judge-in-n-c-a-a-case-known-as-fair-and-modest.html?_r=0). When first confronted with the common abbreviation of the Southeastern Conference, SEC (one of the major conferences in college athletics), during the *O'Bannon* proceedings, she admitted that she immediately thought of the Securities Exchange Commission, and not college athletics. *Id.*

<sup>155</sup> See Eder & Strauss, *supra* note 1 (stating that the list includes former basketball greats Oscar Robertson and Bill Russell, along with many other former and current players).

UCLA All-American Ed O'Bannon, sued the NCAA.<sup>156</sup> They alleged the NCAA violated the Sherman Act by using players' names, images, and likenesses to promote and sell NCAA licensed products without sharing the resulting profits with the players.<sup>157</sup> The NCAA presented some of its most common defenses at trial and asserted that the compensation restrictions were reasonable because "they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product."<sup>158</sup> Despite the NCAA's use of its classic defenses, the court ruled in favor of the student-athletes, finding that the "challenged NCAA rules unreasonably restrain trade."<sup>159</sup>

*O'Bannon* is especially significant because the court eviscerated each of the arguments presented by the NCAA.<sup>160</sup> The court found the NCAA's commitment to amateurism to be inconsistent at best,<sup>161</sup> and went as far as to compare the practices of the NCAA to those of a "cartel."<sup>162</sup> The judge criticized the testimony given by NCAA President, Mark Emmert, during trial. In defense of NCAA rules and regulations, Emmert testified to the importance of amateurism and stated that for over 100 years the

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<sup>156</sup> *Id.* The popular video game producer "EA Sports" was initially a named defendant in this case as well, but prior to the recent decision, the company chose to settle its portion of the claim for \$40 million, and the case against the NCAA continued. Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN.COM (May 31, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm).

<sup>157</sup> *O'Bannon*, 7 F. Supp. 3d at 963. Plaintiffs were seeking a permanent injunction against the NCAA's restrictions on compensation pertaining to the use of student-athletes' names and likenesses. Amanda Norris Ames, David B. Hamilton & Jason C. Hicks, *O'Bannon Decision Could Open the Door to Significant Changes in Collegiate Athletics*, THE NATIONAL LAW REVIEW (Sep. 5, 2014), [www.natlawreview.com/article/o-bannon-decision-could-open-door-to-significant-changes-collegiate-athletics](http://www.natlawreview.com/article/o-bannon-decision-could-open-door-to-significant-changes-collegiate-athletics).

<sup>158</sup> *O'Bannon*, 7 F. Supp. 3d at 973.

<sup>159</sup> *Id.* at 963.

<sup>160</sup> Ames, Hamilton & Hicks, *supra* note 157.

<sup>161</sup> Judge Wilken stated that certain NCAA theories pertaining to the traditions of amateurism were simply "implausible." Dan Wetzel, *Why the O'Bannon Victory is a Win for Everyone Who Stopped Believing the NCAA's Charade*, YAHOO! SPORTS (Aug. 9, 2014, 1:49 AM), [http://sports.yahoo.com/news/why-the-o-bannon-victory-is-a-win-for-everyone-who-stopped-believing-the-ncaa-scharade054938570.html?utm\\_source=twitterfeed&utm\\_medium=twitter](http://sports.yahoo.com/news/why-the-o-bannon-victory-is-a-win-for-everyone-who-stopped-believing-the-ncaa-scharade054938570.html?utm_source=twitterfeed&utm_medium=twitter).

<sup>162</sup> Ames, Hamilton & Hicks, *supra* note 157. Judge Wilken issued a permanent injunction that prevents the NCAA from prohibiting "deferred compensation in an amount of \$5,000 per year or less for the licensing of athletes' names, images, and likenesses through a trust fund payable upon expiration of athletic eligibility or graduation." *Id.* The injunction also prevented the NCAA from limiting athletic scholarships to any number that is lower than the full cost of attendance. *Id.*

amateurism rules have focused on making sure that student-athletes are provided with the resources they need to obtain an education.<sup>163</sup>

In dismissing Emmert's argument, the court stated, "[t]he historical evidence . . . demonstrates that the association's amateurism rules have not been nearly as consistent as Dr. Emmert represents."<sup>164</sup> To illustrate the historical inconsistency of NCAA amateurism, the court pointed to the fact that the rules have been modified numerous times in the last 100 years,<sup>165</sup> and the current amateur rules blatantly violate bylaws of the past.<sup>166</sup> The court's skepticism towards NCAA amateurism permeates throughout the opinion.

The NCAA immediately filed an appeal of the district court's decision in *O'Bannon*.<sup>167</sup> The Ninth Circuit added to the growing list of courts showing disdain for NCAA amateurism when it affirmed the district court's decision that the NCAA violated antitrust laws by limiting student-athlete compensation related to the NCAA's use of their names, images, and likenesses.<sup>168</sup> While the Ninth Circuit vacated the portion of the district court's ruling that would have allowed member-institutions to pay student-athletes up to \$5,000 per year, it "affirmed the core of Judge Wilken's reasoning that the NCAA has been violating Section 1 of the Sherman Act for years."<sup>169</sup>

One of the most significant parts of the ruling was that the Ninth Circuit rejected the NCAA's assertion that any challenge regarding the rules of amateurism – as opposed to the NCAA's commercial activity – must fail as a matter of law based on the precedent established in *Board of Regents*.<sup>170</sup> The court stated that "the NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules."<sup>171</sup> According to one leading commentator,

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<sup>163</sup> *O'Bannon*, 7 F. Supp. 3d at 973.

<sup>164</sup> *Id.*

<sup>165</sup> Since the bylaws were first enacted in 1906, there have been significant changes to amateurism rules in 1916, 1922, 1948, 1952, 1956, 1975, 2004, and 2013. *Id.* at \*43-46.

<sup>166</sup> *Id.* at 973.

<sup>167</sup> See generally Michael McCann, *What the Appeals Court Ruling Means for O'Bannon's Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sep. 30, 2015) [hereinafter *McCann 1*], [www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling](http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling) (discussing the *O'Bannon* proceedings leading up to the Ninth Circuit's ruling).

<sup>168</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015)[hereinafter *O'Bannon Appeal*].

<sup>169</sup> See McCann 1, *supra* note 167 (analyzing the Ninth Circuit's ruling).

<sup>170</sup> See *id.* (stating that the Ninth Circuit rejected the NCAA's use of Board of Regents "to assert that challenges to amateurism rules must fail as a matter of law").

<sup>171</sup> *O'Bannon Appeal*, 802 F.3d at 1079.



“[t]his language is a setback for the NCAA since it makes the NCAA more vulnerable to antitrust lawsuits, including those brought by other student-athletes.”<sup>172</sup>

Coupled with the other cases mentioned above, the *O'Bannon* rulings clearly demonstrate that courts are no longer affording deference to NCAA rules and regulations based on the traditions of amateurism. This recent shift in treatment looms large as the NCAA prepares for another round of antitrust challenges that are pending in the courts.<sup>173</sup> Multiple lawsuits were recently filed against the NCAA challenging NCAA rules that cap scholarship limits at amounts well below the actual cost of attendance.<sup>174</sup> The cases have been consolidated in federal court and are collectively referred to as the “cost of attendance” cases.<sup>175</sup> The most important of the pending cases is *Jenkins v. NCAA*<sup>176</sup> (hereinafter “the Kessler Case”).<sup>177</sup> Simply put, it is the most brazen and direct attack the NCAA has ever faced.<sup>178</sup>

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<sup>172</sup> McCann 1, *supra* note 167.

<sup>173</sup> See generally Bill Donahue, *NCAA Ruling is a Game Changer, Hausfeld Says*, LAW360 (Aug. 11, 2014, 6:04 PM) [www.law360.com/articles/566161/ncaa-ruling-is-a-game-changer-hausfeld-says](http://www.law360.com/articles/566161/ncaa-ruling-is-a-game-changer-hausfeld-says) [hereinafter *Donahue 1*] (stating that the *O'Bannon* ruling opens the door for successful challenges in the future because the NCAA will not be able to rely on its classic antitrust defenses).

<sup>174</sup> See Andy Staples, *O'Bannon just the beginning: Jenkins case could unhinge NCAA*, SPORTS ILLUSTRATED (June 18, 2014), [www.si.com/college-football/2014/06/18/obannon-vs-ncaa-jenkins-mark-emmert-claudia-wilken](http://www.si.com/college-football/2014/06/18/obannon-vs-ncaa-jenkins-mark-emmert-claudia-wilken) (discussing the next round of antitrust challenges that the NCAA will defend). “All those cases were filed in different parts of the country, but the U.S. Judicial Panel on Multidistrict Litigation consolidated them and placed them in the courtroom of Wilken.” *Id.*

<sup>175</sup> In total, there are six independent claims that have been identified and consolidated in front of Judge Claudia Wilken. Jon Solomon, *Judge Draws NCAA Doubleheader with O'Bannon, Scholarship Cases*, CBS SPORTS, (June 17, 2014, 1:42 PM), [www.cbssports.com/collegefootball/writer/jon-solomon/24590912/judge-draws-ncaa-doubleheader-with-obannon-scholarship-cases](http://www.cbssports.com/collegefootball/writer/jon-solomon/24590912/judge-draws-ncaa-doubleheader-with-obannon-scholarship-cases).

<sup>176</sup> *Jenkins v. NCAA*, 4:14-CV-02758 (N.D. Cal. 2014).

<sup>177</sup> The case has become known as “the Kessler Case” because of the attorney who filed the lawsuit. See Bill Donahue, *In Latest NCAA Suit, a Clearer Goal and Bigger Name*, LAW360 (Mar. 18, 2014, 5:36 PM), [www.law360.com/articles/519716/in-latest-ncaa-suit-a-clearer-goal-and-bigger-name](http://www.law360.com/articles/519716/in-latest-ncaa-suit-a-clearer-goal-and-bigger-name) (discussing the background and past successes of attorney Jeffrey Kessler); see also David J. Parnell, *The NCAA's 'Cartel' Activity has Awakened a Sleeping Giant*, FORBES, (Oct. 1, 2014, 8:46 AM), [www.forbes.com/sites/davidparnell/2014/05/08/the-ncaas-cartel-activity-has-awakened-a-sleeping-giant/2/](http://www.forbes.com/sites/davidparnell/2014/05/08/the-ncaas-cartel-activity-has-awakened-a-sleeping-giant/2/), (stating that the NCAA has exploited athletes for long enough and Jeffrey Kessler will be the attorney to solve the problem). Jeffrey Kessler is a world-renowned labor law attorney who is best known for successfully bringing free agency into the NFL. *Id.* Kessler's list of impressive accomplishments does not stop there. A small sampling of his wins includes: successfully represented NFL players in a dispute over television contracts used to fund the 2011 NFL lockout; successfully represented various NBA players in multiple antitrust actions, which led to the current free

#### IV. ANALYZING THE FUTURE OF INTERCOLLEGIATE ATHLETICS THROUGH THE KESSLER CASE

Using the *O'Bannon* decisions as a guide, the Kessler Case is likely to destroy or, at the very least, significantly alter the current NCAA model. This section discusses the ramifications that a victory in the Kessler Case will have on the NCAA, and intercollegiate athletics in general. Although sweeping reform of the NCAA model is necessary, this section presents multiple reasons why seeking such reform through an antitrust challenge like the Kessler Case is not the ideal solution to the problems presented within the unique world of big-time intercollegiate athletics.

##### A. *An Introduction to the Kessler Case*

Rather than build its antitrust claim around theories in intellectual property law, like *O'Bannon* and others, the Kessler Case seeks a more direct route in its challenge. The case hopes to bring a free-market system to college athletics by removing all restrictions on student-athlete compensation.<sup>179</sup> Kessler contends that no cap is legal in a free-market and the NCAA should be permanently enjoined from restraining athlete compensation.<sup>180</sup>

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agency/salary cap in the NBA and the end of the 2011 NBA lockout; successfully represented Oscar Pistorius, the double-amputee runner, in an arbitration hearing that led to Pistorius competing against able-bodied athletes in the Summer Olympics. *Id.*

<sup>178</sup> See Staples, *supra* note 174 (stating that the Kessler Case is terrifying to the NCAA because it seeks to “drop a bomb” on the business model for college sports, and truly open the market for student-athletes). See generally Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the NCAA*, N.Y. TIMES (Aug. 27, 2014), [www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html](http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html) (discussing what Jeffrey Kessler’s formidable antitrust challenge to The NCAA’s compensation restrictions). It is worth noting that the NCAA is not taking Kessler lightly; in response to the suit, they have hired another world-renown labor law attorney, Jeffrey Mishkin, to defend the organization. *Id.* Mishkin is a longtime adversary of Kessler’s and has represented the NBA in every major dispute they have faced in the last 35 years. *Id.*

<sup>179</sup> Staples, *supra* note 174.

<sup>180</sup> Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014, 6:09 PM) [hereinafter *Kessler Files*], <http://espn.go.com/espn/print?id=10620388>. According to Jeffrey Kessler, the NCAA and its member-institutions have “lost their way far down the road of commercialism, signing multibillion dollar contracts wholly disconnected from the interests of ‘student-athletes’” Staples, *supra* note 176. The Kessler Case argues that substantial damages have been inflicted upon the student-athletes whose services have yielded riches to so many and this lawsuit is necessary to alter

Kessler argues that “[i]n no other business, and college sports is big business, would it ever be suggested that the people who are providing the essential services work for free.”<sup>181</sup>

Kessler’s free-market model would allow colleges to compete for the services of student-athletes by offering anything from enhanced scholarships to better medical care to, potentially, “lots of cash.”<sup>182</sup> Kessler has stated, “[i]f you have a school like Texas that earns close to \$200 million [from] their football or basketball programs, you might decide it is fair to give some of that to the players who are generating the money.”<sup>183</sup> Essentially, the Kessler Case is attempting to use the Sherman Act to bring “free agency” to big-time college sports.<sup>184</sup>

### B. What if Kessler Is Victorious? Analyzing the Future of Intercollegiate Athletics

Commentators have noted that a victory for the Kessler Plaintiffs — which is likely<sup>185</sup> — would “certainly end all vestiges of the amateurism model.”<sup>186</sup> At first glance, this may seem like the ideal solution to the exploitive NCAA model, but a closer analysis reveals that a free-market system – implemented through

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the NCAA model, “which is inconsistent with the most fundamental principles of antitrust law.” *Id.*

<sup>181</sup> *Kessler Files*, *supra* note 180.

<sup>182</sup> Eder, *supra* note 178.

<sup>183</sup> *Id.* Under Kessler’s model,

A top high school basketball prospect could be recruited by colleges just as the Cleveland Cavaliers courted LeBron James. There could be agents, and money, and maybe even a salary cap down the road. The prospect could choose where to go based on the coach, the facilities, the scholarship – or who was offering the most money. The Players [will not] get one dollar more than the markets decides they are worth. *Id.*

<sup>184</sup> See IBJ, *supra* note 93 (stating that critics of the free-market model have compared Kessler’s demands to “free-agency” in professional sports). Former NCAA basketball great and current television analyst, Len Elmore, says the consequences would be “earth-shattering.” *Id.*

<sup>185</sup> When the case was consolidated with the other cost of attendance cases, it was transferred to the Northern District of California and is set to be tried in front of a woman who has suddenly become the most important person in college athletics: Judge Claudia Wilken. See Solomon, *supra* note 175 (stating that Judge Claudia Wilken’s importance to the future of college athletics is on full display as she presides over both cases). In *O’Bannon*, Judge Wilken analyzed and eviscerated the various rationales the NCAA has historically used to defend itself from antitrust challenges. Joe Nocera, *From Sneakers to O’Bannon*, N.Y. TIMES (Aug. 11, 2014), [www.nytimes.com/2014/08/12/opinion/joe-nocera-from-sneakers-to-obannon.html?\\_r=0](http://www.nytimes.com/2014/08/12/opinion/joe-nocera-from-sneakers-to-obannon.html?_r=0). Wilken is likely to apply the same reasoning to this case, despite the differences between the two challenges. See *generally* Donahue 1, *supra* note 167.

<sup>186</sup> See Eder, *supra* note 178 (discussing the devastating results the NCAA would face following a victory for the Kessler plaintiffs).

antitrust litigation – is not the ideal solution for the unique issues associated with the world of big-time intercollegiate athletics. First, there are legitimate reasons why certain aspects of the current system deserve to be saved. Second, implementing a free-market system would create a plethora of legal and logistical problems that would far outweigh the benefits of such a system.

1. *Although the Current NCAA Model Exploits Student-Athletes, the Model Provides Certain Benefits That Are Worth Protecting*

While it is undeniable that the current NCAA model results in the economic exploitation of student-athletes, this Comment suggests that the entire NCAA model should not be destroyed because there are beneficial aspects of the current system that should be protected and preserved going forward. First, the commercialization of college athletics is not inherently negative; rather, this development can be used to provide major benefits for colleges and universities as a whole. Second, despite the fact that a small number of athletes face significant economic harm under the current model, studies show that far more athletes receive long-term benefits from the existing amateur model.

a. *The Commercialization of College Sports Can Provide Legitimate Benefits for Colleges and Universities*

The increasing commercialization of college sports is not an inherently negative development. The higher education market is increasingly competitive, and administrators at institutions of higher learning understand that sports can serve as a catalyst to achieving legitimate goals outside of the athletic department.<sup>187</sup> These administrators “are immersed in our society’s economic climate”<sup>188</sup> and “use of intercollegiate sports” by these leaders is “a rational response to marketplace realities.”<sup>189</sup> University and athletic department administrators should be able to do what is necessary for their institutions to compete successfully in a competitive marketplace.<sup>190</sup>

There are many recent examples of universities using big-time college sports to benefit non-athletic components of their

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<sup>187</sup> Mitten, Musselman & Burton, *supra* note 34, at 792. The success of these institutions depends on a school’s ability to attract large incoming classes of students, obtain and retain prominent faculty, enlarge fundraising for brick and mortar, enhance and expand academic programs, and expand endowments. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 799.

<sup>190</sup> *Id.* at 792.

institutions.<sup>191</sup> In recent years, the University of Florida has won National Championships in both football and men's basketball.<sup>192</sup> Following the championships, application numbers rose significantly and the school's fundraising efforts increased 38 percent to \$183 million.<sup>193</sup> The school allocated half of that money to athletics and half to general university funds.<sup>194</sup> The school recently launched an ambitious \$1.5 billion fundraising campaign that will undoubtedly benefit from the national notoriety generated by its sports teams.<sup>195</sup>

Critics are likely to argue that schools like Florida - large institutions with massively popular and successful sports programs - are the exception and not the norm, but there are also examples of much smaller schools using athletics to benefit the entire university.<sup>196</sup> For example, in 2007, the Boise State University football team recorded an improbable win in one of the biggest college football bowl games of the year by defeating the heavily favored team from Oklahoma University.<sup>197</sup> Following the game, the small school in Idaho received millions of dollars in new pledges for its business and nursing schools, growth in a number of its graduate school programs, merchandising contracts, increases in alumni donations not solely directed towards athletics, and boosts in local businesses as well.<sup>198</sup> School officials believe that the school and community will benefit from this bowl victory for years to come.<sup>199</sup>

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<sup>191</sup> See *id.* at 793-97 (discussing the calculated efforts of many universities to use athletics to boost enrollment, attract well-known professors and boost general awareness for the university itself).

<sup>192</sup> *Id.* at 793.

<sup>193</sup> *Id.* at 793-94.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 794.

<sup>196</sup> See *id.* at 794-97 (discussing how smaller schools such as Boise State University, North Dakota State University, Georgia State University and the University of Connecticut have strategically used their athletic departments and athletic programs to foster growth within their respective universities).

<sup>197</sup> *Id.* at 793.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* Even schools outside of Division I and big-time college athletics can rely on intercollegiate athletics "as a means of revitalization or transformation." *Id.* at 797. Before 2005, Adrian College, a small liberal arts school in Michigan, was struggling with "slumping enrollment and campus malaise." *Id.* The school decided to use athletics as a recruiting tool and was able to completely turn things around. *Id.*

Since 2005, Adrian's enrollment has surged 57% to its highest number--1470--in twenty years, and the academic caliber of students has shot up. Before 2005, Adrian had accepted 93% of its pool of 1200 applicants. Since adopting its athletics-based student recruiting strategy, Adrian now accepts only 72% of the applicants from a nearly fourfold larger pool of 4200 applications and reports that its student body has better academic credentials. *Id.*

As the previous stories illustrate, the commercialization of intercollegiate athletics is not inherently negative. School administrators should be allowed to use the benefits of the commercialized world of intercollegiate athletics to benefit the entirety of their respective institutions. Destroying the current model will not allow them to do so.

*b. Many More Student-Athletes Benefit from the Current Model than Are Harmed by It*

While reform of the current NCAA model is long over due, the entire NCAA system should not be destroyed because the majority of student-athletes actually *benefit* from the current rules. Seeking reform through the implementation of a free-market system will harm more student-athletes than it benefits.<sup>200</sup> It is estimated that the top 1 percent of student-athletes generate 90 percent of revenues in big-time college sports.<sup>201</sup> And while a draft-quality football or basketball player earns his school anywhere from \$406,000 to \$1.194 million annually,<sup>202</sup> the economic value of most players, in a free-market system, would be far less than the value of the scholarship they currently receive.<sup>203</sup> If a free-market system is implemented, the inevitable will occur: schools will start paying the majority of football and basketball players less, in order to pay the large salaries commanded by a handful of star players.

This will prove harmful because the current system provides a large number of student-athletes with “the opportunity to leverage their athletic abilities into academic achievement that might otherwise be unavailable to them.”<sup>204</sup> If most of the student-athletes on a football team, for example, will be worth less on the open market than the value of their current scholarship, this would lead to less student-athletes going to college and receiving the life-long benefits associated with obtaining a degree.

Studies show the significant academic and future career benefits that participation in intercollegiate athletics provides.<sup>205</sup> A study conducted by the NCAA in 2007 revealed:

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<sup>200</sup> See Mitten & Ross, *supra* note 12, at 865 (discussing the likely outcome of paying the small number of student-athletes that would be worth large sums of money to colleges and universities).

<sup>201</sup> Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sep. 7, 2011), [www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single\\_page=true](http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true).

<sup>202</sup> Robert John Givens, “*Capitamateuralism*”: *An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UNIV. MO. KANSAS CITY L. REV. 205, 211 (2013).

<sup>203</sup> Mitten & Ross, *supra* note 12, at 865.

<sup>204</sup> *Id.* at 854.

<sup>205</sup> Mitten, Musselman & Burton, *supra* note 34, at 801.

that (1) 88% of student-athletes earn their baccalaureate degrees, compared to less than 25% of the American adult population; (2) 91% of former Division I student-athletes are employed full-time, 11% more than the general population, and average higher income levels than non-student-athletes; (3) 89% of former student-athletes believe the skills and values learned from participating in intercollegiate athletics helped them obtain their current employment in a career other than playing professional sports; and (4) 27% of former Division I student-athletes earn a postgraduate degree.<sup>206</sup>

These numbers are compounded by the fact that almost every single college athlete will pursue a career in something other than sports.<sup>207</sup> Statistics show that only 1.2 percent of men's basketball players, and 1.6 percent of football players will play professionally on any level.<sup>208</sup> The economic exploitation of a relatively minute percentage of student-athletes does not justify the destruction of the entire system; especially when considering that the 1 percent of athletes that generate most of the revenues are likely to be in the 1.2 percent to 1.6 percent of student-athletes that will go on to play professionally in their respective sports.<sup>209</sup>

## 2. *Implementing a Free-Market System through the Sherman Act Would Create More Problems than it Would Fix*

Implementing a free-market system through an antitrust challenge would present numerous legal and logistical problems that far outweigh any of the system's benefits. If a free-market system were implemented, the NCAA and its member-institutions would be faced with multiple legal issues, such as tax liability,<sup>210</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> Mitten, Musselman & Burton, *supra* note 34, at 839. (discussing the low likelihood of NCAA student-athletes playing professional sports).

<sup>208</sup> *Probability of Competing beyond High School*, NCAA [www.ncaa.org/about/resources/research/probability-competing-beyond-high-school](http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school) (last visited Nov. 14, 2014).

<sup>209</sup> See Branch, *supra* note 201 (explaining that the top 1 percent of student-athletes generate most of the revenues within college sports).

<sup>210</sup> A brief look into the tax implications of allowing student-athletes to offer their services in a free-market system demonstrates some of the difficulties of paying student-athletes. Under current law, an athlete who receives a scholarship only has taxable income to the extent such scholarship exceeds the cost of tuition, books, and fees. Lorry Spitzer et al., *Game On! Recent Legal Developments and Tax Issues for College Athletics*, ROPES & GRAY LLP (Sept. 15, 2014), [www.ropesgray.com/news-and-insights/Insights/2014/September/Game-On-Recent-Legal-Developments-and-Tax-Issues-for-Collegiate-Athletics.aspx](http://www.ropesgray.com/news-and-insights/Insights/2014/September/Game-On-Recent-Legal-Developments-and-Tax-Issues-for-Collegiate-Athletics.aspx). Since NCAA rules limit athletic scholarships to an amount several thousand dollars less than the cost of attendance, this is currently not an issue in collegiate sports. *Id.* The decision

labor law issues,<sup>211</sup> workers' compensation issues,<sup>212</sup> and Title IX violations,<sup>213</sup> among others.

For example, if a free-market system were put in place, the NCAA and its individual member-institutions would face a deluge of future lawsuits under Title IX. Essentially, Title IX forbids discrimination on the basis of sex within higher education.<sup>214</sup> The law was implemented at a time when the landscape of college sports was radically different.<sup>215</sup> Title IX, as it has been applied to intercollegiate athletics, means that any opportunity that is available for male athletes must also be available for female athletes.<sup>216</sup> Commentators have stated that the laws of Title IX "would presumably prohibit extreme disparities between women's and men's sports programs."<sup>217</sup> Since few institutions have women's teams in any sport that generate significant revenue,<sup>218</sup> it stands to reason that men's football players and basketball players would receive significant income in a free-market system, while female athletes will not.

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in *O'Bannon*, which allowed athletes to receive "deferred compensation," could lead to at least two negative results. *Id.*

First, it would change the current rules on reporting scholarships, which would result in "increased compliance and reporting burdens for both students and schools." *Id.* Second, the Tax Code has provisions that come into play when a tax-exempt organization, such as the NCAA, creates a deferred compensation program. *Id.* It is likely that even though the money would be in a trust that the athlete could not access until graduation or the expiration of eligibility, that the money would be taxable during each tax year that it was received. *Id.*

<sup>211</sup> See generally Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077 (2012) (discussing, from a labor law perspective, the legal implications of compensating student-athletes).

<sup>212</sup> See generally Michael J. Mondello & Joseph Beckham, *Workers' Compensation and College Athletes: the Debate over the Pay for Play Model: A Counterpoint*, 31 J.L. & EDUC. 293 (2002) (analyzing whether workers' compensation benefits should be provided for student-athletes participating in intercollegiate athletics).

<sup>213</sup> See Marot, *supra* note 52 (stating that if men's basketball and football players begin to receive compensation for competing, then female athletes would argue the existence of Title IX violations).

<sup>214</sup> Michael McCann, *Ed O'Bannon v. the NCAA: A complete analysis before the trial*, SPORTS ILLUSTRATED (June 6, 2014) [hereinafter *McCann 2*], [www.si.com/college-football/2014/06/05/ed-obannon-ncaa-trial-primer](http://www.si.com/college-football/2014/06/05/ed-obannon-ncaa-trial-primer).

<sup>215</sup> *Id.*

<sup>216</sup> See Jill Lieber Steeg, *Lawsuits, Disputes Reflect Continuing Tension Over Title IX*, USA TODAY (May 13, 2008, 1:59 AM), [http://usatoday30.usatoday.com/sports/college/2008-05-12-titleix-cover\\_N.htm](http://usatoday30.usatoday.com/sports/college/2008-05-12-titleix-cover_N.htm) (stating that "Title IX has come to stand for equality in college sports, though it applies to all schools receiving federal funds, not just colleges, and not just to athletics").

<sup>217</sup> Harvard, *supra* note 43, at 1317.

<sup>218</sup> See Smith 1, *supra* note 10, at 20 (discussing Title IX and its application to intercollegiate athletics over the last few decades).



It is not certain that the NCAA would lose Title IX challenges if a free-market system were implemented and student-athletes were compensated.<sup>219</sup> Title IX is based on providing equal opportunities for male and female athletes; thus, the fact that certain male athletes participate in revenue generating sports and would command more compensation, might not trigger Title IX violations because women are still being provided similar opportunities to participate in intercollegiate athletics.<sup>220</sup> Regardless of the outcome, any Title IX issues would only be sorted out through complex, future litigation that will cost all parties, including the courts, vast amounts of time and resources.<sup>221</sup> The same can be said for the other legal questions that would arise regarding tax law, employment law, and others.

In addition to the legal problems, paying student-athletes in a free-market system would also create overwhelming logistical problems for the NCAA and its member-institutions.<sup>222</sup> If schools were required to compensate student-athletes, the first issue would be determining where the additional money would come from.<sup>223</sup> Under the current system, only a small fraction of Division I football and basketball programs claim that their athletic departments produce any profits.<sup>224</sup> Therefore, most programs argue that they simply cannot afford to compensate student-athletes beyond the scholarship amounts currently provided.<sup>225</sup> Critics claim that the money to pay student-athletes is there, but it is being spent on lavish facilities and high coaching salaries instead.<sup>226</sup> Additional evidence suggests that many athletic departments actually do produce profits for their

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<sup>219</sup> See Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBS SPORTS (June 5, 2014, 9:52 AM), [www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women](http://www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women) [hereinafter *Solomon Title IX*] (stating that some legal experts predict large Title IX implications if athletes receive compensation, while other experts believe it will be a non-issue).

<sup>220</sup> *Id.*

<sup>221</sup> See generally McCann 2, *supra* note 214 (discussing potential title IX problems associated with paying student-athletes and stating that any issues will be sorted out through litigation).

<sup>222</sup> See Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, THE SPORT JOURNAL (June 15, 2012), available at <http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/> (discussing the issues that would arise if schools were to pay student-athletes).

<sup>223</sup> Kristi Dosh, *The Problems with Paying College Athletes*, FORBES (June 9, 2011, 6:34 PM), [www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/2/](http://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/2/).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> See generally Petchesky, *supra* note 84.

respective universities, but these revenues are hidden through the use creative accounting practices.<sup>227</sup>

Even if these arguments are valid, and the money to pay student-athletes does exist, many practical issues would need to be considered.<sup>228</sup> “How do [schools] decide which athletes are paid? Is it just in revenue-producing sports? Is it every athlete playing in those sports or just the elite?”<sup>229</sup> Schools would also have to decide how much to pay student-athletes. Would it be “one set amount for every athlete no matter the sport or the school?”<sup>230</sup> Would compensation be performance based?<sup>231</sup> How would injury and other factors affect compensation?<sup>232</sup>

Regardless of how these questions are answered, it is likely that student-athletes in non-revenue generating sports will be the ones to suffer.<sup>233</sup> One commentator addressing these problems has stated that “[t]he outcome here would be inevitable: Forcing athletic departments to pay its football and basketball players would result in the eventual elimination of most, if not all, of the non-revenue sports.”<sup>234</sup> As mentioned above, this would prevent countless student-athletes from obtaining college degrees – and the life-long benefits associated with them.<sup>235</sup>

The myriad legal and logistical complications that will inevitably arise with a victory in the Kessler case point to a much larger issue: attempting to reform the NCAA through the use of the “Sherman Act is an ill-fitting solution” to the unique problems associated with the world of big-time intercollegiate athletics.<sup>236</sup> This is because “[t]he Sherman Act was primarily designed to focus on for-profit commercial enterprises . . . [and] antitrust law is not well-suited for case-by-case judicial application” to an industry like the NCAA, where non-economic factors – i.e., the preservation of amateurism – must be balanced against the anticompetitive economic effects of the restraints.<sup>237</sup> Analysts have

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<sup>227</sup> See *id.* (arguing that the money to pay student-athletes exists, and that athletic departments “tweak their balance sheets to show loss even though [they are] actually turning a nice profit”).

<sup>228</sup> See Dosh, *supra* note 223 (presenting a variety of issues that would arise if student-athletes were compensated by their respective schools).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Johnson & Acquaviva, *supra* note 222.

<sup>232</sup> *Id.*

<sup>233</sup> See *id.* (stating that most sports do not generate revenues for their schools, and would likely be eliminated so schools can pay star players from revenue generating sports); Dosh, *supra* note 223 (stating that non-revenue generating men’s sports will suffer if schools start compensating other student-athletes).

<sup>234</sup> Johnson & Acquaviva, *supra* note 222.

<sup>235</sup> Mitten & Ross, *supra* note 12, at 865-66.

<sup>236</sup> See *id.* at 861 (providing five reasons why the use of the Sherman Act is not the best solution to the problems of the NCAA).

<sup>237</sup> *Id.* See also Gabe Feldman, *A Modest Proposal for Taming the Antitrust*

noted that “[t]he promotion of amateurism, or any other social goals, has no place in the [rule of reason analysis] and has no impact on the legality of a restraint.”<sup>238</sup> Forcing judges to incorporate social goals into their antitrust analysis “sets [them] up for failure[,]” and has resulted in a “wildly diverse and incoherent application of the Sherman Act to the NCAA’s student-athlete restrictions.”<sup>239</sup> Furthermore, other commentators have noted that “a piecemeal approach by way of antitrust litigation that merely considers the legality of the particular challenged restraint will not effectively solve systemic problems inherent in the production of commercialized intercollegiate athletics by institutions of higher education.”<sup>240</sup>

## V. Proposal

Immediate reform of the NCAA model is needed because the system has developed into a scheme that primarily serves the needs of universities and other “high-stakes players” without protecting the needs of student-athletes.<sup>241</sup> And, essentially, under the current system, “amateurism” is nothing more than a term used by the NCAA to designate its business model.<sup>242</sup> The system needs to change so that the needs of the student-athletes are once again of primary importance. And while there will undoubtedly be complex logistical problems and growing pains associated with the implementation of any type of reform,<sup>243</sup> it is clear that using the Sherman Act to attack the NCAA and implement a free-market system is not the answer.

Thus, this Comment proposes that Congress enact an alternative regulatory scheme that would *force* the NCAA to engage in meaningful economic and academic reform.<sup>244</sup> In return

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*Beast*, 41 Pepp. L. Rev. 249, 257 (2014) (stating that balancing non-economic, social factors against economic factors is “anathema to antitrust law”).

<sup>238</sup> Feldman, *supra* note 237, at 257.

<sup>239</sup> *Id.*

<sup>240</sup> Mitten & Ross, *supra* note 12, at 867.

<sup>241</sup> Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, WIS. L. REV. 545, 548 (1995).

<sup>242</sup> Karcher, *supra* note 104, at 49.

<sup>243</sup> Kavitha A. Davidson, *Today Let’s Blow up the NCAA*, BLOOMBERG VIEW (Aug. 7, 2014, 8:45 AM), [www.bloombergvie.com/articles/2014-08-07/today-let-s-blow-up-the-ncaa](http://www.bloombergvie.com/articles/2014-08-07/today-let-s-blow-up-the-ncaa) (discussing and analyzing the NCAA Board of Directors’ decision to grant more autonomy to the “Power Five” athletic conferences). It is argued that more autonomy for the larger conferences and schools will lead to a larger void between the “haves and have-nots” of college athletics. *Id.* There will likely be infighting and conflicting interests blocking progress of NCAA reform no matter what is decided, but at this point “any action against the NCAA is a good action.” *Id.*

<sup>244</sup> See John Infante, *Drake Group Proposes Sweeping Federal Regulation of NCAA ATHNET*(Oct. 11, 2013, 3:33 PM), [www.athleticscholarships.net/](http://www.athleticscholarships.net/)

for complying with the new regulatory rules, the NCAA and its member-institutions will be provided with a strictly enforced, qualified exemption to the antitrust laws of the Sherman Act.<sup>245</sup> This exemption will force the NCAA into meaningful reform but allow the NCAA to keep certain rules and regulations in place that might otherwise leave the organization vulnerable to antitrust attacks.<sup>246</sup>

Congressional intervention is necessary because the NCAA has demonstrated its unwillingness to implement reform on its own, and shifting judicial treatment indicates that it is only a matter of time before the NCAA is destroyed through antitrust litigation. However, as discussed above, this would not be the ideal solution to the unique problems associated with the world of big-time intercollegiate athletics, and would create more problems than it would remedy.

The key component to the Reform Legislation will be the creation of an independent organization to monitor and oversee the operations of the NCAA.<sup>247</sup> Independent oversight is required because there is simply too much money involved to expect the self-interested NCAA to implement meaningful reform on its own accord.<sup>248</sup> The NCAA Reform Committee (“the Committee”) would

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2013/10/11/drake-group-proposes-sweeping-federal-regulation-of-ncaa.htm (stating that the NCAA is caught in the middle of arguments from the “pay-for-play” advocates on one side, and academic reform advocates on the other). The Drake Group is an NCAA reform group that is currently drafting a similar proposal aimed at creating a federally regulated scheme for NCAA athletics. *Id.*

This Comment’s proposal has certain aspects that mirror the Drake Group’s proposal, but also differs on several factors. This proposal is similar in that it does not advocate for any “pay-for-play” system at all. *See generally id.* Under this model, certain “likeness” rules will be modified and relaxed to allow athletes to reap some economic benefits, but no NCAA student-athletes, in any sport, will receive a salary or additional compensation of any kind directly from their college or university. *Id.* This will allow the NCAA and student-athletes to avoid the complex legal issues that would arise through the implementation of a free-market system sought by Kessler.

One of the differences in the proposals is that Drake Group does not ask for the creation of an independent regulatory committee. *Id.* Instead, they call for an overhaul of the current NCAA Board of Directors that provide equal representation by school presidents from all three Divisions of intercollegiate athletics. *Id.* This is likely to be ineffective, as the NCAA has had ample opportunity to reform the system on its own and has failed to do so. There is simply too much money involved in intercollegiate athletics to expect the self-interested NCAA to voluntarily change the way it does business. C. Thomas McMillen, *Accountability on the Quad*, N.Y. TIMES, Aug. 31, 2011, at A29.

<sup>245</sup> *See* Mitten & Ross, *supra* note 12, at 874-75. (arguing that the NCAA should be given a legislative exemption to the rules of the Sherman Act).

<sup>246</sup> *Id.* at 875.

<sup>247</sup> *See id.* at 867-70 (proposing that federal regulation through external, independent review is a better solution to the current problems associated with the NCAA’s current amateur model).

<sup>248</sup> McMillen, *supra* note 245.

be a “quasi-governmental regulatory organization” similar to those used to monitor financial markets.<sup>249</sup> The Committee should model its structure after the National Futures Association (“NFA”), which monitors and regulates activities associated with futures trading.<sup>250</sup> The purpose of the Committee will be to ensure compliance with the regulatory scheme, while leaving the NCAA to do what it does best: organize and oversee the implementation of athletic events and championships.<sup>251</sup>

The Committee will have the authority to develop and enforce rules, provide programs and services that safeguard the integrity of intercollegiate athletics, protect student athletes from exploitation, and provide member institutions with the tools and resources necessary to meet their regulatory requirements.<sup>252</sup> While compliance with the Committee’s rules will not be mandatory, any institution that wishes to host Division I athletics

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<sup>249</sup> “Federal financial regulators rely heavily on quasi-governmental regulatory organizations (QGROs) . . . to complement their rulemaking and examination efforts.” Hester Peirce, *Economic Analysis by Federal Financial Regulators*, 9 J.L. ECON. & POL’Y 569, 601 (2013).

QGROs vary in their statutory bases, form of governance, and degree to which they are overseen by one or more federal financial regulators. Most QGROs exert considerable control within their areas of delegated authority. QGROs often serve as the frontline regulators, directly regulating the firms and individuals that deal with the public. The rules adopted by QGROs are of critical importance to the firms they regulate, the customers of those firms, and the structure of our financial markets.

*Id.*

<sup>250</sup> See *Who We Are*, NATIONAL FUTURES ASSOCIATION, [www.nfa.futures.org/NFA-about-nfa/index.HTML](http://www.nfa.futures.org/NFA-about-nfa/index.HTML) (last visited Nov. 14, 2014) [hereinafter *NFA*] (stating that the “National Futures Association (NFA) is the self-regulatory organization for the U.S. derivatives industry”). The NFA oversees and protects investors from fraudulent commodities and futures activities. *Id.* The NFA is a non-profit, independent regulatory organization. *Id.* The organization does not operate or implement any trading markets or trade associations. *Id.* The sole responsibility of the organization is to regulate futures trading and protect fraudulent activities. *Id.* The NFA operates at no cost to taxpayers and is financed exclusively from membership dues and assessment fees. *Id.*

<sup>251</sup> See John Infante, *NCAA Miami Problems Show Need for Federal Takeover*, ATHNET (Jan. 23, 2013, 1:30 PM), [www.athleticscholarships.net/2013/01/23/ncaa-federal-takeover.htm](http://www.athleticscholarships.net/2013/01/23/ncaa-federal-takeover.htm) [hereinafter *Federal Takeover*] (proposing the commission of a federal regulatory body that would enforce rules in intercollegiate athletics while leaving the NCAA to implement the sporting events and championships). The proposal presented by Infante differs from this proposal because it would be a fully controlled governmental agency under the Department of Education. *Id.* Full reliance on government funding and support is not ideal for an organization like this because intercollegiate sports might become “a political football” with funding for athletics being used as a “bargaining chip.” *Id.*

<sup>252</sup> These fundamental elements of the Committee mirror the language provided on the NFA website describing that organizations functions. See NFA, *supra* note 250 (providing information on how the NFA is structured and what the organization has the power and authority to accomplish).

will have to be a Committee “member” and adhere to the same high standards as every other institution. Only schools that spend a certain amount of money each year on intercollegiate athletics will be required to comply with the rules.<sup>253</sup> Any institution that decides not to adopt the Committee’s rules will not receive the benefits of the antitrust exemption.<sup>254</sup>

The Committee will not impose any tax burdens on citizens because it will be completely self-sufficient, just like the NFA.<sup>255</sup> The NCAA and its member-institutions will support the operation of the Committee through membership dues and assessments.<sup>256</sup> Like the NFA, the Committee will require that any complaints brought under the new system be resolved through mediation and binding arbitration.<sup>257</sup> Mandatory arbitration provides for the efficient and cost-effective resolution of disputes,<sup>258</sup> while simultaneously removing the burden on judges to apply complex legal doctrines to the unique world of intercollegiate athletics.<sup>259</sup>

While the new regulatory structure under the NCAA Reform Committee will remain flexible and dynamic to allow for change in the future, it is proposed that the following provisions be included in the original reform legislation enacted by Congress:

#### A. *Strict Reporting and Accounting Standards for the NCAA and its Member-Institutions*

To effectively regulate and enforce reform, the Committee must have accurate financial information about each institution, and the current system simply cannot produce such

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<sup>253</sup> See Federal Takeover, *supra* note 251 (proposing various options that would force NCAA member institutions to comply with a federal regulatory scheme). Division I schools that do not want to participate will have to cut spending and drop to a lower level. *Id.* Conversely, smaller schools would have to make a more informed decision when deciding to jump up to Division I. *Id.*

<sup>254</sup> Mitten & Ross, *supra* note 12, at 874-75.

<sup>255</sup> See generally NFA, *supra* note 250 (explaining the structure of the NFA).

<sup>256</sup> See *Id.* (explaining that the NFA is “financed exclusively from membership dues and assessment fees”).

<sup>257</sup> *Dispute Resolution*, NATIONAL FUTURES ASSOCIATION, [www.nfa.futures.org/NFA-about-nfa/who-we-are/dispute-resolution.HTML](http://www.nfa.futures.org/NFA-about-nfa/who-we-are/dispute-resolution.HTML) (last visited, Nov. 14, 2014).

<sup>258</sup> See Mitten & Ross, *supra* note 12, at 876 (suggesting that arbitration would benefit NCAA challenges by ensuring that complaints get resolved within 45 days).

<sup>259</sup> See *id.* at 867 (stating that the Sherman Act is ill-equipped to handle the “systemic problems inherent in the production of commercialized intercollegiate athletics”). There are rules and agreements within intercollegiate athletics, which “define this unique brand of athletic competition” and courts are not in the best position to determine the “permissible scope of a university’s relationship with its student-athletes.” *Id.*

information.<sup>260</sup> Under the current reporting set-up, universities are required to report data regarding 15 categories of their annual operating revenues and 19 categories of operating expenses.<sup>261</sup> The problem is that there are no standard reporting metrics, so schools report numbers that make it incredibly difficult to determine whether or not its athletic department operates at a profit or loss.<sup>262</sup>

Essentially, the unique world of big-time college sports has created dysfunctional economic practices because the NCAA and its member-institutions produce billions of dollars in revenues but operate in a “not-for-profit accounting world.”<sup>263</sup> It is difficult to analyze the economics of intercollegiate sports because “[e]ven within a single athletic conference, accounting methods are so varied that comparing any single financial item is a challenge.”<sup>264</sup> Many athletic departments that claim to operate at a loss would easily turn a profit if revenues or expenses were counted differently.<sup>265</sup>

For example, the University of Tennessee’s athletic department reported taking over \$12 million in subsidies from the university to operate its athletic programs in 2013.<sup>266</sup> The number

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<sup>260</sup> See generally Petchesky, *supra* note 84; Steve Berkowitz, *A Proposal for Better Balance Sheets Among NCAA Members*, USA TODAY (June 18, 2013, 9:46 PM) [hereinafter *Berkowitz 2*], [www.usatoday.com/story/sports/college/2013/06/18/ncaa-athletic-subsidies-accounting-changes/2435527/](http://www.usatoday.com/story/sports/college/2013/06/18/ncaa-athletic-subsidies-accounting-changes/2435527/); Jason Kirk, *College Athletic Departments Aren’t Necessarily as Broke as You Think*, SBNATION (June 6, 2014, 9:00 AM), [www.sbnation.com/college-football/2014/6/6/5783394/college-sports-profits-money-schools-revenues-subsidies](http://www.sbnation.com/college-football/2014/6/6/5783394/college-sports-profits-money-schools-revenues-subsidies) (providing examples of the various ways schools can manipulate accounting practices to skew the true financial viability of intercollegiate athletics).

<sup>261</sup> Berkowitz 2, *supra* note 260.

<sup>262</sup> *Id.*

<sup>263</sup> See Brian Goff, *NCAA “Arms Race” Metaphor Gets the Economics Backwards*, FORBES (July 30, 2014, 10:40 AM), [www.forbes.com/sites/briangoff/2014/07/30/ncaa-arms-race-metaphor-gets-the-economics-backwards/](http://www.forbes.com/sites/briangoff/2014/07/30/ncaa-arms-race-metaphor-gets-the-economics-backwards/) (analyzing the accounting practices of big-time athletic departments and stating that traditional measurements of profitability and sustainability are inadequate because schools have no incentive to grow surpluses that can be extracted as profits).

<sup>264</sup> Kirk, *supra* note 260.

<sup>265</sup> *Id.* Much of the confusion arises out of the complications with defining the word “subsidy.” *Id.* Under the current NCAA system, almost every athletic department in the country has taken a “subsidy” from elsewhere in order to “stay afloat.” *Id.* “Only seven, of the 230 listed public schools are shown as having no subsidy money in 2013.” *Id.* Currently, the NCAA considers as subsidy any revenue generated by an athletic department that comes from student-fees, any state support, and either of two types of university support: direct financial support; and the use of tuition waivers. Berkowitz 2, *supra* note 260.

<sup>266</sup> Kirk, *supra* note 260. The athletic department takes the subsidies despite having a 100,000-seat football stadium and a lucrative SEC television contract. *Id.*

is misleading because the majority of it is “money that has never actually existed.”<sup>267</sup> A closer examination of the athletic department’s budget turns the \$12 million loss into a gain of almost \$6 million.<sup>268</sup> The athletic department “created” the losses by counting an \$8 million depreciation in the value of its basketball arena as an expense and by sending more than \$6 million in revenue directly to the university – to cover the money the school lost by giving the student-athletes scholarships – and counting it as an expense.<sup>269</sup> Misleading accounting tricks like this are nothing new,<sup>270</sup> and are common practice even within the wealthiest athletic departments.<sup>271</sup>

Many athletic departments are not being malicious when “fudging the numbers.”<sup>272</sup> Because they are “attached to non-profit universities, athletic departments face little pressure to show a profit or even to have precise bookkeeping, and [it is] simply time-consuming to try and parse out true sources of revenues or expenses.”<sup>273</sup> Regardless of athletic departments’ motives or financial conditions,<sup>274</sup> no meaningful analysis or reform can be implemented until each institution is required to abide by a set of uniform accounting standards. This standardization of accounting practices will also enable the Committee to identify and prevent wasteful spending within athletic departments, thus providing additional revenue for student-athletes.<sup>275</sup>

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* These are standard practices at most universities that operate big-time college sports. *Id.* The practices allow athletic departments to “hide their profits” to keep them away from the student-athletes and other claimants, while looking viable enough that critics won’t use “sports’ apparent poverty to strip them of power.” *Id.*

<sup>270</sup> The results of a famous study from 1992 showed that while the athletic department at Western Kentucky was claiming to operate at a \$1.5 million yearly loss, they were actually generating around \$5 million in profits annually but hiding the money using “creative accounting practices.” Petchesky, *supra* note 84.

<sup>271</sup> The University of Texas’ athletic department – the wealthiest college athletic department in existence – counts every full athletic scholarship it grants in every sport as “out-of-state” tuition, whether the athlete is from Texas or not, “in an obvious attempt to falsely increase expenses.” *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> The University of Rutgers’ athletic department took \$47 million from the public university in order to operate its athletic programs. Keith Sargeant & Steve Berkowitz, *Subsidy of Rutgers Athletics Jumps 67.9% to \$47 Million*, USA TODAY (Feb. 23, 2014, 10:32 PM), [www.usatoday.com/story/sports/college/2014/02/23/rutgers-university-athletics-subsidy-jumps/5761371/](http://www.usatoday.com/story/sports/college/2014/02/23/rutgers-university-athletics-subsidy-jumps/5761371/).

<sup>275</sup> See Dennie, *supra* note 9, at 49 (stating that the arguments about the inability of athletic departments to generate net revenues fails to consider that the reason there is no money is because it is all being mismanaged and spent on everything other than the student-athletes).



### B. Caps on Coaching Salaries and Other Expenditures

Spending limits need to be imposed to prevent the gross mismanagement of athletic department funds that occurs under the current model.<sup>276</sup> One way to curb spending would be to cap the salaries for head coaches. Some have argued that salaries for coaches and top administrators should be capped at a level two times what top professors in the country make.<sup>277</sup> While any decision to limit pay for coaches will undoubtedly be met with staunch resistance, doing so would put academics and athletics on a more level playing field within NCAA member-institutions and be a huge step towards implementing the academic reform mentioned above. Furthermore, capping coaches' salaries would provide another source of money for athletic departments to provide the necessary increases in scholarship dollars for student-athletes.<sup>278</sup>

### C. Require Bonus Money to be Strictly Monitored and Allocated

Athletic Conferences and the institutions that comprise them receive large bonuses for participating in certain NCAA tournaments and games. Under the current model, there are no restrictions on what this money can be used for. Schools should be forced to funnel portions of that money into general trusts for the athletes. At the very least, conferences and schools should be required to report exactly where their money is going and how it is being used.

### D. Mandatory Healthcare for All Student-Athletes

The current model does not require the NCAA or its member-institutions to provide medical care or health insurance for sports-related injuries.<sup>279</sup> The Committee will implement rules guaranteeing such benefits. Additionally, the NCAA will be required to implement benefit programs that provide support for student-athletes who suffer documented, long-term injuries related to their participation in college sports.<sup>280</sup>

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<sup>276</sup> See generally Daniel Hare, *How to Curb Spending in College Athletics*, THE BUSINESS OF COLLEGE SPORTS (Mar. 14, 2013), <http://businessofcollegesports.com/2013/03/14/how-to-curb-spending-in-college-athletics/> (arguing for the implementation of yearly spending limits within intercollegiate athletics).

<sup>277</sup> Infante, *supra* note 244.

<sup>278</sup> Dennie, *supra* note 9, at 49.

<sup>279</sup> Mitten, Musselman & Burton, *supra* note 34, at 840.

<sup>280</sup> This issue has gained traction lately, as the negative long-term health

## VI. CONCLUSION

As the NCAA and big-time college sports have evolved into multibillion-dollar industries, the NCAA has stubbornly clung to its antiquated “principles of amateurism” in an effort to maintain the lucrative status quo. In doing so, the NCAA, ironically, has become the group most responsible for the exploitation of student athletes.<sup>281</sup>

The proposed NCAA Reform Legislation would allow for the implementation of actual, meaningful reform in intercollegiate athletics, while avoiding the complex legal and logistical problems mentioned above. Congressional intervention is required because the NCAA has demonstrated its unwillingness to implement any reform on its own and, as time goes on, the judiciary seems more willing to reprimand the NCAA under the ill-suited antitrust laws of the Sherman Act.

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effects of playing college sports, particularly football, have been called into question. *See NCAA reaches Proposed Settlement in Concussion Lawsuit*, NCAA (Jul. 29, 2014, 8:47 AM) [www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-proposed-settlement-concussion-lawsuit](http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-proposed-settlement-concussion-lawsuit) (discussing the proposed settlement in several consolidated concussion-related class action lawsuits).

Under the proposed settlement agreement, all current and former NCAA student-athletes in all sports and divisions who competed at an NCAA member school within the past fifty years may qualify for physical examination, neurological measurements and neurocognitive assessments. The agreement covers academic accommodations for student-athletes with concussions, return-to-play guidelines, educational programs, research and plaintiffs' attorney fees. Bodily injury claims are not part of this settlement. *Id.*

<sup>281</sup> Matthew Mitten & Stephen F. Ross, *Regulate, Don't Litigate, Change in College Sports*, INSIDE HIGHER ED (June 10, 2014), [www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay](http://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay). *See also* Edelman, *supra* note 13, at 1031 (stating that as revenues soar, the benefits are passed along to NCAA officers, college administrators, and coaches instead of the student-athletes).

