IS AMATEURISM REALLY NECESSARY OR IS IT AN ILLUSION SUPPORTING THE NCAA'S ANTICOMPETITIVE BEHAVIORS?: THE NEED FOR PRESERVING AMATEURISM IN COLLEGE ATHLETICS

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Since the inception of the NCAA, amateurism has been the bedrock principle of college athletics, which means that athletes are students pursuing an education first. Over time, the nature of collegiate athletics has changed dramatically; it has gone from a side activity to a multi-billion-dollar industry. The foundational principle of amateurism still remains; however, it is on rocky grounds, and changes in the culture surrounding collegiate athletics has threatened its continued existence. The NCAA relies on the concept of amateurism to justify its seemingly anticompetitive behaviors and this puts universities in a precarious position where they must strike a balance between preserving amateurism and ensuring the fair treatment of student-athletes.

With this in mind, this Note proposes two solutions. First, this Note argues that the NCAA should be awarded a partial antitrust exemption. This will be instrumental in protecting amateurism in college athletics. Second, this Note argues that Congress should establish a Committee to oversee the NCAA's actions. The NCAA would need oversight to ensure they do not abuse their exemption by overreaching or using questionable tactics. With this two-prong approach, the NCAA will be able to preserve amateurism while still being held accountable for protecting student-athletes' rights.

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I. INTRODUCTION

In today's age of college athletics it is hard to contemplate a world where student-athletes are not allowed to receive scholarships based on their athletic abilities. Yet, until the 1950s the National Collegiate Athletic Association's ("NCAA") amateurism rules prohibited students from receiving athletic scholarships.[1] College athlete Jesse Owens exemplifies the stark contrast between past and present NCAA amateurism rules.[2] In 1933 Owens, a runner, decided to attend the Ohio State University on the condition that the school help find his father a job.[3] Jesse received no scholarship and he worked throughout college to support himself and his family, while still attending school and participating in his sport.[4] A similar situation would never occur in college athletics today

1. *See generally* Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 330–37 (2007); *The Drake Group Response to Declaration of James E. Delany in Support of the NCAA's Class Certification Opposition Brief*, DRAKEGROUP (Mar. 21, 2013) [hereinafter *The Drake Group Response*], https://drakegroupblog.files.wordpress.com/2010/04/obannon_position_statement.pdf .

2. *See* Mechelle Voepel, *College Athletes Are Already Getting Paid*, ESPN (July 18, 2011), http://www.espn.com/ncaa/columns/story?columnist=voepel_mechelle&id=6739971.

3. *Id.*

4. *Id.*

due to the many changes in the amateurism rules over the past fifty years.

Throughout the history of the NCAA and intercollegiate athletics, amateurism has been considered "the bedrock principle of the NCAA."[5] Amateurism is necessary to preserve academic integrity and to ensure that receiving a quality education is a top priority.[6] The NCAA emphasizes that student-athletes' participation in athletics is only one part of their education; it is not the primary purpose for attending college.[7] While amateurism is still a core principle of the NCAA and college athletics, its definition and how it affects college athletes has changed dramatically over time. The debate over amateurism is far from over.[8]

The story of the NCAA begins in 1906.[9] The first NCAA Constitution prohibited inducing players to come to a university by compensating them based on their athletic abilities.[10] Players were supposed to compete solely for the pleasure derived from athletics.[11] The NCAA created the first true definition of amateurism in 1916 describing an amateur as an individual who participates in sports only for the physical, mental, moral, and social benefits derived from participating.[12] Over time the NCAA altered and expanded the definition of amateurism. First, the NCAA prohibited college athletes from receiving any compensation.[13] Next, they allowed the athletes to receive tuition and fees, but only for their academic abilities.[14] Finally, in the 1950s the NCAA permitted schools to award scholarships to students for their athletic talents.[15] The most recent change came in 2015 when the NCAA altered the amount covered by scholarships to include the full "cost of attendance."[16]

While the majority of this Note concerns amateurism in intercollegiate athletics and how it has changed over the past one hundred years, it will also briefly address antitrust law since many of the cases concerning alterations of the NCAA rules arise out of antitrust claims.[17] A crucial

5. *Amateurism*, NCAA, http://www.ncaa.org/amateurism (last visited Nov. 4, 2016).

6. *Id.*

7. Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, SPORT J. (Jan. 3, 2012), http://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/.

8. Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS (June 3, 2000, 4:07 PM), https://perma.cc/SZR2-UA9B.

9. Lazaroff, *supra* note 1, at 330–31.

10. Hawes, *supra* note 8.

11. EUGENE A. GLADER, AMATEURISM AND ATHLETICS 18 (1978).

12. *The Drake Group Response*, *supra* note 1, at 2.

13. *See* Lazaroff, *supra* note 1; *The Drake Group Response*, *supra* note 1.

14. *See* Lazaroff, *supra* note 1, at 332–33; *The Drake Group Response*, *supra* note 1, at 3.

15. *See* Lazaroff, *supra* note 1, at 333–34. Additionally, the type and amount of expenses covered under the term "scholarship" has changed over the past sixty years. *Id.*

16. NCAA 2015–2016 Division I Manual, Bylaw art. 15, 15.02.5 [hereinafter NCAA 2015–2016 Manual].

17. The term antitrust describes contracts or conspiracies that restrain trade and promote anticompetitive actions. *Antitrust Labor Law Issues in Sports*, USLEGAL, http://sportslaw.uslegal.com/antitrust-and-labor-law-issues-in-sports/ (last visited Nov. 4, 2016). The main legislation prohibiting antitrust is the Sherman Antitrust Act, which forbids restraints of trade and formation of monopo-

question that is still unclear after the courts' decisions is whether the NCAA's justification that the bylaws promote amateurism is a sufficient procompetitive defense to their anticompetitive behaviors that violate the antitrust laws.

This Note explains that while the amateurism concept may be nearing destruction, many courts have upheld amateurism as a valid justification for the NCAA's seemingly anticompetitive behaviors.[18] This Note argues that even if the amateurism structure seems unfair to athletes who could be paid for their names, images, and likenesses ("NILs"), the courts should continue to uphold amateurism as a sufficient procompetitive justification for the NCAA's anticompetitive actions. Amateurism is the primary reason why the line of demarcation between college and professional sports can be maintained.

Part II of this Note discusses the background and history of amateurism in intercollegiate athletics. It also examines the important changes to the amateurism definition and how these alterations affected college athletics. Part III analyzes the impacts of these changes by exploring how courts handled cases involving amateurism rules during specific time periods, and what effects those decisions had on amateurism and college sports. Part IV recommends preserving the amateurism concept. The best way to do this is by awarding the NCAA a partial antitrust exemption and instituting a Presidential Commission to oversee the NCAA's actions. Part V provides concluding remarks.

II. BACKGROUND

The NCAA began in 1906[19] and over time developed a clear set of core values.[20] Originally, the NCAA was created to protect the health and safety of the athletes, but that focus shifted to educating and preserving the amateur status of student-athletes.[21] For decades amateurism served as the touchstone of intercollegiate athletics, and the concept is clearly detailed in the NCAA manuals that are printed and updated each year.[22] The NCAA wanted a clear divide between college athletics and

lies. *See id.*; *see also The Antitrust Laws,* FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Nov. 4, 2016).

18. *See e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

19. Lazaroff, *supra* note 1, at 330–31.

20. *NCAA Core Values*, NCAA, http://www.ncaa.org/about/ncaa-core-values (last visited Nov. 4, 2016).

21. Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 323 (2003).

22. Orion Riggs, Note, *The Facade of Amateurism: The Inequities of Major-College Athletics*, KAN. J.L. & PUB. POL'Y 137, 140 (1996).

professional athletics.[23] To promote this goal, the NCAA promulgated rules that required athletes to go to class and punished those who accepted money for their athletic talents.[24] Other rules that promote amateurism revolve around the use of agents, the ability to compete in professional athletics events, acceptable benefits, and more.[25]

To enforce amateurism, student-athletes are required to sign the "Student Athlete Agreement Form," which affirms that the athlete will maintain his amateur status.[26] The amateurism certification process requires institutions to abide by certain rules in order for their athletes to be eligible to participate in competition.[27] Additionally, the amateurism rules prohibit student-athletes from profiting off their NILs, but allow the NCAA and universities to use the name or image of an athlete for promotional or other purposes.[28] The athletes give up their rights to profit off their NILs when they sign the required forms.[29]

While the NCAA has been concerned with amateurism since the organization's founding, the definition of amateurism and how the concept is applied in intercollegiate athletics has been altered many times. Detailed below are the shifts in both the definition and application of amateurism during three main time periods.

A. The Founding of the NCAA to 1950

In 1916, the NCAA created a clear definition of amateurism, which described amateurs as individuals who participate in competitive sports for the pleasure and benefits derived from competing.[30] The period from 1906 to 1920 is generally labeled as uneventful for the NCAA.[31] The first alteration to the 1916 definition of amateurism occurred in 1922. The amended version defined an amateur athlete as one who participates in a sport solely for the physical, mental, or social benefits he receives from his involvement; and that the sport is nothing more than a hobby to the athlete.[32] This version, however, is not substantially different from the definition created in 1916.[33]

In 1939, the NCAA tried to regulate financial aid by instituting a "Declaration of Sound Principles and Practices for Intercollegiate Ath-

23. Rosenthal, *supra* note 21.
24. *Id.*
25. NCAA 2015–2016 Manual, *supra* note 16, at Bylaw art. 12.
26. Erin Cronk, Note, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes for the Use of Their Names, Images, and Likenesses*, 34 U. LA VERNE L. REV. 135, 137 (2013).
27. NCAA 2015–2016 Manual, *supra* note 16, at Bylaw art. 12, 12.1.1.1.
28. Cronk, *supra* note 26. *See also* John A. Maghamez, Comment, *An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How* O'Bannon v. NCAA *and* Keller v. NCAA *Forever Changed College Athletics*, 9 LIBERTY U.L. REV. 313, 320 (2015).
29. Maghamez, *supra* note 28, at 319–20.
30. *The Drake Group Response*, *supra* note 1, at 2 (internal citations omitted).
31. Lazaroff, *supra* note 1, at 332.
32. *The Drake Group Response*, *supra* note 1, at 2 (internal quotations omitted).
33. *See id.*

letics."[34] The NCAA declared that aid could be given to athletes through the same process as other students that receive aid, but the aid could not be tied to the student's athletic participation, nor could the athletic department fund the scholarships.[35] Technically, there was a prohibition against athletic scholarships, but a study conducted by Howard Savage found that many athletes were subsidized under the table.[36] The study defined subsidization as financial or other assistance awarded to the players based on their athletic abilities.[37] Savage found that eighty-one of the 121 colleges studied subsidized their athletes in some form, including employment, loans, athletic scholarships, and cash.[38] The majority of those practices clearly violated the NCAA's amateurism principle.[39] Between 1906 and 1947 the NCAA refined and changed the bylaw language, but remained formally opposed to awarding athletic scholarships.[40]

In addition to the underhand subsidization of college athletes, there is evidence that some conferences allowed athletic grants starting in the 1930s, even though the NCAA prohibited the practice.[41] The NCAA then took a significant step to enforce the concept of amateurism in 1948 when it instituted the Sanity Code.[42] The Sanity Code significantly altered the NCAA's definition of amateurism by allowing awards of financial aid for athletic ability.[43] Yet, the NCAA also instituted the requirement that the aid be tied to need and be limited only to the cost of tuition and other incidental expenses.[44] This allowed universities to seek out individuals for their athletic talents and pay their tuition, if they qualified for need.[45] Alternatively, players could go through the normal channels that other non-athlete students followed to receive aid.[46]

The Sanity Code was a clear attempt to ban full athletic scholarships, since it intentionally did not cover room and board.[47] Additionally, the Sanity Code specified that aid could not be withdrawn if an athlete stopped playing.[48] The NCAA instituted this policy so that the aid would still be permissible under the amateurism principle would not be consid-

34. Roger G. Noll, *The Antitrust Economics of NCAA Restrictions on Athletic Scholarships*, WIN AD, 30, http://winthropintelligence.com/wp-content/uploads/2013/02/Noll-Report-NCAA-The-Antitrust-Economics-of-NCAA-Restrictions-on-Athletic-Scholarships.pdf (last visited Nov. 4, 2016).

35. *See id.*

36. ALLEN L. SACK & ELLEN J. STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 36 (1998).

37. *Id.*

38. *Id.*

39. *Id.* at 37.

40. *Id.* at 42.

41. Noll, *supra* note 34, at 27–28.

42. Lazaroff, *supra* note 1, at 332–33.

43. SACK & STAUROWSKY, *supra* note 36, at 44.

44. *Id.*

45. *Id.*

46. Lazaroff, *supra* note 1, at 333.

47. *See* Kristin R. Muenzen, Comment, *Weakening It's [sic] Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 260 (2003).

48. *The Drake Group Response*, *supra* note 1, at 3.

ered pay for the athletes.[49] The Sanity Code turned out to be a disaster and many colleges did not follow it because they already awarded athletic scholarships, even though the NCAA prohibited them.[50] The NCAA abandoned the Sanity Code in 1952.[51]

B. 1950s to 2000

After the Sanity Code fell apart, the NCAA gave institutions the authority to set their own financial-aid policies, as long as the institution administered the aid.[52] During the 1950s the NCAA instituted new regulations, which allowed student-athletes to receive financial support regardless of their financial need or academic abilities.[53] 1956 legislation permitted institutions to award student-athletes aid for "commonly accepted educational expenses" based on their athletic abilities.[54] In 1957, the NCAA released an "Official Interpretation" which defined educational expenses as tuition and fees, room and board, books, and fifteen dollars per month for laundry.[55] Thus, by 1957 the NCAA rules allowed a university to pay an athlete's educational expenses in order to entice him to participate in athletics; this would have been unfathomable in the early 1900s.[56]

Additionally, in the 1950s NCAA President Walter Byers created the term "student-athlete" to replace the terms "player" or "athlete" to ensure that the athletes would not be considered employees.[57] This action was spurred by the death of collegiate athlete Ray Dennison who sustained a head injury on the field.[58] His wife filed for workers'-compensation benefits and the NCAA concluded that it needed to cultivate a defense against future claims.[59] The NCAA acknowledged that the athletes are students first, and this emphasis on the players' roles as students supports the NCAA's amateurism arguments.[60]

During the 1960s, the NCAA added additional rules concerning employment and benefits.[61] These rules, which included prohibiting athletes from using their reputation or athletic skills to make money, limiting expenditure reimbursements, and barring student-athletes from receiving special benefits, supported the amateurism model.[62] In 1969, the

49. SACK & STAUROWSKY, *supra* note 36, at 44.
50. *Id.* at 46.
51. *Id.* at 47.
52. *Id.* at 45–46.
53. Lazaroff, *supra* note 1, at 333.
54. SACK & STAUROWSKY, *supra* note 36, at 47.
55. *The Drake Group Response*, *supra* note 1, at 3. *See also* SACK & STAUROWSKY, *supra* note 36, at 47.
56. SACK & STAUROWSKY, *supra* note 36, at 47.
57. Cronk, *supra* note 26, at 138.
58. *Id.*
59. *Id.*
60. *Id.* at 138–39.
61. *See* Noll, *supra* note 34, at 31.
62. *See id.*

NCAA changed the Principle of Amateurism definition.[63] The critical addition to the definition is as follows: "or has entered into an agreement of any kind to compete in professional athletics or to negotiate a professional sports contract . . . ."[64] Prior to 1969, the last change to the Principle of Amateurism was in 1960, and it did not include the portion about professional sports.[65]

A more extreme shift occurred in 1973 when the NCAA prohibited multi-year scholarships; instead NCAA-member schools could only offer scholarships renewable on a yearly basis.[66] This signaled a break from the traditional model of amateurism, and had a major impact on college athletics.[67] The rule specifically stated "[i]t is not permissible for an institution to assure the prospect that it automatically will continue a grant-in-aid past the one-year period if the recipient sustains an injury that prevents him or her from competing in intercollegiate athletics . . . ."[68] This allowed a coach to cancel a student-athlete's scholarship at the end of a year for virtually any reason: injury, wrong fit, little contribution to team success, etc.[69] Finally, in 1976 the NCAA altered its definition of "commonly accepted expenditures" and excluded "course related supplies and incidental expenses, including laundry."[70]

Two important cases that emerged before 2000 demonstrate the struggle between student-athletes, universities, and the NCAA, over the NCAA's actions and the impact of the amateurism rules on student-athletes. The first case, *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, involved an antitrust action brought by universities against the NCAA.[71] The second case, *Banks v. National Collegiate Athletic Association*, involved an antitrust action brought by a student-athlete against the NCAA.[72]

1. NCAA v. Board of Regents of University of Oklahoma

NCAA v. Board of Regents of University of Oklahoma is a landmark Supreme Court case concerning college athletics and the NCAA amateurism rules.[73] In this case, the University of Oklahoma and the University of Georgia brought an antitrust action against the NCAA, arguing that the NCAA unreasonably restrained trade in the televising of inter-

63. NCAA 1969 Manual, Const. art. 3.1.
64. *Id.*
65. *Id.*; *see generally* NCAA Constitution and By-Laws 1963, Const. art. 3.1.
66. *See* Tibor Nagy, *The "Blind Look" Rule of Reason: Federal Courts' Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 356 (2005); *The Drake Group Response*, *supra* note 1, at 4.
67. *See The Drake Group Response*, *supra* note 1, at 4.
68. NCAA 2004–05 Division I Manual, Bylaw art. 15.3.3.1.2.
69. *The Drake Group Response*, *supra* note 1, at 4.
70. Noll, *supra* note 34, at 32.
71. 468 U.S. 85 (1984).
72. 977 F.2d 1081 (7th Cir. 1992).
73. *Bd. of Regents*, 468 U.S. at 88.

collegiate football games.[74] The schools contested the live televising plan the NCAA adopted.[75] The College Football Association ("CFA"), an organization that the Respondent universities were members of, ignored the NCAA's plan and entered into a television agreement with the National Broadcasting Company ("NBC").[76] In response, the NCAA announced that it would sanction "any CFA member that complied with the CFA-NBC contract."[77] As a result of the threatened sanctions, the CFA-NBC agreement was never consummated.[78]

The Supreme Court held that by setting a price, restricting output, and "blunting the ability of member institutions to respond to consumer preference," the NCAA put an unreasonable restraint on trade and therefore violated antitrust laws.[79] The Court agreed that the NCAA had a legitimate interest in preserving a competitive balance among athletic teams, but did not agree that this interest justified the NCAA's regulations in this case.[80] While this decision was technically a judgment against the NCAA, it actually had a considerable impact on preserving amateurism in college athletics. Justice Stevens' *dicta* had a significant impact on the principle of amateurism, as discussed in Part III.[81]

2. Banks v. NCAA

Banks v. NCAA followed the *Board of Regents* decision.[82] In this case Braxston Banks, a football player for the University of Notre Dame, sued the NCAA arguing that its "no-agent" and "no-draft" rules restrained trade and, in doing so, violated Section 1 of the Sherman Antitrust Act.[83] Prior to his final year, Banks tried out for the NFL, but no team drafted him.[84] Afterwards, he attempted to reinstate his eligibility and play his final year of college football at Notre Dame.[85] The NCAA denied his eligibility, citing that he violated Rule 12.2.4.2, the "no-draft" rule, which causes an athlete to lose his amateur status when he attempts to be drafted for a professional league.[86] He also violated Rule 12.3.1, the "no-agent" rule, which states that a student-athlete loses eligibility if he agrees to be represented by an agent for the purpose of marketing his athletic abilities.[87]

74. *Id.*
75. *Id.* at 94.
76. *Id.* at 94–95.
77. *Id.* at 95.
78. *Id.*
79. *Id.* at 99, 120.
80. *Id.* at 117.
81. *See infra* Part III.B.1.
82. 977 F.2d 1081, 1088 (7th Cir. 1992).
83. *Id.* at 1083–84.
84. *Id.* at 1083.
85. *Id.*
86. *Id.*
87. *Id.* at 1083–84.

Based on the ruling in *Board of Regents*, a plaintiff in a suit against the NCAA must show that there are anticompetitive effects on a discernible market in order for relief to be granted.[88] Banks failed to show how the NCAA's amateurism rules decreased competition in the relevant markets.[89] Additionally, he did not allege how the no-draft and no-agent rules restrained trade under the Sherman Act.[90] Since Banks' allegations did not meet the proper standard, the Seventh Circuit affirmed the district court's dismissal.[91] The court further stated that the no-draft and no-agent rules were needed to preserve the amateur status of college athletes, and to keep sports agents from interjecting into the intercollegiate educational system.[92] The necessity of these amateurism rules and *Banks*' impact on the concept of amateurism will be discussed in Part III.[93]

C. 2000s to Present Day

The NCAA has altered its amateurism rules in various ways since the 2000s. Each academic school year the NCAA publishes a manual detailing the rules governing Division I intercollegiate athletics.[94] The NCAA currently defines amateurism as follows:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises . . . . A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association; however, such aid as defined by the Association shall not exceed the cost of attendance as published by each institution.[95]

Bylaw, Article 12 of the NCAA Division 1 Manual is entirely about Amateurism and Athletics Eligibility; this section is approximately thirty pages long.[96] The NCAA takes an athlete's amateur status seriously, and carefully details what actions do and do not violate the amateurism rules.[97]

88. *Id.* at 1089.
89. J. Winston Busby, Comment, *Playing for Love: Why the NCAA Rules Must Require a Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 160 (2012) (citing *Banks*, 977 F.2d at 1093–94).
90. *Banks*, 977 F.2d at 1093.
91. *Id.* at 1094.
92. *Id.* at 1091.
93. *See infra* Part III.
94. *See, e.g.*, NCAA 2015–2016 Manual, *supra* note 16.
95. *Id.* at Const. art. 2, §§ 2.9, 2.13.
96. *Id.* at Bylaw art. 12.
97. *Id.*

Financial aid is another important piece of amateurism detailed in the NCAA Manual.[98] A student-athlete is permitted to receive grant-in-aid from an educational institution, so long as the aid does not conflict with the governing legislation of the NCAA.[99] The student-athlete will lose his amateur status if paid beyond what is now deemed "the cost-of-attendance" for the particular university.[100] The NCAA's definition of cost of attendance references the "amount calculated by an institutional financial aid office . . . ."[101] As of January 17, 2015, full grant-in-aid now includes tuition and fees, room and board, books, and other expenses related to attendance at the university, up to the cost of attendance pursuant to the NCAA bylaws.[102] This is a departure from the previous definition, which did not include the "other related expenses" language.[103]

While the NCAA manuals detail the rules of amateurism, there are frequent disputes concerning the wording and understanding of the amateurism concept, which has resulted in litigation. The following cases detail the battle between the NCAA and student-athletes over the NCAA's allegedly anticompetitive behaviors. Although these cases arose from antitrust claims, this Note focuses on how the courts' decisions impacted the NCAA's use of amateurism as a procompetitive justification for its behaviors.

1. In Re *NCAA Student-Athlete Name & Likeness Licensing Litigation*

A group of current and former college athletes brought a suit against the NCAA for misuse of the athletes' names, images, and likenesses in violation of the Sherman Antitrust Act.[104] The plaintiffs argued that the NCAA conspired against the athletes to sell their NILs, without their consent, to be used in television broadcasts, game footage, and videogames.[105] They accused the NCAA of conspiring to fix the amount student-athletes are paid by instituting set scholarships in order to profit off of them, and to keep the athletes from selling the rights to their own NILs.[106] The NCAA put forth five procompetitive justifications for the rules that prohibit student-athletes from profiting off their NILs;[107] the most pertinent to this Note being amateurism.

98. *Id.* at Bylaw art. 15.
99. *Id.* at Bylaw art. 15, § 15.01.1.
100. *Id.* at Bylaw art. 12, § 12.1.2; *Id.* at Bylaw art. 15, § 15.01.6.
101. *Id.* at Bylaw art. 15, § 15.02.2.
102. *Id.* at Bylaw art. 15, § 15.02.5.
103. *Id.*
104. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1133 (N.D. Cal. 2014). The focus of this Note is less on the actual ruling and more on the substantive reasoning behind the Court's ruling.
105. *Id.* at 1133–34.
106. *Id.* at 1134.
107. The procompetitive justifications include: (1) amateurism, (2) competitive balance, (3) integration of education and athletics, (4) viability of other sports and (5) increased output benefits. *Id.* at 1146–52.

The court analyzed this case under the rule of reason, a standard established in *Board of Regents*.[108] In order to violate the rule of reason, a restraint's "harm to competition [must outweigh] its procompetitive effects."[109] The initial burden rests on the plaintiff to show there are anticompetitive effects in a "relevant market" as a result of the restraint.[110] If shown, the burden shifts to the defendant to show there are procompetitive effects to the rules.[111] Finally, if the defendant successfully brings forward this evidence, the plaintiff must show that the organization's goals could be achieved by less restrictive means.[112] The court did not complete this entire analysis, but instead focused on the first two prongs of the test.[113]

Both the plaintiffs and defendant sought summary judgment.[114] The court found that there were anticompetitive effects within a relevant market,[115] but that a fact-finder could conclude that the NCAA's prohibition on college athlete compensation has a procompetitive purpose.[116] Since the plaintiffs also put forth persuasive arguments that the concept of amateurism does not serve a procompetitive purpose,[117] the court held that neither side was entitled to summary judgment on the issue.[118] Notably, the court did not say whether or not the procompetitive justifications outweighed the anticompetitive effects; that is still left up for debate.

2. O'Bannon v. National Collegiate Athletic Association

Former and current college athletes filed this suit, alleging that the NCAA violated the Sherman Antitrust Act by prohibiting athletes from profiting off of their NILs.[119] The main issue was whether the NCAA's rules were subject to the Sherman Antitrust Act, and, if so, whether the rules were illegal restraints of trade.[120] This appeal came after the district court held that the NCAA amateurism rules were an illegal restraint of trade and violate the antitrust laws.[121] The district court enjoined the NCAA from prohibiting its member schools from awarding athletic scholarships for the full cost of attendance, and allowed universities to create trusts for the individual athletes, worth up to five thousand dollars in deferred compensation.[122]

108. *See generally*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).
109. *In re NCAA*, 37 F. Supp. 3d at 1136.
110. *Id.* (citing Hairston v. Pacific 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996)).
111. *Id.*
112. *Id.*
113. *See generally id.*
114. *Id.* at 1133.
115. *Id.* at 1138.
116. *Id.* at 1147.
117. *Id.*
118. *Id.*
119. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).
120. *Id.* at 1052.
121. *Id.* at 1052–53, 1056.
122. *Id.* at 1053.

The Ninth Circuit agreed that, while the NCAA's amateurism rules may have procompetitive justifications, this does not exempt them from antitrust scrutiny.[123] The Ninth Circuit upheld the district court's solution of awarding the student-athletes full scholarships, up to the cost of attendance, as an alternative to the current NCAA compensation rules.[124] The Ninth Circuit, however, reversed the district court's second solution of creating trusts of up to five thousand dollars for the student-athletes to receive after leaving college.[125] Ultimately, the Ninth Circuit found that the NCAA is not exempt from the Sherman Antitrust Act and its compensation rules violated the antitrust laws; however, it did not hold that the NCAA is prohibited from using amateurism as a defense to its practices.[126] The Court concluded that when NCAA regulations "truly serve procompetitive purposes," they should be upheld.[127]

D. Amateurism and Antitrust Laws

An issue courts have had to tackle is whether certain NCAA rules and actions should be considered automatic violations of the antitrust laws, especially since they likely would be violations if commercial enterprises engaged in those types of anticompetitive behaviors.[128] Some courts have ruled that the NCAA's amateurism rules violate the Sherman Antitrust Act because they allow universities to band together to set the amount of compensation they pay the college athletes.[129] The Sherman Antitrust Act makes it illegal to form any type of contract or conspiracy that restrains trade or commerce between States.[130] In order to prevail in an antitrust claim, the plaintiff must show "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."[131]

An increasing number of universities and student-athletes brought claims against the NCAA for antitrust violations, starting in the 1980s.[132] To succeed under an antitrust claim, plaintiffs today must show there was

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1079.
127. *Id.*
128. Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31, 31 (1985).
129. Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1300 (1992) [hereinafter *Sherman Act Invalidation*].
130. 15 U.S.C. § 1 (2012).
131. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citing Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)).
132. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988); Karmanos v. Baker, 816 F.2d 258 (6th Cir. 1987); Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983).

an unreasonable restraint of trade.[133] To prove this: (1) the plaintiff must demonstrate that the agreement substantially and adversely affects competition; (2) then the defendant must show that challenged actions have a procompetitive objective; and (3) in rebuttal the plaintiff has to prove the defendant's restraint is not reasonably necessary to meet the stated goal.[134] The NCAA often uses amateurism as a procompetitive defense to antitrust suits.[135] Courts, to a certain extent, have deferred to the importance of amateurism and the NCAA's role in preserving it.[136] This Note will further explain the antitrust claims below in Part III; the claims will be examined within the discussion of the cases.

III. ANALYSIS

This Part discusses how the courts' rulings have impacted the NCAA's ability to use amateurism as a procompetitive justification for its behaviors. This Part analyzes whether the NCAA amateurism rules violate the Sherman Antitrust Act and what effect antitrust violations actually have on college athletes. In general, the courts, starting with *NCAA v. Board of Regents of the University of Oklahoma,* have ruled that the NCAA's rules are subject to antitrust scrutiny.[137] Although, the extent to which the courts defer to the amateurism rules as a sufficient procompetitive justification for antitrust violations evolved over time.[138] The earlier courts gave more deference to the NCAA amateurism defense,[139] whereas the later courts conduct a more careful analysis of whether the procompetitive justifications outweigh the anticompetitive behaviors.[140]

This Part delves deeper into how the courts interpret the role of amateurism. In order to accomplish this, Part III will not follow the same "years breakdown" as Part II, and will not analyze each individual rule change. Instead, this Part will first analyze general arguments regarding amateurism. Then, it will analyze how and why the courts came to their conclusions, the impacts of the courts' decisions, and proponents' and opponents' reactions to the amateurism justification.

133. Nagy, *supra* note 66, at 335 (citing Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

134. *Id.* at 336.

135. *See e.g.*, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014).

136. Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 29 (2000).

137. *See generally* NCAA v.Bd. of Regents, 468 U.S. 85 (1984).

138. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

139. *See* Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 331 (2003).

140. *See e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

A. General Arguments Regarding Amateurism

There are two primary schools of thought regarding amateurism: (1) it is necessary to preserve college athletics, and (2) amateurism is used as a front to exploit the student-athletes. A common argument supporting amateurism is that the four-year scholarships student-athletes receive are sufficient compensation for their athletic talents and work.[141] Along with scholarships, student-athletes receive a variety of other tangible and intangible benefits, such as: professional mentoring and coaching; travel opportunities; an invaluable education; and the ability to develop teamwork, discipline, and leadership skills.[142] Education is the universities' main purpose, and paying the athletes would severely undermine this objective.[143]

Proponents discourage disrupting the amateurism model because of the significant unintended consequences on the institution's Olympic and non-revenue-generating sports.[144] Many student-athletes depend on money from the big sports, such as basketball and football, to fund their scholarships, equipment, and facilities.[145] Destroying amateurism and allowing institutions to pay athletes could eliminate other, less popular college sports teams.[146] This would be unfair to thousands of athletes. In addition, there are many other issues and questions that arise, especially regarding recruitment and the education of the athletes, if they are no longer considered amateurs.[147] The NCAA also claims that eliminating amateurism and paying college athletes would trigger a Title IX problem.[148]

Advocates of preserving amateurism argue that it is a part of the attraction to college athletics.[149] The NCAA claims that destroying this model would significantly alter "the nature of college sport, fan interest, and the ability of athletes and non-athletes to commingle on campus."[150] A primary argument against amateurism is that the athletes do not actu-

141. Cronk, *supra* note 26, at 140.

142. Ben Sutton, *A Case for Amateurism in College Sports*, SPORTSBUSINESS DAILY (Apr. 21, 2014), http://www.sportsbusinessdaily.com/Journal/Issues/2014/04/21/Opinion/Ben-Sutton.aspx.

143. Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, SPORT JOURNAL (June 15, 2012), http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes/.

144. *See* Sutton, *supra* note 142.

145. *See generally id.*; Theodore Ross, *Cracking the Cartel*, NEW REPUBLIC (Sept. 1, 2015), https://newrepublic.com/article/122686/dont-pay-college-athletes.

146. *See* Sutton, *supra* note 142.

147. *See id.*

148. Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS (Jan. 6, 2014, 8:00 AM), http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid.

149. Zachary Stauffer, *NCAA President Defends Amateurism in College Sports*, FRONTLINE (June 19, 2014), http://www.pbs.org/wgbh/frontline/article/ncaa-president-defends-amateurism-in-college-sports/.

150. *Id.*

ally receive a full scholarship covering all costs.[151] That argument, however, is less persuasive because the NCAA now allows, and even encourages, institutions to cover the actual full "cost of attendance."[152] This ensures that the cost of education is truly free, which should alleviate opponents' concerns that athletes are being saddled with loans because the full cost is not covered.[153]

In contrast, opponents of amateurism find the reasons supporting this concept unpersuasive; some even call it "rubbish."[154] Critics combat the argument about the athletes receiving a free education by pointing to the universities' and NCAA's failures to ensure that its student-athletes, especially football and basketball players, actually obtain a valuable college degree.[155] They believe it is ironic that amateurism rules were put in place to keep athletes from being exploited by third parties, while in reality the rules result in the NCAA exploiting the athletes.[156] Opponents see amateurism as "naked price-fixing and restraint of trade."[157] Critics view the NCAA's behavior of touting the value of competition, while at the same time participating in anticompetitive practices,[158] as highly hypocritical.

Additionally, amateurism critics do not buy the argument that receiving a free education for their athletic abilities is just as good, if not better for the athletes, than receiving money.[159] Instead, opponents see this argument as a "convenient justification for unpaid work."[160] Some opponents go so far as to say that the student-athletes are akin to indentured servants, and that the NCAA operates similar to the "plantation system," where the masters (universities and the NCAA) reap the benefits from the laborers (student-athletes), who in turn receive little compensation for their efforts.[161] Even some athletes assert that they "risk[] body and brain," so that universities and the NCAA can reap the prof-

151. Richard Hagstrom, *NCAA's Latest Legal Nightmare May Be Most Important*, LAW 360 (July 11, 2014, 10:39 AM), http://www.law360.com/articles/555368/ncaa-s-latest-legal-nightmare-may-be-most-important.

152. *See* NCAA 2015–2016 Manual, *supra* note 16, at Bylaw art. 15, 15.02.5.

153. *See* Johnson & Acquaviva, *supra* note 143.

154. Hyunjae Ham, *Capitalism and College Sports: Time to Pay Student Athletes*, LAW STREET (June 12, 2015), http://lawstreetmedia.com/blogs/sports-blog/capitalism-and-college-sports-student-athlete-compensation-let-the-market-decide/.

155. Warren K. Zola, *The Illusion of Amateurism in College Athletics*, HUFFPOST SPORTS (Feb. 11, 2013, 5:01 PM), http://www.huffingtonpost.com/warren-k-zola/college-athletes-pay-to-play_b_2663003.html.

156. Maghamez, *supra* note 28, at 321; John Niemeyer, Comment, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 884 (2015).

157. Patrick Hruby, *Court of Illusion*, SPORTS ON EARTH (Oct. 10, 2013), http://www.sportsonearth.com/article/62747894/.

158. Cameron Miller, *Dissecting the NCAA Argument Against Paying College Athletes*, STANFORD DAILY (Oct. 22, 2015), http://www.stanforddaily.com/2015/10/22/miller-dissecting-the-ncaa-argument-against-paying-college-athletes/.

159. Ross, *supra* note 145.

160. *Id.*

161. Johnson & Acquaviva, *supra* note 143.

its.[162] Opponents argue the compensation student-athletes receive is "artificially limited" because the amateurism concept "is absent any intellectual or normative grounding."[163]

Another argument against amateurism is that it prohibits athletes from profiting off their talents, while non-athlete students are able to benefit from their talents without "compromising their academic achievement as a result."[164] Athletes should not be restricted from monetizing their skills, when non-athletes are not limited in this way.[165] Additionally, critics argue that amateurism is not the reason college athletics are popular and that they would still draw the same, if not more, fans if the concept were destroyed.[166] In fact, some Olympic sports, such as tennis and golf, became more popular after compensation increased.[167] A similar situation could occur in college athletics if the amateurism model is eliminated.

A major problem with the amateurism model in college athletics, as critics correctly point out, is that the NCAA has applied "an arbitrary, morphing, and overly restrictive definition of amateurism," which exploits and manipulates the student-athletes.[168] Amateurism is often called an "illusion," and the NCAA is seen as hypocritical for embracing commercialization in all aspects of college sports, except for compensating athletes.[169] Nonetheless, there are significant benefits to an amateurism structure in college sports. While this Note argues that eliminating the amateurism model is not the answer, changes need to occur in order to preserve the concept, as discussed further below in Part IV.[170]

B. Major Court Rulings and Changes to Amateurism Prior to 2000

1. NCAA v. Board of Regents

NCAA v. Board of Regents substantially impacted the NCAA's ability to use amateurism as a justification for its rules in college athletics.[171] The majority of the opinion speaks to the antitrust claim brought against the NCAA; however, arguably the most influential part of the opinion is Justice Stevens' *dicta* regarding the importance of amateurism

162. Ross, *supra* note 145.
163. Zola, *supra* note 155.
164. Miller, *supra* note 158.
165. *Id.*
166. Hruby, *supra* note 157.
167. *Id.*
168. Andrew Zimbalist, *The Cost of Paying Athletes Would be Far Too High*, U.S. NEWS (Apr. 1, 2013, 5:56 PM), http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/the-cost-of-paying-athletes-would-be-far-too-high.
169. Zola, *supra* note 155.
170. *See infra* Part IV.
171. 468 U.S. 85 (1984).

and the NCAA's role in maintaining the concept.[172] The court deemed the NCAA's actions procompetitive since they allow the organization to market a product which may otherwise be unavailable.[173] Prior to this decision, few antitrust claims against the NCAA were filed because courts typically did not interfere with what was seen as a legitimate effort to promote amateurism in intercollegiate athletics.[174]

At first glance it appears that *Board of Regents* only negatively impacted amateurism in college athletics because the Court held that the NCAA's actions are subject to antitrust laws, meaning the NCAA is not automatically exempt from scrutiny.[175] Courts are supposed to examine the NCAA's actions under the "rule of reason" and determine its impact on competition.[176] Nonetheless, the Court stated that it would uphold NCAA rules if they increase the economic-marketplace competition by maintaining the unique product of intercollegiate athletics.[177] The Court also noted the importance of college athletics as an industry where restraints on competition are necessary in order to offer the product.[178] While the NCAA bylaws are subject to antitrust scrutiny, this does not mean they will be automatically invalidated. The *Board of Regents* Court implies that predominantly noncommercial NCAA rules that protect amateurism, academic integrity, and competitive balance do not violate the antitrust laws.[179]

In *Board of Regents*, the Court avoided destroying amateurism in college athletics by articulating the importance of the concept.[180] In Justice Stevens' *dicta*, he clearly expressed how the NCAA plays a critical role in maintaining the tradition of amateurism.[181] He stated that "[i]n order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[182] Additionally, the opinion stated that the NCAA plays a critical role in maintaining the tradition of amateurism in intercollegiate athletics and it should be given ample latitude.[183] The *Board of Regents* dicta "[was] crippling to later antitrust suits," even though the Court did not actually rule on amateurism's antitrust implications.[184]

172. Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 790 (2015).
173. *Id.* (citing *Bd. of Regents*, 468 U.S. at 102).
174. Lazaroff, *supra* note 1, at 337.
175. *See Sherman Act Invalidation, supra* note 129, at 1301.
176. *Id.*
177. *Id.*; *see also Bd. of Regents*, 468 U.S. at 101–02.
178. Nagy, *supra* note 66, at 339 (citing *Bd. of Regents*, 468 U.S. at 100–01).
179. 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*, 11 MARQ. SPORTS L. REV. 1, 4 (2000).
180. *Bd. of Regents*, 468 U.S. at 120.
181. *Id.*
182. *Id.* at 102.
183. *Id.* at 120; Moyer, *supra* note 172, at 790–91.
184. Brian Welch, Comment, *Unconscionable Amateurism: How the NCAA Violates Antitrust By Forcing Athletes to Sign Away Their Image Rights*, 44 J. MARSHALL L. REV. 533, 539 (2011).

Interestingly, the *Board of Regents* Court states that its respect for the NCAA's role in protecting amateurism in college athletics did not inform its decision and it should not impact future courts' decisions.[185] Based on Justice Stevens' *dicta*, however, some say the contrary has occurred.[186] In subsequent cases,[187] the NCAA was not forced to prove that college athletics would be indistinguishable from professional athletics without the concept of amateurism.[188] Instead, courts often assumed that amateurism rules are essential.[189] Also, Justice Stevens' *dicta* clearly articulated that college athletes should not be paid, in order to preserve amateurism.[190]

The Court in *Board of Regents* not only avoided the destruction of amateurism, but also arguably contributed to protecting the concept because it "laid a strong foundation for subsequent arguments that the antitrust laws should not invalidate restraints on competition for the services of NCAA student-athletes."[191] The Court made it clear that preserving a competitive balance between amateur college athletics and professional athletics is a legitimate concern.[192] The Court's statements are crucial because maintaining a competitive balance could justify some of the restraints the NCAA places on student-athletes to support amateurism.[193]

The Court noted that paying student-athletes a market wage would destroy a distinct aspect that attracts consumers to college sports.[194] The NCAA has successfully used this argument to defend against subsequent antitrust claims involving payment to college athletes.[195] The Court, however, did not prohibit plaintiffs from bringing antitrust claims against the NCAA; it merely gave the NCAA a viable defense to these claims.[196] This decision also permitted future courts to defer to the NCAA's role as the protector of amateurism.[197]

As opponents of amateurism point out, the *Board of Regents* decision did not exempt the NCAA from antitrust attacks, even though the organization's purpose is education-focused.[198] Regardless, future courts interpreted Justice Stevens' *dicta* as creating a flexible standard for the

185. *Bd. of Regents*, 468 U.S. at 100–01.
186. Nagy, *supra* note 66, at 339.
187. *See, e.g.*, Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992).
188. Pekron, *supra* note 136, at 53.
189. Nagy, *supra* note 66, at 341.
190. *Bd. of Regents*, 468 U.S. at 102.
191. Lazaroff, *supra* note 1, at 339.
192. *Id.*
193. *Id.* at 340.
194. Drew N. Goodwin, Note, *Not Quite Filling the Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 36 B.C. INT'L & COMP. L. REV. 1277, 1300 (2013).
195. *See id.* at 1294–95.
196. *See generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).
197. Welch, *supra* note 184, at 539.
198. Ethan Lock, *Unreasonable NCAA Eligibility Rules Send Braxston Banks Truckin'*, 20 CAP. U. L. REV. 643, 645 (1991).

NCAA when it attempts to present procompetitive justifications for its actions.[199] After *Board of Regents*, some courts found that certain NCAA rules may put economic restraints on the college athletes; however, they held that rules created to preserve amateurism are warranted.[200] Notably, the Supreme Court did not determine if the antitrust laws apply to the NCAA in relation to their interaction with the college athletes.[201] Thus, after *Board of Regents*, student-athletes continued to make antitrust claims against the NCAA for the rules imposed on the athletes.[202]

2. Banks v. NCAA

After *Board of Regents*, courts consistently ruled against plaintiffs that brought suits involving amateurism bylaws disputes.[203] *Board of Regents* set a standard that made it difficult for college athletes to bring claims against the NCAA, thus courts dismissed a number of cases for failure to state a claim.[204] These cases supported the notion that upholding amateurism is a valid justification for the anticompetitive effects of certain NCAA rules in antitrust suits.[205] One case in particular that supported this trend was *Banks v. NCAA*.[206]

The *Banks* court found that the NCAA's amateurism rules did not violate any antitrust laws because they had a procompetitive effect of differentiating its product (intercollegiate athletics) from its competition (professional athletics).[207] The court used the amateurism justification to find that the plaintiff did not establish a "relevant market for their services."[208] *Banks* relied on the *Board of Regents'* idea that amateurism can be a procompetitive justification for rules that arguably violate antitrust laws.[209] The *Banks* holding saved the concept of amateurism because it

199. Vincent J. DiForte, Note, *Prevent Defense: Will the Return of the Multiyear Scholarship Only Prevent the NCAA's Success in Antitrust Litigation?,* 79 BROOKLYN L. REV. 1333, 1347 (2014).

200. *Id.*

201. *Id.*

202. *Id.*

203. Welch, *supra* note 184, at 539–40.

204. *See* McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988) (stating "[t]hat the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable." The Court held that the facts presented did not support an antitrust claim and therefore it dismissed the claim.); Karmanos v. Baker, 816 F.2d 258, 259–61 (6th Cir. 1987) (signaling that a main objective of the NCAA is to promote fair competition by upholding uniform standards of scholarship, sportsmanship, and amateurism. In addition, its rule prohibiting athletes who have played professionally is in line with this objective.); Shelton v. Nat'l Collegiate Athletic Ass'n, 539 F.2d 1197, 1198–99 (9th Cir. 1976) (holding that the NCAA rule that relies on a signed professional contract as a signal that a student's amateur status is compromised is related to the goal of preserving amateurism, and is therefore valid and does not violate the equal protection clause); Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 384 (D. Ariz. 1983) (holding that the NCAA sanctions imposed against the University of Arizona's football team did not violate antitrust laws).

205. Welch, *supra* note 184, at 541.

206. Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992).

207. Welch, *supra* note 184, at 541.

208. Goodwin, *supra* note 194, at 1298. *See also Banks*, 977 F.2d at 1089–91.

209. Welch, *supra* note 184, at 541.

further solidified the notion that the NCAA could use amateurism as a defense to allegedly anticompetitive actions.

Banks held that "the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college students."[210] The Seventh Circuit emphasized that the athletes are students, not sources of labor, and the NCAA rules foster the idea that athletics is just one piece of the student-athlete's overall educational experience.[211] Similar to *Board of Regents*, the *Banks* court focused on the amateur aspect of college sports and how it should remain distinct from professional sports.[212]

Banks relied on *Board of Regents* to support the idea that establishing a clear line of demarcation between amateur and professional sports is a legitimate objective.[213] The line is critical because allowing professional athletes and their agents to enter into NCAA sports would destroy the amateur status of intercollegiate athletics.[214] The *Banks* majority stated that without amateurism rules, colleges and athletes would be exposed to payment-bidding wars found in professional athletics, and that would turn college athletics into a "minor-league farm system."[215]

Additionally, without amateurism, the athletes' attention would be focused on the money that could be made in professional sports, as opposed to their educational pursuits.[216] The court articulated its reluctance to find that the NCAA's rules related to preserving the amateurism model violate the Sherman Act.[217] Importantly, *Banks* found that the NCAA rules that promote amateurism and preserve the educational values of college athletics are legitimate procompetitive justifications.[218]

Conversely, the *Banks* court left a door open for successful antitrust suits down the road when it stated that the plaintiff in this case could have alleged how the no-draft and no-agent rules "have an anticompetitive impact on a relevant market," but failed to do so.[219] The majority contended that it is not their job to restructure a complaint, and they must review only "the well-pleaded allegations of the complaint."[220] Since the court suggested a more carefully drafted complaint could have

210. *Banks*, 977 F.2d at 1090.
211. Lazaroff, *supra* note 1, at 349.
212. 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, 91 (2013).
213. Lazaroff, *supra* note 1, at 349.
214. *Banks*, 977 F.2d at 1091.
215. Busby, *supra* note 89, at 160 (citing *Banks*, 977 F.2d at 1091).
216. *Banks*, 977 F.2d at 1091.
217. *Id.*
218. Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change,* 4 SETON HALL J. SPORT L. 483, 504 (1994).
219. *Banks*, 977 F.2d at 1094.
220. *Id.* (internal quotations omitted).

alleged an anticompetitive impact that outweighs the procompetitive justifications, it paved the path for future suits to make this allegation.[221]

The dissent contended that the NCAA no-draft rules could be seen as anticompetitive based on the definition of the Sherman Antitrust Act because they forced players to choose between collegiate eligibility and a possible future in professional sports.[222] The dissent argued that the case should have moved forward because the plaintiff met the burden that his injury was attributable to the purportedly anticompetitive aspect of the NCAA rules.[223] Further, the NCAA amateurism rules, specifically the no-draft rules, are anticompetitive because they constitute an agreement between the universities to eliminate an element of competition in the college athletics market.[224] The current structure of intercollegiate athletics pressures the student-athletes to stay in college as opposed to going out for the professional drafts because if the athletes fail they will be prohibited from returning to their schools; the dissent deemed this anticompetitive behavior.[225]

Although the dissent made a strong argument about the anticompetitive effects of the NCAA amateurism rules, the critical question is whether the anticompetitive effects outweigh the procompetitive effects. The dissent stated that while Banks alleged the anticompetitive effect of the NCAA's amateurism rules, that is only the first step.[226] In order to win on an antitrust claim, Banks would have to demonstrate that the NCAA's rules are not a "'justifiable means of fostering competition among amateur athletic teams and therefore procompetitive' on the whole."[227] The dissent acknowledged that the court could find that the amateurism rules are critical to the survival of college athletics, and in that case Banks would lose.[228] Whether the procompetitive effects of the NCAA rules outweigh the anticompetitive effects is a question that is still heavily debated.

Some scholars believe that the *Banks* decision was wrongly decided.[229] Those who disagree with the majority in *Banks* state that the court's procompetitive justifications, which focus on the NCAA rules' "original intent, impact on member costs, and social policy goals," are factors that the Supreme Court has deemed immaterial to a correct antitrust analysis.[230] Critics contend that the NCAA uses the concept of amateurism to support an outdated image of intercollegiate athletics.[231] They

221. *Id.*
222. *Id.* at 1095 (Flaum, J., dissenting).
223. *Id.* at 1097.
224. *Id.*
225. *Id.* at 1095.
226. *Id.* at 1098.
227. *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984)).
228. *Id.*
229. *See* Edelman, *supra* note 212, at 95.
230. *Id.* at 98.
231. *Banks*, 977 F.2d at 1099 (Flaum, J., dissenting).

claim that the NCAA's amateurism rules do not contribute to the creation and production of a distinctive product, an argument frequently touted by supporters.[232]

Opponents further claim that amateurism rules are used to cover up the fact that certain college sports, such as football and basketball, have become a business, making the NCAA millions of dollars.[233] Instead, they believe that since the NCAA is the only buyer of student-athlete services, the institution is akin to a cartel and essentially has a monopoly over the intercollegiate-athletic market.[234] Even Walter Byers, former NCAA executive director, stated that "[a]mateurism is not a moral issue; it is an economic camouflage for monopoly practice."[235] Some opponents say that amateurism is a cult that intercollegiate student-athletes have to follow.[236] Others argue that college athletics is similar to "a modern-day form of indentured servitude."[237] Although these views may be extreme, it shows how polarizing the issue of amateurism is in college athletics.

On the other hand, supporters of the *Banks* decision, including the NCAA, argue that the educational goals promoted by the NCAA's amateurism and eligibility rules are the kind of procompetitive benefits legitimized by the courts.[238] Preserving amateurism is necessary to help intercollegiate athletics maintain the unique qualities that distinguish it from professional sports.[239] That line of separation allows the NCAA to broaden consumer choice by offering a product that would otherwise be unavailable.[240] Supporters believe that an amateur organization, such as the NCAA, should not be treated like a typical commercial, for-profit organization.[241] The noneconomic factors that the NCAA focuses on, including education, outweigh the NCAA rules' anticompetitive effects, and these factors need to be taken into account when conducting the antitrust analysis.[242] Even some opponents of amateurism admit that an appropriate antitrust analysis does not automatically prohibit all agreements that involve intercollegiate student-athlete compensation.[243]

232. Lock, *supra* note 198, at 649.
233. *Banks*, 977 F.2d at 1098–99 (Flaum, J., dissenting).
234. *See* Darren Heitner, *National Letter of Indenture: Why College Athletes are Similar to Indentured Servants of Colonial Times*, FORBES (July 25, 2012, 8:52 AM), http://www.forbes.com/sites/darrenheitner/2012/07/25/national-letter-of-indenture-why-college-athletes-are-similar-to-indentured-servants-of-colonial-times/#2634029230d4.
235. Ramogi Huma & Ellen J. Staurowsky, *The $6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, NCPA, http://www.ncpanow.org/news/articles/body/6-Billion-Heist-Study_Full.pdf (last visited Nov. 4, 2016) (internal citations omitted).
236. Sarah Jaffe, *The Cult of Amateurism Plaguing the Sports World*, WEEK (Feb. 19, 2014), http://theweek.com/articles/450784/cult-amateurism-plaguing-sports-world.
237. *See* Heitner, *supra* note 234.
238. Nagy, *supra* note 66, at 339.
239. Lock, *supra* note 198, at 649.
240. *Id.*
241. Kirby & Weymouth, *supra* note 128, at 32.
242. *Id.*
243. *See* Edelman, *supra* note 212, at 98–99.

While there are arguments on both sides about the fairness and validity of the NCAA's amateurism rules, *Banks* made it clear that amateurism can be a valid justification for the NCAA's anticompetitive behaviors.[244]

C. Major Court Rulings and Changes to Amateurism after 2000

1. In Re *NCAA*

As noted above, this case was brought by a group of current and former college athletes against the NCAA for antitrust violations.[245] The plaintiffs argued that the NCAA amateurism rules preventing student-athletes from selling the rights to their NILs were unreasonable restraints.[246] Plaintiffs further claimed that the NCAA precludes recruits from receiving a portion of revenue that they would otherwise receive in an unrestrained market.[247]

The NCAA argued the plaintiffs failed to show that former student-athletes were harmed by unreasonable restraints because athletes are able to sell the rights to their NILs after they finish competing.[248] The plaintiffs claimed that the license for a student-athlete's NIL is most valuable while they are still competing.[249] The Court ultimately concluded that while the NCAA amateurism rules do not prohibit former student-athletes from selling the rights to their NILs, these former student-athletes were harmed because they were unable to participate in licensing practices when those rights were most valuable.[250]

In response to the plaintiffs' presentation of the NCAA bylaws' anticompetitive effects, the NCAA put forward five procompetitive justifications for their rules.[251] The justification most relevant to this Note is amateurism.[252] The NCAA argued that one of the main reasons college athletics is popular is due to the amateur status of the athletes.[253] To prove this, the NCAA conducted polls of college-athletics fans. The polls concluded that 51% of fans were opposed to paying athletes, and a significant portion were less likely to attend, watch, or listen to college games if the student-athletes were paid.[254]

244. *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1091 (7th Cir. 1992).
245. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1133 (N.D. Cal. 2014).
246. *Id.* at 1137.
247. *Id.* at 1138.
248. *Id.*
249. *Id.* at 1138–39.
250. *Id.*
251. *Id.* at 1146.
252. *Id.*
253. *Id.* at 1146–47.
254. *Id.*

As noted above, since the inception of the NCAA, college sports have been built around the idea of amateurism;[255] destroying that concept would likely significantly impact its popularity. College sports have to compete with professional sports for viewers.[256] Destroying amateurism could severely damage college sports' commercial position, which would harm the athletes who rely on college athletics' popularity to fund their scholarships.[257] The ultimate question is whether the amateurism justification, along with the other procompetitive justifications,[258] outweighs the plaintiffs' anticompetitive allegations. The NCAA believes its amateurism rules are *per se* procompetitive after *Board of Regents*, specifically because its rules protect the amateurism model.[259]

The *In re* NCAA court came to two main conclusions.[260] First, prohibiting student-athlete compensation, for the sake of preserving amateurism, could be a procompetitive justification.[261] Second, and in contrast to the first supposition, the plaintiffs' arguments "support[ed] an inference that the preservation of the NCAA's definition of amateurism serves no procompetitive purpose."[262] The court ultimately did not decide whether the NCAA's procompetitive amateurism justification outweighed the alleged effect; instead it ruled that "neither party is entitled to summary judgment on this issue."[263] While the court did not side specifically with one party, it did state that *Board of Regents* did not explicitly rule that the amateurism rules are procompetitive; this holding could have negative results for the NCAA.[264] Additionally, the court stated that significant changes in the amateurism rules could limit *Board of Regent's* application and value to antitrust suits brought against the NCAA in the future.[265]

In Re NCAA sparked further debate around the purpose of the NCAA's bylaws and the use of amateurism as a procompetitive justification for restraints on college athletes. Dr. Roger Noll, an expert in the *In re* NCAA litigation, proffers that the NCAA changed the amateurism bylaws multiple times and those changes have not significantly affected

255. *See infra* Part II.

256. *See* Darren Rovell, *NFL Most Popular for 30th Year in a Row*, ESPN (Jan. 26, 2014), http://www.espn.com/nfl/story/_/id/10354114/harris-poll-nfl-most-popular-mlb-2nd.

257. Bob Egelko, *NCAA President Says Paying Athletes Would Hurt College Sports*, SFGATE (June 20, 2014), http://www.sfgate.com/sports/article/NCAA-president-says-paying-athletes-would-hurt-5565520.php.

258. As noted earlier, the other justifications include: competitive balance, integration of education and athletics, viability of other sports, and increased output benefits. *See In re* NCAA, 37 F. Supp. 3d at 1148–52.

259. Shepard Goldfein & James A. Keyte, *'NCAA Student-Athlete' Litigation: Out of Bounds?*, N.Y. L.J. (Nov. 12, 2013), *available at* http://www.newyorklawjournal.com/id=1202627065363?keywords=ncaa+student+athlete+litigation&publication=New+York+Law+Journal.

260. *See In re* NCAA, 37 F. Supp. 3d at 1147.

261. *Id.*

262. *Id.*

263. *Id.* at 1148.

264. Goldfein & Keyte, *supra* note 259.

265. *Id.*

the demand for college sports.[266] This is one of the strongest arguments against preserving amateurism in college sports: if the concept has been changed so many times, what is the point of preserving it?

College athletics is often compared to the Olympics, which used to only permit unpaid amateurs to participate.[267] In his testimony, Dr. Noll contended that when the Olympics removed the amateurism restrictions it did not undermine its attractiveness or marketability.[268] This directly contradicts the idea that college athletics will lose popularity if the amateurism concept is destroyed. According to Dr. Noll, the NCAA rules result in multiple anticompetitive effects, including the effect of collusive prices that force some college athletes out of the market because the financial costs outweigh the benefits.[269]

Although, now that the NCAA allows institutions to cover the full cost of attendance, including travel and other incidental costs, the athletes should not be forced to make any financial sacrifices. There is a difference in pay, obviously, between college and professional athletics, but this is necessary to maintain a clear demarcation between the two levels.[270] In addition to the scholarship, student-athletes receive a quality education and a variety of other advantages,[271] and that is a trade-off athletes make if they decide to go to college as opposed to going professional. There are risks and benefits associated with each path.

College-athletics dynamics would change significantly if athletes were paid for their NILs, and the amateurism concept would likely be destroyed.[272] Proponents of amateurism, such as Dr. Rubinfeld,[273] argue that consumers like the "amateur nature of college sports."[274] Other proponents go as far as to say that the "whole area of name and likeness and

266. *In re* NCAA, 37 F. Supp. 3d at 1147–48.

267. *See generally* Patrick Hruby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/.

268. *In re* NCAA, 37 F. Supp. 3d at 1148.

269. Noll, *supra* note 34, at 6–7.

270. *Should College Athletes Get Paid Pros and Cons List*, NYLN (July 6, 2015), http://nyln.org/should-college-athletes-get-paid-pros-and-cons-list; Jeffery Dorfman, *Pay College Athletes? They're Already Paid up to $125,000 Per Year*, FORBES (Aug. 29, 2013), http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#3da3b4784797.

271. *See id.*

272. As Dr. Savage stated in 1929, subsidizing or paying the athletes would be "to the detriment of the intellectual aims of a college . . . ." Howard J. Savage, *American College Athletics*, CARNEGIE FOUND. 1, 32 (1929), http://sites.comm.psu.edu/thecoia/wp-content/uploads/sites/6/2014/09/Carnegie-Commission-1929-excerpts.pdf. He went on to say that if an athlete's main interest in going to college is to get paid for his athletic abilities, then this will reduce his academic motivation and could lead to schools giving athletes special privileges. *Id.* at 20. While Dr. Savage was referring to giving the athletes scholarships for payment, these arguments resonate with paying athletes beyond their scholarships today. *See id.* at 32. There are already instances of preference and special treatment for athletes on scholarships, and this would likely get worse if the athletes were paid.

273. Dr. Rubinfeld is an economist whose expert reports the NCAA relied on. *In re* NCAA, 37 F. Supp. 3d at 1146–47.

274. *Id.* at 1147.

the NCAA is a disaster leading to catastrophe . . . ."[275] Paying athletes, whether for their athletic abilities or NILs, will further alienate the athletes from the rest of the student body.[276] Amateurism helps ensure that academics are a priority; without it, the intercollegiate-athletic system would essentially become a minor professional league with academics barely in the background.

2. O'Bannon v. National Collegiate Athletic Association

The *O'Bannon* case has arguably been the most important and influential case for the amateurism model in college athletics over the last few decades. The district court's decision was monumental because it declared outright that the NCAA's amateurism rules violate antitrust laws.[277] The court also ordered that the NCAA change its anticompetitive behaviors.[278] The district court found that the NCAA amateurism rules have anticompetitive effects that the procompetitive justifications do not outweigh.[279] Speaking directly to the amateurism-procompetitive justification, the district court found that the inconsistent application of the amateurism model did not make it a "core principle" of the NCAA.[280] While the NCAA did present procompetitive justifications, the plaintiffs presented two less restrictive alternatives to the NCAA rules.[281] The district court concluded that these alternatives to the ban on compensating players for their NILs would not undermine the NCAA's procompetitive justifications.[282]

The NCAA appealed, arguing that the Sherman Act claim fails on the merits.[283] The NCAA also argued that the court is prohibited from reaching the merits on the case for the following reasons: "(1) The Supreme Court held in [*Board of Regents*], that the NCAA's amateurism rules are 'valid as a matter of law'; (2) the compensation rules at issue here are not covered by the Sherman Act . . . and (3) the plaintiffs have no standing to sue under the Sherman Act . . . ." [284] The Ninth Circuit

275. Peter Baran, *O'Bannon v NCAA: Potential Financial Consequences of a Student–Athlete Trust Fund*, WIN AD, http://winthropintelligence.com/2012/12/16/obannon-v-ncaa-potential-financial-consequences-of-a-student-athlete-trust-fund/ (last visited Nov. 4, 2016).

276. Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014), http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid.

277. Matthew Gustin, *The O'Bannon Court Got it Wrong: The Case Against Paying NCAA Student-Athletes*, 42 W. ST. L. REV., 137, 138–39 (2015).

278. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

279. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1057 (citing *O'Bannon*, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014)).

280. *Id.* at 1058–59 (citing *O'Bannon*, 7 F. Supp. 3d at 999–1000).

281. The first alternative is to allow schools to provide stipends that cover up to the full cost of attendance, to compensate for any "shortfall[s]" in the athletes' scholarships. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1060–61 (2015) (internal citations omitted). The second is to allow schools to hold a share of the athlete's licensing revenue, up to five thousand dollars, in a trust that he can access after he leaves college. *Id.* at 1061.

282. *O'Bannon*, 7 F. Supp. 3d at 1005–06.

283. *O'Bannon*, 802 F.3d at 1061.

284. *Id.*

found these arguments unpersuasive and stated that *Board of Regents* held that the NCAA bylaws should be analyzed under the rule of reason and are not automatically valid or invalid.[285] Additionally, since the amateurism analysis in *Board of Regents* was *dicta*, the Ninth Circuit was not bound to determine that every NCAA amateurism rule is automatically legal.[286]

Furthermore, the Ninth Circuit noted that the NCAA was pressuring the court to hold that the amateurism rules "are essentially exempt from antitrust scrutiny."[287] This assumption goes beyond the *Board of Regents* ruling, which stated that the amateurism rules have a procompetitive purpose, but are not *per se* procompetitive.[288] Ultimately, the Ninth Circuit stated that it would not presume the NCAA's amateurism rules were lawful.[289] This was a departure from the *Board of Regents* line of cases, which did not probe further into whether amateurism rules truly served a procompetitive purpose.[290]

The Ninth Circuit followed the three-step rule-of-reason standard set in *Board of Regents*: (1) first, the plaintiff has to show the restraint has anticompetitive effects within a relevant market; (2) if established, the defendant had to show procompetitive effects of the restraint; (3) finally, the plaintiff had to demonstrate realistic, less restrictive alternatives that could be achieved.[291] The Ninth Circuit agreed with the district court that the NCAA's amateurism bylaws, specifically the compensation rules, have anticompetitive effects.[292] The plaintiffs were able to successfully argue that the NCAA amateurism bylaws have anticompetitive effects because the NCAA "fix[es] the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component."[293]

Next, the Ninth Circuit looked at the procompetitive purposes proffered by the NCAA, focusing mainly on the "promotion of amateurism" justification.[294] Notably, the district court acknowledged that the NCAA's amateurism rules play a part in the growing support and demand for intercollegiate athletics.[295] The NCAA took this a step further by claiming that the amateurism structure gives student-athletes increased opportunities because it affords them the ability to obtain a college degree while participating in athletics.[296] Ultimately, the Ninth Circuit found that the

285. *Id.*
286. *Id.* at 1063.
287. *Id.*
288. *Id.* at 1063–64.
289. *Id.* at 1064.
290. *See generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992).
291. *O'Bannon*, 802 F.3d at 1070 (internal citations omitted).
292. *Id.* at 1072.
293. *Id.* at 1071–72.
294. *Id.* at 1072.
295. *Id.* (internal citations omitted).
296. *Id.*

NCAA's rules have procompetitive justifications, the crucial one being that amateurism helps preserve the popularity of college sports.[297]

Lastly, the Ninth Circuit looked at the viability and feasibility of legitimate alternatives to the current NCAA bylaws and behaviors. Based on the *Board of Regents* decision, a court had to give the NCAA "ample latitude" in overseeing college sports.[298] While the district court found that there were two reasonable alternatives,[299] the Ninth Circuit only agreed that increasing scholarships to cover the full cost of attendance is an acceptable alternative to the NCAA's current rules.[300] The Court concluded that raising the amount of grant-in-aid awarded would not have an impact on or violate the amateurism model of college athletics.[301] In addition, the Ninth Circuit noted that the scholarship cap is not connected to the procompetitive justifications, because the student-athletes will still be amateurs with the increased grant-in-aid, so long as the money covers "legitimate educational expenses."[302] While the actual impact on amateurism may be minor, the concern is whether this holding will open the floodgates to future suits involving alterations to the NCAA rules, especially regarding athlete pay.[303]

Arguably, the most significant part of the Ninth Circuit's decision is its finding that the district court erred in holding that paying student-athletes a capped amount for their NILs is a legitimate alternative.[304] The Ninth Circuit correctly noted that what makes student-athletes amateurs is the fact that they are not paid, whether with salaries, or for their NILs.[305] The court found that paying student athletes for their NILs but capping the amount they receive is not an effective solution to preserve amateurism and the NCAA's market.[306]

The Ninth Circuit acknowledged the difference between paying the student-athletes small versus large amounts for their NILs, but stated that any payment for NILs at all defeats the purpose of amateurism.[307] Even if the amounts paid to athletes were capped, future plaintiffs would challenge this cap until it is removed; at that juncture "the NCAA will

297. *Id.* at 1073. (internal citations omitted).

298. *Id.* at 1074 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 120 (1984)).

299. The District Court identified the following alternatives: 1) permitting institutions to increase athletic scholarships to cover the full cost of attendance; and 2) permitting schools to put a set amount of money in a trust fund to pay for the use of the athletes' NILs. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1005–07 (N.D. Cal. 2014).

300. *O'Bannon*, 802 F.3d at 1074.

301. *Id.* at 1075.

302. *Id.*

303. *Id. See also* Jennifer A. Dunn & Melissa D. Sobota, *Ninth Circuit Rules in O'Bannon Case That Some of the NCAA Rules are Unlawful Restraints of Trade*, FRANCZEKRADELET (Oct. 13, 2015), http://www.franczek.com/frontcenter-Ninth_Circuit_Rules.html (arguing that the Ninth Circuit's decision in *O'Bannon* opened the door to permitting schools, in the future, to award even greater aid to student-athletes than what other non-athlete students would be allowed to receive).

304. *O'Bannon*, 802 F.3d at 1076.

305. *Id.*

306. *Id.* at 1076–77.

307. *Id.* at 1077.

have surrendered its amateurism principles entirely . . . ."[308] After *O'Bannon*, the NCAA is required to pay student-athletes the full cost of attendance, but they do not have to pay the athletes for the use of their NILs.[309]

The question of who actually "won" this case is still undecided. Some believe that that the Ninth Circuit's decision "was a massive win for the NCAA" and a "massive defeat" for proponents who want student-athletes to be paid beyond scholarships.[310] The decision can be seen as a victory for the NCAA because it reaffirms that the NCAA can use amateurism as a defense to antitrust claims.[311] This decision helped preserve the amateurism model in college athletics[312] because it struck down the district court's approval of trust accounts for the student-athletes so that they could be paid for their NILs.[313] While the NCAA is not exempt from antitrust scrutiny, the Ninth Circuit affirmed that amateurism is a legitimate procompetitive justification that could outweigh its rules' anticompetitive effects.[314] The main difference after *O'Bannon* is that the NCAA now cannot decrease the amount of grant-in-aid, which they technically could have done before this ruling.[315] This decision may also strengthen the NCAA's position because they have a more recent decision to cite that must be followed by future courts assessing challenges to the NCAA rules.[316]

On the other hand, some believe that the Ninth Circuit's ruling was primarily a loss for the NCAA because it reiterates that the NCAA not only violated antitrust laws, but it is also subject to them.[317] Additionally, the Ninth Circuit held that the NCAA may no longer use the *dicta* from *Board of Regents* to completely shield itself from antitrust scrutiny.[318] While *Board of Regents* stated that the NCAA's amateurism rules are procompetitive, the Ninth Circuit made it clear that the Supreme Court did not say that the rules and anticompetitive behaviors are automatical-

308. *Id.* at 1078–79.

309. *Id.* at 1079.

310. Jeremy Jarrett, *The Great Escape: The NCAA Receives a Tremendous Ruling for Now and the Future in the O'Bannon Appeal Decision*, SPORTS ESQUIRES (Oct. 1, 2015), http://thesportsesquires.com/the-great-escape-the-ncaa-receives-a-tremendous-ruling-for-now-and-the-future-in-the-obannon-appeal-decision/.

311. Marc Tracy & Ben Strauss, *Court Strikes Down Payments to College Athletes*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/10/01/sports/obannon-ncaa-case-court-of-appeals-ruling.html?_r=0.

312. *See* Michael McCann, *What the Appeals Court Ruling Means for O'Bannon's Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling.

313. *O'Bannon*, 802 F.3d at 1079.

314. Jarrett, *supra* note 310.

315. *Id.*

316. *Id.*

317. *Did the NCAA Win or Lose the O'Bannon Case Appeal?*, ONLY A GAME (Oct. 3, 2015) [hereinafter *Did the NCAA Win or Lose*], http://www.wbur.org/onlyagame/2015/10/03/ncaa-antitrust-obannon-lawsuit.

318. *Id.*; *see also O'Bannon*, 802 F.3d at 1063–64.

ly legal.[319] The Ninth Circuit declared that it did not have "to conclude that every NCAA rule that somehow relates to amateurism is automatically valid."[320] Courts will no longer presume that anticompetitive behaviors, justified by furthering the amateurism model, are valid; the NCAA must prove this presumption. This clarification hurts the NCAA because it now cannot argue that courts must give deference to its amateurism rules as *per se* lawful.

Since *O'Bannon* was decided a little more than a year ago, there is much speculation about the effects it will have on college athletics' amateurism model.[321] Although the Ninth Circuit's decision is significant, it is hard to tell how much of an impact it will have. The "win" for the NCAA is that the Ninth Circuit declined to allow universities to pay student-athletes, preserving the amateurism model of intercollegiate athletics. In contrast, the main "win" for the student-athletes is the increase in grant-in-aid.[322] Although, the NCAA had already increased and changed its definition of "full cost of attendance;" this took effect in August of 2015.[323] Nevertheless, since *O'Bannon* clearly affirmed that the NCAA is subject to antitrust laws, inevitably more athletes will bring suits arguing various claims that the NCAA is violating antitrust laws.[324]

Multiple issues may arise after the *O'Bannon* decision. First, there is a disagreement over what "full cost of attendance" actually means, which was not clearly defined in *O'Bannon*.[325] Second, the consistency of the NCAA's concept of amateurism may be a future problem. For example, tennis players are allowed to receive up to $10,000 a year and can still could be considered amateurs, which is not the case for most other sports.[326] This inconsistency could lead to future suits for which *O'Bannon* opened the door. Finally, another question still unanswered is whether student-athletes are prohibited from seeking additional pay above the full cost of attendance.[327] With these questions not concretely

319. *O'Bannon*, 802 F.3d at 1063–64.

320. *Id.* at 1063.

321. In terms of the future of this decision, it is also important to note that the Ninth Circuit denied the plaintiffs' request for a rehearing of the case with all eleven judges, also known as an *en banc* hearing. Steve Berkowitz, *9th Circuit Court of Appeals Declines Request for Rehearing of O'Bannon Case*, USA TODAY: SPORTS (Dec. 16, 2015, 4:36 PM), http://www.usatoday.com/story/sports/college/2015/12/16/9th-circuit-court-appeals-declines-rehearing-obannon-case/77427064/.

322. *See* Jarrett, *supra* note 3010.

323. NCAA 2015–2016 Manual, *supra* note 16, at Bylaw art. 15, 15.02.5 (defining full grant-in-aid as "financial aid that consists of tuition and fees, room and board, books, and *other expenses related to attendance at the institution up to the cost of attendance* established pursuant to Bylaws 15.02.2 and 15.02.2.1") (emphasis added).

324. *Did the NCAA Win or Lose*, *supra* note 317.

325. Dunn & Sobota, *supra* note 303.

326. NCAA 2015–2016 Manual, *supra* note 16, at Bylaw art. 12, 12.1.2.4.2.1 (stating that "[i]n tennis, prior to full-time collegiate enrollment, an individual may accept up to $10,000 per calendar year in prize money based on his or her place finish or performance in athletics events"); *id.* at Bylaw art. 12, 12.1.2.4.1 (explaining that "[i]n sports other than tennis, an individual may accept prize money based on his or her place finish or performance in an athletics event. Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the event").

327. Tracy & Strauss, *supra* note 311.

decided, there will likely be future disputes over the amateurism model in college athletics. In order to sustain the concept of amateurism, especially in the wake of recent controversies, several steps need to be taken; these actions will be discussed in Part IV.[328]

IV. RECOMMENDATION

While the concept of amateurism has evolved over time, it is a principle that must be preserved in order for college athletics to flourish. Instead of discarding the concept, the amateurism model in college athletics should be strengthened and properly enforced. This Note does not take issue with the NCAA's current definition of amateurism,[329] rather it takes issue with how the amateurism concept is interpreted and used in a way that is inconsistent with its actual definition.[330] This Note acknowledges that the NCAA should be allowed to engage in some anticompetitive behaviors in order to preserve amateurism in intercollegiate athletics; however, an oversight committee is needed to ensure that the NCAA acts in ways that are consistent with the amateurism model and does not take advantage of the athletes.

Discarding the NCAA's amateurism rules and paying college athletes would completely change the dynamics of college athletics. The amateurism bylaws are critical because they put a focus on education and prevent college sports from morphing into a minor league or semi-professional training ground. There are steps that can and should be taken to preserve the amateurism structure in college athletics. The first is awarding the NCAA a partial antitrust exemption. The second is creating a Presidential Commission to supervise the NCAA's activities and to ensure that the NCAA is not exploiting the antitrust exemption. Combining these two ideas will help preserve the concept of amateurism while still promoting the fair treatment of the college athletes.

A. Partial Antitrust Exemption

In order to preserve the concept of amateurism, the NCAA should receive a limited antitrust exemption that is subject to independent regulatory oversight. Advocates of continuing the amateurism model argue that an antitrust exemption would preserve the concept of the "traditional college athlete."[331] A partial antitrust exemption would eliminate most

328. *See infra* Part IV.

329. The NCAA's current definition of amateurism is as follows: "[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 in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises." NCAA 2015–2016 Manual, *supra* note 16, at Const. art. 2, 2.9.

330. *See* Hawes, *supra* note 8 (depicting how the interpretation of amateurism has changed over time).

331. Sara Ganim, *Redefining the 'College Athlete': Could it Work?*, CNN (July 15, 2015, 3:07 PM), http://www.cnn.com/2015/07/15/us/ncaa-antitrust-exemption/.

lawsuits against the NCAA and would keep the concept of amateurism intact. Partial immunity would allow the NCAA to participate in some seemingly anticompetitive behaviors in order to stay competitive in the sports market. This Note argues that this will help universities acquire enough money to fund athletic scholarships.[332]

Opponents of giving the NCAA an antitrust exemption argue it would allow the NCAA to operate as a monopoly, and would make college athletics more similar to professional sports, such as the MLB, NBA, and NFL.[333] Opponents further believe that the exemption would put athletes in a significantly worse position because they would no longer be able to bring suits over whether or not the athletes should be paid beyond scholarships.[334] While these are valid concerns, the main differentiators between professional and college sports are: (1) the lack of a salary, and (2) the idea that college athletes are students first.[335] A partial antitrust exemption will allow the NCAA to keep this distinction while still maintaining viability in the market. Competing with professional sports will be more difficult without a partial antitrust exemption.

Recently, Andrew Zimbalist, a Professor of Economics at Smith College,[336] proposed that the NCAA receive a partial antitrust exemption in order to reform and preserve the traditional image of intercollegiate athletics.[337] Zimbalist argues that paying athletes a salary would substantially increase the financial burden on schools and lead to hefty long-term deficits.[338] Additionally, paying athletes could wreak havoc on the current academic culture,[339] creating a greater divide between non-athlete and athlete students. A partial antitrust exemption would allow schools to compete with professional athletics, while still allowing them to maintain both a line of demarcation and the amateurism concept that is so crucial to college athletics' success. If the NCAA does not receive an antitrust exemption, and if they have to pay even a subset of the athletes, this could negatively impact all of the non-revenue-generating sports at schools, and it could hurt the schools' reputations in recruiting students in general.[340]

Notably, there are several differences between this recommendation and Zimbalist's proposal. First, Zimbalist believes that the student-athletes should be able to profit off of their NILs and sign with an agent

332. *See supra* text accompanying notes 255–57.
333. Ganim, *supra* note 331.
334. *See id.*
335. Miller, *supra* note 7.
336. *Andrew Zimbalist Biography*, FOX 25 (July 21, 2015, 7:14 PM), http://www.fox25boston.com/news/andrew-zimbalist-biography/8999068.
337. *See* Andrew Zimbalist, *Paying College Athletes: Take Two*, HUFFPOST SPORTS (May 28, 2015, 12:17 PM), http://www.huffingtonpost.com/andrew-zimbalist/paying-college-athletes-take-two_b_6961314.html.
338. *Id.*
339. *Id.*
340. *Id.*

without being disqualified from participating in intercollegiate athletes.[341] These provisions, however, would make it extremely difficult to maintain the collegiate amateurism model. Permitting universities to pay the athletes for their NILs would be akin to paying an athlete a salary for participating in college athletics. Additionally, Zimbalist believes that, as part of their athletic scholarships, the athletes should receive a benefits package, which would include health, life, and disability insurance.[342] Again, adding these extra benefits, on top of the cost of attendance, makes the benefits more akin to a salary and treats the student-athletes like employees, which directly contradicts how amateurs ought to be treated. This Note advocates for an antitrust exemption in order to maintain amateurism and the separation between college and professional sports, not to make college athletics more like professional sports.

A partial antitrust exemption is necessary to protect amateurism in college athletics. Even though some NCAA behaviors are anticompetitive, they help preserve the amateurism model, and for that reason they should be permissible. An antitrust exemption will further promote the idea that college athletes are not professionals and should not be paid or allowed to profit off of their NILs like professionals.

B. Oversight Commission

The purpose of giving the NCAA a limited antitrust exemption is to preserve the concept of amateurism. The NCAA, however, needs to be monitored, it should not be trusted to enforce the concept on its own. A regulatory body is needed to ensure that the NCAA is not overreaching or using questionable tactics.[343] As the courts noted, anticompetitive behaviors are permissible if there are valid procompetitive justifications.[344] Amateurism can be a valid procompetitive justification,[345] but the NCAA must stay true to this principle. Part of the regulatory body's mission will be to ensure that the NCAA is furthering procompetitive purposes, including preserving amateurism, and not just using amateurism as a front to profit off of athletes.

The next question to address is who should provide the oversight. Congress should create something similar to a Presidential Commission to supervise the NCAA's activities. In January 2015, several members of the House of Representatives introduced a bill to establish a Presidential Commission on Intercollegiate Athletics, which would "examine issues of national concern related to the conduct of intercollegiate athletes, to

341. *Id.*
342. *Id.*
343. Daniel E. Lazaroff, *An Antitrust Exemption for the NCAA: Sound Policy or Letting the Fox Loose in the Henhouse?*, 41 PEPP. L. REV. 229, 246 (2014).
344. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1070 (9th Cir. 2015). *See also* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1089 (7th Cir. 1992).
345. *See O'Bannon*, 802 F.3d at 1064.

make recommendations for the resolution of the issues, and for other purposes."[346] The Commission would be tasked with many responsibilities including reviewing the "interaction of athletics and academics."[347] The Commission would analyze how intercollegiate athletics is financed, the sources of revenues, and how those revenues are spent.[348]

In the current bill, the Commission would be responsible for overseeing rules related to earnings by student-athletes, including potential profits for their NILs.[349] As mentioned earlier, allowing athletes to profit off of their NILs will likely destroy the concept of amateurism and will significantly alter how college athletics operates.[350] This Note does not recommend that the Commission oversee compensation to student-athletes. Instead, it should focus on ensuring that the NCAA's seemingly anticompetitive behaviors and rules are actually promoting amateurism, to the benefit of the student-athletes. Additionally, this Note does not recommend that the exact Presidential Commission described in the bill be created, but instead Congress should construct a committee along those lines that will act as a check on the NCAA to ensure it is furthering its missions of preserving amateurism and academic integrity.

While proponents of the NCAA state that it and the majority of its member institutions are not profiting off the athletes,[351] it is beneficial to have an external check on the NCAA's behavior. As the bill stands now, the Commission would consist of (1) five members appointed by the President, (2) three members appointed by the Speaker of the House of Representatives, (3) three members appointed by the minority leader of the House of Representatives, (4) three members appointed by the majority leader of the Senate, (5) three members appointed by the minority leader of the Senate.[352] While having members of Congress on this committee could be beneficial, it may be equally or more beneficial for the committee to include key players in the collegiate athletics arena, including player advocates. Nonetheless, it is important that the committee not be filled with staff from the NCAA or any of its member institutions. The committee needs to be independent and impartial in order to increase its credibility and earn the trust of individuals who doubt the intentions of the NCAA.

346. H.R. 275, 114th Cong. (1st Sess. 2015).

347. *Id.*

348. *Id.* Essentially, the Commission will ensure that the NCAA is more transparent with its spending and activities. *See id.* These duties will be crucial, especially the responsibility to enforce transparency, if the NCAA is given a partial antitrust exemption.

349. *Id.*

350. *Supra* Part III.

351. *Andrew Zimbalist Biography*, *supra* note 336. *See also* Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), http://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html?_r=1.

352. H.R. 275, 114th Cong. (1st Sess. 2015).

As the bill is written now, the Commission will end thirty days after it submits its report.[353] In creating this Commission, Congress envisioned it as a short-term committee that would review the NCAA's actions and submit a report on what changes it should make.[354] This Note, on the other hand, recommends that the committee be a permanent enforcement body that serves as a continuous check on the NCAA's actions. This will be especially important if, and when, the NCAA receives a partial antitrust exemption, because it will ensure that any anticompetitive behaviors will support the amateurism structure of college sports.

In addition, this Note advocates that a committee be installed regardless of whether the antitrust exemption is awarded to the NCAA. The Committee will certify that the NCAA controls its costs, which may include putting caps on certain expenses and salaries.[355] Overall, this Note recommends that a partial antitrust exemption, along with oversight from a committee, is the best way to preserve amateurism and maintain the line of demarcation between college and professional sports.

V. CONCLUSION

This Note addressed the concept of amateurism in intercollegiate athletics and the variety of changes the principle has observed since its inception. This Note looked at the changes made to the amateurism concept throughout the decades, and the impact amateurism has had on college athletics. The Note also examined how different courts have viewed the amateurism concept as a justification for the NCAA's seemingly anticompetitive behaviors. Additionally, this Note addressed the arguments for and against amateurism and explains why the amateurism structure in college athletics is necessary.

In order to continue to preserve the concept of amateurism, this Note advocates that (1) the NCAA be given a partial antitrust exemption, and (2) that Congress establish a committee to oversee the NCAA's actions. While a partial antitrust exemption will preserve amateurism, the NCAA should not be trusted to maintain its principles without some oversight, which would come in the form of a committee. These recommendations will help preserve the concept of amateurism and further the educational purposes of college athletics. They will also ensure that athletes like Jesse Owens,[356] and the thousands of student-athletes like him today, can have the opportunity to participate in college athletics, while having their education fully paid.

353. *Id.*
354. *See id.*
355. *See* Jake New, *Presidential Panel on College Sports?*, INSIDE HIGHER ED (Jan. 13, 2015), https://www.insidehighered.com/news/2015/01/13/ncaa-discuss-federal-oversight-college-athletics-white-house.
356. *See* Voepel, *supra* note 2.