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## NCAA and the Rule of Reason: Analyzing Improved Education Quality as a Procompetitive Justification

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NCAA AND THE RULE OF REASON: ANALYZING IMPROVED  
EDUCATION QUALITY AS A PROCOMPETITIVE  
JUSTIFICATION

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## INTRODUCTION

In early August of 2013, Jay Bilas—ESPN basketball analyst, lawyer, and frequent National Collegiate Athletic Association (NCAA) critic—sent a series of tweets with pictures of screenshots from ShopNCAASports.com.<sup>1</sup> Bilas used the website’s search function to look up the names of prominent NCAA Division I football players. For instance, Bilas searched “Clowney” and University of South Carolina football jerseys with the number seven appeared.<sup>2</sup> Number seven just happened to be star defensive end and future number one overall NFL draft pick, Jadeveon Clowney.<sup>3</sup> Bilas repeated the process using the names Johnny Manziel, Tajh Boyd, Teddy Bridgewater, Braxton Miller, Denard Robinson, Everett Golson, and Tyrann Mathieu.<sup>4</sup> Within minutes the NCAA removed the search function from the website.<sup>5</sup> Within days the entire ShopNCAASports.com website was shut down, later to be put back up selling only NCAA championship merchandise.<sup>6</sup> NCAA President Mark Emmert commented, saying, “In the national office, we can certainly recognize why [the sale of that merchandise] could be seen as hypocritical, and indeed I think the business of having the NCAA selling those kinds of goods is a mistake, and we’re going to exit that business immediately.”<sup>7</sup>

According to its own Division I Manual, the NCAA’s Principle of Amateurism is that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an

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1. Chris Greenberg, *Jay Bilas Tweets ShopNCAASports.com Search Results, Embarrasses NCAA*, HUFFINGTON POST (Aug. 7, 2013, 10:04 AM), [http://www.huffingtonpost.com/2013/08/06/jay-bilas-ncaa-twitter-jerseys-search\\_n\\_3715373.html](http://www.huffingtonpost.com/2013/08/06/jay-bilas-ncaa-twitter-jerseys-search_n_3715373.html) [<http://perma.cc/89BH-Q4WB>].

2. *Id.*

3. See *Jadeveon Clowney*, NAT’L FOOTBALL LEAGUE, <http://www.nfl.com/player/jadeveon-clowney/2543456/draft> [<http://perma.cc/5JRV-VC8E>] (last visited Oct. 23, 2015).

4. Greenberg, *supra* note 1.

5. *Id.*

6. Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013, 1:10 PM), [http://espn.go.com/college-sports/story/\\_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical](http://espn.go.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical) [<http://perma.cc/S8DU-4W3C>].

7. *Id.*

avocation, and student-athletes should be *protected from exploitation by professional and commercial enterprises*.<sup>8</sup> In contrast, the NCAA had nearly \$871.6 million in total revenue for the fiscal year 2011-2012.<sup>9</sup> At the heart of the discrepancy between the NCAA's mission statement and its annual revenue is the debate about whether big-time collegiate athletes should be compensated for the use of their names, images, and likenesses. Legal academics<sup>10</sup> and the sports establishment have frequently advocated for compensating student-athletes, which would alter the current NCAA amateurism ideal.<sup>11</sup> That position has only increased in popularity as the NCAA's annual revenue continues to rise.<sup>12</sup> Bilas, in an interview after his Twitter rant, stated that there is a tension between the NCAA's amateurism model and the NCAA's current commercial model.<sup>13</sup> The NCAA is making money by licensing student-athletes' names, images, and likenesses, but restricting what the revenue drivers, the student-athletes, can make.<sup>14</sup>

Current NCAA bylaws restrict student-athletes from receiving any compensation from their school or outside sources for use of

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8. NAT'L COLLEGIATE ATHLETIC ASS'N [NCAA], 2014-2015 NCAA DIVISION I MANUAL § 2.9 (2014) [hereinafter 2014-2015 NCAA DIVISION I MANUAL] (emphasis added).

9. *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> [http://perma.cc/J83L-MKHG] (last visited Oct. 23, 2015).

10. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 208 (1990); 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, 7 (2000).

11. See Steve Rushin, *Inside the Moat Behind the Forbidding Façade of NCAA Headquarters*, SPORTS ILLUSTRATED, Mar. 3, 1997, <http://www.si.com/vault/1997/03/03/223392/inside-the-moat-behind-the-forbidding-facade-of-ncaa-headquarters-the-very-people-who-enforce-the-organizations-rigid-rules-also-question-its-godlike-powers-and-ultimate-mission> [http://perma.cc/P44V-QSTV] (quoting former NCAA executive director Cedric Dempsey as saying that the inconsistency between paying coaches a lot and generating significant revenue, but not paying athletes, was hard to explain); Phil Taylor, *Players Have Rights, Too*, SPORTS ILLUSTRATED, Nov. 23, 1992, <http://www.si.com/vault/1992/11/23/127611/players-have-rights-too-in-a-fanciful-locker-room-showdown-college-athletes-go-to-extremes-to-get-their-due-from-the-ncaa> [http://perma.cc/9LYT-28UV] (depicting a conversation where an NCAA athlete describes unfair treatment of student-athletes).

12. Jeffrey J.R. Sundram, Note, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 544-45 (2010).

13. Laura Keeley, *A Q&A with Jay Bilas on the O'Bannon Case and the NCAA*, NEWS & OBSERVER (Aug. 7, 2013), <http://perma.cc/MW57-D5SU>.

14. *Id.*

their names, images, or likenesses.<sup>15</sup> Schools are not permitted to give student-athletes financial aid in an amount greater than a full grant-in-aid.<sup>16</sup> Additionally, the NCAA prevents an athlete from receiving outside financial aid in an amount greater than the cost of attendance.<sup>17</sup>

The discussion about whether student-athletes should receive compensation for use of their names, images, and likenesses was thrust into the national spotlight following the United States District Court for the Northern District of California's ruling in *O'Bannon v. NCAA*.<sup>18</sup> In *O'Bannon*, a group of current and former big-time NCAA Division I football and men's basketball players brought a class action suit.<sup>19</sup> The Complaint alleged that NCAA rules that restrict elite Division I football and men's basketball players' compensation violated section 1 of the Sherman Antitrust Act.<sup>20</sup> Judge Claudia Wilken, sitting for a bench trial, held that the challenged NCAA rules unreasonably restrained trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools, that the NCAA's proffered procompetitive justifications supported the restraint, but that these justifications could be achieved through less restrictive alternatives.<sup>21</sup> Judge Wilken granted an injunction that prevented the NCAA from enforcing any rules that prohibited member schools from offering Division I football and men's basketball recruits a share of the revenue generated from their names, images, and likenesses.<sup>22</sup> The injunction also prohibited the NCAA from enforcing any of its rules that prevented member schools from depositing a share of NCAA licensing revenue in trust for Division I football and men's basket-

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15. 2014-2015 NCAA DIVISION I MANUAL, *supra* note 8, § 15 (compensation for use of names, images, or likenesses not included in permitted financial aid category).

16. *Id.* (defining grant-in-aid as the cost of tuition, fees, room and board, and required course-related books).

17. *Id.* (defining cost of attendance as a grant-in-aid plus transportation, supplies, and other expenses related to attendance). Generally, the cost of attendance is a few thousand dollars more than a grant-in-aid.

18. 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

19. *See id.*

20. *Id.* at 963; *see also infra* Part I.A (discussing the Sherman Act).

21. *O'Bannon*, 7 F. Supp. 3d at 963.

22. *Id.* at 1007-08.

ball recruits.<sup>23</sup> Schools could put a limited amount of money in trust for each of their football and men's basketball student-athletes, which would be paid out to the athletes after they leave school.<sup>24</sup>

This landmark decision, which could have altered the shape of collegiate athletics, was tempered by limitations in the injunction. The injunction allowed the NCAA to continue capping the amount of money recruits receive while in school at the cost of attendance.<sup>25</sup> The injunction also allowed the NCAA to cap the amount of licensing revenue paid to an athlete in trust at \$5000 per year—in 2014 dollars.<sup>26</sup> Despite what may be described as a win for student-athletes, commentators have criticized the decision for not going far enough. Michael McCann, sports legal analyst and New Hampshire Law School professor, stated that Judge Wilken allowed the NCAA to cap player pay for reasons “not entirely clear in her opinion.”<sup>27</sup> McCann added that, “it is not readily apparent why it is unlawful for the NCAA to ‘collude’ to cap at \$0, but not at \$5000.”<sup>28</sup> Fellow law professor and sports legal analyst Marc Edelman echoed McCann's opinion in the immediate aftermath of the decision.<sup>29</sup>

Judge Wilken used antitrust law's Rule of Reason analysis to examine the NCAA's restraint on student-athlete compensation.<sup>30</sup> The Rule of Reason is the framework courts most often use to analyze restraints challenged under the Sherman Act.<sup>31</sup> Despite holding that the NCAA's limits on student-athlete compensation restrained trade within the meaning of the Sherman Act, Judge

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23. *Id.* at 1008.

24. For example, a school could promise recruits that each year \$4000 would be put in trust. After the student leaves school, he would be entitled to \$4000 multiplied by the number of years he was in school.

25. *O'Bannon*, 7 F. Supp. 3d at 1008.

26. *Id.*

27. Michael McCann, *What Ed O'Bannon's Victory over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED (Aug. 10, 2014), <http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> [<http://perma.cc/85YM-DKJL>].

28. *Id.*

29. See Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2343 (2014) (arguing the injunction implemented was “limited and weak”).

30. *O'Bannon*, 7 F. Supp. 3d at 984-85.

31. See *infra* Part I.A.

Wilken upheld the restraints—with some limitations—due to the NCAA's alleged procompetitive benefits.<sup>32</sup> When courts perform the Rule of Reason analysis, they are comparing an activity's anticompetitive effects with its procompetitive justifications. Procompetitive benefits, when accepted by the court, justify a restraint that would otherwise violate the Sherman Act as an unreasonable restraint on trade.<sup>33</sup> This Note focuses on Judge Wilken's holding that the restraints on student-athlete compensation were justified in part on grounds that they improved the integration of athletics and academics.<sup>34</sup> Judge Wilken undoubtedly held that the NCAA restrained trade as defined by section 1 of the Sherman Act. She also held, however, that integrating student-athletes into the broader campus—thereby improving the academic product student-athletes receive—was a procompetitive justification for the restraint.

The purpose of this Note is to argue that improving education quality for student-athletes is not a procompetitive justification for restraining trade, and thus Judge Wilken should have overruled the NCAA's limitations on pay in their entirety *as to this procompetitive justification* and allowed schools to compensate athletes for their names, images, and likenesses. Part I of this Note outlines the relevant antitrust framework, and describes how the Supreme Court has applied that framework to the NCAA in the past. Part I concludes with the relevant portions of Judge Wilken's ruling in *O'Bannon*. Part II describes the analysis courts apply when determining whether a given restraint is justified by its procompetitive benefits. Part II then analyzes how the Supreme Court has applied that analysis to procompetitive claims similar to what the NCAA

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32. See *infra* Part I.B.2-3.

33. See *infra* Part II.A.

34. *O'Bannon*, 7 F. Supp. 3d at 1008. Judge Wilken also ruled that increased fan interest and demand for amateur collegiate athletics is a procompetitive justification for the restraint. Although beyond the scope of this Note, past legal analyses suggest that this procompetitive justification also fails. See Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 82 n.178 (2006) (noting that the NCAA has never proven that fans care about amateurism); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2659 (1996) (arguing that with widespread academic fraud and illicit booster payments, it is unlikely any college athletics fan truly believes they are watching "normal" students compete). There are ongoing lawsuits that seek both to bar any restraint on student-athlete compensation and to attack this idea of amateurism. See *infra* notes 243-52 and accompanying text.

argued in *O'Bannon*—namely that the restraint is necessary to improve product quality. Part III applies the framework established in Parts I and II to Judge Wilken's determination that an improved educational product is a procompetitive benefit that justifies the challenged restraints on trade. This Note then concludes by briefly describing what this analysis means for the NCAA moving forward. Because Judge Wilken held that maintaining amateurism is also a procompetitive benefit, this analysis will not be outcome determinative in any future student-athlete compensation cases. Nevertheless, it strikes at one of two accepted NCAA defenses in the *O'Bannon* case and leaves the NCAA open to future antitrust challenges. Multiple such challenges are already pending, and legal attacks on currently accepted NCAA defenses threaten the current NCAA structure.

## I. ANTITRUST FRAMEWORK AND THE NCAA

### A. Antitrust Framework

Section 1 of the Sherman Act makes illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”<sup>35</sup> To prevail on a § 1 claim, a plaintiff must show (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under the per se rule of illegality<sup>36</sup> or the Rule of Reason analysis;<sup>37</sup> and (3) that the agreement affected interstate commerce.<sup>38</sup> For purposes of the *O'Bannon* case, elements one and three were satisfied and were not at issue. The NCAA bylaws were a clear agreement that restricted the amount of financial aid and money a student-athlete could receive,<sup>39</sup> and NCAA Division I collegiate athletics so clearly affected interstate commerce that the point did not warrant further

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35. 15 U.S.C. § 1 (2012).

36. See *infra* Part I.A.1 for an explanation of what actions are illegal per se.

37. See *infra* Part I.A.2 for an explanation of how courts apply Rule of Reason analysis.

38. 15 U.S.C. § 1; *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

39. *O'Bannon*, 7 F. Supp. 3d at 985.

discussion.<sup>40</sup> The court was left to determine if the restraints were reasonable under the appropriate § 1 analysis.

### 1. *Per Se Rule of Illegality*

The plaintiffs in *O'Bannon* alleged that the NCAA and member institutions had engaged in price-fixing by charging every recruit the same price for educational and athletic opportunities.<sup>41</sup> Historically, the Supreme Court “consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”<sup>42</sup> In practical terms, if parties agree to fix prices, they have violated the Sherman Act; the Court will not conduct any further examination into their motives or explanations.<sup>43</sup> For analysis purposes, price-fixing does not require the parties to agree to a rigid, uniform price.<sup>44</sup> An agreement to raise or lower prices, no matter what “machinery” was used, is illegal.<sup>45</sup> Although the per se analysis has historically been the Court’s approach to handling price-fixing restraints, the Court has slowly relaxed the assumption that all restraints that violate perfect competition—such as price-fixing—are per se unreasonable and has begun to apply the Rule of Reason analysis more frequently.<sup>46</sup>

### 2. *Rule of Reason Analysis*

A restraint violates the Rule of Reason if its anticompetitive harm is greater than its procompetitive benefits.<sup>47</sup> Typically, courts rely on a burden-shifting framework to conduct the Rule of Reason

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40. *Id.*

41. *Id.* at 988.

42. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

43. *E.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958).

44. *Socony-Vacuum Oil Co.*, 310 U.S. at 222.

45. *Id.*

46. *See infra* Part II.A.

47. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113-15 (1984) (analyzing whether the NCAA’s procompetitive justification offsets the restraint’s anticompetitive harm); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

analysis.<sup>48</sup> In order to show a violation of section 1 of the Sherman Act, the plaintiff must prove that the defendant restrained trade in the relevant market.<sup>49</sup> The relevant market in § 1 cases includes “notions of geography as well as product use, quality, and description.”<sup>50</sup> The “outer boundaries” of a market are defined by the interchangeability and price-elasticity of demand between the product and its potential substitutes.<sup>51</sup> The plaintiff must show that the restraint produces actual negative effects in that market—the mere existence of a restraint is insufficient evidence of harm.<sup>52</sup> Showing anticompetitive effects establishes a prima facie antitrust case.<sup>53</sup> If the plaintiff succeeds in showing that the alleged conduct restrains trade in the relevant market, the defendant has to prove the restraint produces cognizable procompetitive benefits.<sup>54</sup> On the outside chance the case makes it this far,<sup>55</sup> the court will then balance the restraint’s anticompetitive effects with its procompetitive

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48. See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268 [hereinafter Carrier, *Bridging the Disconnect*] (finding that many courts engage in a burden-shifting analysis before balancing a restraint’s procompetitive and anticompetitive effects); Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828 (2009) (finding that the burden-shifting framework has become even more popular since his earlier article).

49. Some courts also require a showing of market power. See *Bhan*, 929 F.2d at 1413 (holding ordinarily a plaintiff must show restraint in the relevant market *and* that the defendant has enough control in the market to negatively affect competition). However, most lower courts do not. See Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 101-05 (noting that a dwindling number of lower courts, led by the Seventh Circuit, require a showing of market power and that instead showing that the restraint actually restrains trade in the relevant market is sufficient).

50. *Tanaka*, 252 F.3d at 1063.

51. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Newcal Indus., Inc. v. Ikon Office Sols.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

52. See *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (holding that evidence that could be consistent with procompetitive and anticompetitive goals is not enough to support an inference of anticompetitive conduct); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (stating that plaintiff must satisfy burden by showing actual anticompetitive effects).

53. Meese, *supra* note 49, at 100.

54. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 459-60 (1986); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996).

55. Carrier, *Bridging the Disconnect*, *supra* note 48, at 1269 (stating that only 4 percent of antitrust cases from 1977-1999 made it past the prima facie case).

justifications.<sup>56</sup> Finally, if the defendant can successfully show that the restraint's benefits outweigh its harms, the plaintiff has a chance to show there are less restrictive means available to achieve those benefits that are: (1) substantially less restrictive; (2) nearly as effective in serving the procompetitive benefit; and (3) able to achieve these effects without significantly increasing the defendant's costs.<sup>57</sup> Even if the court determines that the restraint's benefits outweigh its harms, if the court also finds that there is a less restrictive alternative, then the challenged restraint violates section 1 of the Sherman Act.

### 3. Rule of Reason Analysis and Joint Ventures

A joint venture is one context where the Supreme Court has recognized that restraints on trade may be reasonable, thus applying the Rule of Reason analysis as opposed to the per se approach. Joint ventures necessarily involve agreement between members; courts are therefore willing to give deference to restraints adopted so the venture can exist, based on the theory that the presence of some restraints is economically better than not having the joint venture at all. The Court first treated joint ventures differently than traditional businesses in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*<sup>58</sup> The Court held that “[j]oint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.”<sup>59</sup> The licenses in question

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56. See *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417 (5th Cir. 2010); *Int'l Healthcare Mgmt. v. Haw. Coal. for Health*, 332 F.3d 600, 607 n.6 (9th Cir. 2003); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143 (3d Cir. 2001); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 760-61 (2012). But see William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, 22 ANTITRUST 85, 87 (2008) (noting that courts almost never explicitly balance procompetitive and anticompetitive effects because the balancing occurs at each step of the analysis); Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 120 (1996) (stating courts often do not explicitly balance procompetitive benefits but “scrutinize such an assertion by means of a less restrictive alternative test”).

57. *City of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001); *Law*, 134 F.3d at 1019; *Hairston*, 101 F.3d at 1319; *Brown Univ.*, 5 F.3d at 679.

58. 441 U.S. 1, 23 (1979).

59. *Id.*

were not per se legal, but were at least subject to the Rule of Reason.<sup>60</sup>

The Supreme Court applied the *Broadcast Music* decision to collegiate sports in the 1984 case *NCAA v. Board of Regents of the University of Oklahoma*.<sup>61</sup> The Board of Regents claimed that the NCAA had violated section 1 of the Sherman Act with its television contracts for broadcasting collegiate football games.<sup>62</sup> The NCAA's four-year plan awarded CBS and ABC the exclusive right to negotiate and contract to televise NCAA football.<sup>63</sup> The plan included stipulations about the maximum number of games that the networks could broadcast, appearance requirements, and appearance limitations for each two-year period of the contract.<sup>64</sup> Although the broadcasting networks were allowed to negotiate directly with member schools for the right to broadcast their games, the plan stipulated the minimum amount the companies had to spend on all broadcasts in a given year.<sup>65</sup> The district court found that the minimum aggregate price operated "to preclude any price negotiation between broadcasters and institutions."<sup>66</sup>

The district court held that the control the NCAA exercised "over the televising of college football games violated the Sherman Act."<sup>67</sup> The court said, "the [NCAA] has established a uniform price for the products of each of the member producers with no regard for the differing quality of these products or the consumer demand for these various products."<sup>68</sup> At the appellate level, the court of appeals held "the television plan constituted illegal per se price-fixing."<sup>69</sup>

On appeal, the Supreme Court noted that price-fixing was "ordinarily condemned as a matter of law" under the per se approach.<sup>70</sup> The Court, however, held that the per se rule was not applicable because the case involved an industry in which some horizontal

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60. *Id.* at 24-25.

61. 468 U.S. 85, 100 (1984).

62. *Id.* at 88.

63. *Id.* at 92.

64. *Id.* at 94.

65. *Id.* at 93.

66. *Id.* at 99-100.

67. *Id.* at 95.

68. *Id.* at 96.

69. *Id.* at 97.

70. *Id.* at 100.

restraints on competition were essential to make the product available at all.<sup>71</sup> The Court found that the NCAA and member institutions market amateur athletics, and that the “integrity of the product” could “not be preserved except by mutual agreement” between member institutions to preserve this amateurism.<sup>72</sup> By applying the Rule of Reason, the Court extended *Broadcast Music*.<sup>73</sup> According to the Court, certain joint selling arrangements are so efficient that they are actually procompetitive, and thus *all* restraints in those ventures should be subject to the Rule of Reason.<sup>74</sup>

Although the NCAA eventually lost in *Board of Regents*, the case has largely acted to protect the NCAA from subsequent antitrust attacks. First, *any* NCAA rule that restrained trade was thereafter subject to the Rule of Reason analysis.<sup>75</sup> Second, in his description of why the NCAA might need rules that otherwise horizontally restrain trade, Justice Stevens explained, “[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. And the integrity of the ‘product’ cannot be preserved except by mutual agreement.”<sup>76</sup> In his conclusion, Justice Stevens added that “[t]he NCAA plays a critical role” in the preservation of amateur athletics, “that it needs ample latitude” to do so, and that intercollegiate athletics are consistent with the Sherman Act.<sup>77</sup> Despite the fact that Justice Stevens’s comments on compensation were mere dicta, the NCAA and federal courts in subsequent cases interpreted those statements to mean that NCAA bylaws are generally procompetitive, and that the NCAA could legally restrain student-athlete compensation.<sup>78</sup>

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71. *Id.* at 101.

72. *See id.* at 102.

73. *See id.* at 103.

74. *See id.* at 103-04; *see also* 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1910d (3d ed. 2011) (“In sum, in a situation involving a complex network joint venture where horizontal restraints are necessary if the product is to be marketed ‘at all,’ *every* restraint created by that venture qualifies for rule of reason treatment.”).

75. 11 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1910d.

76. *Bd. of Regents*, 468 U.S. at 102 (emphasis added).

77. *Id.* at 120.

78. *See Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (holding Sherman Act applies to NCAA bylaws, but that *NCAA v. Board of Regents* implies most are justifiable as fostering amateur competition); *Banks v. NCAA*, 977 F.2d 1081, 1089 (7th Cir. 1992) (“[M]ost of the regulatory controls of the NCAA [are] a justifiable means of fostering competition among the

Justice Stevens's dicta and lower court decisions notwithstanding, there is no per se rule of legality for NCAA restraints on compensation, and Judge Wilken analyzed the restraints under the Rule of Reason as the *Board of Regents* ruling necessitated.

### B. *O'Bannon v. NCAA*

This Section gives a brief introduction to the *O'Bannon* case, and then analyzes the portion of the opinion relevant to the holding that improved education quality is a procompetitive justification for the restraint.<sup>79</sup>

#### 1. Background

On July 21, 2009, twelve former NCAA Division I football and men's basketball student-athletes, led by former UCLA basketball star Ed O'Bannon, filed an initial Complaint against the NCAA.<sup>80</sup> The Complaint alleged that the NCAA violated federal antitrust law "by engaging in a price-fixing conspiracy and a group boycott/refusal to deal that has unlawfully foreclosed class members from receiving compensation in connection with the commercial exploitation of their images following their cessation of intercollegiate athletic competition."<sup>81</sup> The plaintiffs brought the Complaint on behalf of all current and former student-athletes.<sup>82</sup> The original twelve former athletes eventually added current student-athletes to the Complaint as the court demanded.<sup>83</sup> As the case evolved throughout the litiga-

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amateur athletic teams and therefore are procompetitive." (quoting *Bd. of Regents*, 468 U.S. at 117)); *McCormack v. NCAA*, 845 F.2d 1338, 1343-45 (5th Cir. 1988) (holding NCAA eligibility rules limiting compensation reasonable (citing *Bd. of Regents*, 468 U.S. at 102)); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1148 (W.D. Wash. 2005) ("The law is clear that athletes may not be 'paid to play.'"); Roberts, *supra* note 34, at 2654 (stating that the NCAA argues preserving amateurism as a procompetitive justification because the Supreme Court said so in *NCAA v. Board of Regents*).

79. The Ninth Circuit recently issued its ruling on the NCAA's appeal of Judge Wilken's decision. See *O'Bannon v. NCAA*, No. 14-16601, 2015 WL 5712106 (9th Cir. Sept. 30, 2015).

80. Class Action Complaint at paras. 1-2, *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. C 09-3329 CW), 2009 WL 2416720.

81. *Id.*

82. *Id.* at para. 1.

83. Third Consolidated Amended Class Action Complaint at para. 1, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (No. C 09-01967

tion process,<sup>84</sup> the plaintiffs eventually sought to challenge NCAA rules that prohibited current and former student-athletes from receiving a portion of the revenue created by the sale of their names, images, and likenesses.<sup>85</sup> The plaintiffs argued that these rules violated section 1 of the Sherman Act, and it was that charge that Judge Wilken decided.<sup>86</sup>

## 2. *Relevant Portions of the O'Bannon Ruling*

Judge Wilken held that the plaintiffs provided sufficient evidence to establish a national market where NCAA Division I schools sold unique goods and services to football and men's basketball recruits.<sup>87</sup> Because Division I football and men's basketball schools operated in a distinct market, Judge Wilken held that they had the power to fix the price of their product.<sup>88</sup> Under the challenged restraints, the schools exercised that power by agreeing to charge every recruit the same price for the educational and athletic opportunities they offered.<sup>89</sup> According to Judge Wilken, this price-fixing constituted a clear restraint on trade, and it did not matter that the price-fixing agreement operated to undervalue the names, images, and likenesses of the student-athletes as opposed to determining a specific monetary price for their services.<sup>90</sup> Judge Wilken further held, in the alternative, that the NCAA and member institutions could be considered buyers in a market for recruits' athletic services and licensing rights.<sup>91</sup> As a result, the NCAA and member institu-

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CW), 2013 WL 3810438.

84. For a more in-depth analysis of the procedural history of this case, including its consolidation with another NCAA right of publicity case, see Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1033-36 (2014).

85. See *O'Bannon* 7 F. Supp. 3d at 963; Third Consolidated Amended Class Action Complaint, *supra* note 83 (alleging NCAA and member institutions engaged in a conspiracy to "fix the amount current and former student-athletes are paid for the licensing, use, and sale of their names, images, and likenesses at zero").

86. *O'Bannon*, 7 F. Supp. 3d at 963.

87. *Id.* at 986-88.

88. *Id.* at 988.

89. *Id.*

90. *Id.* at 989.

91. *Id.* at 991.

tions had fixed prices among buyers, just as illegal a method of price-fixing as price-fixing among sellers.<sup>92</sup>

The NCAA raised four procompetitive justifications for the price-fixing restraint: amateurism, competitive balance, integration of academics and athletics, and increased output.<sup>93</sup> Judge Wilken flatly rejected the arguments that restraints on student-athlete compensation increased competitive balance and output of collegiate athletics.<sup>94</sup> She did, however, hold that restraints on player compensation might increase fan interest and may thus be considered procompetitive.<sup>95</sup> She held that fans associated college athletics with amateurism, and increased fan interest might justify the challenged restraints.<sup>96</sup> Judge Wilken also noted that the challenged rules might “facilitate the integration of academics and athletics by preventing student-athletes from being cut off from the broader campus community.”<sup>97</sup>

### *3. Improved Academic Quality*

This Note addresses the NCAA’s claim that restraining student-athlete compensation helps promote the integration of academics and athletics, and that doing so improves the quality of education NCAA member institutions provide their student-athletes.<sup>98</sup> The NCAA alleged that student-athletes received short- and long-term benefits from being student-athletes, and that student-athletes’ graduation rates showed the substantial benefit athletes received.<sup>99</sup> Judge Wilken noted, however, that those benefits came from student-athletes’ access to “financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the challenged restraints in this case.”<sup>100</sup> Those

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92. *Id.* at 991-93.

93. *Id.* at 999.

94. *Id.* at 1001-04.

95. *Id.* at 1000-01.

96. *Id.* As indicated, this Note does not address Judge Wilken’s holding that amateurism is a procompetitive justification.

97. *Id.* at 1003.

98. *Id.* at 979.

99. *Id.* at 979-80.

100. *Id.* at 980.

benefits would still accrue as long as schools continued to provide those services.

The NCAA further alleged that the challenged restraint helped integrate student-athletes into the student body as a whole, and that paying them large sums of money would “create a wedge” between student-athletes and the other students and professors.<sup>101</sup> The NCAA argued that, if compensated, student-athletes would separate themselves from the campus and lose out on the benefit of interacting with classmates and professors in an academic and social setting, thus reducing the quality of their education.<sup>102</sup> Again, Judge Wilken held that the proffered benefit was better achieved through restraints other than the ones at issue.<sup>103</sup> Rules that forbade member institutions from creating athlete-specific dorms and rules that required student-athletes to attend class were better at integrating student-athletes than restraints on compensation.<sup>104</sup> Only towards the end of the section did Judge Wilken hold, “Nonetheless, the Court finds that certain limited restrictions on student-athlete compensation may help to integrate student-athletes into the academic communities of their schools, which may in turn improve the schools’ college education product.”

Later in the opinion, Judge Wilken again addressed improving education quality as a procompetitive justification for the restraint.<sup>105</sup> Judge Wilken continued the discussion and analysis as though the alleged procompetitive benefit did not justify the challenged restraints.<sup>106</sup> Despite all of the evidence the NCAA provided that integrating student-athletes into the academic communities at their school improved the educational “product” student-athletes receive, Judge Wilken held to her determination that the challenged restraints were irrelevant for those purposes.<sup>107</sup> A ruling for the plaintiffs on the issue seemed forthcoming when Judge Wilken stated:

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 1002-03.

106. *Id.*

107. *Id.* at 1003.

[T]he NCAA has not shown that the specific restraints challenged in this case are necessary to achieve these benefits. Indeed, student-athletes would receive many of the same educational benefits described above regardless of whether or not the NCAA permitted them to receive compensation for the use of their names, images, and likenesses.<sup>108</sup>

She held that athlete integration was satisfied by requiring student-athletes to attend class and maintain certain academic qualifications, and that student-athlete academic success would continue as long as schools continued to provide academic support.<sup>109</sup>

Judge Wilken tempered her opinion, however, and held that some limited restriction on student-athlete compensation may be needed to prevent student-athletes from cutting themselves off from the rest of campus.<sup>110</sup> Ultimately, Judge Wilken issued an injunction prohibiting enforcement of the challenged restrictions, with caveats. Schools could increase what they paid student-athletes each year, up to the cost of attendance.<sup>111</sup> Moreover, schools could put up money in trust annually for each student-athlete, which they would receive after leaving school, up to \$5000 annually.<sup>112</sup> These limitations appear to be aimed at the narrow procompetitive benefit Judge Wilken recognized.<sup>113</sup> If student-athletes are paid only a few extra thousand dollars a year in addition to their scholarships, that would not be enough to cut them off from campus, according to Judge Wilken's logic. Additionally, any amount paid over that would be held in trust and not accessible until after graduation, preventing student-athletes from using the money while in school to separate

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108. *Id.*

109. *Id.*

110. *Id.* ("As found above, the only way in which the challenged rules might facilitate the integration of academics and athletics is by preventing student-athletes from being cut off from the broader campus community. Limited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal.")

111. *Id.* at 1007-08.

112. *Id.*

113. *Id.* at 1008. The injunction also did not prohibit the NCAA from enforcing rules that would prevent the student-athlete from borrowing money against the amount held in trust. *Id.* Judge Wilken stated the purpose for this was "to ensure the NCAA may achieve its goal of integrating academics and athletics." *Id.*

themselves from campus.<sup>114</sup> These were the less restrictive means for obtaining the NCAA's benefits without completely restraining competition.

## II. PROCOMPETITIVE BENEFIT ANALYSIS

The analysis from here forward accepts the position that the *O'Bannon* court was correct in determining the plaintiffs established a prima facie Sherman Act section 1 case. The existence of market power, a restraint, and anticompetitive effects of the restraint were well established. This Part analyzes what makes a justification procompetitive, and compares that standard to Judge Wilken's decision to hold that improved educational quality is a procompetitive benefit.

### A. Procompetitive Framework

The goal of antitrust law is not to "condemn collaborations producing socially desirable results."<sup>115</sup> The express language of section 1 of the Sherman Act condemns "[e]very contract ... in restraint of trade or commerce among the several States."<sup>116</sup> Every single contract between parties restrains trade to some extent.<sup>117</sup> In spite of the absolute language used in the statute, in each antitrust case the court must determine whether the effects of a contract "cause it to be a restraint of trade within the 'intendment' of the act."<sup>118</sup> The test of legality within the statute "is whether the

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114. *Id.* Judge Wilken compared the amount held in trust to the value of a Pell Grant, a stipend student-athletes in financial need may receive. *Id.* If there were no concerns about the value of the Pell Grant, there should not be any about the \$5000 held in trust. *Id.*

115. 7 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1504a.

116. 15 U.S.C. § 1 (2012).

117. *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 568 (1898) ("[T]he act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly restrain it." (quoting *Hopkins v. United States*, 171 U.S. 578, 600 (1898))).

118. *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911); *see id.* at 60 ("The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Id.* at 60

restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”<sup>119</sup> As the court did in *O’Bannon*, courts applying the Rule of Reason consider the defendant’s claim that the alleged restraint serves a legitimate end and promotes competition.<sup>120</sup> The issue that courts face, then, is determining what restraints promote competition and are thus legitimate under the Act.<sup>121</sup>

The Court in *Standard Oil*—the case that established the Rule of Reason<sup>122</sup>—stated that that the prohibition on unreasonable restraints was aimed at preventing monopolies or monopoly-like consequences.<sup>123</sup> The consequences of monopolies are restricted output, increased prices, or reduced product quality.<sup>124</sup> These consequences were deemed bad for the welfare of consumers and were the primary aim of the Act.<sup>125</sup> Economists and courts believed that free markets were better for consumer welfare than markets in which competitors had colluded, vertically or horizontally, to fix price, output, or quality.<sup>126</sup> From about 1940 to 1978, courts relied on this economic paradigm, which led to what scholars have called

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(emphasis added); see also *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1982) (“[A]s we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.”).

119. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

120. 7 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1504a; see *supra* notes 105-14 and accompanying text.

121. 7 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1504a.

122. Meese, *supra* note 49, at 84.

123. *Standard Oil*, 221 U.S. at 57.

124. *Id.* at 52; see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 13 (3d ed. 2005) (stating that the monopolist produces at a lower rate and charges a higher price than a perfect competitor would in the same market).

125. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (“My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement ... only that value we would today call consumer welfare.”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2 (1984) (arguing that monopolies are self-destructive in the long run and thus the negative impact of monopolies reduces over time, but that the goal of antitrust is to speed up the process).

126. Meese, *supra* note 49, at 102. Meese argues that for decades, courts adopted an economic paradigm called price theory, which rested upon several incorrect assumptions—mainly that market transactions were costless, and as a result, nonstandard contracts had no apparent efficiency purposes. Many nonstandard contracts, therefore, were held as anticompetitive attempts to create, protect, or exercise monopoly power and were thus unreasonable restraints on trade. *Id.*

antitrust's "inhospitality tradition."<sup>127</sup> Belief in the unconstrained market during this period led the Court to condemn many nonstandard contracts as limiting competition regardless of their actual effects, which may have been to improve competition.<sup>128</sup>

Completely relying on the unconstrained free market to increase consumer welfare, however, often results in market failure, defined as an inefficient allocation of resources caused by transaction costs.<sup>129</sup> The idea that uninhibited, perfect competition will always provide an efficient allocation of resources rests on assumptions of perfect competition that do not hold true in reality.<sup>130</sup> In the face of transaction costs that cause market failures,<sup>131</sup> inefficiencies can be solved by contracts that would otherwise appear to be prima facie anticompetitive.<sup>132</sup> Economists commonly assume that nonstandard contracts can reduce the cost of transacting, thus negating the market failures that transaction costs create and improving competition.<sup>133</sup> Relying on markets in these situations would have

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127. Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Distorts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1322-23 (2013); see also Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982) ("In [the inhospitality tradition] an inference of monopolization followed from the courts' inability to grasp how a practice might be consistent with substantial competition.").

128. See *supra* notes 126-27; see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("[T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.").

129. See Alan J. Meese, *Competition and Market Failure in the Antitrust Jurisprudence of Justice Stevens*, 74 FORDHAM L. REV. 1775, 1783 (2006) (arguing that because transaction costs exist in real life, relying on "unconstrained 'spot' markets to allocate resources will often result in 'market failure'—that is, an allocation of resources that is less than optimal").

130. See Easterbrook, *supra* note 125, at 1 ("[T]he picture of 'perfect competition' found in economic texts, is a hypothetical construct."); Meese, *supra* note 129, at 1783 ("[I]n the 'real world,' without contractual integration, numerous assumptions of the perfect competition model simply do not obtain."); *supra* notes 126-27.

131. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (arguing that there would be no inefficient allocation of resources absent transaction costs because parties would transact until they allocated resources efficiently).

132. See Meese, *supra* note 49, at 82; Meese, *supra* note 129, at 1784; see also Easterbrook, *supra* note 125, at 4 (arguing that "cooperation is the source of monopoly," but it "is also the engine of efficiency").

133. Alan J. Meese, *Market Failure and Non-Standard Contracting: How the Ghost of Perfect Competition Still Haunts Antitrust*, 1 J. COMP. L. & ECON. 21, 40-41 (2005).

a negative impact on competition, and antitrust scholars recognize that nonstandard contracts can actually be procompetitive.<sup>134</sup>

The Supreme Court has applied this principle in several cases—*NCAA v. Board of Regents*,<sup>135</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,<sup>136</sup> and *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>137</sup>—and has altered how it treats once per se unlawful restraints.<sup>138</sup> When the analysis of a restraint is centered on any market inefficiencies the restraint might correct, there is no distinction between a procompetitive justification and a restraint that is reasonable.<sup>139</sup> As soon as the defendant provides proof that the restraint corrects a market failure, the restraint should be deemed procompetitive because it moves market performance closer to where it would be absent transaction costs.<sup>140</sup> In other words, the procompetitive conduct moves market performance closer to the economic ideal. When restraints eliminate or mitigate a market failure, the allocation of resources is more efficient than what a “perfectly competitive” market would produce, improving consumer

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134. *Id.* Note that rather than explicitly recognizing that nonstandard contracts can reduce market failure, most antitrust scholars recognize that principle by refraining from using the per se analysis and arguing that non-standard contracts should be analyzed under the Rule of Reason. *Id.* at 87-89.

135. 468 U.S. 85, 101 (1984) (holding that some horizontal restraints would be necessary to correct market inefficiency, namely that the product would not exist without the restraints). See generally Meese, *supra* note 133, at 28 (“The Court’s refusal to apply the *per se* rule in *NCAA* seems to reflect a nascent recognition that some horizontal restrictions on rivalry can overcome failures and thus enhance the results of overall competition.”).

136. 441 U.S. 1, 20-23 (1979) (stating that the horizontal restraint enhanced the total volume of the music that was sold and that the blanket license at issue substantially lowered costs). The Court recognized a market failure when it said the restraints “made a market in which individual composers are inherently unable to compete fully effectively.” *Id.* at 22-23. See generally HOVENKAMP, *supra* note 124 (“The blanket license arrangement [in *BMI*] saved untold millions of dollars in transaction costs.”).

137. 433 U.S. 36 (1978) (holding that manufacturer restrictions on dealer territories were procompetitive because they reduced the market failure problem of free riding on advertising expenditures of other dealers).

138. See generally Meese, *supra* note 49, at 141-43; see also Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 77 (2010) (“More recently, the Court has explained the purpose of antitrust laws is to correct market failures.” (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993))).

139. See Meese, *supra* note 49, at 161-67 (“[T]here is no reason to weigh benefits against anticompetitive harm, since the very existence of such benefits undermines any presumption of harm.”).

140. *Id.*

welfare. The result is therefore reasonable under the policy of the Sherman Act.

*B. Product Quality and National Society of Professional Engineers*

The market failure alleged in *O'Bannon* is that left to their own devices, schools would compete for student-athletes by compensating them for use of their names, images, and likenesses. The NCAA claims this extra compensation would result in student-athletes disassociating from the rest of campus, thus decreasing education quality.<sup>141</sup> The challenged restraints, then, prevent schools from paying student-athletes, which in turn keeps athletes from separating themselves from campus and increases education quality.<sup>142</sup> In other words, unconstrained competition would reduce product quality. The Supreme Court's decision in *National Society of Professional Engineers v. United States*<sup>143</sup> strongly suggests, however, that increased product quality in this situation is *not* a procompetitive justification for a restraint that otherwise violates the Sherman Act.<sup>144</sup> *Engineers* involved an agreement similar to the one at issue in *O'Bannon*<sup>145</sup> in that a horizontal agreement negated price competition among competitors.<sup>146</sup> The National Society of Professional Engineers (NSPE) agreed to refuse to negotiate or discuss the price of its members' work until after the client had chosen the engineer to work on the job.<sup>147</sup> The complaint alleged that this suppressed price competition because customers had been deprived of free and open competition.<sup>148</sup> Rather than deny the agreement existed, the

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141. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 979-81 (N.D. Cal. 2014).

142. *Id.*

143. 435 U.S. 679 (1978).

144. This is not to say that increased product quality is *never* a procompetitive benefit. See *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) (stating that the Court in *NCAA v. Board of Regents* recognized improved product quality as a procompetitive virtue *when it increases the public's desire for the product*).

145. See *supra* notes 88-92 and accompanying text.

146. Compare *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 682-84 (noting that this was not a specific price-fixing claim, but rather a refusal to negotiate that eliminated price competition), with *O'Bannon*, 7 F. Supp. 3d at 991-98. Antitrust scholars state that this restraint looks "very much like price fixing." 7 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1504c.

147. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 682-83.

148. *Id.* at 684.

NSPE raised the affirmative defense that the restraint had the pro-competitive benefit of increasing engineering quality.<sup>149</sup> The NSPE alleged that competitive bidding pushed engineers to decrease their prices to win bids, thus incentivizing them to decrease the quality of their work in order to continually outbid their competition.<sup>150</sup>

The Court disagreed with the defendant's argument that increased product quality in this situation was a procompetitive justification within the Sherman Act framework.<sup>151</sup> The Court stated that the Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."<sup>152</sup> The policy is based on the assumption that competition and the free market are the best methods of allocating resources, and that the free market recognizes all elements in a deal—quality, service, safety, and durability—in addition to cost.<sup>153</sup> The Court rejected the quality claim on grounds it was illegitimate and inconsistent with the policy of the Sherman Act.<sup>154</sup> The Act "expresses great hostility, at least in the case of serious restraints, to claimed benefits other than those that move us closer to competitive results."<sup>155</sup> The purpose of all antitrust analysis "is to form a judgment about the competitive significance of the restraint."<sup>156</sup> To justify a restraint on the basis of a potential threat to product quality and public safety would be "nothing less than a frontal assault on the basic policy of the Sherman Act."<sup>157</sup>

In *Engineers*, parties to the transaction could internalize the decision about product quality and thus no restraint on trade was needed to correct a market failure. The Court agreed that competitive bidding might drive some engineers to produce a defective product.<sup>158</sup> The Court added, however, that a purchaser of engineering services had the ability to conclude for itself that in the

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149. *Id.* at 685.

150. *Id.*

151. *Id.* at 694 ("[T]his Court has never accepted such an argument.").

152. *Id.* at 695.

153. *Id.*

154. 7 AREEDA & HOVENKAMP, *supra* note 74, ¶ 1504c.

155. *Id.*

156. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692.

157. *Id.* at 694-95.

158. *Id.* at 694.

interest of quality it would not pit bidders against each other.<sup>159</sup> Additionally, the engineer could refrain from negotiating until it was sure all of its customers' required standards were met.<sup>160</sup>

Improved product quality would justify a restraint on trade so long as the restraint corrected a market failure that was causing reduced product quality in some way. Where there is no market failure, actors cannot justify an otherwise unlawful restraint by claiming it improves product quality. The Court has clearly held that such a restraint restricts competition and is inconsistent with the policy of the Sherman Act.

### C. Engineers and Its Progeny

The Court has relied on its decision in *Engineers* in other situations involving horizontal restraints that limit competition. In *FTC v. Indiana Federation of Dentists (IFD)*, dentists in the Federation agreed to refuse to supply insurance companies with X-rays taken of their patients.<sup>161</sup> Insurance agencies, at the demand of policyholders, attempted to limit the cost of dental treatment by limiting coverage to the "least expensive yet adequate treatment."<sup>162</sup> The insurance agencies used X-rays to determine whether the treatment the dentist pursued was appropriate.<sup>163</sup> The Federation formed in response to demands for the X-rays by insurance companies, and promulgated a rule that forbade its members from submitting X-rays to insurance agencies.<sup>164</sup> The Court determined that there was a restraint of trade, and that it had actual negative effects on the competition between dentists.<sup>165</sup> One of the Federation's procompetitive justifications was that overturning the rule would have a negative impact on the quality of dental care.<sup>166</sup> The dentists argued that X-rays alone were not enough to determine what treatment should be pursued, and if insurance agencies relied on the X-rays,

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159. *Id.*

160. *Id.*; see also Meese, *supra* note 129, at 1788-89 ("[C]onsumers in a competitive market could presumably perform their own assessment of any trade-off between price and quality.").

161. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 449-51 (1986).

162. *Id.* at 449.

163. *Id.*

164. *Id.* at 449-51.

165. *Id.* at 455-57.

166. *Id.* at 462.

they might decline to pay for treatment that the patients actually needed, thus reducing the quality of care.<sup>167</sup>

The Court expressly rejected this argument, invoking its decision in *Engineers*.<sup>168</sup> The Court stated, “[t]he argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices.”<sup>169</sup> Quoting *Engineers*, the Court concluded that such an argument was a “frontal assault” on Sherman Act policy.<sup>170</sup> Absent the restraint, the dentists in the Federation could make the determination about service quality and the demands of their clients for themselves.<sup>171</sup> If clients wanted the cheapest care possible, dentists would respond by providing the X-rays to the insurance companies. If clients desired the best care possible, the dentists could refuse to turn over the X-rays. The public safety (improved product quality) justifications in *Engineers* and *IFD* were based on the “faulty premise that consumer choices made under competitive market conditions are ‘unwise’ or ‘dangerous,’” and the Court did not recognize them as procompetitive justifications under the Sherman Act.<sup>172</sup>

The Court again held that improved product quality is not a procompetitive justification in *FTC v. Superior Court Trial Lawyers Ass’n*.<sup>173</sup> In the case, court-appointed attorneys in Washington, D.C., boycotted taking new cases until they received a wage increase.<sup>174</sup> The lawyers eventually received the desired wage increase, but the Federal Trade Commission (FTC) filed a complaint alleging that the lawyers had violated the Sherman Act.<sup>175</sup> The Administrative Law Judge, the FTC, and the Court of Appeals all agreed that the lawyers had restrained trade within the meaning of section 1 of the Sherman Act.<sup>176</sup> The lawyers defended their position by arguing that

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167. *Id.* at 462-63.

168. *Id.* at 463.

169. *Id.*

170. *Id.*

171. *See supra* notes 158-60 and accompanying text.

172. *United States v. Brown Univ.*, 5 F.3d 658, 677 (3d Cir. 1993).

173. *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990).

174. *Id.* at 416-17.

175. *Id.* at 418-19.

176. *Id.* at 422.

the increased wages would improve the quality of representation provided to indigent defendants.<sup>177</sup>

Just as the Court in *Engineers* conceded that reducing price competition might increase the product quality, here the Court held that increased wages may improve the quality of representation.<sup>178</sup> The Court, however, quoting *Engineers*, held that “the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.”<sup>179</sup> Quality, service, safety, and durability are all favorably improved by the opportunity to select among different offers, which was no less true for legal services than it was for engineering.<sup>180</sup>

Restraints must correct a market failure in order to be considered procompetitive. As these cases make clear, the Sherman Act embodies the belief that competition is the best way for markets to work efficiently. The belief that, given absolute information, consumers will make poor decisions is not a market failure within the Sherman Act. Courts are and should be concerned with situations where market failures prevent efficient market operation, for example when *lack* of information prevents informed decisions. This is distinct from the concern that individuals with complete information will make irrational decisions.

### III. PROCOMPETITIVE BENEFIT AND *O'BANNON*

#### A. *Why Academic Integration Is Not a Procompetitive Justification*

Judge Wilken’s focus on improved education quality as a procompetitive justification for the restraints on compensating student-athletes for use of their names, images, and likenesses actually appears to lean towards holding the restraints *unreasonable* and generally unnecessary for the proffered justification.<sup>181</sup> In reality, she ruled the restraints *were* reasonable. Judge Wilken should have ruled as her analysis indicated she would. The claim that restricting student-athlete compensation increases product quality is substan-

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177. *Id.* at 420.

178. *Id.* at 423.

179. *Id.*

180. *Id.* at 423-24.

181. *See supra* Part I.B.2.

tively the same argument that the NSPE made in *Engineers*.<sup>182</sup> Summarized, if the parties to the horizontal restraint were allowed to compete, the quality of the product would deteriorate.<sup>183</sup> This is not enough to withstand antitrust scrutiny, either in *Engineers* or in this case.<sup>184</sup>

If restricting the level of compensation truly increases the quality of education for student-athletes, member institutions would be free to take that into consideration when determining how much aid to provide, and student-athletes would be free to consider it when deciding what school to attend.<sup>185</sup> If a school known for its academic standards, for example Stanford University or Duke University, thought their education product was truly better without compensating student-athletes for use of their names, images, or likenesses, they could choose not to provide such compensation. Other institutions might choose the opposite strategy and decide that the effect on education quality caused by not paying student-athletes is minimal, and consequently choose to compensate student-athletes for use of their names, images, and likenesses. This second group of schools would have come to a different conclusion than the first: student-athletes, even if they value a quality education, do not find the increase in education quality worth forfeiting the right to additional compensation. Neither of these decisions is wrong, or correct for that matter, but absent the challenged restraints, the universities could make that decision for themselves and allocate their resources in a way they best see fit to provide the educational and athletic opportunities student-athletes desire. The Court in *Engineers* said that “an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers’ needs.”<sup>186</sup> No different

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182. Compare *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 685 (1978) (overruling engineers’ arguments that their restraint was reasonable because it increased the quality of the good produced), with *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014) (reciting the NCAA’s argument that paying student-athletes large sums of money could result in their separation from campus and thus reduce the quality of their education).

183. *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 685.

184. See *supra* Part II.B.

185. This statement, and the argument that follows, uses the same reasoning the Court used in *Engineers*. See *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 695. If quality of product mattered to the engineers’ customers, the consumer could have considered that when deciding to take competing bids. See *supra* notes 153-60 and accompanying text.

186. *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 694.

here is the schools' ability to determine what its customers, potential student-athletes, want.

That is to say nothing of the student-athletes' ability to make this distinction when deciding what school to attend. One student-athlete might value the best education he can receive, which might include attending a university that does not compensate him beyond his scholarship. Another student-athlete might decide that the decreased quality of education caused by being paid is offset by the opportunity to earn money for use of his name, image, and likeness. Further, the NCAA's argument hinges on the fact that student-athletes might separate themselves from campus and, as a result, hurt their education.<sup>187</sup> That requires that the student-athlete actually separate himself from campus before his education suffers.<sup>188</sup> A student-athlete may well value both an education and the opportunity to earn extra money. Even if separating from campus does negatively impact education, these goals are not mutually exclusive. A student-athlete who feels this way could choose to attend a reputable academic institution that also pays its student-athletes for use of their names, images, and likenesses, and then refuse to separate from campus knowing full well the negative consequences of doing so.

Given our definition of a procompetitive benefit,<sup>189</sup> there is no market failure here that the restraint on trade corrects. Education quality may improve when student-athletes are not compensated for use of their names, images, or likenesses, but the parties to the transaction are capable of considering all necessary effects of the additional compensation when transacting. Improved product quality alone is not enough of a justification for the restraint, as long as the parties to the transaction internalize the effects of their decision. There is no reason to believe student-athletes and universities cannot do so here without the challenged restraints. There is no

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187. See *O'Bannon*, 7 F. Supp. 3d at 980 (reciting the NCAA's argument that student-athletes who make a large sum of money might be inclined to separate themselves from the broader campus community).

188. Nothing in the NCAA's argument about education quality seems to indicate that making money in and of itself reduces the quality of student-athletes' education. *Id.* at 979-81. In fact, no NCAA witness could articulate why paying student-athletes would be any more of an issue than it is for students who come from affluent backgrounds or for students paid to work at the university. *Id.* at 980.

189. See *supra* Part II.A.

market failure to correct, so the restrictions do not move the parties closer to competitive results any more than the restraints in *Engineers* and its progeny did. Consequently, the alleged procompetitive justification is inconsistent with Sherman Act policy.

*B. Brown University*

This is not the first time academic institutions have raised this procompetitive benefit. In *United States v. Brown University*, the Third Circuit dealt with what was called the “Ivy Overlap Group.”<sup>190</sup> The Ivy League schools, plus MIT, eliminated price competition for students by agreeing to give only need-based financial aid, agreeing on the formula for determining the amount of need-based aid to give, and agreeing to give all commonly admitted students the same amount of need-based aid.<sup>191</sup> When challenged under § 1, one of the procompetitive justifications the Overlap Group gave for their agreement was that it allowed a more socioeconomically diverse set of students to be admitted, which improved the education students at these schools received.<sup>192</sup> At the trial level, the United States District Court for the Eastern District of Pennsylvania held that although a diverse student body may improve education quality, the Overlap Group did not need to restrain trade to achieve this benefit.<sup>193</sup> The court explicitly invoked *Engineers* and *IFD* in its decision.<sup>194</sup> There was no reason, in the district court’s opinion, to believe that if such a benefit actually existed, the members of the Overlap Group would not continue to give need-based aid to students who would improve the quality of education at their schools of their own accord.<sup>195</sup> The district court concluded, “[i]f MIT and the other Ivy League schools were to so easily abandon these objectives merely because Overlap was not in play, then the court could conclude only that their professed dedication to these ends was less than sincere.”<sup>196</sup>

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190. 5 F.3d 658, 662 (3d Cir. 1993) [hereinafter *Brown University II*].

191. *Id.*

192. *Id.* at 674.

193. *United States v. Brown Univ.*, 805 F. Supp. 288, 306 (E.D. Pa. 1992).

194. *Id.*

195. *Id.* at 306-07.

196. *Id.* at 307.

On appeal, the Third Circuit remanded the case for further Rule of Reason analysis on the grounds that the district court did not consider in its market analysis the effects of the restraint.<sup>197</sup> Although past cases, *Engineers* being one, indicated a full market analysis might not always be necessary, the court held that the fact that the Overlap Group dealt with higher education might justify different treatment than in other contexts.<sup>198</sup> The circuit court also held that *Engineers* and *IFD* might be distinguished on grounds that the Overlap Group allegedly provided some consumers with additional choices that a free market would deny them.<sup>199</sup>

Relying on the Third Circuit's opinion in *Brown University* to counter this Note's argument is unpersuasive for a number of reasons. First, the Third Circuit did not actually say how the case should be decided.<sup>200</sup> The court simply held the case should be remanded for a full Rule of Reason analysis.<sup>201</sup> Second, the restraints never underwent a full Rule of Reason analysis.<sup>202</sup> Congress intervened on the schools' behalf, and passed an act that permitted the Overlap Group to continue to restrict financial aid to need-based scholarships before any Rule of Reason analysis could take place.<sup>203</sup>

Further, and most importantly, it is not entirely clear why the market for higher education should be treated any differently than a typical market. This is especially true given that the Third Circuit devoted three pages of its opinion to determining that giving financial aid was a commercial transaction.<sup>204</sup> The Third Circuit

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197. *Brown University II*, 5 F.3d at 678.

198. *Id.* ("The nature of higher education, and the asserted procompetitive and pro-consumer features of the Overlap, convince us that a full rule of reason analysis is in order here.")

199. *Id.*

200. *Id.* at 677-78 (holding that the Overlap Group "may in fact merely regulate competition in order to enhance it," and that it "may be that institutions of higher education" require a practice that would violate the Sherman Act in other contexts) (emphasis added).

201. *Id.* at 678 ("Accordingly, we will remand this case to the district court with instructions to evaluate Overlap using the full-scale rule of reason analysis outlined above.")

202. Elizabeth T. Bangs, *MIT Settlement Won't Save Overlap*, HARV. CRIMSON (June 9, 1994), <http://www.thecrimson.com/article/1994/6/9/mit-settlement-wont-save-overlap-pdid> [<http://perma.cc/6JQK-MZJV>] (discussing details of the DOJ and MIT Overlap Group settlement in 1993).

203. Improving America's School Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 3518, 4060 (exempting institutions of higher education from antitrust law when agreeing to award financial aid).

204. *Brown University II*, 5 F.3d at 665-68.

potentially accepted improved product quality as a procompetitive justification, a decision inherently at odds with substantial Supreme Court precedent.<sup>205</sup> There is no reason, on remand, that the district court would have found that colluding on the way financial aid was distributed was necessary to fix a market failure. If schools truly benefit from a diverse student body, they would continue to grant need-based aid to a socioeconomically diverse set of students.<sup>206</sup> This was not a benefit, or ill-defined property right, that the parties to the transactions failed to internalize. Students benefit from going to a socioeconomically diverse school, and the school provides a better product by admitting a wide range of diverse students. In the case at hand, the NCAA alleged that student-athlete integration would improve the product quality that student-athletes received, which requires assuming universities and student-athletes would make unwise decisions in a competitive market.<sup>207</sup> This is an assumption that is inconsistent with Sherman Act policy for the reasons argued above.<sup>208</sup> The Supreme Court simply has not recognized the use of noncompetition to enhance procompetitive benefits.<sup>209</sup> If better bridges, better health care, or better legal services for the indigent do not justify a restraint, it seems a stretch to say the Court would hold otherwise for education quality.<sup>210</sup>

### *C. Illusory Benefit*

Even assuming that this restraint serves a procompetitive benefit and negates a market failure, it is not clear that the alleged benefit even exists. When a defendant justifies a restraint with a theoretical procompetitive benefit, the plaintiff still has the opportunity to show that the benefit is nonexistent.<sup>211</sup> If athletes cutting them

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205. See *supra* Parts II.B-C.

206. This is the *exact* conclusion the district court came to the first time. See *United States v. Brown University*, 805 F. Supp. 288, 306-07 (E.D. Pa. 1992).

207. See *supra* Part III.A.

208. See *supra* Part II.

209. See *supra* Part II.

210. See, e.g., Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 364 (2000) (arguing that the Third Circuit's holding in *Brown University* was inconsistent with Supreme Court precedent in *Engineers*, *NCAA v. Board of Regents*, *IFD*, and *Superior Court Trial Lawyers*).

211. See Meese, *supra* note 49, at 161-67 (arguing that even though proof of a procompetitive benefit negates the need to balance any anticompetitive harm, the plaintiff

selves off from campus is bad for education quality, it necessarily follows that athletes being separated from campus for any reason is bad for education quality. In the *O'Bannon* opinion, Judge Wilken noted how Ed O'Bannon testified that he felt like he was "an athlete masquerading as a student."<sup>212</sup> Innumerable examples exist that show how secluded student-athletes already are from the broader student body and not entirely of their own accord.

For instance, the NCAA's own rules permit institutions to provide meals to student-athletes as a part of training tables.<sup>213</sup> This allows student-athletes to separate themselves from campus at a time when student interaction is at a peak: during evening meals. Presumably, even if compensated for use of their names, images, and likenesses, student-athletes would have to continue going to class.<sup>214</sup> The real concern, then, seems to be that student-athletes will separate themselves socially from other students, harming their all-around college experience.<sup>215</sup> Even assuming that this is a valid concern, the NCAA's bylaws already allow institutions to separate student-athletes from the campus as a whole. This indicates that the benefit for which the NCAA is allegedly fighting does not exist in the first place.

Individual universities also allow student-athletes to separate themselves from the broader campus community. In 2013, Oregon opened a 145,000 square foot training facility for the football program.<sup>216</sup> In addition to athletic equipment upgrades, the facility includes player lounges, game rooms, a cafeteria, and the players' own barbershop.<sup>217</sup> It is hard to imagine a student-athlete more cut off from the general student body than one who has the opportunity to eat, relax, entertain, train, and get his hair cut in a place that is

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should still have the opportunity to show that any alleged benefit is "illusory").

212. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 981 (N.D. Cal. 2014).

213. 2014-2015 NCAA DIVISION I MANUAL, *supra* note 8, §§ 15.2.2, 15.2.2.1.5.

214. *O'Bannon*, 7 F. Supp. 3d at 980-81 (stating that the benefits student-athletes get from student and professor interaction are mostly fulfilled by the NCAA's academic requirements). This would continue to be the case unless the NCAA altered those rules as well.

215. *Id.* at 980 ("These administrators noted that ... [s]tudent-athletes might also be inclined to separate themselves from the broader campus community by living and socializing off campus.").

216. See John W. McDonough, *Oregon's Football Facility: Behind the Scenes*, SPORTS ILLUSTRATED (July 31, 2013), <http://www.si.com/college-football/photos/2013/07/31/university-oregon-athletic-facility-behind-scenes#1> [<http://perma.cc/Y77C-LRSQ>].

217. *Id.*

limited to the football team. This type of facility is not exclusive to Oregon; in 2013, the University of Alabama, a college football powerhouse, unveiled a new training facility that includes a nutrition center, player lounges, and an arcade.<sup>218</sup> Other universities are spending millions of dollars on similar facilities.<sup>219</sup>

The most anomalous contradiction between what the NCAA says it wants to do—integrate student-athletes into the broader campus—and what it actually does, is the way the NCAA and its athletic conferences maximize profit. For the most recently available data, the 2011-2012 fiscal year, the NCAA made \$871.6 million in revenue.<sup>220</sup> About 81 percent of that revenue came from broadcasting rights the NCAA sold to television networks.<sup>221</sup> In 2010 the NCAA signed a fourteen-year, \$10.8 billion deal with CBS/Turner Broadcasting for the rights to the NCAA Division I men's basketball tournament.<sup>222</sup> In late 2012, ESPN agreed to pay the NCAA \$470 million annually over a twelve-year period for the right to broadcast the new NCAA College Football Playoff.<sup>223</sup> That deal was in addition to a deal the NCAA and ESPN agreed to in late 2011.<sup>224</sup> The 2011 deal was worth \$500 million over twelve years, and includes the right to broadcast twenty-four NCAA championships and over 600 hours of live telecasts.<sup>225</sup> Individual NCAA athletic conferences also have television contracts that are worth billions of dollars over the lifetime of the agreements.<sup>226</sup>

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218. Andrew Kulha, *How Alabama's New Facility Compares to Oregon's New Football Performance Center*, BLEACHER REP. (Aug. 1, 2013), <http://bleacherreport.com/articles/1724284-how-alabamas-new-facility-compares-to-oregons-new-football-performance-center> [<http://perma.cc/U3CY-NXEL>].

219. Jordan Zirm, *17 Insanely Expensive College Athletic Training Facilities*, STACK (June 2, 2014), <http://www.stack.com/2014/06/02/expensive-college-athletic-training-facilities> [<http://perma.cc/3WXA-RJ84>].

220. *See Revenue*, *supra* note 9.

221. *Id.*

222. *Id.*

223. Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J. (Nov. 21, 2012, 1:46 PM), <http://online.wsj.com/articles/SB10001424127887324851704578133223970790516> [<http://perma.cc/2QPV-D2UH>].

224. Lucas Shaw, *ESPN, NCAA Extend Deal Through 2023-24*, REUTERS (Dec. 15, 2011, 6:32 PM), <http://www.reuters.com/article/2011/12/15/us-espn-ncaa-idUSTRE7BE2FM20111215> [<http://perma.cc/W6YN-Z7NE>].

225. *Id.*

226. Andrew Carter, *ACC, ESPN Agree on \$3.6 Billion TV Rights Deal*, ORLANDO SENTINEL (May 10, 2012), <http://articles.orlandosentinel.com/2012-05-10/sports/sns-mct-acc-espn-agree->

The issue with these broadcasting agreements is that they require the NCAA to make athletic events available throughout the week so the broadcasting companies have games to televise. In 2014, ESPN networks aired more regular season college baseball games than they ever had before.<sup>227</sup> The Southeastern Conference (SEC) had a special broadcast on Thursdays and the Atlantic Coast Conference (ACC) had a broadcast spot on Mondays.<sup>228</sup> Historically, college baseball series were played on Friday evening, Saturday, and Sunday. The result of these television deals is that games are being moved around and played midweek, causing student-athletes to miss significant amounts of class. ESPN airs ACC basketball games on Tuesdays, Wednesdays, and Saturdays.<sup>229</sup> Mid-major Division I football programs are often forced to play games midweek, during less favorable time slots, in order to increase the value of their television deals.<sup>230</sup>

Some of the biggest scheduling issues occur with the Division I men's basketball conference tournaments and NCAA tournament. Conference tournaments typically take place in the early part of March at neutral sites and involve games throughout the day start-

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on-3.6-billion-tv-rights-deal-20120510\_1\_acc-espn-contract [http://perma.cc/Y2AF-KYC2] (reporting ACC and ESPN broadcasting agreement through 2026-2027 for \$3.6 billion); Brett McMurphy, *Big 12 Strikes New Media Deal*, ESPN (Sept. 7, 2012, 4:06 PM), [http://espn.go.com/college-sports/story/\\_/id/8346345/big-12-announces-media-deal-abc-espn-fox](http://espn.go.com/college-sports/story/_/id/8346345/big-12-announces-media-deal-abc-espn-fox) [http://perma.cc/5K9J-JS6Q] (announcing Big 12 media deal with ESPN and Fox for thirteen years and \$2.6 billion); *Pac-10 Announces ESPN/Fox TV Deal*, ESPN (May 4, 2011, 8:04 PM), <http://sports.espn.go.com/ncf/news/story?id=6471380> [http://perma.cc/6MZA-E23H] (announcing Pac-10 media deal with ESPN and Fox for twelve years and \$2.7 billion).

227. Michael Humes, *ESPN Networks to Air Most Regular-Season College Baseball Games Ever*, ESPN MEDIAZONE (Feb. 6, 2014), <http://espnmediazone.com/us/press-releases/2014/02/espn-networks-air-regular-season-college-baseball-games-ever> [http://perma.cc/SDE3-EMP5].

228. *Id.*

229. *ACC's 2014 ESPN Television Schedule*, ESPN (Aug. 22, 2013, 3:00 PM), [http://espn.go.com/blog/collegebasketballnation/post/\\_/id/87563/accs-2014-espn-television-schedule](http://espn.go.com/blog/collegebasketballnation/post/_/id/87563/accs-2014-espn-television-schedule) [http://perma.cc/BJE8-RXDF].

230. See Connor Tapp, *Wednesday's College Football Schedule: Game Times, TV Coverage for Week 12 MACtion*, SB NATION (Nov. 13, 2013, 5:01 PM), <http://www.sbnation.com/college-football/2013/11/13/5088964/college-football-2013-schedule-week-12-Wednesday> [http://perma.cc/2Z9E-7JJC] (discussing MAC football games taking place on Wednesday nights); Bryan M. Vance, *The New MAC-ESPN TV Deal Explained*, SB NATION (Aug. 20, 2014, 11:26 AM), <http://www.hustlebelt.com/2014/8/19/6045303/explaining-the-new-mac-espn-tv-deal> [http://perma.cc/8KKF-2NAV] (discussing the new MAC-ESPN television deal).

ing on Wednesday and culminating on Sunday.<sup>231</sup> Some conference tournaments start as early as Tuesday, and run the duration of the week.<sup>232</sup> The 2014 NCAA tournament, for which CBS and Turner Sports paid \$10.8 billion over fourteen years for the right to broadcast,<sup>233</sup> involved games played across the nation on a Tuesday, multiple Wednesdays, multiple Thursdays, and multiple Fridays.<sup>234</sup> Marc Edelman, law professor at Zicklin School of Business, Baruch College, reported that the Syracuse University men's basketball team would miss nearly 25 percent of their second semester classes if they made it to the NCAA Championship game.<sup>235</sup> The article was written in direct response to Syracuse head basketball coach Jim Boeheim's comment that it would be "idiotic" to pay student-athletes because of the free education they receive.<sup>236</sup> Syracuse ended up making it to the Final Four but not the Championship game, meaning they missed "only" about 20 percent of their scheduled classes.<sup>237</sup> Even that is a far cry from the education a typical college student receives. Boeheim's stand for amateurism and the typical education-based compensation comes off as even more insincere and hypocritical in light of Syracuse's recent NCAA sanctions, some of the stiffest ever levied, for academic fraud and illicit booster payments to men's basketball players.<sup>238</sup>

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231. See Troy Machir, *College Basketball Conference Tournaments: TV Schedule, Sites, Dates and Times*, SPORTING NEWS, <http://www.sportingnews.com/ncaa-basketball/story/2014-02-26/college-basketball-conference-tournaments-schedules-tv-information-times-dates> [<http://perma.cc/9PJ5-4E6D>] (last updated Mar. 16, 2014).

232. *Id.*

233. See *supra* note 222 and accompanying text.

234. *2014 NCAA Tournament Schedule*, ESPN (Feb. 18, 2014), [http://espn.go.com/mens-collegebasketball/story/\\_/id/9258206/2014-ncaa-tournament-schedule-key-dates](http://espn.go.com/mens-collegebasketball/story/_/id/9258206/2014-ncaa-tournament-schedule-key-dates) [<http://perma.cc/K72M-5uQR>].

235. Marc Edelman, *Syracuse's Road to the 2014 NCAA Men's Basketball Championship Would Likely Cost Players 17 Days of Class; 24.2% of Overall Semester*, FORBES (Jan. 7, 2014), <http://www.forbes.com/sites/marcedelman/2014/01/07/syracuses-road-to-the-mens-basketball-championship-would-cost-players-17-days-of-class-24-2-of-overall-semester> [<http://perma.cc/37JV-BCW3>].

236. *Id.*

237. Mike Waters, *Syracuse Basketball's Run Ends at Final Four Against Michigan*, SYRACUSE.COM (Apr. 17, 2014), [http://www.syracuse.com/orangebasketball/index.ssf/2013/04/final\\_four\\_2013\\_syracuse\\_vs\\_mi\\_9.html](http://www.syracuse.com/orangebasketball/index.ssf/2013/04/final_four_2013_syracuse_vs_mi_9.html) [<http://perma.cc/G7CG-RSH6>].

238. Ricky O'Donnell, *Everything You Need to Know About Syracuse's NCAA Scandal*, SB NATION (Mar. 9, 2015), <http://www.sbnation.com/college-basketball/2015/3/9/8166543/syracuse-ncaa-scandal-explained-jim-boeheim> [<http://perma.cc/ZA8B-6MA6>].

The NCAA has offered the procompetitive justification of increased education quality by integrating athletics and academics.<sup>239</sup> Student-athletes are already missing extraordinary amounts of class and spending significant time away from the rest of the student body. Even if a court were to hold that improving education quality is a procompetitive benefit, a challenger could likely show the benefits are illusory. Student-athletes have schedules, responsibilities, and opportunities that cut them off from the general student body. Not paying them for use of their names, images, and likenesses cannot somehow create a benefit that does not exist in the first place.

#### CONCLUSION: THE NCAA MOVING FORWARD

Even if the NCAA were to accept this Note's argument as true, the debate over compensating student-athletes would not be over. Judge Wilken also held that increased fan interest in collegiate sports was a procompetitive justification for the restraint.<sup>240</sup> If that portion of the court's holding is accepted as true, the justification would also warrant holding the restraints reasonable under section 1 of the Sherman Act.<sup>241</sup>

This Note, however, is not simply an esoteric analysis of one type of alleged procompetitive benefit. The NCAA has historically received favorable treatment under antitrust law.<sup>242</sup> That status is being challenged, and continues to be so even after the *O'Bannon* decision. In August 2014, after the *O'Bannon* case had been decided, antitrust lawyer Jeffrey Kessler filed suit against the NCAA claiming that he wanted to take down the cartel controlling college sports and get rid of any rules against paying college athletes.<sup>243</sup> A *New York Times* report on the lawsuit said that "while the N.C.A.A. has shown an inclination to tiptoe toward significant change, Kessler's case takes a bazooka to the entire model of college athletics."<sup>244</sup>

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239. See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014).

240. *Id.*; see *supra* note 34.

241. See *supra* Part I.A.3.

242. See *supra* note 78 and accompanying text.

243. Steve Eder, *A Legal Titan of Sports Labor Disputes Sets His Sights on the NCAA*, N.Y. TIMES (Aug. 27, 2014), [http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html?\\_r=0](http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html?_r=0) [<http://perma.cc/YAT6-MGQ8>].

244. *Id.*

Kessler, one of the lawyers who helped negotiate the free-agency systems in the National Football League and National Basketball Association, aims to knock out all restrictions on student-athlete compensation and allow the free market to determine their worth.<sup>245</sup>

Two other NCAA antitrust litigation cases are ongoing. In 2012, Gardner-Webb University quarterback John Rock filed an antitrust lawsuit against the NCAA, alleging that it violated antitrust law with the old rule that forbade colleges from guaranteeing scholarships for more than a year.<sup>246</sup> Under the old rule, changed in 2012, colleges were only permitted to grant one year scholarships.<sup>247</sup> Each year, then, the college had the ability to renew or revoke each player's scholarship.<sup>248</sup> In 2013, the District Court for the Southern District of Indiana denied the NCAA's motion to dismiss, and the case remains ongoing.<sup>249</sup> The second pending antitrust case was brought by Shawne Alston, former West Virginia University running back, for violation of antitrust law relating to the restricted value of athletic scholarships.<sup>250</sup> The lawsuit alleges an antitrust violation, but the legal arguments are different than those in the *O'Bannon* case.<sup>251</sup> As opposed to *O'Bannon*, which limited its attack to compensation for use of players' names, images, and likenesses, this case asserts broader violations related to compensation limits in general.<sup>252</sup> According to sports law professor Michael McCann, the case is particularly worth paying attention to because it could create a circuit split.<sup>253</sup> The Ninth Circuit in *O'Bannon* sided with the players.<sup>254</sup> If the NCAA were to win in the Seventh Circuit,

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245. *Id.*

246. Michael McCann, *Former Player Faces Uphill Battle in Antitrust Lawsuit Against the NCAA*, SPORTS ILLUSTRATED (Mar. 6, 2014), <http://www.si.com/college-football/2014/03/06/ncaa-lawsuit-scholarship-limit-shawne-alston> [<http://perma.cc/QY2L-EPKZ>].

247. Jon Solomon, *NCAA Faces New Suit over Number, Length of Football Scholarships*, CBS SPORTS (Sept. 1, 2014, 9:48 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24691100/ncaa-faces-another-lawsuit-over-number-length-of-football-scholarships> [<http://perma.cc/32FH-6TB6>].

248. *Id.*

249. *Rock v. NCAA*, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at \*16 (S.D. Ind. Aug. 16, 2013).

250. McCann, *supra* note 246.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

where the *Alston* case sits, there would be a circuit split, making it significantly more likely that the Supreme Court would grant certiorari.<sup>255</sup>

Even though Judge Wilken's ruling upheld the restraint to a certain degree, the decision still struck a blow to the NCAA's antitrust protection.<sup>256</sup> As that protection is challenged further, the *O'Bannon* decision and subsequent legal analyses like this Note leave the NCAA increasingly vulnerable to having its bylaws that restrict student-athlete compensation overturned as antitrust violations.

*Cameron D. Ginder\**

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255. *Id.*

256. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007-09 (N.D. Cal. 2014); *see also supra* notes 21-24, 110-14 and accompanying text.

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