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THE DEATH OF AMATEURISM IN THE NCAA: HOW THE NCAA CAN SURVIVE THE NEW ECONOMIC REALITY OF COLLEGE SPORTS

Claire Haws [*]

TABLE OF CONTENTS

INTRODUCTION

In October 2019, the National Collegiate Athletic Association (NCAA) announced it would be making a major change to its rules: student-athletes would soon be permitted to receive compensation for the use of their name, image and likeness (NIL).[1] The announcement came in response to an increasing volume of state legislation allowing for student-athlete NIL compensation.[2] On July 1,

* J.D., May 2022, University of Michigan Law School. Thank you to Professor Timothy Pinto and the staff of the *Michigan Business & Entrepreneurial Law Review* for your support and guidance.

1. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities,* NCAA (Oct. 29, 2019, 1:08 PM), https://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities [hereinafter *Board of Governors*].

2. Ben Pickman, *NCAA Votes to Start Process Permitting Athletes to Benefit from Likeness*, SPORTS ILLUSTRATED (Oct. 29, 2019), https://www.si.com/college/2019/10/29/ncaa-student-athlete-likeness-permitted-vote.

2021, student-athletes finally had the opportunity to receive NIL benefits as the NCAA's interim NIL policy went into effect.[3] This change represents a nail in the coffin for traditional notions of amateurism.

For decades, the NCAA defended its rules from antitrust challenges with the procompetitive justification of preserving amateurism.[4] As permissible compensation for student-athletes has expanded, the NCAA has continuously adjusted its definition of amateurism to fit its needs.[5] Now, with the availability of NIL compensation, it has become clear that no coherent concept of amateurism exists in college sports. Yet, the death of amateurism does not have to lead to the death of the NCAA. This Note concludes that in future antitrust challenges, the NCAA will need to point to a procompetitive justification other than amateurism to defend its remaining rules. An antitrust defense based on the unique culture of college sports, rather than amateurism, will align with the realities of student-athlete compensation without sacrificing the NCAA's ability to enforce eligibility rules.

Part I of this Note provides background for the relevant antitrust law and its historical application to the NCAA. Part II discusses how the concept of amateurism in collegiate athletics is unraveling and argues that amateurism will no longer be an effective defense in antitrust challenges to NCAA rules. Part III proposes a solution to the problems addressed in Part II that will allow the NCAA to maintain its distinct product of collegiate athletics without depending on the dying concept of amateurism.

PART I: BACKGROUND

A. *Antitrust Law Background*

Antitrust law in the United States exists to protect free competition and, as a result, benefit consumers.[6] Most antitrust challenges to NCAA rules arise under Section I of the Sherman Act, which addresses agreements between competitors.[7] Section I prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce."[8] In the Sherman Act's application, however, not every agreement amongst competitors is illegal.[9] The Supreme Court has inter-

3. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy.

4. John Niemeyer, Comment, *The End of an Era: The Mounting Challenges to the NCAA's Model of Amateurism*, 42 PEPP. L. REV. 883, 885 (2015).

5. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).

6. *See* Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 694–95 (1978).

7. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 340 n.40 (2007).

8. Sherman Act, 15 U.S.C. § 1.

9. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979).

preted the Act to prohibit only "undue restraints" of trade, using a "standard of reason."[10]

To prevail in a Section I claim, a "plaintiff must show 1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce."[11] In cases involving the NCAA, the first and third elements are easily met: NCAA eligibility rules are agreed upon by all member institutions, satisfying the first element; and the NCAA is a national organization with members in every state, easily satisfying the third element of affecting interstate commerce.[12] NCAA antitrust cases typically turn on the determination of the second element: are the challenged restraints unreasonable?[13]

The standard articulated above contemplates two means for determining whether a restraint is unreasonable. One method, the per se rule, is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[14] Agreements for price fixing and limitations on output are usually considered per se illegal.[15] Alternatively, the rule of reason analysis asks whether the challenged restraint, on balance, actually promotes competition.[16] Courts use a four-step burden-shifting process when applying the rule of reason.[17] The plaintiff bears the initial burden of showing that the restraint harms competition.[18] If the plaintiff makes this showing, the burden then shifts to the defendant to show the restraint has legitimate procompetitive justifications.[19] If the defendant can do this, the burden shifts back to the plaintiff to show that those legitimate objectives can be achieved in a "substantially less restrictive manner."[20] If the first three steps are met, the court balances the restraint's anticompetitive and procompetitive effects against one other to determine whether the restraint is reasonable.[21]

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10. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60 (1911).

11. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991).

12. Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 299–300 (2018).

13. *Id.* at 300.

14. *Broad. Music*, 441 U.S. at 19–20.

15. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984).

16. *See generally* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST MAG., Spring 2019 at 50, 50–51.

17. *Id.* at 50.

18. Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

19. *Id.*

20. *Id.*

21. *Id.*

B. *The NCAA's Historical Treatment Under Antitrust Law*

Courts have consistently used the rule of reason when assessing antitrust challenges to NCAA restraints.[22] NCAA rules, agreed upon by all member institutions, dictate the terms of intercollegiate athletic competition.[23] Although many of these restraints constitute horizontal price fixing and limitation on output—typically illegal per se—courts have determined application of the per se rule would be inappropriate in antitrust claims against the NCAA.[24] This is a result of the Supreme Court's 1984 decision in *Board of Regents*, which recognized that rule of reason analysis is warranted because the NCAA is an "industry in which horizontal restraints on competition are essential" if the distinct product of college football is to exist at all.[25]

The *Board of Regents* Court determined that the challenged restraint, which limited the number of games any one team may televise, was unreasonable.[26] The Court agreed with the NCAA's argument that "maintaining a competitive balance among amateur athletic teams" was a legitimate interest.[27] Because the NCAA already "impose[d] a variety of other restrictions designed to preserve amateurism . . . which are 'clearly sufficient'" to achieve that legitimate interest, however, the particular restraint failed the rule of reason analysis.[28]

Importantly, *Board of Regents* specifically recognized the preservation of amateurism as a valid procompetitive justification for NCAA restraints.[29] The Court stated that "in order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[30] In addition, the Court noted the NCAA's "critical role in the maintenance of a revered tradition of amateurism in college sports."[31] In subsequent antitrust cases, the NCAA consistently avoided liability by relying on this principle of amateurism to justify its restrictions.[32]

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22. McDavis, *supra* note 12, at 300.

23. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

24. *Id.* at 100. *See also* McDavis, *supra* note 12, at 302 (noting that "the per se analysis has yet to be applied to antitrust claims against the NCAA").

25. *Bd. of Regents*, 468 U.S. at 101 (noting that the NCAA's product "is competition itself—contests between competing institutions" and that "this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed").

26. *Id.* at 94, 117.

27. *Id.* at 117.

28. *Id.* at 119–20 (citing Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1296, 1309–10 (W.D. Okla. 1982) (noting that these restrictions include limits on the number of games played and rules governing recruiting)).

29. *Id.* at 102.

30. *Id.*

31. *Id.* at 120.

32. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988); Gaines v. NCAA, 746 F. Supp. 738, 746 (M.D. Tenn. 1990); Banks v. NCAA, 977 F.2d 1081, 1089–90 (7th Cir. 1992); Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004); Agnew v. NCAA, 683 F.3d 328, 342–43 (7th Cir. 2012).

Following *Board of Regents*, antitrust courts afforded significant deference to NCAA rules regulating student-athletes.[33] Although the restraint challenged in the case failed rule of reason analysis, *Board of Regents* dicta regarding the importance of amateurism formed the basis of a pro-competitive justification for NCAA rules.[34] In 1988, a group of alumni and current student-athletes challenged NCAA rules "limiting compensation for football players to scholarships with limited financial benefits" in *McCormack v. NCAA*.[35] The plaintiffs also argued that the NCAA applied its amateurism rules unequally, damaging their university's reputation and revenue as a result.[36] Applying the rule of reason, the Fifth Circuit had "little difficulty in concluding that the challenged restrictions are reasonable."[37] Quoting the majority's opinion in *Board of Regents*, the Court emphasized that in order to preserve the distinct product of collegiate athletics, student-athletes "must not be paid."[38] In response to plaintiffs' claims that amateurism rules are applied unequally, the Court stated that the fact "that the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable."[39]

Two years after *McCormack*, the District Court for the Middle District of Tennessee in *Gaines v. NCAA* similarly utilized the line of dicta from *Board of Regents* stating that student-athletes "must not be paid" to justify NCAA restraints on player compensation.[40] The Court in *Gaines* rejected a football player's antitrust challenge to the NCAA's "no-draft" rule which stripped athletes of amateur status when they entered into a professional draft.[41] In accordance with *Board of Regents*, the Court held that the rule's effects were procompetitive because they "preserve the distinct 'product' of major college football as an amateur sport."[42]

As recently as 2012, courts have treated *Board of Regents* as "creat[ing] a presumption in favor of certain NCAA rules."[43] In *Agnew v. NCAA*, the Seventh

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33. *McCormack,* 845 F.2d at 1343–44.

34. Lazaroff, *supra* note 7, at 339.

35. *McCormack*, 845 F.2d at 1340. (plaintiffs contending that the NCAA's compensation limits "constitute illegal price-fixing").

36. *Id.*

37. *Id.* at 1344 (stating that the *Board of Regents* decision clearly supported this outcome, relying on a paragraph from the *Board of Regents* majority opinion stating: "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.").

38. *Id.* (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984)).

39. *Id.* at 1345.

40. Gaines v. NCAA, 746 F. Supp. 738, 747 (M.D. Tenn. 1990) (quoting *Bd. of Regents*, 468 U.S. at 102).

41. *Id.* at 740.

42. *Id.* at 746 (applying the Rule of Reason despite Gaines' claim arising under Section II of the Sherman Act).

43. Agnew v. NCAA, 683 F.3d 328, 341 (7th Cir. 2012).

Circuit dismissed student-athletes' antitrust challenge to NCAA rules limiting the number of scholarships per team and barring multi-year scholarships.[44] Quoting *Board of Regents*, the Court held that "when an NCAA bylaw is clearly meant to help maintain the 'revered tradition of amateurism in college sports' or the 'preservation of the student-athlete in higher education,' the bylaw will be presumed procompetitive."[45] The Court concluded, however, that "[t]he Bylaws at issue in this case . . . are not eligibility rules" and thus were not presumptively procompetitive.[46] The Court ultimately dismissed the plaintiffs' antitrust claims on procedural grounds.[47]

After decades of NCAA-friendly court rulings, an antitrust challenge to NCAA compensation rules prevailed in 2015.[48] In *O'Bannon v. NCAA*, plaintiffs brought a class action suit challenging NCAA compensation rules barring student-athletes from receiving NIL compensation.[49] Applying the first step of rule of reason analysis at trial, the district court concluded that the NCAA's rules had the procompetitive justification of promoting amateurism in college sports.[50]

While acknowledging that some compensation restrictions may be necessary, the *O'Bannon* district court chastised the NCAA for its ever-evolving, internally inconsistent definition of amateurism.[51] Moving to the next step of rule of reason analysis, the court identified two substantially less restrictive alternatives to the NCAA's current rules: (1) allowing athletic scholarships up to the full cost of attendance; and (2) allowing limited, deferred compensation for the use of a student-athlete's name, image, and likeness.[52] Thus, the district court issued an injunction to remove the "unreasonable elements of the restraint found in this case."[53]

On appeal, the Ninth Circuit agreed that the challenged restraints barring NIL compensation were unlawful.[54] The Court affirmed the district court's finding that allowing scholarships up to the "full cost of attendance would be a substantially less restrictive alternative to the current compensation rules," and "would have virtually no impact on amateurism."[55] However, the Court held that "the district court clearly erred in finding it a viable alternative" to permit

44. *Id.* at 332.
45. *Id.* at 342–43.
46. *Id.* at 343.
47. *Id.* at 347.
48. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
49. *Id.* at 963.
50. *Id.* at 1007.
51. *Id.* at 1000.
52. *Id.*
53. *Id.* at 1007.
54. O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).
55. *Id.* at 1074–75.

NIL compensation.[56] The Court stated that permitting compensation unrelated to education would be "a quantum leap," and if that leap occurred, there would be "no basis for returning to a rule of amateurism."[57] Emphasizing the procompetitive interest of preserving amateurism, the court concluded that "[t]he Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."[58] The Ninth Circuit's ruling, while weakening the NCAA's antitrust armor, suggested that protecting amateurism in college sports may still be a viable procompetitive justification.

PART II: THE CURRENT STATE OF AMATEURISM

A. *Amateurism No Longer Exists in the NCAA*

The concept of amateurism in intercollegiate athletics is unraveling. The "quantum leap" contemplated in *O'Bannon* has already happened.[59] Student-athletes already receive cash benefits unrelated to education.[60] States have begun enacting legislation permitting student-athletes to enter into endorsement deals and receive compensation for the use of their NILs.[61] In October 2019, the NCAA announced it will modify its rules to permit this sort of compensation, albeit with "guardrails."[62] As of July 1, 2021, student-athletes are allowed to receive compensation for the use of their NILs.[63] It has become clear that "amateurism" in college sports, at least as defined in economic terms, is dying. The NCAA's traditional antitrust armor is no longer a viable option in future antitrust challenges to its rules.

Criticism of the NCAA's inability to abide by a consistent definition of amateurism has become even more justified in the years since *O'Bannon*. Even before the NCAA permitted NIL compensation, the NCAA already permitted compensation above the cost of attendance, such as monetary awards for partic-

56. *Id.* at 1076.

57. *Id.* at 1078.

58. *Id.* at 1079.

59. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1071 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020).

60. *Id.* at 1073.

61. Ross Dellenger, *With Recruiting in Mind, States Jockey to One-Up Each Other in Chaotic Race for NIL Laws*, SPORTS ILLUSTRATED (Mar. 4, 2021), https://www.si.com/college/2021/03/04/name-image-likeness-state-laws-congress-ncaa [hereinafter Dellenger, *Recruiting in Mind*].

62. Michael McCann, *Legal Challenges Await After NCAA Shifts on Athletes' Name, Image and Likeness Rights*, SPORTS ILLUSTRATED (Apr. 29, 2020), https://www.si.com/college/2020/04/29/ncaa-name-image-likeness-changes-legal-analysis.

63. Hosick, *supra* note 3.

ipation or achievement in athletics.[64] The NCAA's Student Assistance Fund and Academic Enhancement Fund allow schools to give money to student-athletes above the cost of attendance.[65] In 2018, the NCAA made a combined total of over $130 million of these funds available for distribution.[66] Schools disburse the money "to assist student-athletes in meeting financial needs, improve their welfare or academic support, or recognize academic achievement."[67] There are no limits on the amount of these funds schools can give to an individual student athlete, they can be in the form of cash or benefits, and they need not be for education-related purposes.[68]

In addition to payments above cost of attendance from schools to student-athletes, the NCAA has expanded permissible payments to student-athletes from third parties.[69] Since 2015, "international" student-athletes can accept *unlimited* funds from their country's Olympic governing body based on their performance in certain elite international competitions.[70] Likewise, student-athletes competing for the U.S. Olympic team are permitted to accept unlimited funds from the U.S. Olympic Committee based on their performance.[71]

These NCAA rules reflect no coherent concept of amateurism. The NCAA's current definition of amateurism states:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[72]

This definition completely ignores the reality of intercollegiate sports today. College sports are a multibillion dollar industry.[73] NCAA member institutions, coaches, and corporate sponsors enjoy enormous profits as a result of their involvement, and success, in college sports.[74] Recent scandals involving student-

64. NATIONAL COLLEGIATE ATHLETIC ASS'N, 2020-2021 NCAA DIVISION I MANUAL, (2020), https://www.ncaapublications.com/p-4605-2020-2021-ncaa-division-i-manual.aspx [hereinafter NCAA DIVISION I MANUAL] § 16.1.4.1 at 238. *See also In re NCAA Antitrust Litig.*, 375 F. Supp. 3d at 1071–72.

65. NCAA DIVISION I MANUAL, *supra* note 64, §§ 16.11.1.8 at 246, 15.01.6.1 at 208; *In re NCAA Antitrust Litig.*, 375 F. Supp. 3d at 1072.

66. *In re NCAA Antitrust Litig.,* 375 F. Supp. 3d at 1072.

67. *Id.*

68. *Id.* at 1073.

69. *Id.* at 1074.

70. NCAA DIVISION I MANUAL, *supra* note 64, § 12.1.2.1.5.2 at 65.

71. *Id.* § 12.1.2.1.5.1 at 65.

72. *Id.* § 2.9 at 3.

73. Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177, 178 (2020).

74. *Id.* at 178–79 (noting that the benefits to NCAA member institutions go beyond the revenue generated by their athletic programs: successful athletic programs often lead to increased new-student applications to the school and increased alumni donations).

athletes demonstrate that many NCAA member institutions value the "athlete" portion of that identity more than the "student" aspect.[75] While the NCAA and its member institutions may still care about their student-athletes' education, they sacrifice that for their school-team success.[76]

The NCAA claims their amateurism model allows student-athletes to focus on their education by limiting compensation and restricting athletic training to twenty hours per week.[77] The actual experiences of student-athletes reflect a different reality. As one Ohio State football player put it, "we ain't come to play school."[78] In a 2015 NCAA study, Division 1 football players reported they spent a median of 42 hours per week on athletics.[79] Both athletes and coaches admit that "voluntary" practices are not truly voluntary.[80] Athletes are forced to pick certain classes—and sometimes majors—to accommodate their team schedule.[81] Team travel makes missed classes unavoidable.[82] Yet, the NCAA hypocritically suggests that all student-athletes are "motivated primarily by education and by the physical, mental and social benefits to be derived" from their participation in intercollegiate athletics.[83]

B. *Responses to the Death of Amateurism*

Against the backdrop of this market reality, court opinions are becoming less deferential to the NCAA. *O'Bannon* was the first step, but the Supreme Court's ruling in *NCAA v. Alston* represents an even starker change. In *Alston*, plaintiffs brought an antitrust challenge to NCAA compensation rules limiting education-related benefits.[84] The District Court for the Northern District of California entered judgment in plaintiffs' favor, and the Ninth Circuit and Supreme Court affirmed.[85] In its opinion, the Ninth Circuit accepted plaintiffs' argument that the "quantum leap" considered in *O'Bannon*—permitting compensation be-

75. *See id.* at 182–83.

76. *See id.*

77. NCAA DIVISION I MANUAL, *supra* note 64, § 17.1.7.1 at 255.

78. Cardale Jones (@Cordale10), TWITTER, (Oct. 5, 2012, 8:43 AM) https://i.imgur.com/dFY0U.png (tweet has since been deleted).

79. NCAA, NCAA GOALS STUDY OF THE STUDENT-ATHLETE EXPERIENCE: INITIAL SUMMARY OF FINDINGS 2 (2016), https://perma.cc/UZ3S-KGKM.

80. Hannah Smothers, *NCAA Athletes Were Pressured to Practice. Now Over 150 Have COVID-19*, VICE (June 26, 2020), https://www.vice.com/en/article/g5p5jm/college-athletes-test-positive-for-coronavirus-after-voluntary-workouts-ncaa.

81. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as an Employee*, 81 WASH. L. REV. 71, 100 (2006).

82. Andrew Carter, *As College Athletes Travel More, Missed Classes Come into Focus*, NEWS OBSERVER (Dec. 29, 2017), https://www.newsobserver.com/sports/college/acc/duke/article192121459.html.

83. NCAA DIVISION I MANUAL, *supra* note 64, § 2.9 at 3.

84. NCAA v. Alston, 141 S. Ct. 2141, 2144 (2021).

85. *Id.*

yond cost of attendance—has already occurred.[86] The decision marks a major shift from courts' traditional treatment of amateurism as an antitrust defense and opened the door for future cases challenging NCAA compensation rules.

Even internally, the NCAA has begun to recognize that "there is a general sense that intercollegiate athletics is as thoroughly commercialized as professional sports."[87] Unlike professional sports, however, the lucrative industry of college sports is founded on the unpaid labor of student-athletes. Rather than protecting student-athletes from exploitation at the hands of corporations, the NCAA and its member institutions are exploiting their own students for reputational and financial gain.[88]

Public opinion on the issue of student-athlete compensation has shifted. The NCAA has consistently argued that the preservation of amateurism benefits consumers.[89] Yet, studies indicate that the majority of consumers *favor* rules permitting increased compensation for student-athletes.[90] An expert witness for the plaintiffs in *NCAA v. Alston* conducted research indicating that rule changes allowing above-COA payments had "no negative impact on consumer demand."[91] Another expert survey found that "consumers would continue to view or attend college athletics (at the same rate) even if eight types of compensation that the NCAA currently prohibits or limits were individually implemented."[92] Given this backdrop, the NCAA's go-to argument—that consumers will lose interest in college sports if the athletes receive any payment—does not seem to hold water.

Recent state legislation reflects these changing views on amateurism. In September 2019, California became the first state to enact legislation allowing for student-athletes to enter into endorsement deals and profit off the use of their own NIL.[93] As of March 2021, six states have passed similar legislation, while over thirty others have introduced bills of their own.[94] Although they are similar, these various state laws are not identical, and could pose problems for the NCAA and its member institutions.[95] According to Big 12 commissioner

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86. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1255 (9th Cir. 2020), *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

87. Memorandum of Points and Authorities in Support of Motion by Antitrust Plaintiffs for Summary Judgment at 7, *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 4:09-cv 1967 CW).

88. *See* Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 177 (2020).

89. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1249 (9th Cir. 2020).

90. *Id.*

91. *Id.* at 1250.

92. *Id.*

93. Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sep. 30, 2019), https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12.

94. Dellenger, *Recruiting in Mind*, *supra* note 61.

95. *Id.*

Bob Bowlsby, current state legislation forces schools into a "catch-22" of violating NCAA rules while complying with state laws.[96]

In response to state NIL legislation and public pressure, the NCAA announced a massive shift in its position on the issue. In October 2019, the NCAA's Board of Governors voted to permit student-athletes "to benefit from the use of their name, image and likeness in a manner consistent with the collegiate model."[97] The NCAA's interim NIL policy went into effect July 1, 2021, finally permitting student-athletes to receive NIL compensation.[98] The NCAA believes this interim policy "preserves the commitment to avoid pay-for-play and improper inducements tied to choosing to attend a particular school."[99] The interim policy will remain in effect "until federal legislation or new NCAA rules are adopted."[100] NCAA NIL legislation was previously expected in January 2021, but was delayed due to the pending Supreme Court decision in *Alston*.[101]

Facing a plethora of incongruent state NIL laws, the NCAA has turned to Congress for help.[102] A federal bill could preempt state laws and help the NCAA avoid litigation.[103] Unfortunately for the NCAA, however, federal NIL legislation is unlikely to come quickly. A few federal bills have been introduced, but Democrats and Republicans are somewhat split on the proper scope of NIL laws.[104] And whatever the content of eventual federal NIL legislation, it is unlikely the law meets all of the NCAA's requests.[105] Given the political composition of Congress, a federal law will likely permit more expansive NIL compensation and will provide the NCAA with little to no protection from antitrust suits challenging rules justified by the need to preserve amateurism.[106] As a result, any future additional restrictions the NCAA places on NIL compensation—going beyond those placed by Congress—will be subject to antitrust scrutiny.

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96. *Id.*

97. *Board of Governors*, *supra* note 1.

98. Hosick, *supra* note 3.

99. *Id.*

100. *Id.*

101. Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24, 2021), https://www.si.com/college/2021/02/24/ncaa-athlete-rights-compensation-congress-jerry-moran [hereinafter Dellenger, *Congressional NIL Bill*].

102. Ross Dellenger, *As Congressional Power Shifts, NCAA Reform and Athletes' Rights Are Firmly in the Crosshairs*, SPORTS ILLUSTRATED (Jan. 20, 2021), https://www.si.com/college/2021/01/20/ncaa-athlete-rights-compensation-congress-nil [hereinafter Dellenger, *Congressional Power Shifts*].

103. Dellenger, *Congressional NIL Bill*, *supra* note 101.

104. *Id.*

105. Dellenger, *Congressional Power Shifts*, *supra* note 102.

106. *Id.*

Now, in light of the shift in legal deference and the many legislative attacks on NIL compensation limits, amateurism as an antitrust defense appears to be on its last legs. Without amateurism as an effective pro-competitive justification for those restraints, the NCAA could find itself newly vulnerable to antitrust attacks. In his *Alston* concurrence, Justice Kavanaugh emphasized "that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws," signaling support for additional challenges to NCAA rules.[107] The Supreme Court's decision in *Alston* "makes clear that the decades-old 'stray comments' about college sports and amateurism" from *Board of Regents* "were dicta and have no bearing on whether the NCAA's current compensation rules are lawful."[108] The NCAA will have to identify a new procompetitive justification for its eligibility rules if it is to have eligibility rules at all.

PART III: HOW THE NCAA CAN RESPOND

A. *A New Procompetitive Justification for NCAA Rules*

Fortunately for the NCAA, the death of amateurism will not necessarily lead to an onslaught of antitrust liability. The NCAA needs to impose certain rules—governing things like academic eligibility and recruiting—in order to maintain their distinct product. Rather than relying on the vanishing procompetitive justification of preserving amateurism to defend these rules, the NCAA should shift to a procompetitive justification of "preserving the unique culture of intercollegiate athletics." This justification aligns with economic reality and consumer opinion.[109] Such a justification would be much stronger than pretending "amateurism" actually means anything. To defend its rules from antitrust challenges, the NCAA needs to stop talking about money, and start focusing on the culture of college sports.

Ironically, the current status of the NCAA's antitrust liability mirrors that at the time of the *Board of Regents* decision: the case that originally established amateurism as a valid procompetitive justification.[110] There, the Court recognized that "consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die."[111] Because the challenged output restrictions in *Board of Regents* were "hardly consistent with this role," they were invalidated.[112] Today, the NCAA's role remains the same. The tradition

107. NCAA v. Alston, 141 S. Ct. 2141, 2166–67 (2021) (Kavanaugh, J., concurring).

108. *Id.* at 2167.

109. *See* David Gargone, *A Study of the Fan Motives for Varying Levels of Team Identity and Team Loyalty of College Football Fans*, SPORT J. (Jan. 25, 2016), https://thesportjournal.org/article/a-study-of-the-fan-motives-for-varying-levels-of-team-identity-and-team-loyalty-of-college-football-fans/; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 977–78 (N.D. Cal. 2014).

110. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 119 (1984).

111. *Id.* at 120.

112. *Id.*

they are preserving, however, is not amateurism, but the unique culture of college sports. Compensation rules are no longer consistent with that role, but remaining NCAA rules should survive antitrust scrutiny.

Preserving the culture of a product may be a novel antitrust justification. Yet, existing antitrust caselaw supports the validity of this justification. In antitrust cases, courts have consistently recognized that horizontal agreements are procompetitive when they are "necessary to market the product at all."[113] Similarly, horizontal agreements may "make possible a new product by reaping otherwise unattainable efficiencies" and thus may be procompetitive.[114] The language in the *Board of Regents* decision, recognizing "the maintenance of a revered tradition of amateurism in college sports" as a legitimate justification, resembles the ideal of preserving a culture.[115] In *Alston*, the Supreme Court did acknowledge some pro-competitive aspects of the NCAA's goal of maintaining a distinct product.[116] A procompetitive justification of "preserving the unique culture of college sports"—that is, a league made up of students playing for the school which they attend—is a logical development of antitrust jurisprudence.

B. *The Consequences if the NCAA Fails to Adopt a New Approach*

In the absence of an alternative justification, the death of amateurism could lead to the death of the NCAA. Rules unrelated to compensation will still be subject to antitrust scrutiny. If the NCAA cannot offer a procompetitive justification for these rules, they will not survive rule of reason analysis. Existing agreements amongst member institutions and the NCAA on rules regarding recruiting, academic eligibility, playing and practice seasons, and postseason competitions all constitute horizontal restraints.[117] Without a procompetitive defense, these rules could fail antitrust scrutiny, leaving the NCAA powerless to enforce uniform rules across member institutions. As a result, the institution of the NCAA would serve no purpose.

Of course, many NCAA rules unrelated to compensation mirror rules used by professional sports leagues. In order for any sports league to function, certain horizontal restraints are necessary.[118] Thus, courts have consistently applied the

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113. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979).

114. *Bd. of Regents*, 468 U.S. at 113 (quoting Arizona v. Maricopa County Medical Society, 457 U.S. 332, 365 (1982) (Powell, J., dissenting)).

115. *Id.* at 120 (the Court implied it considered the culture of college sports throughout the opinion, noting "academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable," and that certain NCAA rules are necessary to "preserve the character" of its product).

116. NCAA v. Alston, 141 S.Ct. 2141, 2158, 2163 (the Court stated that while "*Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities," *Board of Regents* did not create immunity for *all* NCAA compensation restrictions).

117. *See generally* NCAA DIVISION I MANUAL, *supra* note 64.

118. *Bd. of Regents*, 468 U.S at 101.

rule of reason to antitrust challenges in the professional sports context as well.[119] NCAA rules requiring "cooperat[ion] in the production and scheduling of games," for example, would likely survive antitrust scrutiny on the same basis as analogous professional league rules.[120] Yet, the NCAA requires a procompetitive defense beyond those used in the context of professional sports. Without a new justification for NCAA rules that are unique to college sports, the NCAA's product could become indistinguishable from minor professional leagues. If the NCAA fails to identify a new procompetitive justification for its rules, it may no longer be able to provide a distinct product.

C. *The True Defining Characteristics of College Sports*

The thing that makes the NCAA's product distinct—and drives consumer demand—is the unique culture of college sports. The NCAA Constitution identifies its basic purpose as retaining "a clear line of demarcation between intercollegiate athletics and professional sports."[121] The NCAA can still retain this demarcation, and defend its rules from antitrust scrutiny, if it identifies the features that *actually* make college sports distinguishable from other sports leagues.

College sports are unique because student-athletes play for the school that they attend. Fan support is motivated more by loyalty to a team as a whole than by support for individual players.[122] Consumer demand is driven by attachments to one's alma mater or schools in a particular geographic area.[123] All of these factors contribute to college sports constituting a distinct product from professional sports. NCAA rules meant to protect the unique culture of college sports should survive antitrust scrutiny.

Although it cannot be used to justify all of its compensation rules, the NCAA should not abandon its past position that "student" status drives demand.[124] Rather, student status is one of the factors that makes intercollegiate athletics distinct from professional sports. In *Alston*, both the District Court and the Ninth Circuit rejected the NCAA's argument that "student" status was connected to the challenged compensation rules, noting that "student-athletes would continue to be students in the absence of the challenged rules."[125] The Ninth Circuit's opinion suggests, however, that rules that *are* connected to student status may be defensible.

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119. Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. L. REV. 1221, 1222 (2012).

120. Am. Needle, Inc. v. NFL, 560 U.S. 183, 202 (2010).

121. NCAA DIVISION I MANUAL, *supra* note 64, § 1.3.1 at 1.

122. David Gargone, *A Study of the Fan Motives for Varying Levels of Team Identity and Team Loyalty of College Football Fans*, SPORT J. (Jan. 25, 2016), https://thesportjournal.org/article/a-study-of-the-fan-motives-for-varying-levels-of-team-identity-and-team-loyalty-of-college-football-fans/.

123. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 977–78 (N.D. Cal. 2014).

124. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1250 (9th Cir. 2020).

125. *Id.*

Using a procompetitive justification based on the unique culture of college sports, NCAA eligibility rules regarding academics would be reasonable. NCAA bylaws require that student-athletes be enrolled in a "full-time program of studies, be in good academic standing, and maintain progress" toward a degree.[126] This particular rule could be justified as necessary to maintain student-athletes' status as students, thus protecting the unique culture of college sports. Rules limiting the number of seasons in which a student-athlete may compete, eligibility to play after transfer, and permissible recruitment activities could be defended on a similar basis.

CONCLUSION

Amateurism no longer exists in college sports. Student-athletes are already receiving compensation beyond the cost of attendance and are now permitted to enter into endorsement deals and profit off the use of their name, image and likeness. But the death of amateurism does not mean the death of the NCAA. If the NCAA successfully adopts a new antitrust defense based on the unique culture of college sports, the NCAA's distinct product—and the NCAA itself—can survive.

126. NCAA DIVISION I MANUAL, *supra* note4, § 14.01.2 at 165.