

# The Forgotten Party in *O’Bannon v. National Collegiate Athletic Association*: How Non-Revenue Sports Operate in a Changing Intercollegiate Marketplace

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*ABSTRACT: The O’Bannon v. National Collegiate Athletic Association litigation has put the financial landscape and future of intercollegiate sports at a monumental crossroads. The U.S. district court granted Division I men’s basketball and football players remedies due to antitrust violation by the National Collegiate Athletic Association (“NCAA”). On appeal, the Ninth Circuit affirmed that NCAA must pass antitrust scrutiny and accepted one of the district court’s remedies. Other reforms, including the NCAA’s decision to grant the Power Five Conferences more autonomy, have made clear that the “Principle of Amateurism” needs to be revisited for college athletes. The vast majority of athletes, those in “non-revenue” sports, do not have a clear place in this reform. Those in a position of reform should account for these interests to reach the best solution for the future of intercollegiate athletics. This Note proposes three possible routes that fit the changing times for student-athletes and their compensation for their athletic services. First, without other intervention, changes to college athletics could lead to a free market employer–employee relationship between student-athletes and the institutions. Second, government intervention could help stabilize what lies ahead in college athletics. Lastly, and what this Note argues to be the most appropriate, member institutions should embrace cost-of-attendance scholarships, and the NCAA should reform its bylaws to allow student-athletes to receive compensation for their name, image and likeness. The NCAA bylaw reform should rethink the “Principle of Amateurism” and allow athlete-agent interaction for the benefit of “indirect financial activity.”*

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## I. INTRODUCTION

College sports and American culture are intertwined. Approximately 420,000 young adults in about 1000 member institutions are now a part of the National Collegiate Athletic Association ("NCAA").<sup>1</sup> While most "will be going pro in something other than sports,"<sup>2</sup> no one can deny the impact that collegiate athletics have on students. Countless students have needed non-revenue intercollegiate sports to "make it."

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1. NCAA College Athletics Statistics, STAT. BRAIN RES. INST., <http://www.statisticbrain.com/ncaa-college-athletics-statistics/> (last visited May 16, 2016) (providing information verified as of May 16, 2016).

2. NCAA, *NCAA Commercial Spot: Going Pro in Something Other than Sport (Bourse Sportive USA)*, YOUTUBE (Jan. 29, 2013), <https://www.youtube.com/watch?v=CXeDUFTaU1Y>.

One example comes from William Jewell College, a small but well-respected liberal arts institution in Liberty, Missouri.<sup>3</sup> William Jewell Athletic Director Darlene Bailey recounted the story of a student-athlete who graduated in December 2014.<sup>4</sup> School-sponsored athletics are not often the reason that an individual ends up at a school like William Jewell, which competes in the NCAA's Division II.<sup>5</sup> Yet this particular student-athlete came to the school after being discarded from a larger university due to underwhelming grades and lack of playing time.<sup>6</sup> The coaching staff for this young man's non-revenue producing sport at William Jewell gave him another shot at higher education, supplemented by an athletic scholarship.<sup>7</sup> He struggled through poor grades his first year but wanted to be there because he was getting the chance to play college sports.<sup>8</sup> The coaching staff and Dr. Bailey took care to ensure that he was not forgotten in the highly academic environment.<sup>9</sup> The young man seized the opportunity and remained eligible every semester.<sup>10</sup> After completing a strong student-athlete career, this student-athlete will realize the prize of a college degree.<sup>11</sup> This would not have happened without college athletic programs for non-revenue sports and scholarships that draw individuals to a school like William Jewell.

The NCAA has become big business.<sup>12</sup> Yet the value for the "forgotten" athletes—those not seen on ESPN every Saturday in the fall or at the men's basketball tournament every March—is comprised completely of the

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3. See *About Jewell*, WM. JEWELL C., <https://www.jewell.edu/about-jewell> (last visited May 16, 2016) ("Consistently ranked among America's best colleges in *U.S. News & World Report*, *Forbes*, *The Princeton Review*, *Washington Monthly*, and *Kiplinger's Personal Finance*, Jewell is cited for small class sizes, low student debt, high graduation rates, commitment to service and overall value.").

4. Telephone Interview with Darlene Bailey, Athletic Dir., William Jewell Coll. (Oct. 17, 2014).

5. See *About NCAA Division II*, NCAA, <http://www.ncaa.org/about?division=d2> (last visited May 16, 2016) ("[I]nstitutions in Division II generally don't have the financial resources to devote to their athletics programs or choose not to place such a heavy financial emphasis on them.").

6. Telephone Interview with Darlene Bailey, *supra* note 4.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Big business and college sports now go hand in hand. Television money for both men's Division I basketball and FBS football has skyrocketed. The NCAA is in the middle of a 14-year March Madness (men's basketball tournament) television contract with CBS and Turner Broadcasting that is worth \$11 billion. Chris Smith, *The Most Valuable Conferences in College Sports 2014*, FORBES (Apr. 15, 2014, 2:49 PM), <http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014>. Additionally, the television contracts each Power Five Conference (Big Ten, Big 12, Pac-12, Southeastern Conference ("SEC") and Atlantic Coast Conference ("ACC")) receives for football are enormous. For example, the SEC's new network contract is reported to have a payout to each team of \$34 million annually starting with the 2014-2015 season. Steve Berkowitz, *SEC Revenue Set to Jump 50% with Playoff, New TV Deals*, USA TODAY (Jan. 16, 2013, 9:23 PM), <http://www.usatoday.com/story/sports/college/2013/01/16/sec-conference-money-increases/1836389>.

experience of four to six years of competing in athletics while working to obtain a college degree. The 2014 district court decision in *O'Bannon v. NCAA* indicated that all college sports are not equal in economic value.<sup>13</sup> The District Court for the Northern District of California determined that former Division I men's basketball player Ed O'Bannon and the plaintiff-players "identified . . . less restrictive alternatives for . . . preserving the popularity of the NCAA's product;" for example, schools could award cost-of-attendance stipends or hold in trust limited-revenue shares for the players.<sup>14</sup> The court also held that the NCAA had violated antitrust law and

enjoin[ed] the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their [Football Bowl Subdivision ("FBS")] football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid.<sup>15</sup>

The NCAA appealed, and about 13 months later, the Ninth Circuit accepted the vast majority of the district court's fact-finding.<sup>16</sup> The three judge panel agreed that the NCAA had violated antitrust law and injured the plaintiffs by "foreclose[ing] the market for their [name, image, and likeness]."<sup>17</sup> As discussed in Part III.A, the Ninth Circuit determined that the NCAA's compensation rules were subject to antitrust scrutiny<sup>18</sup> and examined the NCAA subject to the Rule of Reason.<sup>19</sup> The Ninth Circuit disagreed, however, with the district court in one of the remedies for the plaintiffs. While the opinion agreed with the district court's decision to enjoin the NCAA from prohibiting cost-of-attendance scholarships, the Court of Appeals vacated the district court's decision to enjoin the NCAA from prohibiting its member schools to "pay [the] deferred compensation" because the trust payments would be "untethered to their education expenses."<sup>20</sup>

The *O'Bannon* case trajectory, along with some slight tweaks in NCAA governance in recent years, suggests that institutions are likely going to rearrange their budgets to pump even more money into a select few of their school-sponsored sports. However, this Note argues that this likelihood does not spell the demise of non-revenue or "non-major" sports—all those sports outside of NCAA Men's Division I basketball and FBS football (the "major

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13. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

14. *Id.* at 1005, 1007–08.

15. *Id.* at 1007–08.

16. *O'Bannon*, 802 F.3d 1049.

17. *Id.* at 1067.

18. *Id.* at 1065 (citing PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 260b (4th ed. 2013)).

19. *Id.* at 1070.

20. *Id.* at 1076, 1079.

sports”).<sup>21</sup> For non-revenue sports to continue, the NCAA and its member institutions must take action. The economics of college sports have changed, and its leaders need to choose a new direction. The NCAA must accept that it is time to take a better look at some of its own bylaws and constitutional provisions and compare them to the landscape of 21st-century intercollegiate athletics.<sup>22</sup>

If revenue distribution changes, what or who has to change? FBS<sup>23</sup> football and men’s Division I basketball are not going anywhere; they are only getting bigger. The focus must turn to the “other” sports. These non-revenue sports bring about an incredible impact and, because of that, the forgotten sports need a voice. Their participants cannot suffer, nor can their sports ultimately dissolve because of the *O’Bannon* decision and the player-pay movement.<sup>24</sup> Yet Mark Emmert, President of the NCAA, has hinted that the loss of non-revenue sports lies ahead.<sup>25</sup> Public opinion and the Iowa Supreme Court make clear that the NCAA, although not a government agency,<sup>26</sup> is entrusted with a public duty.<sup>27</sup> That public duty is to maintain competition in

21. “Non-revenue sports” is a broad term regularly used when distinguishing between college sports. Men’s Division I basketball and FBS football are categorized separately as the major sports. Institutions competing in those divisions can generate revenue off those one or two sports alone. That revenue comes from ticket sales, television contracts, and distribution from the Men’s Division I basketball tournament. “Non-revenue sports” extends from all other sports at those same institutions that compete in the major sports, all the way to other divisions (Division II and Division III). The National Association of Intercollegiate Athletics (“NAIA”) is a governing body for college sports separate from the NCAA but will not be directly addressed within this Note.

22. See, e.g., NCAA CONST. art. 2, § 2.9 (2015). All references to articles of the NCAA Constitution and to NCAA bylaws come from NCAA, 2015–2016 NCAA DIVISION I MANUAL (2015), unless otherwise noted.

23. The NCAA’s Division I is divided into two subdivisions for football. See *Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited May 16, 2016). FBS is the higher level of competition and usually contains the schools with the largest athletic department budgets. See *id.*

24. The player-pay movement refers generally to litigation and other efforts to reshape compensation for student-athletes. For more on the player-pay movement, see Salima Koroma & Sean Gregory, *The Long and Winding Road to Paying College Players*, TIME (Oct. 8, 2014), <http://time.com/3479821/college-payers-compensation-payment>.

25. *Emmert Testifies in O’Bannon Trial, Tries to Quell Claims of Hypocrisy by NCAA*, SPORTS BUS. DAILY (June 20, 2014), <http://www.sportsbusinessdaily.com/Daily/Issues/2014/06/20/Colleges/Emmert.aspx> (“Emmert supports [the] development [of the five biggest conferences beginning to increase student-athlete benefits], but he said that giving athletes ‘more than the true cost of attendance would cause a free-for-all in recruiting and force many schools to give up smaller sports.’ He added that many schools ‘would simply leave Division I sports rather than pay their players.’”).

26. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 193–99 (1988) (concluding that the NCAA is not a state actor for constitutional purposes); Joshua J. Despain, Note, *From Off the Bench: The Potential Role of the U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1303 (2015) (arguing for better due process rights for student-athletes).

27. *Greene v. Athletic Council of Iowa State Univ.*, 251 N.W.2d 559, 561 (Iowa 1977) (determining that an amateur athletics council specific to a university was quasi-public because

intercollegiate athletics, not to suppress individual student-athletes' ability to reap the benefits of profit made from their individual popularity.<sup>28</sup> Consequently, the NCAA's responsibility is to construct a system that allows for fair treatment of athletes in the major sports and maintains competition for all intercollegiate sports.

This Note argues for changes to the NCAA's approach to amateurism, so as to best support non-revenue sports' continued existence in the intercollegiate landscape. Part II details the history of the NCAA, including how legal checks from Congress and adjudications shape student-athletes' rights up to and through the district court decision in *O'Bannon*. Part III examines the Ninth Circuit's *O'Bannon* decision, other changes that are taking place, and some of the questions yet to be answered. Because change is imminent, it calls for an examination of what will happen to non-revenue sports that do not have voices loud enough to be heard. Part IV examines three possible ways to ensure non-revenue sports' continued existence, and recommends that the NCAA handle the change by reforming its bylaws and the "Principle of Amateurism."<sup>29</sup> Specifically, it proposes that schools provide full cost-of-attendance scholarships and allow student-athletes to be paid for their name, image and likeness through access to "indirect financial activities."<sup>30</sup>

## II. HOW AMERICA ARRIVED AT TODAY'S INTERCOLLEGIATE ATHLETICS STRUCTURE

This Part looks at how intercollegiate athletics and the NCAA reached its current standards, including the influence of revenue and litigation. Subpart II.A discusses the origins of college sports and the foundations of the NCAA. Subpart II.B examines the influx of revenues to intercollegiate athletics. Next, Subparts II.C and II.D consider the legislated and adjudicated battles that pertain to individuals' rights in college athletics. Subpart II.E focuses on student-athlete compensation and, specifically, the Northern District of California's 2014 *O'Bannon* decision.

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the council "exercises governmental powers"); *see also* 2 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES: COMMON ISSUES IN AMATEUR AND PROFESSIONAL SPORTS 70–71 (2d ed. 1993).

28. By "profit made from individual popularity," this Note refers to the revenue generated in relation to a player's name, image or likeness (e.g., revenue generated from apparel sales).

29. *See infra* Part IV.C. For the NCAA's definition of their "Principle of Amateurism," *see* NCAA CONST. art. 2, § 2.9 (2015) ("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.*" (emphasis added)).

30. *See infra* Part IV.C.2.

## A. COLLEGE ATHLETICS AND THE ORIGINS OF THE NCAA

No country prizes collegiate athletics like the United States.<sup>31</sup> Intercollegiate athletics are a purely American activity<sup>32</sup> that can trace their lineage to Yale and Harvard's first regatta in 1852.<sup>33</sup> The common practice in athletics of constantly seeking to gain an edge, ethically or otherwise, began in that same year when Harvard enlisted a non-student to help achieve victory over their rival.<sup>34</sup> With its beginnings in 1852, and exponential popularity growth from the advent of American football, "[t]he commercialization of intercollegiate athletics, including the payment of compensation to the best athletes, was well entrenched by the latter part of the nineteenth century."<sup>35</sup>

The structure of control, or lack thereof, over intercollegiate athletics developed as fast as its popularity. To concisely summarize the developments through the first decades of college sports:

In the years prior to the formation of the NCAA, schools wrestled with the same issues that we face today: the extreme pressure to win, which is compounded by the commercialization of sport, and the need for regulations and a regulatory body to ensure fairness and safety. In terms of regulation, between 1840 and 1910, there was a movement from loose student control of athletics to faculty oversight, from faculty oversight to the creation of conferences, and, ultimately, to the development of a national entity for governance purposes.<sup>36</sup>

In 1905, President Theodore Roosevelt called a conference to reform football rules, leading to a second conference that same year to create "a rule-making body and a stage for sport discussion groups."<sup>37</sup> This marked the beginning of the NCAA.<sup>38</sup> However, for many years, the "spectacularly

31. Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, at 80, 82.

32. *Id.* ("The United States is the only country in the world that hosts big-time sports at institutions of higher learning.")

33. Guy Lewis, *The Beginning of Organized Collegiate Sport*, 22 AM. Q. 222, 224 (1970). Harvard and Yale formed boat clubs in the 1840s and competed against each other in a regatta for the first time in 1852. *Id.*

34. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10-11 (2000) [hereinafter Smith, *A Brief History*]. For more detail on intercollegiate athletics' quick start down the path of not-so-ethical competition, see Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988-89 (1987) [hereinafter Smith, *Death Penalty*].

35. Smith, *Death Penalty*, *supra* note 34, at 989.

36. Smith, *A Brief History*, *supra* note 34, at 12-13 (footnote omitted).

37. GEORGE W. SCHUBERT ET AL., SPORTS LAW § 1.1(A), at 1-2 (1986). Further, Taylor Branch's critique of the NCAA gives a more in-depth look at how the United States reached the point of a president stepping in to intercollegiate athletics. Branch, *supra* note 31, at 83.

38. Branch, *supra* note 31, at 83. The NCAA was originally called the Intercollegiate Athletic Association of the United States and "was officially changed to the NCAA" in 1910. SCHUBERT ET

profitable cartel”<sup>39</sup>—today’s NCAA in place in recent decades—seemed like a far-fetched idea.<sup>40</sup> College athletics continued to increase in popularity through the early 20th century, prompting a growth in college athletics.<sup>41</sup> Just like at the early regatta, student-athletes continued receiving extra benefits from schools and other sources, and schools made no attempt to hide it.<sup>42</sup> The NCAA’s first attempt to curb player pay and other infractions was the Sanity Code of 1948.<sup>43</sup> Unfortunately, the Code was ineffective.<sup>44</sup> Next, the NCAA created the Committee on Infractions in 1951.<sup>45</sup> Along with the Committee on Infractions, two events in the 1950s changed the NCAA’s course: hiring Walter Byers as executive director and the signing of a \$1.14 million television contract with NBC in 1952.<sup>46</sup> Byers steered the NCAA towards increased profits and increased regulation of its participants.<sup>47</sup> The NCAA became a financial and regulatory giant because of Byers, and thereafter controlled the collegiate athletic landscape.<sup>48</sup>

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AL., *supra* note 37, § 1.1(A), at 2. For more on the construction of the NCAA, see WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 12:3, at 340 (2d ed. 2004) (“The prime purpose of the NCAA is to formulate policies and regulations that govern almost all aspects of intercollegiate sports.”).

39. See Branch, *supra* note 31, at 86.

40. See *id.* at 84 (“For nearly 50 years, the NCAA, with no real authority and no staff to speak of, enshrined amateur ideals that it was helpless to enforce.”).

41. Smith, *Death Penalty*, *supra* note 34, at 989.

42. A 1929 Carnegie Foundation report showed that, “[o]f the 112 schools surveyed, 81 flouted NCAA recommendations with inducements to students ranging from open payrolls and disguised booster funds to no-show jobs at movie studios.” Branch, *supra* note 31, at 84.

43. Smith, *A Brief History*, *supra* note 34, at 14; Smith, *Death Penalty*, *supra* note 34, at 992. The Sanity Code “was designed to ‘alleviate the proliferation of exploitive practices in the recruitment of student-athletes.’” *Id.* (quoting David F. Gaona, Note, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1070 (1981)).

44. The Sanity Code lacked approval from the schools due to its poor enforcement mechanism. The only punishment the Sanity Code established “was termination of NCAA membership, [thus] over half of the member institutions voted to overturn the decision of the committee.” Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 492 (1995).

45. Smith, *Death Penalty*, *supra* note 34, at 993 (citing Gaona, *supra* note 43, at 1071). The NCAA Committee of Infractions is still in place today. See *Division I Committee on Infractions Duties & Responsibilities*, NCAA, <http://www.ncaa.org/governance/committees/division-i-committee-infractions-duties-responsibilities> (last visited May 16, 2016). The Committee on Infractions still deals with all major infractions both by member institutions and individual players. *Id.* For more on the history and breadth of jurisdiction for the NCAA Committee on Infractions, see generally Glenn Wong et al., *The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47 (2009).

46. Branch, *supra* note 31, at 84; see also SCHUBERT ET AL., *supra* note 37, § 1.1(A), at 2.

47. Branch, *supra* note 31, at 84 (“Only one year into his job, Byers had secured enough power and money to regulate all of college sports.”).

48. *Id.*

## B. COLLEGE SPORTS BECOMES BIG BUSINESS

“Amateur athletics at the major college level is big business. It is marketed, packaged and sold the same way as many other commercial products.”<sup>49</sup> The NCAA was in total control when it came to profits, but by the late 1970s its member schools started to realize the need to take a greater role in not only governing but in profiting from intercollegiate athletics.<sup>50</sup> These institutions obtained a share of the contracts for television rights, just as it remains today.<sup>51</sup>

In 1984, the NCAA faced its first major antitrust challenge by its own member schools.<sup>52</sup> *The National Collegiate Athletic Association v. Board of Regents* decision delivered a major blow to the NCAA’s financial control on college athletics.<sup>53</sup> The University of Oklahoma and The University of Georgia challenged the NCAA’s restriction on televising college football games, claiming a violation of the Sherman Act.<sup>54</sup> The Court agreed that the NCAA had authority to regulate intercollegiate athletics, but with limits: “[C]onsistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.”<sup>55</sup>

The most relevant justification for the NCAA’s “Principle of Amateurism” used in *Board of Regents* was that the NCAA had the responsibility to maintain the “competitive balance” in intercollegiate sports and that opening up television rights to the schools would defeat that purpose.<sup>56</sup> The Court agreed that the objective to sustain “competitive balance” was legitimate and important.<sup>57</sup> The Court also acknowledged that “the Sherman Act was intended to prohibit only unreasonable restraints of trade.”<sup>58</sup> However, the Court disagreed with the NCAA that the desire for “competitive balance” could in any way relate to the restraints of the television plan.<sup>59</sup>

49. Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 206 (1990). Goldman argued for athlete compensation at fair market value for those participating in the major sports. *Id.* at 208. He deemed the NCAA a “cartel” in which its “employers” (member schools) had to compete in a restrained market for its “employees” (the athletes). *Id.* at 209–12.

50. Smith, *A Brief History*, *supra* note 34, at 16–17.

51. See, e.g., Alana Glass, *SEC Network: What You Should Know*, FORBES (Aug. 14, 2014, 9:52 AM), <http://www.forbes.com/sites/alanaglass/2014/08/14/sec-network-what-you-should-know> (citing a CBS Sports report that the SEC will make about \$400 million in television money for the 2014–2015 year alone).

52. Smith, *A Brief History*, *supra* note 34, at 19.

53. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85 (1984).

54. *Id.* at 88.

55. *Id.* at 120 (emphasis omitted).

56. *Id.* at 96.

57. *Id.* at 117.

58. *Id.* at 98.

59. *Id.* at 118.

The seminal decision in *Board of Regents* abridged some of the control the NCAA had over revenue. Although the decision did not pertain to student-athletes' rights, it brought antitrust law and revenue sharing to college sports. In light of this Supreme Court ruling, plaintiffs began to experiment with new strategies for creating an equal playing field for the athletes—whether between their peers, their institutions, or the NCAA itself.

C. TITLE IX AND OTHER GOVERNMENT INVOLVEMENT IN COLLEGE SPORTS

The 1990s saw a heavy push in gender discrimination litigation in college sports through Title IX of the Education Amendments of 1972 ("Title IX").<sup>60</sup> Challenges were brought under Title IX citing the statutory language: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."<sup>61</sup> Seven years after enactment, the U.S. Department of Education's Office of Civil Rights ("OCR") explained that the Act applied to intercollegiate sports.<sup>62</sup> Title IX applies to intercollegiate sports because all college athletic programs using federal scholarships fall under the section 901(a) standard for gender discrimination in education activities.<sup>63</sup> All women's intercollegiate sports fall under the umbrella of non-revenue sports.<sup>64</sup>

The OCR adopted policy guidelines that remain just as important today, even with the *O'Bannon* decision's major distinctions between the two major sports on one hand, and all other sports on the other. First, the OCR uses Title IX in one of three ways to determine whether institutions have created gender-equal competition levels: (1) opportunities must be proportionately similar to gender enrollment; (2) the institution needs to demonstrate efforts are being made to improve the opportunities that create gender equality in intercollegiate sports; and (3) the institution should be accommodating "the abilities and the interests of the underrepresented sex" within the current athletic department structure.<sup>65</sup> Further, the OCR uses a set of strict guidelines when interpreting Title IX, which provides for "[t]he inclusion of

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60. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1686 (2012); see also *Champion*, *supra* note 38, § 13:4, at 394–98. The NCAA expanded to women's athletics in the early 1980s. SCHUBERT ET AL., *supra* note 37, § 1.1(D), at 5 (discussing how the NCAA entered into women's athletics, leading to the demise of the Association for Intercollegiate Athletics for Women).

61. 20 U.S.C. § 1681(a).

62. 2 BERRY & WONG, *supra* note 27, at 254.

63. See *id.* at 255; see also *id.* at 253.

64. This determination comes from both the public's general classification and from *O'Bannon* limiting the plaintiffs to only Division I men's basketball and FBS football. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

65. 2 BERRY & WONG, *supra* note 27, at 254.

football and other revenue-providing sports” when assessing institutional adherence to Title IX.<sup>66</sup>

The push for gender equality in college athletic programs, along with fund allocation to non-revenue sports, continues to put pressure on schools’ budgets.<sup>67</sup> Title IX cases often stem from hard financial times for athletic departments, but “one can guess that football will not feel the ax first.”<sup>68</sup> Plaintiffs have invoked Title IX to ensure that women’s sports would not be eliminated using the “full and effective accommodation” standard.<sup>69</sup>

In addition to Title IX, the federal government has intervened in college athletics for the purpose of protecting student-athletes. The Buckley Amendment in 1974<sup>70</sup> provided protections for student-athletes and their families regarding access to student records without consent.<sup>71</sup> Congress provided more access to information for high school students deciding on college with the enactment of the Student Right-to-Know Act,<sup>72</sup> which “seeks to minimize the exploitation of student-athletes by requiring institutions to disclose graduation rates for athletes to potential recruits.”<sup>73</sup>

More recently, the Senate Commerce Committee conducted hearings related to the *O’Bannon* case and an overhaul of NCAA governance as a whole.<sup>74</sup> Senators Cory Booker of New Jersey and Dean Heller of Nevada both made statements questioning whether the NCAA should even exist anymore.<sup>75</sup> This came just months after the House of Representatives

66. *Id.*

67. See Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 368 (1996).

68. CHAMPION, *supra* note 38, § 13:4, at 394 (setting up the common scenario in which some important Title IX cases have begun).

69. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (accommodating women’s varsity programs for gymnastics and volleyball); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993) (accommodating women’s programs for intercollegiate softball); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993) (accommodating women’s gymnastics and field hockey teams).

70. Family Educational Rights and Privacy Act, Pub. L. 93-380, 88 Stat. 571 (1974) (codified as amended at 20 U.S.C. § 1232(g) (2012)). The “Buckley Amendment” is another name for this legislation, which is also commonly known as FERPA. 2 BERRY & WONG, *supra* note 27, at 233.

71. 2 BERRY & WONG, *supra* note 27, at 232–33.

72. Student Right-To-Know Act, Pub. L. 101-542, 104 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092 (2012)).

73. Chris Truax, *Why Can’t the Football Team Read?: The Student Athlete’s Right-to-Know Act and the Growing Threat of Liability*, 4 VILL. SPORTS & ENT. L.J. 301, 302 (1997); see also 2 BERRY & WONG, *supra* note 27, at 3 (providing the Student Right-to-Know Act as an example of collegiate sports “com[ing] under the scrutiny of state and federal governments”).

74. Steve Berkowitz, *NCAA’s Mark Emmert Gets Grilling from Senate Committee*, USA TODAY (July 10, 2014, 2:59 AM), <http://www.usatoday.com/story/sports/college/2014/07/09/senate-commerce-committee-ncaa-mark-emmert/12409685>.

75. *Id.* (quoting Senator Booker as stating “I want to be very clear, it’s exploitation when athletes spend 50, 60, 70 hours a week [on sports] and cannot afford the basic necessities. . . . This is plain and simple the dark side of the NCAA. . . . And we’ve seen the NCAA move quickly

Committee on Education and the Workforce held hearings concerning the Northwestern University football players' movement to unionize, and the consequences of college athletes' unionization in general.<sup>76</sup>

D. ADDITIONAL STUDENT-ATHLETES' RIGHTS LITIGATION

With the power of the NCAA waning due to the *Board of Regents* antitrust decision, and federal law providing better protection for the intercollegiate sports' participants, student-athletes' rights litigation increased and continued to grow in the 1990s.<sup>77</sup> Initially, courts had been prone to side with the NCAA on challenges to their definition of amateurism<sup>78</sup> and whether due process applied to the NCAA.<sup>79</sup> This has changed. For instance, the 2009 case *Oliver v. NCAA* changed due process rights for student-athletes when a court allowed standing for the athlete to sue the NCAA for acting "arbitrar[ily] and capricious[ly]."<sup>80</sup> In another case, non-scholarship athletes won a lawsuit for more financial aid when a court ruled that the NCAA is not exempt from antitrust law for its financial aid to college students.<sup>81</sup> Antitrust doctrine pertaining to student-athletes became "ripe for reconsideration," thereby weakening the *Board of Regents* dicta.<sup>82</sup> The stage was set for the battle over student-athlete compensation.<sup>83</sup>

when money and reputation is on the table. Where is the urgency?"; and quoting Senator Heller as supporting a bill "that would disband the NCAA" and saying, "give me the reasons why I shouldn't vote for that bill").

76. *Id.*

77. See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 352 (2007).

78. See, e.g., *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998); *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295 (D. Mass. 1975).

79. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 198–99 (1988); see also Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 556–57 (2010) (referencing a 2004 U.S. House of Representatives Subcommittee finding that the NCAA had not made changes, such as providing independent judges, to their appeals process for student-athlete discipline).

80. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203, 215–16 (Ohio Ct. C.P. 2009); see also T. Matthew Lockhart, Comment, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism"*, 35 U. DAYTON L. REV. 175, 189 (2010). For an in-depth account on the litigation process in *Oliver*, see Johnson, *supra* note 79, at 587–99. The parties ultimately settled and the decision and injunction went unenforced. Brandon D. Morgan, Comment, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS LAW. J. 303, 314 (2010).

81. *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005).

82. Lazaroff, *supra* note 77, at 352.

83. For a well-organized, comprehensive dissection of the NCAA player compensation debate and the Sherman Act, see generally Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61 (2013). Edelman not only provides more detail on the Sherman Act's application to NCAA player compensation questions, but also provides further analysis of court decisions

## E. THE BATTLE FOR STUDENT-ATHLETE COMPENSATION: O'BANNON

Although *Board of Regents* was about the Sherman Act and the distribution of television royalties, the Court stated that not compensating student-athletes was a reasonable restraint that the NCAA can invoke.<sup>84</sup> A 1989 criminal case involving sports agents and illegal benefits to college athletes accepted the “reasonable restraint” antitrust standard on student-athlete interests from *Board of Regents*.<sup>85</sup> The Court in *Board of Regents* believed the NCAA’s main objective was “the maintenance of a revered tradition of amateurism in college sports.”<sup>86</sup>

Compensating players is a hot topic.<sup>87</sup> The history of the economic power of college sports, particularly at the Division I men’s basketball and FBS football level, fosters this debate; Americans watch as unpaid students make the NCAA billions of dollars every Saturday in the fall and during every college basketball “March Madness.”<sup>88</sup> The television profits continue to rise.<sup>89</sup> The question remains: how is the balance of amateur athletics kept while creating fairness to those who put in the labor to make the money?

In 1988, *McCormack v. National Collegiate Athletic Association* forced the courts to specifically address the player-pay issue.<sup>90</sup> However, the court

regarding challenges before *O'Bannon*. *Id.*

84. See Goldman, *supra* note 49, at 213.

85. United States v. Walters, 711 F. Supp. 1435, 1441 (N.D. Ill. 1989).

86. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents, 468 U.S. 85, 120 (1984).

87. See, e.g., Marc Edelman, 21 *Reasons Why Student-Athletes Are Employees and Should Be Allowed to Unionize*, FORBES (Jan. 30, 2014, 10:11 AM), <http://www.forbes.com/sites/marcedelman/2014/01/30/21-reasons-why-student-athletes-are-employees-and-should-be-allowed-to-unionize> (arguing that college athletes should be treated like employees of their institution); Mark Koba, *College Athletes or Unpaid Workers? A Debate Rages*, CNBC (Mar. 17, 2014, 9:46 AM), <http://www.cnbc.com/2014/03/17/paying-college-athletes-lawyers-academics-say-its-time-to-pay-them.html> (looking at college basketball program revenues and various legal battles in which the NCAA is involved, including *O'Bannon*); *Should NCAA Athletes Be Paid?*, U.S. NEWS & WORLD REP., <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid> (Apr. 2, 2013, 9:15 AM) (presenting four authorities for and three authorities against paying college athletes).

88. See Marc Tracy & Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES (Dec. 30, 2014), [http://www.nytimes.com/2014/12/31/sports/ncaaf/what-made-college-football-more-like-the-pros-73-billion-for-a-start.html?\\_r=1](http://www.nytimes.com/2014/12/31/sports/ncaaf/what-made-college-football-more-like-the-pros-73-billion-for-a-start.html?_r=1) (showing the profits for institutions on college football are becoming comparable to the NFL); see also Ira Kalb, *Why March Madness Rakes in More Ad Revenue than the NBA and MLB Post Seasons*, BUS. INSIDER (Mar. 14, 2014, 4:44 PM), <http://www.businessinsider.com/what-marketers-can-learn-from-the-ncaas-marketing-of-march-madness-2014-3> (reporting that NCAA March Madness advertising revenue exceeds that of the NBA and MLB post seasons).

89. See, e.g., Kalb, *supra* note 88 (stating that the 2013 March Madness increased live online streaming by 201% from the previous year).

90. *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988); see also Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 44 (2012) (“[T]he court[] concluded that compensating student-athletes in excess of grant-in-aid packages . . . ran afoul of NCAA legislation relating to amateurism and, therefore, concluded that NCAA rules pertaining [to] student-athlete compensation are procompetitive.”).

reiterated that the NCAA had a legitimate interest in distinguishing amateur sports from professional sports.<sup>91</sup> The court reasoned that part of that interest included not compensating players beyond the compensation provided through tuition scholarships.<sup>92</sup> While the *McCormack* decision held as a standard for many years, the compensation movement pressed on. In fact, in stride with the turn of the century, claims for student-athlete compensation ramped up to new levels. Then, in 2014, Ed O'Bannon and his fellow plaintiffs broke through.

On August 8, 2014, the date *O'Bannon* was decided at the trial level, the major sports' student-athletes took their biggest step forward yet against the NCAA's control over its student-athletes' amateurism.<sup>93</sup> Ed O'Bannon, a former University of California, Los Angeles basketball player, led the effort to force the NCAA to compensate student-athletes through antitrust litigation.<sup>94</sup> Under the NCAA bylaws at the start of the *O'Bannon* litigation, student-athlete compensation could not exceed the value of a full "grant-in-aid" tuition scholarship.<sup>95</sup> The plaintiffs argued that a full tuition scholarship is not enough, given the demands on student-athletes and the revenue boost they provide to universities.<sup>96</sup>

Judge Claudia Wilken of the Northern District of California ruled in favor of the plaintiffs and found that the NCAA regulations violated antitrust law by "unreasonably restrain[ing] trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."<sup>97</sup> The court used the "College Education Market," as phrased by the plaintiffs, to describe how the NCAA violates federal antitrust law through market restraints.<sup>98</sup> The decision defined this market as the NCAA Division I institutions that "compete to sell unique bundles of goods and services to elite football and basketball recruits."<sup>99</sup>

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91. *McCormack*, 845 F.2d at 1344-45.

92. *Id.* (recognizing that even the *Board of Regents* dissenters accepted that a reasonable restraint would be the further compensation of student-athletes).

93. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

94. *Between Selling Cars, Former UCLA Star Ed O'Bannon Takes on the NCAA Over Pay*, FOX NEWS (Feb. 19, 2014), <http://www.foxnews.com/sports/2014/02/19/between-selling-cars-former-ucla-star-ed-obannon-takes-on-ncaa-over-pay>. Mr. O'Bannon's involvement began when, after his NBA career fizzled, he "recognized himself on a video game and was troubled that his likeness was being used without his consent—or payment." Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), <http://www.nytimes.com/2014/06/10/sports/ncaa-basketball/understanding-ed-obannons-suit-against-the-ncaa.html>.

95. *O'Bannon*, 7 F. Supp. 3d at 971. A "grant-in-aid" scholarship is "financial aid that consists of tuition and fees, room and board, and required course-related books." *Id.* (quoting an exhibit).

96. *Id.* at 963.

97. *Id.*

98. *Id.* at 965.

99. *Id.* Additionally, Judge Wilken referred to evidence that separated the "bundle" provided at this level of institutions from others: "They also include access to high-quality coaching,

Much of *O'Bannon's* challenge focused on the NCAA's use of players' names, images, and likenesses ("NIL") in the creation of revenue.<sup>100</sup> The district court granted two remedies, based on the "less restrictive means" offered by the plaintiffs.<sup>101</sup> First, the court enjoined the NCAA from enforcing rules that prohibited member schools from using NIL funds to supplement stipends for Division I men's basketball and FBS football players.<sup>102</sup> Second, the court enjoined the NCAA from enforcing rules that prohibited member schools from creating trusts for their Division I men's basketball players and FBS football players.<sup>103</sup> The trusts would receive funds from the schools' licensing revenue and are payable when the athletes' eligibilities end.<sup>104</sup> As the decision stood, the landscape of college athletics changed. Under the district court's ruling, athletes in the two major sports would not have been prohibited from receiving NIL funding in excess of their grants-in-aid.<sup>105</sup> This funding, if they received it, could help cover the difference between the grants-in-aid and the costs of attending college.<sup>106</sup> In addition, athletes in these sports could have access to repayment for their services upon graduation. The injunctions were useful remedies because of the money that football and basketball specifically generate.<sup>107</sup> The *O'Bannon* litigation—in earlier pleadings—excluded non-revenue sports from consideration.<sup>108</sup>

The court's exclusion of other sports before the *O'Bannon* decision is one of the most important takeaways for non-revenue sports. The NCAA initially provided five arguments for "[p]rocompetitive [j]ustifications for the [c]hallenged [r]estraint."<sup>109</sup> The five "justifications include[d]: (1) the

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medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences." *Id.* at 966.

100. *See id.* at 968–71.

101. *See id.* at 1007–08.

102. *Id.* at 1008.

103. *Id.*

104. *Id.*

105. *Id.*

106. Cost-of-attendance "refers to 'an amount calculated by [a school]'s financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance' at that school." *Id.* at 971 (alteration in original) (quoting an exhibit). However, the *O'Bannon* injunction permits the NCAA to set caps on the use of NIL funds for athlete stipends and trust accounts. *Id.* at 1008.

107. *See id.* at 1008–09 ("College sports generate a tremendous amount of interest, as well as revenue and controversy. . . . Before the Court in this case is only whether the NCAA violates antitrust law by agreeing with its member schools to restrain their ability to compensate Division I men's basketball and FBS football players. . . ."). The case's purpose was to consider the antitrust considerations of revenue from these major sports and their athletes' popularity.

108. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp.3d. 1126, 1155 (N.D. Cal. 2014). *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* was the initial court pleadings that later became *O'Bannon v. National Collegiate Athletic Association*. However, there was a cross motion for summary judgment, and a motion to amend the class definition for the plaintiffs was ultimately granted. *Id.* at 1155.

109. *Id.* at 1146.

preservation of amateurism in college sports; (2) promoting “competitive balance” among Division I teams; (3) the integration of education and athletics; (4) increased support for women’s sports and less prominent men’s sports; and (5) greater output of Division I football and basketball.”<sup>110</sup> The NCAA argued that the restraints “increase[] NCAA member schools’ athletic budgets and, therefore, enables them to provide greater financial support to women’s sports and less prominent men’s sports.”<sup>111</sup> This justification failed to establish a legitimate defense, and the court granted the plaintiff’s motion for summary judgment.<sup>112</sup>

The order began by citing to the Supreme Court’s ruling that restraint of competition in one sector is not validated when the restraint improves competition in another sector.<sup>113</sup> The order also explained that a “social purpose” is not a procompetitive justification for trade.<sup>114</sup> Finally, the order stated that the justification failed the less restrictive means standard, “stating that, if a defendant meets its burden to identify a procompetitive justification for a restraint, the ‘plaintiff must then show that “any legitimate objectives can be achieved in a substantially less restrictive manner.’”<sup>115</sup> The court suggested that athletic departments redistribute revenues, or that the NCAA mandate redistribution to non-revenue sports.<sup>116</sup>

Judge Wilken’s decision was a significant moment in the timeline of student-athlete compensation, and the NCAA immediately appealed to the Ninth Circuit.<sup>117</sup> The Northern District of California’s detailed fact-finding in *O’Bannon* resonated with the three-member panel. However, Part III shows the dispute as to the extent of a student-athlete’s amateurism and the NCAA’s governing role. The next Part also delves into other significant events across the college athletics landscape.

### III. THE NINTH CIRCUIT DECISION, POWER CONFERENCE SHIFTS AND WHAT IS AHEAD

On July 31, 2015, one day before Judge Wilken’s remedies were to go into effect, the Ninth Circuit granted the NCAA’s motion to stay the injunction.<sup>118</sup> In a one sentence order, the three-judge panel stated: “Without

110. *Id.*

111. *Id.* at 1151.

112. *Id.* at 1152.

113. *Id.* at 1151 (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

114. *Id.*

115. *Id.* (citing and quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). Antitrust law required the NCAA to show that their procompetitive justifications actually increased competitiveness within the college athletics market, which plaintiffs had already shown they were restraining. *See Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 117 (1984).

116. *Likeness Licensing Litig.*, 37 F. Supp.3d. at 1151–52.

117. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015).

118. *See Order, O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601).

expressing a view as to either party's likelihood of success on the merits, the court grants a stay of the district court's injunction in this case . . . to preserve the status quo until this court's mandate has issued."<sup>119</sup> The decision to grant the stay prevented NCAA member schools from offering deferred compensation trusts to student-athletes. The stay led some to believe the court may at least be "wrestling" with the idea of a possible reversal.<sup>120</sup> The Ninth Circuit filed a decision in the appeal of *O'Bannon* on September 30, 2015.<sup>121</sup>

Subpart III.A examines the Ninth Circuit's decision to affirm in part and vacate in part the district court's 2014 decision in *O'Bannon*. Subpart III.B looks at where other litigation and reforms outside the courtroom stand and their future. Subpart III.C explains that, with respect to those holding in mind the interests of non-revenue sports, it would be unwise to assume athletic departments and others in power are content keeping the status quo (for the most part) in place.

#### A. THE NINTH CIRCUIT'S O'BANNON DECISION

On March 17, 2015, Chief Judge Thomas and Judges Bybee and Quist of the Ninth Circuit heard arguments in *O'Bannon v. National Collegiate Athletic Association*.<sup>122</sup> Six months later, Judge Bybee wrote the majority opinion that affirmed in part and reversed in part Judge Wilken's previous decision. Chief Judge Thomas joined in part, but dissented in reversing one of Judge Wilken's remedies for the plaintiffs.<sup>123</sup> The issue on appeal was "whether the NCAA's rules are subject to the antitrust laws and, if so, whether they are an unlawful restraint of trade."<sup>124</sup> The Ninth Circuit agreed with the district court that the NCAA is not exempt from antitrust scrutiny under the Rule of Reason; however, the majority found that only the cost-of-attendance scholarship increase was a "proper alternative to the current NCAA compensation rules."<sup>125</sup>

The NCAA argued that the claimed Sherman Act violations failed on their merits for three reasons: "(1) The Supreme Court held in [*Board of Regents*] that the NCAA's amateurism rules are 'valid as a matter of law'; (2) the compensation rules . . . are not covered by the Sherman Act . . . ; and (3) the plaintiffs ha[d] no standing."<sup>126</sup> The Ninth Circuit disagreed with the NCAA's claims. First, the court determined that the *Board of Regents* decision

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119. *Id.* at 2.

120. Jon Solomon, *Inside College Sports: Judges Grant Stay to Delay Ed O'Bannon Payments*, CBS Sports (July 31, 2015, 1:01 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25255702/inside-college-sports-jim-delany-cautions-patience-on-obannon-payments>.

121. *O'Bannon*, 802 F.3d 1049 (9th Cir. 2015).

122. *Id.*

123. *Id.* at 1079 (Thomas, C.J., concurring in part and dissenting in part).

124. *Id.* at 1052 (majority opinion).

125. *Id.* at 1053.

126. *Id.* at 1061.

discussed amateurism only for the purpose of deciding that the Rule of Reason was the proper framework under which to analyze NCAA rules.<sup>127</sup> The court concluded on this argument: “The amateurism rules’ validity must be proved, not presumed.”<sup>128</sup> Second, using Professor Hovenkamp’s antitrust treatises as guidance, the court found the NCAA’s arguments that its compensation rules are not subject to the Sherman Act unconvincing.<sup>129</sup> Classifying a rule as an “eligibility rule” does not change what the restraint is; the substance of the rule does that. The court ruled that “[t]he antitrust laws are not to be avoided by such ‘clever manipulation of words.’”<sup>130</sup> Third, the court disagreed on the NCAA’s standing claims.<sup>131</sup>

After concluding that the NCAA’s three arguments on the merits failed, the court moved to the three-step analysis under the Rule of Reason: (1) the plaintiff must show the restraint creates “significant anticompetitive effects” on student-athletes; (2) if shown, the NCAA is required to present why the restraints have “procompetitive effects” within the market; and (3) the plaintiffs “must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.”<sup>132</sup>

First, the Ninth Circuit agreed with the district court on the “significant anticompetitive effects” prong. It found that the NCAA’s compensation rules restrained the “college education market.”<sup>133</sup> Then, secondly, the NCAA had to argue why the restraints were acceptable. The Ninth Circuit looked, once again, to what the district court accepted from the NCAA as procompetitive purposes: “integrating academics with athletics” and that “the amateur nature of collegiate sports increases their appeal to consumers.”<sup>134</sup>

Third, the three judges disagreed on whether the plaintiffs showed that any legitimate objectives could be achieved in a substantially less restrictive manner. Judges Bybee and Quist focused on a key differentiator for less restrictive alternatives: they should not be “untethered to educational expenses.”<sup>135</sup> In other words, an increase in compensation for student-athletes is acceptable only to the point that it can be linked to a benefit in their college experience. Here, Chief Judge Thomas disagreed with the majority, as he felt

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127. *Id.* at 1063. (“*Board of Regents* . . . did not approve the NCAA’s amateurism rules as categorically consistent with the Sherman Act. Rather, it held that . . . no NCAA rule should be invalidated without a Rule of Reason analysis.”).

128. *Id.* at 1064.

129. *Id.* at 1065.

130. *Id.* (quoting *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 22 (1964)).

131. *Id.* at 1067–69 (finding that plaintiffs did suffer an injury in fact). The NCAA had claimed its rules “did not deprive [the plaintiffs] of any NIL compensation they would otherwise receive.” *Id.* at 1067.

132. *Id.* at 1070 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

133. *Id.* at 1072.

134. *Id.* at 1073. The court deferred to the record that NCAA’s compensation rules served those two procompetitive effects on the college athletics market. *Id.*

135. *Id.* at 1078.

it is not the Court's duty to determine where consumer popularity is diminished but "simply to review the district court judgment through the appropriate lens of antitrust law."<sup>136</sup>

Despite the Ninth Circuit's decision, the case is far from over. In December 2015, the Ninth Circuit denied the plaintiffs' petition for an en banc panel.<sup>137</sup> Yet the *O'Bannon* plaintiffs see a serious conflict between the majority's holding and past precedent at the circuit court and Supreme Court level: "By eliminating or assuming away the core question of consumer demand, the majority created further conflicts with Ninth Circuit and Supreme Court decisions, the *O'Bannon* plaintiffs wrote."<sup>138</sup> The plaintiffs also feel that the Ninth Circuit panel went beyond a clear-error review on appeal, that the panel's use of *Board of Regents* was inappropriate, and that the panel incorrectly elevated the plaintiffs' burden of proof.<sup>139</sup> Both sides appear ready to pursue a Supreme Court appeal.<sup>140</sup>

Many sports-related legal scholars have long awaited *some* remedy from the restraints on player compensation by the NCAA.<sup>141</sup> Many, such as lawyer and ESPN analyst Jay Bilas, feel the decision in *O'Bannon* did not free the market enough for the plaintiffs.<sup>142</sup> With this in mind, advocates for non-revenue sports' continued existence must look to *O'Bannon* as the start of a new age of collegiate athletics.

#### B. THE EFFECTS OF *O'BANNON* AND OTHER SIGNIFICANT CHANGES

Maintaining the status quo affects the future of the "other" sports much less. Currently, those "other" sports operate under the same athletic budgets as the major programs that *O'Bannon* ruled unfairly restrained the "College

136. *Id.* at 1083 (Thomas, C.J., concurring in part and dissenting in part).

137. Jon Solomon, *Judges Deny O'Bannon Petition to Rehear Appeal vs. NCAA*, CBSSPORTS (December 16, 2015, 1:54 P.M.), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25416207/judges-deny-obannon-petition-to-rehear-appeal-vs-ncaa->

138. *Id.*

139. Justin Sievert, *NCAA Files Response to O'Bannon Petition to Rehear Student-athlete Compensation Issue*, SPORTING NEWS (Updated Dec. 1, 2015), <http://www.sportingnews.com/ncaa-basketball-news/4662409-ncaa-response-obannon-petition-student-athlete-compensation-issue>.

140. Solomon, *supra* note 137.

141. See, e.g., Goldman, *supra* note 49, at 209-12; Lazaroff, *supra* note 77, at 354-55, 357; Smith, *A Brief History*, *supra* note 34, at 21-22; Smith, *Death Penalty*, *supra* note 34, at 989.

142. Telephone Interview with Jay Bilas, ESPN Coll. Basketball Analyst, Of Counsel at Moore & Allen, PLLC (Oct. 15, 2014). Bilas believes that the Jeffrey Kessler lawsuit filed in March 2014 is the best solution. *Id.* Kessler's antitrust lawsuit focuses its argument on the fact that no other industry caps compensation for the workers that provide the most essential services. Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014), [http://espn.go.com/college-sports/story/\\_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model](http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model) (reporting that Kessler's lawsuit names the NCAA and five athletic conferences for antitrust violations). Bilas was adamant that the NCAA runs the only industry that stands opposite of American market principles. Telephone Interview with Jay Bilas, *supra*.

Education Market” for its participants.<sup>143</sup> An antitrust victory for student-athletes was unsurprising and probably inevitable.<sup>144</sup>

Like most antitrust claims against the NCAA,<sup>145</sup> the plaintiffs in *O’Bannon* seek relief through section 1 of the Sherman Act addressing any “restraint of trade or commerce among the several States.”<sup>146</sup> The NCAA does not have an exemption from federal antitrust laws.<sup>147</sup> The lack of exemption meant that *O’Bannon’s* thorough fact-finding on market restraints produced evidence of Sherman Act section 1 violations.<sup>148</sup> *O’Bannon’s* remedies reduced some of those market restraints, although those injunctions may be too weak.<sup>149</sup> Further, while the Rule of Reason now aids the courts in reviewing NCAA action, the *O’Bannon* litigation is not the only change to the student-athlete landscape. This Note now looks at some of the other significant movements.

While most people at the NCAA continue vigorous opposition to the *O’Bannon* holding that NCAA’s regulations are subject to antitrust scrutiny, some member institutions have changed their approach. It is quite possible that an equally significant event for the NCAA happened the day before the district court opinion. On August 7, 2014, the NCAA voted to give the 65 schools that make up the Power Five Conferences separate decision-making authority from the rest of Division I.<sup>150</sup> With more autonomy, institutions that want to give increased financial compensation to their student-athletes can now do just that. Additionally, at the start of 2015 college athletics officials

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143. See, e.g., *The Gritty on Iowa’s FY2015 Athletics Budget*, COLLEGEATHLETICSCLIPS, <https://collegeathleticsclips.com/news/thegrittyoniowasfy2015athleticsbudget.html> (last visited May 16, 2016) (reproducing a breakdown of The University of Iowa’s athletics budget by expenditures on Football, Men’s Basketball, Wrestling, All Other Men’s Sports, Women’s Basketball, Volleyball, and All Other Women’s Sports).

144. See, e.g., Branch, *supra* note 31 (firmly stating that the model of using student-athletes must change); Dennie, *supra* note 90, at 22–37 (detailing the cases that have led to the breaking point for athletes in the major sports not being fairly compensated); Marc Edelman, *How Young American Athletes Can Best Challenge a Bureaucracy That Prevents Them from Earning a Living*, 9 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 135, 136–44 (2013) (proposing two ways in which players can challenge the “no pay” rules of NCAA competition).

145. MATTHEW MITTEN ET AL., SPORTS LAW: GOVERNANCE AND REGULATION 83 (2013). Historically, claims brought under section 2 of the Sherman Act alleging NCAA violations for monopoly powers “ha[ve] been unsuccessful.” *Id.* (citing Ass’n of Intercollegiate Athletics for Women v. Nat’l Collegiate Athletic Ass’n, 735 F.2d 577 (D.C. Cir. 1984)).

146. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2012); *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015).

147. MITTEN ET AL., *supra* note 145, at 83–84 (citing *Hennessey v. Nat’l Collegiate Athletic Ass’n*, 564 F.2d 1136 (5th Cir. 1977)).

148. *O’Bannon*, 7 F. Supp. 3d at 963–84.

149. For a thorough breakdown of the district court injunctions from *O’Bannon*, why many felt that was not enough, and other implications, see generally Marc Edelman, *The District Court Decision in O’Bannon v. Nat’l Collegiate Athletic Ass’n: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319 (2014). See also *id.* at 2343–47.

150. Sharon Terlep, *NCAA Votes to Give Big Conferences More Autonomy*, WALL STREET J. (Aug. 7, 2014, 7:44 PM), <http://www.wsj.com/articles/ncaa-votes-to-give-big-conferences-more-autonomy-1407433146>.

and Obama Administration officials held a meeting at the White House to discuss, among other things, the effects of this new power on the student-athlete environment.<sup>151</sup>

At the 2015 NCAA Annual Convention, the Power Five Conferences used their new autonomy and voted in favor of increasing full athletic scholarships to the federal cost-of-attendance.<sup>152</sup> Beginning with the 2015–2016 academic year, schools can now provide athletic scholarships to include “[s]tipends, determined by institutions under federally created guidelines.”<sup>153</sup> This significant change falls in line with the part of Judge Wilken’s *O’Bannon* judgment that the Ninth Circuit affirmed.<sup>154</sup>

While most celebrated the change to cost-of-attendance scholarships, some cutbacks in athletics departments have coincided with the change.<sup>155</sup> According to one athletic director, “the problem is that no one knows how to pay for it except in some limited cases.”<sup>156</sup> With some Division I institutions eliminating some sports programs,<sup>157</sup> the results following *O’Bannon* for student-athletes have come with undesirable results for non-revenue sports.

College sports’ governing future is now uncertain in the aftermath of *O’Bannon*.<sup>158</sup> The Power Five Conferences will continue to push for more autonomy from the NCAA.<sup>159</sup> But the question remaining is where—in the

151. Steve Berkowitz & Dan Wolken, *White House to Meet with College Athletics Officials*, USA TODAY (Jan. 12, 2015, 4:49 PM), <http://www.usatoday.com/story/sports/college/2015/01/11/ncaa-white-house-president-obama/21595607>. The federal government has shown some willingness to involve itself, including the most recent proposed legislation from recently retired Representative James Moran. *Id.* For details on the proposed—but ultimately more symbolic—legislation, see Jon Solomon, *Congress Considers Presidential Commission for College Sports*, CBSSPORTS (Dec. 3, 2014, 7:53 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24863579/congress-considers-presidential-commission-for-college-sports>.

152. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships>; see also Mitch Sherman, *Full Cost of Attendance Passes 79–1*, ESPN (Jan. 18, 2015), [http://espn.go.com/college-sports/story/\\_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins](http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins).

153. Sherman, *supra* note 152.

154. See *supra* notes 101–04 and accompanying text.

155. Brad Wolverton, *New Benefits for Athletes Trigger Talk of Cutbacks in College Sports*, CHRON. HIGHER EDUC. (Jan. 15, 2015), [http://www.chronicle.com/article/New-Benefits-for-Athletes/151211/?cid=at&utm\\_source=at&utm\\_medium=en](http://www.chronicle.com/article/New-Benefits-for-Athletes/151211/?cid=at&utm_source=at&utm_medium=en).

156. *Id.* (quoting Michael Cross, athletic director at Bradley University).

157. Recent cuts, or planned cuts, include: football at The University of Alabama at Birmingham (“UAB”), five Olympic sports at The University of North Carolina Wilmington, and swimming and diving at College of Charleston. *Id.* UAB subsequently revived its football program six months after it was cut. Jon Solomon, *UAB Football is Back, Future Questions Remain About Reinstatement*, CBSSPORTS (June 1, 2015, 2:15 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25201823/sources-uab-football-is-back-reinstatement-announcement-monday>.

158. See Kristi Dosh, *Are O’Bannon Ruling and Title IX at Odds?*, BUS. C. SPORTS (Aug. 9, 2014), <http://www.businessofcollegesports.com/2014/08/09/are-obannon-ruling-and-title-ix-at-odds> (questioning whether the *O’Bannon* result is workable with Title IX constraints).

159. The Power Five Conferences held meetings on more autonomy through August 2014.

21<sup>st</sup>-century climate of big business intercollegiate athletics—this leaves non-revenue sports, which includes the majority of student-athletes. *O'Bannon*, as it stands after the Ninth Circuit, is a narrow ruling in that it affected just two sports: Division I men's basketball and FBS football.<sup>160</sup> That is a tiny, albeit the only revenue-generating, portion of students that participate in intercollegiate sports. Many that side with the NCAA say that compensating the athletes of the major sports, in addition to other concerns, will lead to the end of the non-revenue sports.<sup>161</sup> To quote Jay Bilas, “[t]hat’s simply not true.”<sup>162</sup> Many believe the Supreme Court already hinted at separate treatment for major sports because they are competing in different markets than, say, tennis or golf.<sup>163</sup> For example, commentators argue that Supreme Court dicta should be interpreted to mean that the major sports should be examined while “exclu[ding] [the] less competitive NCAA divisions and other athletic associations” because “[t]hose divisions do not maintain the budgets or provide the exposure necessary to compete with the major college teams for recruitment of star athletes.”<sup>164</sup> *O'Bannon*'s national attention has sparked debate on the merits of the college player-pay model and how other college sports will exist in the coming decades.

### C. DANGERS FOR THE “FORGOTTEN SPORTS”

No matter the final import of *O'Bannon*, conference realignment and new television contracts have separated the athletic department “haves” and “have-nots” in terms of financial autonomy. The playing field is not even equal amongst those institutions that *O'Bannon* addresses; a serious divide remains

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For more on the proposed changes to go into effect for the 2015–16 academic year, see *Power Five Conferences Give NCAA Reform Proposals*, PRESSCONNECTS: PRESS & SUN-BULL. (Oct. 1, 2014, 6:31 PM), <http://www.pressconnects.com/story/sports/2014/10/01/top-conf-erences-propose-reform/16556447>.

160. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F. Supp. 3d 1049, 1055–56, 1008–09 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015).

161. See Jon Solomon, *If Football, Men's Basketball Players Get Paid, What About Women?*, CBSSPORTS (June 5, 2014, 9:52 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24581041/if-football-mens-basketball-players-get-paid-what-about-women> (warning “that sports would get cut ‘if some of this discussion leads to extreme or radical solutions that suck a lot of resources that are being used to support these Olympic sports and women’s sports.” (quoting Pac-12 Commissioner Larry Scott)).

162. Telephone Interview with Jay Bilas, *supra* note 142.

163. Goldman, *supra* note 49, at 228–29. Goldman cited the decisions in *National Collegiate Athletic Association v. Board of Regents* and *International Boxing Club v. United States*. *Id.* at 228 n.179. Goldman, like others, believes that there is classification in college sports and that the major sports’ participants should be compensated. *Id.* at 247; see also Dan Wetzel, *NCAA Still Refusing to See Big Picture; All College Sports Are Not Equal*, YAHOO! SPORTS (Apr. 6, 2014, 5:50 PM), [http://sports.yahoo.com/news/ncaa-still-refusing-to-see-big-picture-all-college-sports-are-not-equal-215042288-ncaab.html?soc\\_src=mediaccontentstory&soc\\_trk=tw](http://sports.yahoo.com/news/ncaa-still-refusing-to-see-big-picture-all-college-sports-are-not-equal-215042288-ncaab.html?soc_src=mediaccontentstory&soc_trk=tw). For further examination of Wetzel’s advocacy for a harsh distinguishing of treatment between the major and non-revenue sports, see *infra* p. 30 and notes 177–79 and accompanying text.

164. Goldman, *supra* note 49, at 228.

between the Power Five Conference schools and the rest of Division I institutions. The Power Five Conferences are already in the process of reform.<sup>165</sup> With their mammoth television contracts for the major sports, the Power Five Conferences have almost as much power as the NCAA.<sup>166</sup>

The revenue landscape in college sports continues to change with the conference realignment over the last decade.<sup>167</sup> For non-revenue sports, this means institutions will continue to seek profits from the major sports.<sup>168</sup> Further, it means not all intercollegiate sports programs are inherently equal.<sup>169</sup> To some, the response to this inequality is that this consideration should not be important. As Jay Bilas advocates, “name one other industry where we limit capitalism [to this extent]. It is truly un-American.”<sup>170</sup> Consider The University of Texas at Austin (“Texas”) Athletic Department’s \$165 million in revenue for the 2012–13 year.<sup>171</sup> Texas had the highest athletic revenue in the country and it came almost entirely from football and men’s basketball.<sup>172</sup> Further, The University of Alabama’s (“Alabama”) athletic revenues “exceeded those of all 30 NHL teams and 25 of the 30 NBA teams.”<sup>173</sup>

These numbers alone do not show why the non-revenue sports should worry. It is the simple fact that these revenue numbers are derived from less than 10% of the sports programs at these schools.<sup>174</sup> In a free market system,

165. See *supra* notes 150–54 and accompanying text.

166. The idea of college athletics being financially governed by the NCAA only goes so far when conferences like the SEC can get around \$400 million annually almost exclusively from television rights in the two major sports. Glass, *supra* note 51.

167. Besides the Big 12, which now has ten member institutions, the Power Five Conferences have been stockpiling institutions that have profitable athletic departments (or are located in major media markets) over the last five years. The SEC added two universities. The Pac-10 also added two universities and is now the Pac-12. While the Big Ten hasn’t changed its name, it now has 14 member institutions (up from 11 a few years ago). Further, the ACC has become the leader of the pack for profitable men’s basketball programs with 15 institutions affiliated in that sport.

168. See Branch, *supra* note 31, at 102 (noting that about 90% of the NCAA revenues come from 1% of its athletes (quoting Sonny Vaccaro, former sports marketing agent)).

169. See Wetzel, *supra* note 163.

170. Telephone Interview with Jay Bilas, *supra* note 142.

171. Antonio Gonzalez, *College Athletes Union Could Put Billions at Stake*, ASSOCIATED PRESS (Apr. 6, 2014, 3:09 PM), <http://collegefootball.ap.org/article/college-athletes-union-could-put-billions-stake>.

172. *Id.* Texas has its own television network, called the Longhorn Network. While this network shows all sports at certain times, it cannot be doubted that the Longhorn Network was formed because of the football program’s immense fan base. For example, in August 2014 Longhorn Network announced six new weekly shows devoted to covering the Texas Longhorn football team. Gracie Blackburn, *Longhorn Network Debuts New Shows for 2014 “Strong” Football Season; Longhorn Legend Vince Young Joins Texas GameDay*, ESPN MEDIA ZONE (Aug. 22, 2014), <http://espnmediazone.com/us/press-releases/2014/08/longhorn-network-debuts-new-shows-for-2014-strong-football-season-longhorn-legend-vince-young-joins-texas-gameday>.

173. See Gonzalez, *supra* note 171.

174. For example, Alabama has 15 intercollegiate athletic teams. OFFICIAL HOME U. ALA. ATHLETICS, <http://www.rolltide.com> (last visited May 16, 2016) (scroll over “Sports” dropdown

it raises the question why two sports programs must “share” their profits with the others when those two raise all the money.<sup>175</sup> The profit-sharing is the legal battleground where it is less about young athletes pitted against the administration, and more about classmates of different sports’ interests pitted against other classmates’ interests.

The theory that sports are not created equal has won more and more support.<sup>176</sup> It stands to reason that student-athletes in the major sports at schools like Alabama should have “[a]dditional monetary stipends, a voice for the players, scholarship adjustments, [and] stricter practice time limits.”<sup>177</sup> The real end game for legal battles like *O’Bannon* is not whether schools will have to share revenues with FBS football players, but “football players deciding whether they should continue to allow gymnasts, swimmers, wrestlers and the like to share in their money.”<sup>178</sup>

Yet, the solution is not to take away scholarship opportunities in non-revenue sports to satisfy the need to compete in men’s basketball and football. It may seem daunting for the “other” sports, but no aspiring young golfer should hesitate about her future opportunities to go to college on an athletic scholarship. As the anecdote of Dr. Bailey of William Jewell shows, the success stories and importance of student-athletes in non-revenue sports are too important to let die out.<sup>179</sup> This scholarship opportunity often drives non-revenue sports participants to attend schools like William Jewell. Non-revenue sports are sustainable, but now those in the position to speak for these non-

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menu; each team’s hyperlink displayed). Yet, one sport—football—is responsible for the nationwide popularity of “Roll Tide” and that same sport is responsible for the revenue that makes Alabama’s athletic department capable of out-profiting professional sports teams. One can visit Alabama’s athletic webpage and quickly learn that the football program is clearly the most important. There is even a website linked from the school’s website that is devoted to their head coach: <http://www.coachsaban.net>. *Football*, OFFICIAL HOME U. ALA. ATHLETICS, <http://www.rolltide.com/sports/m-footbl/alab-m-footbl-body.html> (last visited May 16, 2016).

175. See Wetzel, *supra* note 163.

176. *Id.* Wetzel addresses NCAA President Mark Emmert’s statements that sports programs outside of the major sports would be in danger of no longer being able to offer scholarships if a player-pay model is adopted. *Id.* Wetzel’s reply is simple: “Exactly. That’s where this is heading one day.” *Id.*

177. *Id.*

178. *Id.* Wetzel’s theory is that without the NCAA competition restraints, all money will fall to the student-athletes in the major sports. *Id.* This is flawed. True, an uncapped college athletic marketplace would produce financial strength in the players, but the largest distribution of money in college sports is through television contracts. See Smith, *supra* note 12. These contracts will not be negotiated by, for example, the starting lineup for The University of Kentucky’s men’s basketball team. Thus, a slight alteration is necessary to Wetzel’s central thesis of men’s basketball and football players having the financial power to decide whether other sports will have funding. As this Note states above, the legal issue puts the fellow students in opposite bargaining positions. See *supra* notes 174–78. However, institutions, no matter what happens with the NCAA, will be left in between.

179. See *supra* notes 4–11 and accompanying text.

revenue sports must speak. Non-revenue sports can survive and they have more than one way to make it happen.

#### IV. NON-REVENUE SPORTS' PATHS TO SURVIVAL

As previously mentioned, advocates for the non-revenue sports must operate with the understanding that *O'Bannon* will be the ground floor for economic changes in the major sports.<sup>180</sup> While much more litigation and reform must unfold before non-revenue sports truly know what they are faced with,<sup>181</sup> this Note focuses on three approaches to student-athlete compensation and its effect on non-revenue sports. Subpart IV.A considers a free market system and a complete overhaul of today's restrained intercollegiate athletic structure. Subpart IV.B examines the potential for congressional intervention to either produce mandates for all sports or to create an NCAA antitrust exemption, with some of these mandates already active through past legislation. Finally, Subpart IV.C proposes a workable middle ground for all parties' interests, which includes reasonable reform efforts by the NCAA and its member institutions, such as operating within antitrust parameters, following an economic model that can satisfy most interested parties, and creating new internal bylaws that can accommodate the 21st century's version of amateur athletics. These adaptations would provide students with cost-of-attendance scholarships and give student-athletes rights to NIL profits.

##### A. THE LAISSEZ-FAIRE APPROACH

At the far end of the spectrum, the most drastic reform to intercollegiate athletics is to allow all compensation of players as in an employer–employee marketplace; however, just like any other industry of labor, some regulations would be necessary.<sup>182</sup> The simple structure would permit student-athletes to

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180. See *supra* Part III.B.

181. This litigation and reform ranges from in the courtroom to NCAA subcommittee conferences. The *Kessler* case could result in the most drastic legal changes. See Edelman *supra* note 149, at 2351. On the other hand, the Power Five Conferences could shift the entire argument with further changes stemming from ongoing reform meetings. See *supra* notes 152–54 and accompanying text. This Note will not speculate, but a common argument is that the Power Five Conferences may already have all the resources they need to separate from the NCAA and create their own competitive body. For an early and short examination of what the Power Five Conferences are contemplating, see Kevin Gemmill, *Power Conferences in Autonomy Talks*, ESPN (Jan. 17, 2014), [http://espn.go.com/college-sports/story/\\_/id/10307993/ncaa-administrators-mull-giving-power-5-conferences-more-autonomy](http://espn.go.com/college-sports/story/_/id/10307993/ncaa-administrators-mull-giving-power-5-conferences-more-autonomy). For an argument against the Power Five Conferences separation, see Drew Sharp, *Separating NCAA's Power Conferences Would Create Major Problems*, DET. FREE PRESS (Aug. 6, 2014), <http://archive.freep.com/article/20140806/COL08/308060067/ncaa-reform-problems>.

182. The strategy of college athletes forming labor unions could be one route to this end. Athletes and governing bodies—whether the institutions, conferences, or an association—would have to work out parameters for a new system and to create a new workplace environment. However, questions would arise to the employment rights players would then have. Len Elmore,

negotiate “contracts” under a collective bargaining agreement.<sup>183</sup> The Northwestern University football players’ unionization efforts were, in part, a start to this process.<sup>184</sup> Although these specific unionization efforts came to an end when the National Labor Relations Board declined to assert jurisdiction on August 17, 2015,<sup>185</sup> many think the players’ claims that they were employees had merits.<sup>186</sup> In fact, since the unionization petition began, the NCAA has instituted some rule changes to further benefit student-athletes.<sup>187</sup> The laissez-faire approach to the market would require greater autonomy in rulemaking for the institutions and conferences. The NCAA could concede this step, as autonomy has already increased for the Power Five Conferences and its members.<sup>188</sup>

The concerns of Mark Emmert and the NCAA sound the loudest on this front. Emmert firmly believes that a free market for college athletes would destroy the “competitive balance” between schools.<sup>189</sup> Yet, that theory of “competitive balance” turns a blind eye to the “arms race” that exists today with athletic facilities, coaches’ contracts, and apparel contracts with companies like Nike.<sup>190</sup> Jay Bilas predicts that a market where players can be

College Basketball Analyst and former Senior Counsel at Dewey & LeBoeuf, argues that such a free market approach would give institutions the ability to cut ties with players with no repercussions. Koroma & Gregory, *supra* note 24 (see embedded video).

183. Although not exhaustive, some initial aspects of a collective bargaining agreement could clear up many concerns. See generally César F. Rosado Marzán & Alex Tillett-Saks, *Work, Study, Organize!: Why the Northwestern University Football Players are Employees Under the National Labor Relations Act*, 33 HOFSTRA LAB. & EMP. L.J. 301 (2015).

184. *Id.*

185. Nw. Univ. & Coll. Athletes Players Ass’n, 36 N.L.R.B. No. 167, 2015 WL 4882656, at \*1 (Aug. 17, 2015).

186. See Edelman, *supra* note 87.

187. The NCAA Division I Council has proposed reforms including: allowing schools to pay parents or guardians to accompany their children on FBS recruiting visits, reexamination of the time commitments for college athletes, and to further explore how to best prepare student-athletes for life after college. See Michelle Brutlag Hosick, *DI Seeks Policies that Reaffirm Commitment to Education*, NCAA (Aug. 6, 2015, 2:00 PM), <http://www.ncaa.org/about/resources/media-center/news/di-seeks-policies-reaffirm-commitment-education>; Michelle Brutlag Hosick, *Division I Council Sponsors Football Recruiting Proposal*, NCAA (Aug. 14, 2015, 2:59 PM), <http://www.ncaa.org/about/resources/media-center/news/division-i-council-sponsors-football-recruiting-proposal>.

188. Paul Myerberg, *Mike Slive Says SEC Must Pursue Separation if NCAA Autonomy Isn’t Gained*, USA TODAY (July 14, 2014, 5:09 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/07/14/commissioner-mike-slive-sec-media-days-ncaa-autonomy/12632085> (reporting that Mike Slive, the commissioner of the SEC, believes in the pursuit of more autonomy for the conferences, separate from the NCAA).

189. Nick Bromberg, *Mark Emmert Was Steadfast in Defense of NCAA Model During Thursday Testimony*, YAHOO! SPORTS (June 19, 2014, 7:22 PM), <https://sports.yahoo.com/blogs/ncaaf-dr-saturday/mark-emmert-was-steadfast-in-defense-of-ncaa-model-during-thursday-testimony-232259281.html>.

190. Nick Bromberg defeats Emmert’s premise of the sanctity of “competitive balance” in just two sentences:

But as we’ve said time and time again, the free market system is already in play in

recruited almost as though they were free agents out of high school could increase “competitive balance.”<sup>191</sup> Through this change, each athletic department would have to make decisions about how to best allocate the “salary” to compile a complete team, whereas now Duke’s men’s basketball has all the resources to offer all five of the top prospects the same deal.<sup>192</sup>

Pac-12 Commissioner Larry Scott warned that compensating athletes in the major sports could be the demise of non-revenue sports.<sup>193</sup> That will only happen if the member institutions choose the demise of non-revenue sports. In other words, while Scott and Emmert argue budgetary constraints, modern-day coaches’ contracts in the major sports can rival those contracts negotiated by their coaching counterparts at the professional level, yet non-revenue sports still exist.<sup>194</sup> As Bilas argues: “When coaches are offered eight million dollar salaries, nobody stands up and says, ‘Women’s sports are going away,’ or ‘Non-revenue sports are going away.’ When they build multi-million dollar facilities, nobody says, ‘What about women’s sports?’” Bilas says that is true when a student-athlete is receiving more money.<sup>195</sup> At most, very few sports would be cut, but institutions could still allocate some funding for “club” teams, which is already prevalent across the country.<sup>196</sup> To further curb losing non-revenue sports, athletic programs would adapt their budget through

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college sports. Instead of money (that’s not under the table) players are compensated with athletic facilities and winning programs tend to attract better players because of their success. Suddenly paying players would not change the balance of power dramatically in college sports.

*Id.* Additionally, this was one of Jay Bilas’ main points throughout the interview. Telephone Interview with Jay Bilas, *supra* note 142. Bilas cites to conversations with sports economists who agree that the money is there. *Id.* Rather than the money being spent on the new stadium or the coach’s new multi-million dollar extension, the money can be redistributed to the student-athletes that produced the increased revenue for the athletic departments. *Id.*

191. Telephone Interview with Jay Bilas, *supra* note 142.

192. *Id.*

193. See Solomon, *supra* note 161.

194. Compare Steve Berkowitz et al., *NCAA Salaries: NCAAF Coaches*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> (showing the coaching salaries for Division I head football coaches) (last visited May 16, 2016), with *NFL Coaches Salaries*, COACHES HOT SEAT, <http://coacheshotseat.com/NFLCoachesSalaries.htm> (last visited May 16, 2016) (showing the average salary of an NFL head coach to be \$4,851,563).

195. Telephone Interview with Jay Bilas, *supra* note 142. After being pressed on how a completely unregulated market can have no effects on non-revenue compensation, Bilas offered numerous examples of unregulated and constantly increasing spending by athletic departments on projects for the benefit of the major sports programs. *Id.* Bilas carried the comparisons even further to institutions’ spending on any projects, using University of Iowa’s excellent medical facilities as an example. *Id.* To summarize Bilas’s overall point: institutions are always making financial decisions based on what the administrators see as having the greatest value. Bilas is certain that changes in regulations on player compensation will not drastically alter what a university sees as a valuable use of an overall budget. *Id.*

196. For example, the University of Iowa has a large array of club teams through the school. *Sport Clubs*, U. IOWA, <http://recserv.uiowa.edu/sport-clubs> (last visited May 16, 2016).

reducing travel, finding alternative forms of federal funding for the participants, and lowering salaries for coaches and staff.<sup>197</sup>

Unfortunately, a giant administrative cloud looms over this approach: the question of who leads this change. One option would be a complete disbandment of the NCAA and establishment of a new form of governance; the new governance could be divided so that all interests are the focus for that branch of authority over college athletics.<sup>198</sup> The time lag between implementation and viability leaves far too great of a gap between colleges signing onto a new system and that system getting up and running. What about money spent in a free market system, and what happens when institutions run out?<sup>199</sup> Additionally, dissolving the NCAA is an enormous risk for the overall wellbeing of student-athletes. Despite current failures, the NCAA succeeds in providing structure for individuals to obtain education—providing tutoring and other benefits to help student-athletes succeed.<sup>200</sup>

Further, unregulated payment to players leaves the state of non-revenue sports in too much uncertainty.<sup>201</sup> The argument that non-revenue sports would be cut if institutions pay student-athletes beyond scholarships has some validity: “And so if those programs are of so little value to the campus community as a whole, that with the reduction of the subsidy from football and basketball, no one values them enough to pay for them if the subsidy is reduced, they will probably go away.”<sup>202</sup> This is no guarantee that certain sports will be forgotten, but unstructured changes could lead to a greater possibility of that happening. If institutions must use a balancing test to

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197. See Bob Wuornos, *The Future of ‘Other’ College Sports*, NAT’L REV. (Jan. 17, 2015, 4:00 AM), <http://m.nationalreview.com/article/396580/future-other-college-sports-bob-wuornos>.

Wuornos puts forth three ideas for non-revenue sports in the changed player compensation era: (1) “alumni and sports communities have stepped forward to endow or fund their programs;” (2) “non-revenue sports could consider transitioning to the need-based scholarship model that has worked so well for the Ivy League schools;” and (3) a long-term solution of separate governing bodies. *Id.*

198. See John Feinstein, *Why It’s Time to Disband NCAA*, DAILY TIMES NEWS (Feb. 21, 2013, 12:01 AM), <http://www.delcotimes.com/general-news/20130221/john-feinstein-why-its-time-to-disband-ncaa> (“Duke basketball coach Mike Krzyzewski has been saying that there should be three separate organizations, not one. ‘We need an organization that does what’s best for college football, one that does what’s best for [men’s] college basketball and one that does what’s best for non-revenue sports,’ Krzyzewski proposes.” (alteration in original)).

199. Joseph Beyda, *No One Wins in a Free Market NCAA*, STAN. DAILY (May 2, 2014), <http://www.stanforddaily.com/2014/05/02/beyda-no-one-wins-in-a-free-market-ncaa>. Even further, the question of what happens with the players that are currently under scholarship would foster more headaches. Each year’s recruiting class would demand a higher and higher “salary.” *Id.*

200. Allison Schrager, *In Defense of the NCAA*, REUTERS: THE GREAT DEBATE (Mar. 25, 2014), <http://blogs.reuters.com/great-debate/2014/03/25/in-defense-of-the-ncaa>.

201. See John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, in *THE BUSINESS OF SPORTS* 643, 644 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004).

202. Andy Schwarz, *Myth 5: We Can’t Pay Them or Else We’ll Have to Cancel Other Sports*, SPORTSGEEKONOMICS: MUSINGS ON SPORTS ECON. (Dec. 6, 2011), <http://sportsgeekonomics.tumblr.com/post/13848472352/myth-5-we-cant-pay-them-or-else-well-have-to-cancel>.

determine what is valued enough to remain in the budget, non-revenue sports do not present a great argument to stay.<sup>203</sup> For non-revenue sports, the valuation of their economic importance is an outcome that should be avoided.<sup>204</sup>

Also, in the Northwestern University football players' union appeal to the National Labor Relations Board, an amicus brief was filed by the "Association for the Protection of College Athletes" on behalf of a group of student-athletes.<sup>205</sup> The brief illustrates that not all student-athletes desire a complete overhaul of the current model.<sup>206</sup> While student-athletes support the cost-of-attendance scholarship change,<sup>207</sup> they generally do not accept the push for a fully free market system.<sup>208</sup> Athletes who could gain from indirect financial benefits could also be limited by this approach. While the approach has merits, it is not the best route for the interests of non-revenue sports and its participants or the industry as a whole.

### B. THE GOVERNMENT INTERVENTION APPROACH

The next approach is for federal intervention into intercollegiate athletics. Intercollegiate sports and the NCAA could meet the standard for a legitimate government interest because of the public policy considerations.<sup>209</sup> Past action shows that the federal government has been a source of protecting

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203. Weistart, *supra* note 201, at 644.

204. *Id.* at 645.

205. Brief of Amici Curiae Ass'n for the Protection of Collegiate Athletes, Nw. Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359 (N.L.R.B. July 3, 2014), <http://apps.nlr.gov/link/document.aspx/09031d45817ccba5>; see also Daniel Uthman, *NCAA Files Brief Against Northwestern Football Union Effort*, USA TODAY (July 3, 2014, 8:01 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/07/03/ncaa-files-brief-against-northwestern-football-union-effort/12173565>. Many concerns have been raised in opposition of the Northwestern University football team's labor union movement in 2014. Amicus briefs, filed by Senators, echoed that sentiment and believe that college athlete unionization would be "unworkable" under NLRB standards. Brief for Amici Curiae Members of the U.S. Senate Committee on Health Education Labor & Pensions & the U.S. House of Representatives Committee on Education & the Workforce at 25–26, Nw. Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359 (N.L.R.B. July 3, 2014), <http://apps.nlr.gov/link/document.aspx/09031d45817cc7a4>.

206. See Uthman, *supra* note 205 ("While scholarship players in the revenue sports—like all college athletes—do need additional protections, those changes need to be made by the NCAA and its member institutions, who could and should structure remedies in a way to avoid imposing costs on other students." (quoting Brief of Amici Curiae Ass'n for the Protection of Collegiate Athletes, *supra* note 205, at 17)).

207. Hosick, *supra* note 152 ("On behalf of every athlete in this room, I want to thank you guys for making a real effort to enhance the student-athlete." (quoting a University of Oklahoma football player, Ty Darlington)).

208. See Uthman, *supra* note 205; see also Brief of Amici Curiae Ass'n for the Protection of Collegiate Athletes, *supra* note 205.

209. See *supra* notes 26–27 and accompanying text. Not only are the interests of the public as consumers at stake, but the interest of student-athletes' rights have also been the subject of legislative acts. See *supra* Part II.C.

the interests of both the minority party and student-athletes' due process.<sup>210</sup> Congressman Tony Cardenas (D-Cal.) recognized the legitimacy of protecting student-athletes when he articulated that “[t]here are over 400,000 [student-]athletes on any given day. That’s a lot of young, bright people that need to be appreciated and have the kind of protections and balance they deserve.”<sup>211</sup> Moreover, Judge Wilken’s closing language in the *O’Bannon* district court opinion hinted at the need for intervention beyond what the district court—or, likely, any other court for that matter—could provide:

It is likely that the challenged restraints, as well as other perceived inequities in college athletics and higher education generally, could be better addressed as a policy matter by reforms other than those available as a remedy for the antitrust violation found here. Such reforms and remedies could be undertaken by the NCAA, its member schools and conferences, or Congress.<sup>212</sup>

While Congress has come to the defense of student-athletes many times, the one precedent relating to compensation concluded with Congress supporting NCAA policy through the Sports Agent Responsibility and Trust Act (“the Act”).<sup>213</sup> Section 3 of the Act precludes agents from “directly or indirectly recruit[ing] or solicit[ing] a student athlete.”<sup>214</sup> While recent congressional proposals have gone in the direction of providing more financial opportunities for student-athletes, those bills have not gained much traction.<sup>215</sup> Although Congress has shown interest, there are definite red flags.<sup>216</sup> While Representative Cardenas “wants to build laws that provide requirements for the NCAA. . . . Congress [itself] can be influenced by the power of universities and relationships with high-profile coaches.”<sup>217</sup>

If Congress does not take the first step forward, advocates for non-revenue sports should use the same model as Title IX advocates to change intercollegiate sports.<sup>218</sup> In fact, Title IX litigation may result if the *O’Bannon*

210. See *supra* Part II.C–D. But see *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 196–99 (1988) (determining the NCAA to be a private actor and not subject to the Due Process Clause).

211. Jon Solomon, *Can Congress (Yes, Congress) Help NCAA Find Solutions?*, CBSSPORTS (Aug. 18, 2014, 11:16 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24666147/can-congress-yes-congress-help-ncaa-find-solutions>.

212. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014), appeal filed, No. 14-17068 (9th Cir. Oct. 21, 2014), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015).

213. Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801–7807 (2012).

214. *Id.* § 7802(a)(1).

215. See *supra* note 116 and accompanying text.

216. See Solomon, *supra* note 211.

217. *Id.*

218. See *supra* Part II.C.

method is all that changes in intercollegiate sports.<sup>219</sup> This may lead to the OCR providing advisory oversight for college administrators after *O'Bannon*.<sup>220</sup> Further, “Title IX lawsuits will arise in the aftermath of [*O'Bannon*], with women student-athletes objecting to their male counterparts receiving a new type of compensation.”<sup>221</sup>

On the other hand, one avenue for the NCAA to avoid antitrust violations is to lobby Congress for an antitrust exemption.<sup>222</sup> Professional sports associations have attempted this with mixed results. For nearly 100 years, antitrust laws have, in effect, not applied to Major League Baseball.<sup>223</sup> On the other hand, the National Football League lost a 2010 U.S. Supreme Court case that determined that section 1 of the Sherman Act regulates certain aspects of the member teams’ economic activities.<sup>224</sup>

Although Congress could step in to shape intercollegiate athletics,<sup>225</sup> it has no realistic route to doing this. Further, the NCAA has reportedly inquired into an antitrust exemption to protect the “organization’s founding principle of athletic amateurism.”<sup>226</sup> However, an antitrust exemption seems unlikely, especially due to the Power Five Conference autonomy<sup>227</sup> and many seeing it as impractical; “An NCAA antitrust exemption is ‘theoretically possible but not politically likely,’ . . . . ‘It is not a good idea without independent oversight—you’d just be letting the people who are now violating antitrust laws do so with impunity.’”<sup>228</sup>

In further opposition, others see government involvement in college as the wrong route to take in the interest of student-athletes’ rights.<sup>229</sup> While it is seen as an unlikely result, any agreement between the NCAA and the U.S. Department of Education has the chance to join an antitrust exemption for

219. See Michael McCann, *What Ed O'Bannon's Victory Over the NCAA Means Moving Forward*, SPORTS ILLUSTRATED (Updated Aug. 10, 2014), <http://www.si.com/college-basketball/2014/08/09/ed-obannon-ncaa-claudia-wilken-appeal-name-image-likeness-rights> (discussing the uncertain legal implications of *O'Bannon*, specifically its potential impact on Title IX compliance).

220. *Id.*

221. *Id.*

222. Interview with Professor Herbert Hovenkamp, Ben and Dorothy Willie Chair, The Univ. of Iowa Coll. of Law, in Iowa City, Iowa (Oct. 2, 2014).

223. See *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922) (finding that players traveling between cities for games did not constitute interstate commerce).

224. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010) (holding that some activities of the 32 teams fall under the “cartel” category for conspiring as separate economic actors and are subject to Sherman Act § 1 regulation).

225. See *supra* Part II.F.

226. Sharon Terlep, *Colleges May Seek Antitrust Exemption for NCAA*, WALL STREET J. (July 30, 2014, 1:27 PM), <http://www.wsj.com/articles/colleges-may-seek-antitrust-exemption-for-ncaa-1406741252>.

227. See *supra* text accompanying notes 150–53.

228. Terlep, *supra* note 226 (quoting Professor Daniel Lazaroff).

229. See, e.g., Patrick Hruby, *Dear White House: Don't Let the NCAA Scam You*, VICE SPORTS (Jan. 13, 2015), <https://sports.vice.com/article/dear-white-house-dont-let-the-ncaa-scam-you>.

the NCAA, thus increasing the NCAA's control rather than helping to find an equitable resolution.<sup>230</sup> Further, evidence shows that college sports do not need government assistance, and revenue is greater than ever.<sup>231</sup> Any government involvement would be used to avoid meeting demands of new student-athletes' rights to the indirect revenue those students produce.<sup>232</sup>

While the federal government could play a major role in reform, non-revenue sports should not be dependent on this approach. Individuals with the ability to exact change and reform the NCAA should take the first step toward preserving intercollegiate athletics outside of the major sports.

### C. NCAA FINANCIAL GOVERNANCE: 21ST-CENTURY APPROACH

With change certain, the most logical approach is to reform the NCAA to better adapt to a new climate. NCAA President Mark Emmert's steadfast supporters are waning, as many conference commissioners even feel the need for change.<sup>233</sup> Because a new approach is necessary, and a big business like the NCAA still needs strong governance, the best approach for non-revenue sports is: (1) full implementation of the cost-of-attendance scholarships; and (2) NCAA bylaw reforms allowing student-athletes to have the opportunity to receive compensation for their NIL through "indirect financial activities."<sup>234</sup> The NCAA can accomplish these changes, and uphold the existence of non-revenue sports, by abandoning their current "Principle of Amateurism."<sup>235</sup>

Over 30 years ago, Robert H. Ruxin, author of *An Athlete's Guide to Agents*, predicted the unbalanced climate between amateurism and commercialization for men's basketball and football players.<sup>236</sup> However, Ruxin's focus was on proposals to reduce agency abuse after graduation and to enhance player's access to advisors while still eligible for NCAA competition, not to provide additional player compensation while in

230. *Id.*

231. *Id.*

232. *Id.*

233. See, e.g., Joe Schad, *Big 12, WVU Execs Say Player Pay Ok*, ESPN (Aug. 7, 2014), [http://espn.go.com/college-football/story/\\_/id/11320172/bob-bowlsby-big-12-oliver-luck-wvu-mountaneers-say-compensation-players-ok](http://espn.go.com/college-football/story/_/id/11320172/bob-bowlsby-big-12-oliver-luck-wvu-mountaneers-say-compensation-players-ok) ("Big 12 commissioner Bob Bowlsby and West Virginia athletics director Oliver Luck said Wednesday they are generally supportive of allowing student-athletes to be paid for the use of their name, image and likeness.").

234. Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 864 (2002).

235. See, e.g., *id.* at 885–89 (discussing indirect financial activities to benefit student athletes); see also Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 587–92 (2009) (offering a new form of amateurism that reduces restrictions such as the no agent rule); Mark Guarino, *NCAA and College Sports: It Is Time to Pay Athletes to Play?*, CHRISTIAN SCI. MONITOR (May 18, 2014), <http://www.csmonitor.com/USA/Sports/2014/0518/NCAA-and-college-sports-It-is-time-to-pay-athletes-to-play-video> (suggesting three possible models for reform to improve player compensation).

236. See generally Robert H. Ruxin, *Unsportsmanlike Conduct: The Student Athlete, the NCAA, and Agents*, in LAW & AMATEUR SPORTS 191 (Ronald J. Waicukauskis ed., 1982).

college.<sup>237</sup> Although this Note argues for a different role for agents, the principle remains the same: “[T]he NCAA should help its student athletes develop the ability and capacity to protect and enhance their postcollegiate opportunities—whether in professional sports or elsewhere.”<sup>238</sup> Most importantly, in an era before individual conferences had access to the major television contracts,<sup>239</sup> Ruxin did not even mention non-revenue sports’ budgets when suggesting funding to help these athletes, stating only that “[t]he NCAA could use part of its television revenues to benefit the athletes responsible for the television contracts.”<sup>240</sup> Years later, Ruxin’s proposal still provides a foundation for NCAA reform.

### 1. Implementation of Cost-of-Attendance Scholarships

The 2015 Annual Convention began the move towards NCAA reform when the Division I Board of Directors voted for a new governance model that allows for the Power Five Conferences to create certain rules—like allowing cost-of-attendance-scholarships—separate from the rest of the Division.<sup>241</sup> The Power Five Conferences’ initial reform proposal mentioned three principles that align with the overall goal for non-revenue sports: (1) “continu[ing] revenue distributions as they currently exist”; (2) keeping access for all conferences to NCAA championships; and (3) sustaining the benefits of the NCAA “Division I brand” for all sports.<sup>242</sup> Adding to the principle goals at the outset, the January 2015 vote by the Power Five Conferences for cost-of-attendance scholarships marked real reform.<sup>243</sup>

During the 2004–2012 fiscal years, FBS revenues have increased 77.5%.<sup>244</sup> That increase is sure to continue at an even faster pace with the introduction of the College Football Playoff.<sup>245</sup> During the same time period,

237. *Id.* at 192.

238. *Id.* at 204.

239. Ruxin wrote his essay two years before the 1984 Supreme Court decision in *NCAA v. Board of Regents*.

240. Ruxin, *supra* note 236, at 211 n.83.

241. See, e.g., Matt Hinton, *Division Zero: What the NCAA’s “Power Five” Autonomy Decision Means for the Future of College Sports*, GRANTLAND (Aug. 8, 2014), <http://grantland.com/the-triangle/division-zero-what-the-ncaas-power-five-autonomy-decision-means-for-the-future-of-college-sports>.

242. NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 5 (2014), <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf>.

243. See *supra* notes 150–51 and accompanying text.

244. DANIEL L. FULKS, NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT: REVENUES & EXPENSES 12 (2013), <http://www.ncaapublications.com/productdownloads/2012RevExp.pdf>.

245. See George Schroeder, *Power Five’s College Football Playoff Revenues Will Double What BCS Paid*, USA TODAY (July 16, 2014, 5:57 PM), <http://www.usatoday.com/story/sports/ncaa/2014/07/16/college-football-playoff-financial-revenues-money-distribution-bill-hancock/12734897>; see also *College Bowl Payouts Surpass \$500 Million*, ESPN (Apr. 14, 2015), [http://espn.go.com/college-football/story/\\_/id/12688517/college-bowl-game-payouts-surpass-500-million-first](http://espn.go.com/college-football/story/_/id/12688517/college-bowl-game-payouts-surpass-500-million-first).

other sports operated consistently with negative net revenue.<sup>246</sup> And yet the predictions of cutting non-revenue programs are only prevalent as cost-of-attendance scholarships become a reality. The NCAA model of supporting non-revenue sports survived successfully from 2004 to 2012. Now, with the College Football Playoff money, the balancing of expenses for cost-of-attendance scholarships is already in place.<sup>247</sup>

For the rest of the NCAA, and in Division II specifically, maintaining the current overall structure is important. Schools like William Jewell need intercollegiate athletics.<sup>248</sup> While in isolation they can be seen as an expense, sports bring value to institutions by marketing extracurricular activities, increasing the school's culture, and broadening the student body. For example, the William Jewell administration expects about 40% of the student body to participate in athletics programs.<sup>249</sup> Maintaining revenue distributions to Division II and Division III from the NCAA budget must continue to make goals like 40% of the student body participating in sports feasible. Without the revenue distributions, schools like William Jewell cannot fund most sports. Without these non-revenue sports, attendance goes down and the 40% goal is not even close to being reached. This should not be an issue as long as institutions do not extend financial aid to the major sports' participants beyond cost-of-attendance scholarships.<sup>250</sup> The two lower divisions receive less than 10% of the overall budget.<sup>251</sup> Additional television revenue at the top levels allows this allocation to continue with the NCAA reforms currently proposed.<sup>252</sup>

## 2. NCAA Bylaw Reform to Allow Student Access to NIL Revenues

While the cost-of-attendance scholarship increases have now been approved for the Power Five Conferences,<sup>253</sup> reform should not stop there. Student-athletes must be given the opportunity to be compensated for "indirect financial activities."<sup>254</sup> As NCAA executive Oliver Luck, echoing a key

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year-college-football-playoff.

246. FULKS, *supra* note 244, at 17.

247. Each of the Power Five Conferences will receive about \$50 million for the first year of the Playoff. Schroeder, *supra* note 245.

248. Telephone Interview with Dr. Darlene Bailey, *supra* note 4.

249. *Id.*

250. *See* Wuornos, *supra* note 197 (offering three possible solutions to help non-revenue sports during this transition).

251. NCAA, REPORT OF THE NCAA EXECUTIVE COMMITTEE, AUG. 6, 2014, at 5 (2014), <http://www.ncaa.org/sites/default/files/2014-Aug-Exec-Comm-Report.pdf>.

252. *See* Schroeder, *supra* note 245; *see also* text accompanying note 245 (showing the additional revenues for the new College Football Playoff).

253. *See supra* notes 150–51 and accompanying text.

254. Edelman, *supra* note 234, at 864 n.16 ("Indirect financial activities, which are advocated, include payments from third parties to college athletes in exchange for performing a service, such as performing in summer professional leagues, endorsing a product, or promoting an event.").

plaintiff argument in *O'Bannon*, put it, “an athlete’s [NIL] is a ‘fundamental right’” that acceptance of a grant-in-aid scholarship does not waive.<sup>255</sup>

Agents can play an important role. A controlled environment where agents—who are now prohibited from interacting with student-athletes—are more than mere advisors accomplishes two goals that are essential to both non-revenue sports and all student-athletes. Agent and student-athlete interaction will: (1) end, or greatly diminish, court battles similar to *O'Bannon* that are based in antitrust restraints against the student-athletes;<sup>256</sup> and (2) refute the institutions’ claims that they do not have enough money to pay the major sports’ athletes and support non-revenue sports.<sup>257</sup>

Redefining amateurism is the first step for athletes’ access to NIL revenues. When defining amateurism, the federal government has given deference to the governing bodies.<sup>258</sup> Other organizations under the Amateur Sports Act<sup>259</sup> umbrella allow for agent interaction, “but regulated; they are required to have clear contractual terms and abide by ethical rulings.”<sup>260</sup> The model works. For example, the U.S. Olympic Committee has succeeded without ever paying its participants while allowing them to receive endorsement deals and sponsorships.<sup>261</sup> Thus, the NCAA should rework section 12.3<sup>262</sup> of their bylaws to allow agent interaction for the purpose of pursuing financial gains from the athlete’s NIL and, in turn, re-frame the “Principle of Amateurism” to best suit the 21st century.<sup>263</sup>

These reforms keep the vast majority of the current model in place. Athletic scholarships for all sports should be capped as “cost-of-attendance” scholarships. Institutions will still have to rework some of their budget, but

255. Sharon Terlep, *NCAA to Allow Big Sports Schools to Offer Full Cost-of-Attendance Scholarships*, WALL STREET J. (Jan. 17, 2015, 8:00 PM), <http://www.wsj.com/articles/ncaa-to-allow-big-sports-schools-to-offer-full-cost-of-attendance-scholarships-142154283>, at 3 (quoting NCAA Executive Vice President of Regulatory Affairs Oliver Luck).

256. See Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 343 (1998) (“One of the main benefits of revenue sharing is that the NCAA avoids possible antitrust violations.”).

257. See Edelman, *supra* note 234, at 888 (arguing that allowing student-athletes to receive indirect financial benefits avoids Title IX and institutional budget issues).

258. Fitt, *supra* note 235, at 582 & n.179 (citing 36 U.S.C. § 220501(b)(1) (2006)).

259. Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (codified as amended in scattered sections of 15, 36 U.S.C.).

260. Fitt, *supra* note 235, at 584.

261. For more on the argument that the NCAA should fall in line with the changes the Olympics have made, see Patrick Hruba, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 25, 2012), [http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/?single\\_page=true](http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/?single_page=true), and Bob Greene, *What Changed the Olympics Forever*, CNN (July 23, 2012, 11:43 AM), <http://www.cnn.com/2012/07/22/opinion/greene-olympics-amateurs>.

262. NCAA BYLAWS § 12.3 (2015) (prohibiting agent involvement with student-athletes).

263. See Edelman, *supra* note 234, at 885–89 (discussing the benefits of athletes’ ability to profit off their NIL).

the NCAA and its member institutions continue to have revenue opportunities that make keeping non-revenue sports a feasible result. Athletes can profit from their NIL through indirect financial activities. If the NCAA accommodates the changes in intercollegiate athletics and accepts that it is big business, all parties can appreciate the reform. The forgotten party, non-revenue sports, need not suffer because of reform. With the correct steps, all parties—the NCAA, the major sports, and non-revenue sports—survive. In the end, it is a fallacy that non-revenue sports need to be dropped because of student-athlete access to cost-of-attendance scholarships and NIL revenues. It is “simply not true.”<sup>264</sup>

## V. CONCLUSION

The climb of economic supremacy in college athletics is not going away. All evidence points to it continuing to go up. But as this Note has shown, that does not mean non-revenue sports or even the NCAA governing body need to go away. Reform means adapting to an economic climate where individual players’ likenesses are worth enough that a structured system can benefit all parties. It means realizing the value of all school-sanctioned athletics and taking an economically-sound approach to a complete athletic department budget.

Because of the new intercollegiate landscape, future leaders no longer have the assurance that they will have the opportunity to gain valuable life experience playing tennis, soccer, or Division II football while receiving supplemental tuition assistance. Student-athletes will have doubts about getting that second chance at a small school because of the worry that there will not be scholarships available to get them into the school and to build a future. Those concerns can easily be squashed. All it takes is a 21st century approach by the governing voices that can step forward with a real economic and legislative reform plan that suits all interests, including those “other” sports. Non-revenue sports’ athletes need not have doubts about their future because of the *O’Bannon* decision or any other student-athlete compensation litigation. Intercollegiate sports are entering a new era, and all the sports are coming right along for the next chapter.

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<sup>264</sup>. Telephone Interview with Jay Bilas, *supra* note 142.