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The NCAA on Notice: How Utilizing Principles of Federalism Could Relieve Antitrust Pressure

Grant Newton

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The NCAA on Notice: How Utilizing Principles of Federalism Could Relieve Antitrust Pressure

ABSTRACT

The National Collegiate Athletic Association (NCAA) was founded to protect athletes from injury and to provide an avenue for the pursuit of sport alongside the pursuit of education. The NCAA maintains that accomplishing each of those goals requires the preservation of amateurism through a cap on the amount of funds universities may disburse to athletes. Historically, value judgments saved the NCAA from antitrust challenges because courts found that the NCAA’s rules furthered the organization’s purpose. As antitrust law has developed over the past fifty years, however, courts have become increasingly determined to avoid value judgments in antitrust challenges. Thus, it is simply a matter of time before courts’ value judgments on amateurism will be unable to save the NCAA in antitrust challenges. The NCAA should respond by looking to principles of federalism in American governance. This Note explains how the NCAA could learn from federalism principles and delegate scholarship rulemaking authority to the individual conferences to relieve antitrust pressure.

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Organizations often face a point in time where one looming decision proves pivotal to the future direction of the organization, sometimes even detaching the organization from its original purpose. For example, the National Rifle Association (NRA) was originally founded to improve youths' ability to accurately shoot a rifle.¹ Over the last fifty years, however, that vision has changed.² In 1966, the Black Panthers of California protested police brutality against black people who carried firearms in public,³ creating a large amount of Second Amendment publicity.⁴ This publicity arguably compelled the NRA to take a stand.⁵ The organization overhauled its direction to begin defending individuals' rights under the Second Amendment.⁶

The commercialization of college sports, combined with developments in antitrust law since the NCAA's inception in 1905, has brought the NCAA to a similar crossroads. Recently, the NCAA has received heightened criticism from scholars and journalists.⁷ Countless

1. See, e.g., *A Brief History of the NRA*, NAT'L RIFLE ASS'N, <https://home.nra.org/about-the-nra/> [<https://perma.cc/F3F6-7AEH>] (last visited Jan. 8, 2019); *Radiolab Presents: More Perfect—The Gun Show*, WNYC STUDIOS (Feb. 23, 2018), <https://www.wnycstudios.org/story/radiolab-presents-more-perfect-gun-show> [<https://perma.cc/C2SH-XG8F>] [hereinafter *The Gun Show*].

2. See Ron Elving, *The NRA Wasn't Always Against Gun Restrictions*, NAT'L PUB. RADIO (Oct. 10, 2017, 5:00 AM), <https://www.npr.org/2017/10/10/556578593/the-nra-wasnt-always-against-gun-restrictions> [<https://perma.cc/7XL3-T8B7>].

3. *Black Panthers*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/civil-rights-movement/black-panthers> [<https://perma.cc/A795-Z5PD>].

4. See *The Gun Show*, *supra* note 1.

5. See *id.*; Elving, *supra* note 2.

6. See *The Gun Show*, *supra* note 1.

7. See, e.g., Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332–33 (2007); see also GABE FELDMAN, *THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS* (2016),

scholars have argued for change in the NCAA's most revered tradition: amateurism.⁸ The criticism stems from the NCAA's rules preventing athletes from receiving compensation for their performance or for their name, image, or likeness while pursuing a college education.⁹ The amateurism rules have been labeled as "oppressing" and "exploiting" student-athletes.¹⁰ While societal pressures might not force the NCAA to change its rules or governance structure, the rise of antitrust actions against it could.

This Note argues that restricting the amount of scholarship money distributed to student-athletes through the amateurism regime allows the NCAA to pursue an admirable goal: providing the largest number of opportunities for students to pursue education through athletic scholarships.¹¹ The problem is that even in the pursuit of this respectable goal, the confines of amateurism are in constant tension with section 1 of the Sherman Antitrust Act.¹² Antitrust law limits the preservation of amateurism by shifting the burden to the NCAA to justify its caps on the market for college athletics.¹³ To relieve the pressure of antitrust litigation the NCAA faces, this Note recommends that the NCAA utilize principles of federalism to avoid running afoul of the Sherman Antitrust Act. By doing so, the NCAA could delegate scholarship compensation rules to each individual "Power Five" Conference, the five largest in the NCAA,¹⁴ while retaining authority

https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_2016.pdf [https://perma.cc/69N8-GQNR].

8. Lazaroff, *supra* note 7, at 361; *see also* FELDMAN, *supra* note 7.

9. NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL: 2018-19 NCAA § 12.1.2.1 (2018), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [https://perma.cc/WPB9-QCAY] [hereinafter NCAA MANUAL].

10. *See, e.g.,* Jemele Hill, *A Call to Action for College Athletes*, ESPN (Apr. 6, 2011), <http://www.espn.com/espn/commentary/news/story?page=hill/110405> [https://perma.cc/FFR5-2FWQ] ("Instead of allowing coaches and middlemen to use them for short-term gains, college athletes should unite to break the system that is oppressing them."); Victoria L. Jackson, *A Jim Crow Divide in College Sports*, CHI. TRIB. (Jan. 16, 2018, 3:05 PM), <https://www.chicagotribune.com/news/opinion/commentary/ct-perspec-college-sports-ncaa-black-athletes-exploited-0117-20180116-story.html> [https://perma.cc/N6N9-UJLQ] ("Rather, I can't endorse a system that exploits football and basketball players so that 'nonrevenue' athletes like me—runners, tennis players, golfers, gymnasts, swimmers—can both play and study."). For the purposes of this Note, "amateurism" is defined as the NCAA's regime of capping players' scholarship amounts at a certain level. *See* NCAA MANUAL §§ 2.9, 3.1.2.5.

11. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1058 (9th Cir. 2015).

12. *See* Sherman Antitrust Act of 1890, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2018)).

13. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98, 113 (1984).

14. The Power Five Conferences consist of the Big 12 Conference, Southeastern Conference, Atlantic Coastal Conference, Pac-12 Conference, and the Big Ten Conference. *See* Paula Lavigne, *Rich Get Richer in College Sports as Poorer Schools Struggle to Keep Up*, ESPN (Sept. 6, 2016), http://www.espn.com/espn/otl/story/_id/17447429/power-5-conference-schools-

over academic requirements and infractions investigations. Doing so relieves antitrust pressure from the NCAA without jeopardizing the NCAA's ability to pursue its founding purpose.

Part I of this Note explains the history of the NCAA amateurism rules and governance structure. Part II discusses how the Chicago School of Thought persuaded courts to abandon making value judgments in antitrust actions. It then explains how the abandonment of value judgments positively correlates with the validity of antitrust suits against the NCAA. Part III proposes that the NCAA adopt principles of federalism to resolve the tension facing the NCAA in antitrust actions. It further explains how those principles could be adopted on a practical level through the expansion of the areas of autonomy in the NCAA Manual.

I. KEEPING WITH THE DIGNITY AND HIGH PURPOSE OF EDUCATION

In 1905, eighteen different college and amateur football players were killed while playing football.¹⁵ President Theodore Roosevelt responded to the news of these fatalities by hosting a meeting at the White House to investigate the dangers of the sport and to propose a solution.¹⁶ On March 31, 1906, executives of this newly formed committee presented a constitution to universities around the country for ratification.¹⁷ Just a few years later, in 1909, the *New York Times* published a story reporting the founding of an organization charged with overseeing what would eventually become the modern National Collegiate Athletics Association (NCAA).¹⁸ The founding included a statement of purpose for the organization:

[The object of the NCAA] shall be the regulation and supervision of college athletics throughout the United States, in order that the athletic activities in the colleges and universities of the United States may be maintained on an ethical plane in keeping with the dignity and high purpose of education.¹⁹

made-6-billion-last-year-gap-has-nots-grows [https://perma.cc/3S64-FQ7S]. The resources to offer scholarships above cost of attendance are much higher in the Power Five than in the other conferences making up the NCAA, thus this Note is limited in scope to adjustments in the legislation of the Power Five Conferences, not every conference in the NCAA. *See id.*

15. Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Dec. 6, 2017, 1:39 PM), https://www.huffingtonpost.com/daniel-treadway/johnny-manziel-ncaa-eligibility_b_3020985.html [https://perma.cc/VAY7-BN3Q].

16. *Id.*

17. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletics Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 220, 235 (2006).

18. *Notable Educators Meet to Discuss the Uplifting of College Athletics*, N.Y. TIMES (Jan. 3, 1909), <https://timesmachine.nytimes.com/timesmachine/1909/01/03/101032578.pdf> [https://perma.cc/N7JP-NFW8] [hereinafter *Notable Educators*].

19. *Id.*

In its historical context, the organization's purpose seemed evident: protect collegiate athletes' safety and integrity while ensuring that their educational experience is not diminished in pursuit of sport. The NCAA rules ensured that the educational experience remained intact by declaring any students who accepted financial resources as consideration to enter any athletic contest or organization ineligible to compete in the NCAA.²⁰ In fact, those dedicated to the concept of amateurism believed that athletic ability should have no relation to financial aid packages awarded to athletes; only academic performance should warrant aid towards tuition to academic institutions.²¹

This Note is limited in its discussion to the two most dominant collegiate sports, men's basketball and football, even though the NCAA is a much larger entity comprised of countless committees, boards, councils, and cabinets governing multiple sports.²² This Part lays the historical foundation for the NCAA and explains the history of both student-athlete scholarship disbursements and organizational governance since its inception. It concludes with a summary of how those policies led to the two most important antitrust cases in the NCAA's history.

A. History of NCAA Scholarship Rules

While the early years of the NCAA may seem uneventful in comparison to the prevalent legal challenges over the last few decades, even early expansion within the NCAA resulted in tension with its founding principles.²³ Lofty educational requirements kept many high-performing athletes off of the field, and unsuccessful teams found themselves with empty pocketbooks.²⁴ Successful programs, such as the Ohio State University, built stadiums seating thousands of fans as early as 1921.²⁵ The pressure to succeed and expand contradicted the NCAA Constitution's stated objective: keeping with the dignity and high purpose of education.²⁶

20. Carter, *supra* note 17, at 223.

21. *Id.* at 232.

22. While this Note directly addresses football and men's basketball, its solution could, and should, be implemented across all NCAA sports.

23. *Notable Educators*, *supra* note 18.

24. Carter, *supra* note 17, at 235. For a discussion on the public importance and value of football on high-performing athletes, see Ramsey W. Fisher, *Evaluating a "Concussion Clause": Why the NFL's Assumption of Risk Defense Fares No Better As Time Goes On*, 21 VAND. J. ENT. & TECH. L. 651, 668–69 (2019).

25. *Id.* at 236. Ohio State's stadium would seat 64,000, Illinois planned a 75,000-seat stadium, and Nebraska broke ground on a 30,000-seat stadium in 1923. *Id.*

26. *Notable Educators*, *supra* note 18.

As a result, schools had a choice—prioritize academics or prioritize athletics. The University of Chicago, for example, chose academics by leaving the Big Ten Conference and scrapping its football team in 1939.²⁷ In response, the Big Ten Conference turned its sights not to another academic powerhouse, but to Michigan State—a public institution known for its athletic prowess.²⁸ Thus, as conferences pursued athletic expansion, the NCAA lost programs that aligned with its stated purpose of amateurism, and the movement of collegiate sports as a successful business model was well underway.

1. The 1948 Sanity Code

Pinning down the exact point in time that the NCAA transformed from a moderately sized association into a billion-dollar one is impossible. Daniel Lazaroff, in his 2007 historical analysis of the NCAA,²⁹ defined the “Modern Era” as beginning in 1948 with the NCAA’s adoption of the Sanity Code. The Sanity Code prohibited institutions from distributing scholarships or other forms of payment to players based on their athletic ability—effectively codifying the amateurist view of collegiate sports from the founding era mentioned above.³⁰ Thus, a player’s financial need and academic accomplishments determined his financial aid package—not his athletic ability.³¹

Lazaroff contends that the passage of this code marked a historical turning point in NCAA rules and regulations and provided the impetus for many of the regulations currently in force today.³² The Sanity Code was met with intense opposition and proved difficult to enforce.³³ For that reason, the NCAA abandoned the Sanity Code in 1951 and replaced it with the grant-in-aid system—allowing athletes to receive aid regardless of their academic accomplishments.³⁴ Eventually, at the NCAA Convention in 1956, the organization adjusted

27. Joshua Williams, *Big Ten Football: The Forgotten Big Ten Member, the Chicago Maroons*, BLEACHER REP. (June 18, 2011), <https://bleacherreport.com/articles/663252-big-ten-football-the-forgotten-big-10-member-the-chicago-maroons> [<https://perma.cc/X2XG-G568>].

28. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 41–42, 45 (1995).

29. Lazaroff, *supra* note 7, at 332–33 (“Consequently, in 1948, the NCAA took a significant step by adopting the so-called Sanity Code in an effort to develop a meaningful enforcement mechanism to assure compliance with its rules and regulations. The Sanity Code restricted financial aid to student-athletes by requiring that recipients utilize the ‘normal channels’ that other students were compelled to follow.”).

30. *Id.*

31. BYERS, *supra* note 28, at 67.

32. Lazaroff, *supra* note 7, at 334.

33. BYERS, *supra* note 28, at 68.

34. *Id.*

its constitution to allow colleges to pay student-athletes all “commonly accepted educational expenses”—essentially allowing for universities to provide scholarships for tuition and fees associated with the institution.³⁵

In 1973, the NCAA was split into three divisions—I, II, and III.³⁶ The NCAA rules enabled Division I and Division II to utilize athletic scholarships, but prohibited Division III programs from offering such scholarships.³⁷ The rules surrounding these scholarships remained roughly intact until the 2014 seminal case, *O'Bannon v. NCAA*, which is discussed below. With the help of the findings in *O'Bannon*, the NCAA allowed an increase in scholarship funds up to the value of cost of attendance.³⁸ Before 2014, scholarship funds could not exceed the cost of tuition at each athlete's respective university. Allowing funds up to cost of attendance to be distributed allowed universities to include costs of room, board, and other necessities into the total scholarship disbursements given to athletes.³⁹

B. NCAA Governance Structure

In 2014, the NCAA implemented a new concept, the “areas of autonomy,” which gave the Power Five Conferences a voice in legislation directly affecting them.⁴⁰ Only sixty-five institutions—out of the 1,200 members who make up the NCAA—comprise the Power Five Conferences.⁴¹ Despite these sixty-five members creating a majority of the revenue in college sports, they were previously unable to pass legislation in each of their best interests because they were a numerical minority. Some have argued these five conferences could split off from the NCAA and govern themselves if they so desired.⁴² Respecting this threat and aiming to please the Power Five Conferences, the NCAA created the areas of autonomy⁴³ in 2014, relinquishing legislative authority to the members of these Power Five

35. *Id.* at 72.

36. *History of Division II*, NCAA, <http://www.ncaa.org/about/history-division-ii> [<https://perma.cc/V6YW-JPG4>] (last visited Feb. 15, 2019).

37. *Id.*

38. NCAA MANUAL, *supra* note 9, § 15.01.6.

39. *Id.* § 5.3.2.1.2.

40. *Id.* § 5.3.2.1.

41. Connor J. Bush, Comment, *The Legal Shift of the NCAA's Big 5 Member Conferences to Independent Athletic Associations: Combining NFL and Conference Governance Principles to Maintain the Unique Product of College Athletics*, 16 U. DENV. SPORTS & ENT. L.J. 5, 5 (2014). The Power Five Conferences create a majority of the revenue in all of college sports, solely through football television deals. *Id.* at 41–42.

42. *Id.* at 9–10.

43. NCAA MANUAL, *supra* note 9, § 5.3.2.1.2.

Conferences on eleven enumerated issues.⁴⁴ One portion of legislation absent from that list, however, is the ability to legislate the amount of funds distributable to student-athletes in excess of the cost of attendance.⁴⁵ The areas of autonomy only offer discretion to the Power Five Conferences to legislate financial aid *up to* the cost of attendance.⁴⁶ Further, the rules that the Power Five Conferences adopt currently bind the group collectively.⁴⁷ This Note argues that the NCAA should reconsider the areas of autonomy. Rather than forcing the Power Five Conferences to regulate one another as one unit, the NCAA should utilize principles of federalism in which the conferences are permitted to govern themselves in areas of compensation individually, while the NCAA should retain authority over minimum academic and conduct requirements and enforcement of such requirements.

C. The Seminal Antitrust Challenges

Arguably the greatest basketball coach of all time,⁴⁸ John Wooden, earned \$32,500 in 1975—his final year as a coach at UCLA.⁴⁹ Just one decade later, Jim Valvano of North Carolina State reportedly grossed \$850,000 per year from his combined business opportunities.⁵⁰ Adjusting Wooden's salary for inflation over one decade would have increased his salary to \$65,137 in 1985.⁵¹ Therefore, Valvano's salary in 1985 was approximately sixteen times higher than Wooden's would have been in the same year. One explanation for this astounding jump may be the most important antitrust case in the history of the NCAA, *Board of Regents of Oklahoma v. NCAA*.

"It is virtually impossible to overstate the degree of our resentment of the controls of the NCAA," stated Bill Banowsky, President of the University of Oklahoma, during a federal district court

44. The "areas of autonomy" are enumerated as: athletics personnel; insurance and career transition; promotional activities unrelated to athletics participation; recruiting restrictions; pre-enrollment expenses and support; financial aid; awards, benefits, and expenses; academic support; health and wellness; meals and nutrition; and time demands. *Id.*

45. *Id.* § 2.13 ("A student-athlete may receive athletically related financial aid administered by the institution without violating the principle of amateurism, provided the amount does not exceed the cost of education authorized by the Association."); *Id.* § 5.3.2.1.2.

46. *Id.* § 5.3.2.1.2.

47. *Id.*

48. Sporting News donned Wooden as the greatest coach of all time in 2009. See Associated Press, *Sporting News Honors Wooden*, ESPN (July 29, 2009), <http://www.espn.com/mens-college-basketball/news/story?id=4365068> [https://perma.cc/C7AN-6JEA].

49. BYERS, *supra* note 28, at 9.

50. *Id.*

51. INFLATION CALCULATOR, <https://westegg.com/inflation/> [https://perma.cc/Z4PV-XELQ] (last visited Feb. 15, 2019).

hearing in Oklahoma City, Oklahoma.⁵² Banowsky's comment eminently clarified the frustration many major programs felt in the early litigation stages of the most infamous case levied against the NCAA.⁵³ After appeals from the district court and the US Court of Appeals for the Tenth Circuit, the Supreme Court granted certiorari to decide the dispute between the NCAA and its member institutions.⁵⁴ The Court held that "by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA ha[d] restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."⁵⁵

Board of Regents blazed a trail for universities to take advantage of television rights, just as the NCAA had been doing for many years. This opened the door for universities to earn a more significant profit from college sports. Unfortunately, the old adage rings true: more money, more problems.⁵⁶

Three decades later, the US Court of Appeals for the Ninth Circuit decided the second major antitrust challenge facing the NCAA. While cultural sports fans will largely remember former UCLA basketball player Ed O'Bannon's case against the NCAA as ruining collegiate video games, much more was actually determined in the Ninth Circuit's 2014 decision. While watching a friend play a college basketball video game in his living room, Ed O'Bannon had a funny feeling.⁵⁷ He realized that his name, his face, and his stature combined to assist game developers and sponsors in earning a profit—of which O'Bannon would never receive a royalty.⁵⁸ On behalf of a class of student-athletes, O'Bannon sued the NCAA and EA Sports under an antitrust theory, alleging that forbidding college athletes from capitalizing in the intellectual property market violated the Sherman Antitrust Act.⁵⁹ The allegations advanced two theories: (1) The NCAA could not prevent athletes from capitalizing on their name, image, and likeness through a restrictive rule forbidding athletes from receiving

52. BYERS, *supra* note 28, at 8.

53. *See id.*

54. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

55. *Id.* at 120.

56. *See* THE NOTORIOUS B.I.G., *Mo' Money, Mo' Problems*, on LIFE AFTER DEATH (Bad Boy Record Label 1997). The FBI investigations illustrate the "problems" that faced many universities after the significant rises in profits in college sports. *See infra* Part II.B.3.

57. ED O'BANNON & MICHAEL MCCANN, COURT JUSTICE: THE INSIDE STORY OF MY BATTLE AGAINST THE NCAA 6 (2018).

58. *Id.*

59. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014).

compensation untethered to education⁶⁰ and (2) the NCAA violated the Sherman Antitrust Act by capping the amount of compensation athletes could receive at just tuition and fees.⁶¹ The district court agreed with both of the plaintiffs' arguments, holding that prohibiting compensation for players' likenesses restrains trade among the NCAA's member schools.⁶²

On appeal, however, the Ninth Circuit reversed the district court's holding concerning name, image, and likeness compensation, explaining that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs."⁶³ The court, however, upheld the determination that capping the amount of compensation at tuition and fees violated the Sherman Antitrust Act because allowing athletes to receive the full cost of attendance as a scholarship was a less restrictive alternative that continued to tether scholarship awards to educational expenses.⁶⁴

A few years later, the US District Court for the Northern District of California issued an opinion in a related case, *In re NCAA Grant-in-Aid Cap Antitrust Litigation*.⁶⁵ In that case, Judge Claudia Wilken determined that the newly enacted cost of attendance cap also significantly restrained trade in the market for college athletes.⁶⁶ However, the court did recognize a line of demarcation between college athletics and professional athletics, and it explained that prohibiting unlimited cash payments was a reasonable restraint to preserve consumer demand of college sports.⁶⁷ Regardless, the evolution of antitrust cases against the NCAA reveals that pressure continues to mount, as the NCAA is unable to rest its defense on a societal judgment on the value of amateurism.

60. *Id.* at 971.

61. *Id.* at 1008.

62. *Id.* at 1007.

63. *Id.* at 1076.

64. *Id.* at 1074.

65. *In re NCAA Grant-in-Aid Cap Antitrust Litigation*, Findings of Fact and Conclusions of Law, No. 14-md-02541, 1 (N.D. Cal. 2019) [hereinafter *In re NCAA Grant-in-Aid Litigation*], available at https://drive.google.com/file/d/1Ouzba24_iynEFMCXz4zXOXk-F0XcY2Xn/view.

66. *Id.* at 2.

67. *Id.* at 44.

II. THE RISE OF COMMENSURABILITY CREATES ANTITRUST PRESSURE ON THE NCAA

This Part discusses how the Chicago School of Thought—an economic theory promoting the free allocation of resources—encouraged courts to abandon making value judgments in antitrust actions. It then explains how the abandonment of value judgments directly correlates with the validity of antitrust suits against the NCAA.

A. Antitrust Framework and Commensurability's Rise

The amateurism regime—capping the price at which college athletes receive athletic scholarship—places the burden on the NCAA to justify its restraint of trade.⁶⁸ However, this Note argues that the NCAA can continue to pursue its founding purpose without conflicting with antitrust laws by delegating rules that regulate amateurism to the Power Five Conferences. The initial purpose of the NCAA was to protect the integrity and safety of students participating in sport while pursuing an education.⁶⁹ The NCAA contends that preserving such character requires prohibiting payments to student-athletes,⁷⁰ but the Sherman Antitrust Act disregards the purpose a monopoly is pursuing when it restrains trade.⁷¹ Thus, even if pursuing amateurism is an admirable goal, it does not insulate the NCAA from antitrust scrutiny, especially with the rise of commensurability. Commensurability in antitrust consists of comparing economic actors to a common standard without relying on moral, or value, judgments.⁷² Thus, as far as this Note is concerned, commensurability is the outgrowth of the Chicago School of Thought's insistence that the judiciary should attempt to reduce antitrust decisions strictly to the economic ramifications of the agreement.⁷³

Before *O'Bannon*, the judiciary often determined that the amateurism rules should not even be subject to antitrust review.⁷⁴ For example, in a 1975 case before the US District Court for the District of

68. See Lazaroff, *supra* note 7, at 357.

69. See *supra* Part I.

70. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

71. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

72. Rebecca Haw Allensworth, *The Commensurability Myth in Antitrust*, 69 VAND. L. REV. 1, 9–10 (2016).

73. The Rise of Commensurability mirrors the Chicago School of Thought's thesis that courts should abandon making value judgments. See *id.* at 9. As Professor Allensworth argues in *The Commensurability Myth*, courts often ignore the compelling fact that some value judgments cannot be reduced to economics. See, e.g., *id.* at 20.

74. Lazaroff, *supra* note 7, at 344.

Massachusetts, a plaintiff college hockey player's antitrust challenge was rejected.⁷⁵ The court explained that the Sherman Act did not apply because the plaintiff was a student and not a "competitor" under antitrust law.⁷⁶ Then, in *Board of Regents*, the Court indicated that a line of demarcation existed exempting the amateurism rules from judicial scrutiny because "[i]n order to preserve the character and quality of th[is] 'product,' athletes must not be paid."⁷⁷ The Court discussed the societal value of amateurism to justify the conclusion that amateurism rules should be considered valid and free from antitrust scrutiny.⁷⁸ Namely, the Court asserted that amateurism is valuable to society because of its revered tradition in general and specifically because of the importance of preserving the "student" portion of the student-athlete status in higher education, as it "adds richness and diversity to intercollegiate athletics."⁷⁹

However, in the 1970s and 1980s, proponents of the Chicago School of Thought stressed the importance of ignoring societal values during antitrust review, and this view later became the majority viewpoint among the judiciary.⁸⁰ While the Court did not ignore value judgments in its decision in *Board of Regents*,⁸¹ the Chicago School's view has become widely accepted since.⁸² Professor Robert Bork argued that antitrust must serve "the single, unchanging value of wealth

75. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 303 (D. Mass. 1975).

76. *Id.*

77. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

78. See *id.* at 120. The societal value of amateurism had been continually used as a justification for surviving antitrust scrutiny before *O'Bannon*. See *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990) ("Even in the increasingly commercial modern world, this Court believes there is still validity to the Athenian concept of a complete education derived from fostering full growth of both mind and body.").

79. *Bd. of Regents*, 468 U.S. at 120 ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.").

80. See Allensworth, *supra* note 72, at 11 ("Antitrust legal opinions since then are rife with characterizations of § 1 liability that imply symmetry between pro- and anticompetitive effects. Courts will often discuss the 'net' competitive effect of a restriction, a concept that is encouraged by the oft-quoted language from *Chicago Board of Trade* that 'the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'").

81. In *Board of Regents*, the Court acted consistently with the Chicago School's view when it invalidated the NCAA's television plans by ignoring the NCAA's argument regarding value judgments of the NCAA. See 468 U.S. at 133; Allensworth, *supra* note 72, at 9 (explaining the Chicago School of Thought). However, the Court seemed to take a different view on the amateurism regime, articulating that there is value in preserving the student-athlete in higher education. See *Bd. of Regents*, 468 U.S. at 120.

82. See Allensworth, *supra* note 72, at 9.

maximization.”⁸³ Professor Bork’s statement focuses solely on the impact of economic actors in the marketplace, arguing that social morality or welfare is to be ignored in antitrust analysis.⁸⁴ Bork argued that the “true test of legality” in *Board of Trade of Chicago v. United States*—one of the first antitrust cases of the twentieth century—required the Court to evaluate the net effects of procompetitive actions versus anticompetitive actions.⁸⁵ This essentially requires the judiciary to focus on the economic impact of a restraint on trade, rather than other aspects of the restraint⁸⁶—such as the social value of amateurism.

Such a requirement poses a problem for the NCAA, as the chief focus of the NCAA is not to promote economic competition amongst its members, but indeed to restrain it in order to promote societal goals: “keeping with the dignity and high purpose of education.”⁸⁷ Measuring the value of the NCAA’s goals compared to the economic effect of the NCAA’s regulations is like “judging whether a particular line is longer than a particular rock is heavy.”⁸⁸ Regardless, antitrust jurisprudence requires discounting the societal value into a measurable market.⁸⁹ In fact, once the plaintiffs challenging an NCAA rule prove it has anticompetitive effects, the NCAA must respond under the “Rule of Reason” by stating procompetitive justifications for the challenged rule—effectively utilizing a balancing test to analyze the rule’s effect on competition in the marketplace.⁹⁰ This balancing requirement was not as prevalent during the *Board of Regents* decision, but courts’ reluctance to rely on value judgements has continued to increase since.⁹¹ Considering that the goal of moral values in sport cannot be quantitatively measured in antitrust actions, the NCAA is forced to argue that it restrains trade in pursuit of promoting the market for college sports,⁹² which is truly a secondary goal of the NCAA. Thus, the NCAA is inherently disadvantaged in antitrust actions and should delegate the cap on the amount of scholarship funds as an area of autonomy to the Power Five Conferences.

83. See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 838 (1965).

84. *Id.* at 817.

85. See *id.* at 817 (quoting *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918)).

86. See Allensworth, *supra* note 72, at 23 (arguing that commensurability in antitrust is a myth, and that judges attempt to discount societal welfare to compare it to economic impact; however, such measures simply cannot be reduced to the same unit).

87. See *supra* Part II.

88. See *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 897 (1988).

89. Attempting to discount certain noneconomic factors into comparable, economic measurements is “commensurability.” See Allensworth, *supra* note 72, at 8.

90. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 244 (1918).

91. See *id.* at 11.

92. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1058, 1066 (9th Cir. 2015).

B. NCAA's Antitrust Demise

The NCAA freely admits that it restrains trade in collegiate sports, arguing that because such restrictive trade principles in fact promote the market more than restrict it.⁹³ This "market promotion" is the central debate surrounding NCAA regulations that suppress emerging markets in college athletics.⁹⁴ According to the Court in the seminal *Board of Regents* case, it is undeniable that some restraints are necessary to preserve the revered tradition of amateur intercollegiate athletics.⁹⁵ The issue the NCAA faces, however, is how far those restraints may go, as the *Board of Regents* court stated that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."⁹⁶

This Section utilizes the rejection of value judgments in antitrust decisions, to reveal the inherent tension between the NCAA's amateurism rules and such commensurability analysis. It first analyzes the earliest major antitrust suit levied against the NCAA, *Board of Regents*, continues with the Ninth Circuit's *O'Bannon* decision, and concludes with the most recent antitrust action against the NCAA, *In re NCAA Grant-in-Aid Cap Litigation*.

1. Board of Regents of Oklahoma v. NCAA

Once the plaintiff in an antitrust action demonstrates that the defendant made an anticompetitive agreement, the burden shifts to the defendant to provide procompetitive justifications for the anticompetitive regulations enacted.⁹⁷ In *Board of Regents*, the NCAA proffered two justifications for the restraint: (1) Restricting the number of college football games televised protects profits from gate attendance for its member institutions and (2) the regulation preserves competitive balance among the institutions.⁹⁸

The Court rejected each of the proffered justifications. Restricting the number of games televised provided no procompetitive effect because many more games would have been accessible to viewers

93. See *id.*

94. See *id.*

95. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

96. *Id.* at 117.

97. See *id.* at 113. The antitrust framework establishing this burden shifting is entitled the "Rule of Reason." *Id.*

98. *Id.* at 96.

if more games were televised.⁹⁹ Plus, restricting output essentially capped the number of universities that could earn a profit from their brand.¹⁰⁰ Further, preserving competitive balance is possible without such restrictions because every other college sport maintained competitiveness without the television plan.¹⁰¹ This justification arguably cut in the plaintiffs' favor because allowing more games to be televised would allow more programs to be on the same playing field as the televised programs. While some restrictions may have been permissible, the television plan went too far in its restrictions and could not survive the antitrust challenge.¹⁰²

Scholars argue that the significance of the Court's decision was not in its holding that invalidated the NCAA's action, but rather in dicta in the opinion.¹⁰³ The dicta expressed a view that rules preventing college athletes from earning compensation were presumptively valid to protect the educational focus of college sports.¹⁰⁴

This Note argues, however, that the *Board of Regents* litigation forced the NCAA to abandon its only true justification for restricting its member institutions from participating in such a lucrative market: protecting the educational experience of its student-athletes. While Justice Stevens may have expressed admiration for the desirable goal of preserving the integrity of the NCAA, such reasoning was absent from the Court's balancing of the procompetitive and anticompetitive impact of the television plan.¹⁰⁵ The Court indeed ignored the value of amateurism when balancing the positive and negative effects of the television plan, and thus antitrust decisions took a first step in the demise of NCAA rules.

2. *O'Bannon v. NCAA*

In *O'Bannon*, the NCAA regulations challenged were simple: student-athletes who are compensated for their names, images, or likenesses are ineligible from competition at any NCAA program.¹⁰⁶ The challenge initially stemmed from EA Sports Company's famed NCAA video games, where college athletes' jersey numbers, statistics, and even body build were used to create lifelike video game

99. *Id.* at 119.

100. *Id.* at 113.

101. *Id.* at 119.

102. *Id.*

103. *See, e.g., Lazaroff, supra* note 7, at 339.

104. *See Bd. of Regents*, 468 U.S. at 102.

105. *Id.* at 86.

106. *See supra* Part II.

characters.¹⁰⁷ Similar to the argument the institutions made in *Board of Regents*, the *O'Bannon* plaintiffs alleged that the NCAA violated antitrust law by restricting athletes' ability to collect in the apparent market for their names, images, and likenesses.¹⁰⁸ The court agreed that the NCAA rule indeed restricted trade, however, the NCAA's procompetitive justifications proved sufficient to hurdle the challenge.¹⁰⁹

Before reaching the depths of its decision in *O'Bannon*, the Ninth Circuit prefaced its reasoning with the following statement: "As far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices."¹¹⁰ That statement illustrates the magnitude of the *O'Bannon* decision. *O'Bannon* effectively forced the Ninth Circuit to decide whether to engage in the commensurability analysis that antitrust jurisprudence requires or to carve out a quasi-exception for NCAA amateurism rules. This Note argues that the court did both. Ultimately, the Ninth Circuit elected to subject the NCAA amateurism rules to antitrust scrutiny because the rules were unnecessarily burdensome, but held that preserving amateurism was a justifiable, procompetitive restriction.¹¹¹

First, the plaintiff-athletes satisfied their burden of proving a restraint of trade at the district court, and thus the burden shifted to the NCAA to justify its anticompetitive regulation.¹¹² The NCAA offered four justifications: (1) preserving the notion of amateurism, (2) encouraging competitive balance in NCAA football and basketball, (3) balancing students' on-field experience with their in-classroom experience, and (4) growing output in the market for college education.¹¹³ The Ninth Circuit accepted the first and third justifications, just as the district court had, while rejecting the second and the fourth.¹¹⁴

The district court dismissed "promoting competitive balance in football and basketball" because the competitive balance sought had already been eroded.¹¹⁵ This erosion was, and continues to be, a product

107. See *O'BANNON & MCCANN*, *supra* note 57, at 3, 6; see also *supra* Part II.

108. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1052 (9th Cir. 2015).

109. *Id.* at 1072–73.

110. *Id.* at 1053.

111. *Id.*

112. See *id.* at 1070–71.

113. *Id.* at 1058.

114. *Id.* at 1058–60.

115. *Id.* at 1058.

of athletic departments increasing spending on lavish facilities,¹¹⁶ some even amounting to athletic “villages,”¹¹⁷ to compete for top high school recruits around the country. Thus, the court concluded that the arms race for athletes in college sports extinguished whatever competitive balance existed.¹¹⁸

Judge Wilken, writing the district court opinion, likewise rejected a growing output in the education market as a justifiable restraint for restricting players’ ability to be compensated for their names, images, and likenesses.¹¹⁹ In other words, the NCAA argued that limiting the dollar amount given to certain high-performing athletes allows for a greater number of students to receive funds to pursue education, increasing the output in the education market. Conversely, the court discussed how a scholarship cap could have the opposite effect.¹²⁰ While the offer of full tuition may be sufficient for many athletes, the court explained that others might have a more realistic opportunity to receive an education if they could receive compensation above the value of cost of attendance.¹²¹

The court’s reasoning, however, is questionable. Lifting the restraint may make education more accessible for a class of individuals who have serious financial need, but it does not necessarily follow that a larger number of individuals would be given access to education through lifting the restraint.¹²² An equally likely scenario is that the same arms race occurring for the best facilities would occur for the best

116. See Kevin Kiley, *Playing Different Games*, INSIDE HIGHER ED (Jan. 16, 2013), <https://www.insidehighered.com/news/2013/01/16/universities-spend-more-athletics-athlete-academics-student-report-finds> [https://perma.cc/4U38-Q3GT].

117. See Scott Davis, *Here’s the \$55 Million ‘Village’ Clemson Will Build for Its Football Players*, BUS. INSIDER (Dec. 23, 2015, 12:08 PM), <https://www.businessinsider.com/tour-clemsons-players-village2015-12> [https://perma.cc/4KAF-5F96]. Clemson University moved into its \$55 million exclusive “athletic village” in 2017, and it is comprised of extravagant amenities such as pools, gaming areas for activities like bowling and beach volleyball, a grill area, and even an indoor golf simulator. See *id.*; see generally *Facilities*, DABOSWINNEY.COM, <http://www.daboswinney.com/facilities/> [https://perma.cc/SB9W-9MMN] (last visited Feb. 15, 2019).

118. *O’Bannon*, 802 F.3d at 1059.

119. *Id.* at 1060; *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 981 (N.D. Cal. 2014).

120. *O’Bannon*, 802 F.3d at 1072.

121. *Id.* at 1073.

122. In a recent survey conducted by the NCAA, less than half (47 percent) of first-generation students strongly agreed that they would have attended college without an athletic scholarship. See *The First in Their Family*, NCAA (June 2016), <http://www.ncaa.org/about/resources/research/first-their-family> [https://perma.cc/U8ZM-KS59]. While removing a cap may make college an accessible option for a class of individuals that needs income in excess of the cost of attendance, an unregulated price could cause some universities to spend differing amounts on each athlete, potentially decreasing the number of full tuition scholarships. This option could decrease the total output in the market for athletic scholarships.

recruits in the form of cash payments, and therefore many athletes at less prestigious programs would be forced to decide between paying some money to join a program on a partial scholarship or refraining from college sports altogether. On the one hand, controlling price by enacting a cap could create a larger output in the market for education in college sports. On the other hand, furthering the notion of amateurism likely does not increase the market for viewing college sports because, since the abolition of the Sanity Code in 1951, consumer demand for college sports has continued to grow despite an increasing amount of scholarship funds distributed to athletes.¹²³ Thus, this Note argues that the district court repeatedly erred in dismissing the procompetitive justification of “increasing output in the college education market.”¹²⁴ This may be the only justifiable restraint for the NCAA because it directly fits into the commensurability analysis without making a judgment on the value of amateurism.

While the district court analyzed each of the NCAA’s four procompetitive justifications, the Ninth Circuit only examined the NCAA’s proffered justifications concerning the “notion of amateurism.”¹²⁵ The Ninth Circuit failed to avoid making a value judgment—contrary to the commensurability requirement—when it accepted the first of the NCAA’s two justifications regarding amateurism: (1) integrating academics with athletics and (2) preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.¹²⁶

The first theory the NCAA advanced, which both the district court and the Ninth Circuit ultimately accepted, is that if college athletes can accept large sums of money while spending time on campus, a social divide will form between the athletes and the student body.¹²⁷ The courts appeared to reason that such social divide effectively erodes any opportunity for student-athletes to have a normal

123. See *Revenue of the NCAA from Television Broadcast Payments and Licensing Rights from 2010 to 2022*, STATISTA [hereinafter *Revenue of the NCAA 2010–2022*], <https://www.statista.com/statistics/219608/ncaa-revenue-from-television-rights-agreement/> <https://perma.cc/3EEL-C5SC> (last visited Feb. 15, 2019). In 2015, the NCAA changed its scholarship regime to allow for awards up to the full cost of attendance for Division I athletes, rather than full tuition. See Steve Berkowitz, *NCAA to Distribute \$18.9M to Help Pay Cost-of-Attendance Scholarships*, USA TODAY (July 20, 2015, 4:27 PM), <https://www.usatoday.com/story/sports/college/2015/07/20/ncaa-18-million-help-pay-cost-attendance-scholarships/30428777/> [<https://perma.cc/R2FA-4MUD>]. Revenue from television broadcasting agreements has increased from \$666 million in 2012 to an expected \$879 million in 2019. See *Revenue of the NCAA 2010–2022*, *supra*.

124. *O'Bannon*, 802 F.3d at 1058.

125. *Id.* at 1072.

126. *Id.* at 1073.

127. *Id.* at 1060.

student life. The Ninth Circuit also agreed that furthering the notion of amateurism qualified as a procompetitive justification for the anticompetitive action of preventing compensation for athletes' rights to their names, images, and likenesses.¹²⁸

Unlike the second theory—preserving the popularity of the NCAA's product—the court provided no economic justification for considering academic integration as procompetitive.¹²⁹ Therefore, the amateurism rules continued to succeed partially due to the court's decision to ignore the commensurability requirement.¹³⁰ Such a consideration is the type of value judgment antitrust law purports to condemn and indeed has condemned in the majority of antitrust decisions.¹³¹ Notably, the Ninth Circuit did recognize that a revered dedication to preserving amateurism may be noble and violate the principles of antitrust law at the same time.¹³² Thus, without carving out an exemption to the antitrust rules,¹³³ the only argument the NCAA can advance in the wake of *O'Bannon* is that the notion of amateurism increases the market for viewing college athletics.¹³⁴ In the wake of Federal Bureau of Investigation (FBI) inquiries into payments made to college basketball players, however, the notion that amateurism increases the market for viewing college athletics is brought into question.¹³⁵

128. *Id.* at 1058.

129. *Id.* at 1073.

130. *See id.* at 1073. The court determined that two procompetitive purposes justified the restraint: (1) integrating academics with athletics and (2) promoting its current understanding of amateurism. *Id.* at 1073. While the second justification does articulate a market effect caused by amateurism, it does not answer the question of whether integrating academics "promotes competition" in the marketplace.

131. *See Bork, supra* note 83, at 838.

132. *O'Bannon*, 802 F.3d at 1073.

133. Katherine Kargl, Note, *Is Amateurism Really Necessary or Is It an Illusion Supporting the NCAA's Anticompetitive Behaviors?: The Need for Preserving Amateurism in College Athletics*, 2017 U. ILL. L. REV. 379, 410 (2017).

134. *See O'Bannon*, 802 F.3d at 1080 n.2. This Note argues that the Ninth Circuit rejected the most compelling argument the NCAA initially relied on in *O'Bannon*—increasing access to education. This proposition was likewise rejected at the summary judgment stage in *In re Grant-in-Aid Litigation*. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 19. However, the court's rejection of this proposition does not resolve its importance as a policy matter; it simply reinforces this Note's conclusion that the rise of commensurability in antitrust creates pressure on the NCAA in antitrust actions because the NCAA cannot utilize value judgments to defend its anticompetitive actions.

135. *See Grant Newton, G League Contracts and FBI Investigations Change Little for NCAA in Antitrust Actions*, JETLAW BLOG (Nov. 3, 2018), <http://www.jetlaw.org/2018/11/03/g-league-contracts-and-fbi-investigation-change-little-for-ncaa-in-antitrust-action/> [<https://perma.cc/BYW2-L5HL>]. Additionally, the NBA's developmental league, entitled the "G League," introduced select contracts in the fall of 2018. These select contracts could serve as a mechanism, in addition to the FBI investigation, used by plaintiffs to reveal the demand college

3. FBI Investigations into College Basketball

In late September of 2017, the Department of Justice brought charges against executives of Adidas,¹³⁶ four NCAA men's basketball coaches, and several "advisors" involved in a bribery scheme orchestrated to put money in the pockets of athletes and their families, while delivering said athletes to certain programs working in conjunction with Adidas.¹³⁷ Bringing these charges allowed investigators to reveal what many have called a "black market" for the payment of college athletes.¹³⁸ This black market refers to payments made from shoe companies to Amateur Athletic Union (AAU) programs¹³⁹ and other agents, where athletes were then delivered payments in return for choosing particular schools.¹⁴⁰ Most college sports fans were already aware of this market—even University of Chicago President Robert Hutchins predicted this development in 1939.¹⁴¹ The exposure of this underground market highlighted conversations regarding the compensation of college athletes during their tenure at a university. The FBI's college basketball corruption investigation in 2017 reflects the reality that a market is readily available for athletes to be compensated for their abilities, but that the NCAA rules suppress it.¹⁴² Despite overwhelming evidence of countless athletes receiving compensation in the fall of 2017, the popularity of college basketball did not suffer.¹⁴³ In fact, viewership of NCAA Men's Basketball Tournament games actually increased from the prior

athletes garner in the market for their services. They are unlikely to change the NCAA's arguments at this stage, however. *See id.*

136. Tom Winter & Tracy Connor, *4 NCAA Basketball Coaches, Shoe Executives Charged in Bribery Scandal*, NBC NEWS (Sept. 26, 2017, 7:12 PM), <https://www.nbcnews.com/news/us-news/college-basketball-coaches-allegedly-took-bribes-agents-deliver-athletes-n804781> [https://perma.cc/LF5K-KJ6J].

137. *Id.*

138. Will Hobson, *Inside the Basketball Black Market That Put Adidas in the FBI's Crosshairs*, WASH. POST (Oct. 1, 2018), https://www.washingtonpost.com/sports/inside-the-basketball-black-market-that-put-adidas-in-the-fbis-crosshairs/2018/10/01/2a73ba76-c1ad-11e8-97a5-ab1e46bb3bc7_story.html?utm_term=.739b8b4b989d [https://perma.cc/DNH8-XQC4].

139. *See id.* AAU programs are basketball teams that travel across the country to allow their elite players to be seen by college coaches. Several of these programs receive full sponsorships for all of their players to receive gear to wear in games from major shoe companies, such as Nike or Adidas. These sponsorships exceeded simply "gear" and extended to the shoe companies working through agents and AAU programs to ensure that certain high-caliber prospects ended up at universities that were sponsored by the shoe company. *See id.*

140. *Id.*

141. Williams, *supra* note 27.

142. *See* Hobson, *supra* note 138.

143. Dan Wolken, *FBI Scandal Doesn't Cast a Pall over NCAA Tournament. It Lifts One*, USA TODAY (Mar. 14, 2018, 3:31 PM), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2018/03/14/fbi-scandal-ncaa-tournament-amateurism/425159002/> [https://perma.cc/FJC4-B2GF].

year.¹⁴⁴ Thus, the Ninth Circuit's assumption in *O'Bannon* that preserving amateurism actually increases the popularity of college sports is questionable.¹⁴⁵

The judiciary and the NCAA are now in a peculiar position. The judiciary is faced with a decision to follow precedent in antitrust jurisprudence by ignoring value judgments¹⁴⁶ or to carve out an antitrust exemption for the NCAA.¹⁴⁷ Moreover, the NCAA is certainly on notice of the validity of antitrust claims against it and must decide how to respond.¹⁴⁸ This Note argues that the *In re NCAA Grant-in-Aid Cap Litigation* case in the Northern District of California illustrates the insufficient nature of the NCAA's response with its adoption of the areas of autonomy in 2014. This Note proposes utilizing the principles of federalism to expand the areas of autonomy to include giving each of the Power Five Conferences the individual right to choose its own grant-in-aid cap.

C. The Insufficiency of the NCAA's Response to the Investigations

The NCAA has recognized the validity of the antitrust actions against it and the need to respond with governance and rule changes. This Section begins by addressing the ways in which the NCAA has attempted to effectuate change. It concludes by explaining how the latest litigation, *In re NCAA Grant-in-Aid Cap Litigation*, illustrates the insufficiency of the NCAA's responses.

144. See Daniel Holloway, *TV Ratings: NCAA Men's Tournament Up Slightly for CBS*, Variety (Mar. 16, 2018, 3:56 PM), <https://variety.com/2018/tv/news/tv-ratings-ncaa-1202728915> [<https://perma.cc/57B6-JMWZ>]. CBS reported an 11 percent increase in first-round viewership from the 2017 NCAA tournament to the 2018 tournament. See *id.*

145. See *id.*; Wolken, *supra* note 143.

146. Preserving the notion of amateurism today must be a value judgment because of the increasing evidence that viewership of college sports games continues to grow, and viewership numbers would not decline if athletes were to be paid. See Holloway, *supra* note 144.

147. Scholars have argued that the best method for solving the judiciary's problem is to carve out an exemption from the antitrust laws for the NCAA, or for Congress to interfere with legislation protecting amateurism. See, e.g., Kargl, *supra* note 133, at 379. Others have argued that the entire notion of amateurism should be eliminated through serious policy reform. See Lazaroff, *supra* note 7, at 366. This Note does not address either of those solutions, but rather proposes that the NCAA utilize principles of federalism and expand the areas of autonomy adopted in 2014 to offer conferences the ability to create their own caps on financial aid, rather than subjecting every institution to the NCAA broad ban.

148. See, e.g., Field Level Media, *Condoleezza Rice: NCAA Rules 'Incomprehensible'*, REUTERS: SPORTS NEWS (May 10, 2018, 7:58 AM), <https://www.reuters.com/article/us-basketball-ncaa-condoleezza-rice/condoleezza-rice-ncaa-rules-incomprehensible-idUSKBN1IB1TZ> [<https://perma.cc/4GC6-6XLA>]. Former Secretary of State Condoleezza Rice chaired the Commission on College Basketball that released its findings in the spring of 2018. The Commission found the name, image, and likeness restrictions "incomprehensible" and submitted such findings to the NCAA for review. See *id.*

1. Adoption of the Areas of Autonomy

In response to the threat that the Power Five Conferences might leave the NCAA and pressure from the *O'Bannon* proceedings, the NCAA passed Amendment 5.3.2.1.2.¹⁴⁹ This amendment, as mentioned above, creates eleven zones of authority where the conferences can enact legislation to govern themselves.¹⁵⁰ This Note argues that the NCAA should adjust the areas of autonomy by utilizing principles of federalism as a means to relieve antitrust pressure.

The current areas of autonomy fail to relieve the pressure antitrust actions place on the NCAA. Delegating “areas of autonomy” to the conferences was somewhat of a misnomer. The conferences do not have individual autonomy, but rather collective autonomy.¹⁵¹ In other words, the NCAA gave the Power Five Conferences a separate voting regime, where as a collective unit they can pass legislation to govern themselves.¹⁵² For example, the Big 12 Conference must abide by NCAA rules because each of its members is in contractual privity with the NCAA.¹⁵³ The passage of the areas of autonomy did not give the Big 12—or any other conference—the ability to govern itself, like this Note argues it should. It simply adopted a rule authorizing the Big 12, the Big Ten, the Southeastern Conference, the Pac-12 Conference, and the Atlantic Coastal Conference to adopt legislation that would bind all five of the conferences in the same way. Therefore, the NCAA forces the Power Five Conferences to price-fix—the very act that immediately shifts the burden from the plaintiffs to the NCAA in antitrust actions—because each conference is required to bind itself to the decisions of the group.¹⁵⁴

The conferences did utilize the areas of autonomy to raise the scholarship amount given to incoming student-athletes from what was originally the cost of tuition up to the cost of attendance in January

149. NCAA MANUAL, *supra* note 9, § 5.3.2.1.2.

150. See *id.* (enumerating the “areas of autonomy” as athletics personnel; insurance and career transition; promotional activities unrelated to athletics participation; recruiting restrictions; pre-enrollment expenses and support; financial aid; awards, benefits, and expenses; academic support; health and wellness; meals and nutrition; and time demands); *supra* Section II.2.

151. NCAA MANUAL, *supra* note 9, § 5.3.2.1.

152. Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 79 (2017).

153. See NCAA MANUAL, *supra* note 9, § 3.0.1.3; *NCAA Membership*, NCAA, <http://www.ncaa.org/governance/membership> [<https://perma.cc/N3ZS-52U9>] (last visited Feb. 15, 2019).

154. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1072 (9th Cir. 2015); NCAA MANUAL, *supra* note 9, § 5.3.2.1.

2015.¹⁵⁵ While this legislation¹⁵⁶ certainly benefits athletes, it does not delineate autonomy to the individual conferences. As mentioned above, all five conferences are still forced to follow the exact same funding structure as one another, and thus the price-fixing regime continues. Therefore, even after the adoption of the areas of autonomy, the NCAA still conducts a restraint of trade per section 1 of the Sherman Act and faces the burden of justifying such restraint.¹⁵⁷

2. The “Committed to Change” Campaign

On August 8, 2018, the NCAA launched a new campaign entitled “Committed to Change.”¹⁵⁸ The opening statement from NCAA leaders on college basketball reform began as follows: “The September 2017 announcement of a federal investigation into fraud in college basketball recruiting made it clear the NCAA needed to make significant changes—and do so quickly.”¹⁵⁹

These reforms purport to minimize the amount of outside influences on student-athletes, broaden athletes’ ability to make a decision about their personal ability to turn pro, levy harsher punishment for infractions, and create a more efficient and binding infractions process.¹⁶⁰ The NCAA’s “commitment to change” expressed great intentions on the surface, but it does not provide a practical solution to the validity of antitrust actions levied against it. Despite the proposed solution, the NCAA retains total control over the amount of funds schools can provide athletes in return for their education and experience as a collegiate athlete.

155. Shannon, *supra* note 152, at 78–79.

156. While the NCAA rulemaking process is different than that of Congress or state legislatures, the NCAA uses similar language. Compare 2018–19 NCAA DIVISION I AUTONOMY LEGISLATIVE PROCESS (2018), http://www.ncaa.org/sites/default/files/2018-19DIGov_AutonomyLegislativeProcess_20180906.pdf [<https://perma.cc/P52J-M8TJ>], with *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/the-house-explained/the-legislative-process> [<https://perma.cc/475R-U2V9>] (last visited Feb. 16, 2019). Thus, the rulemaking and adopting process is called “legislation” in the NCAA Manual. See, e.g., NCAA MANUAL, *supra* note 9, § 2.01 (“*Legislation* enacted by the Association governing the conduct of intercollegiate athletics shall be designed to advance one or more basic principles, including the following, to which the members are committed.” (emphasis added)).

157. *O’Bannon*, 802 F.3d at 1073; see also *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 2.

158. *Committed to Change: A Look Back*, NCAA, <http://www.ncaa.org/about/committed-change#timeline> [<https://perma.cc/D8QZ-7JP7>] (last visited Feb. 16, 2019).

159. *Id.*

160. *Id.*

3. *In re NCAA Grant-in-Aid Cap Litigation*

Four years after Judge Wilken handed down a district court decision in *O'Bannon*, she oversaw another lawsuit levied against the NCAA, *In re NCAA Grant-in-Aid Cap Litigation*.¹⁶¹ While the crux of the plaintiffs' argument in *O'Bannon* centered around the price-fixing of athletes in regard to compensate rights for their name, image, and likeness, the plaintiffs in the *Grant-in-Aid Litigation* focus their argument on the price-fixing of athletes compensation in exchange for their performance.¹⁶²

The plaintiffs' goal in *O'Bannon* was to garner recognition from the courts that a market existed for their names, images, and likenesses. The plaintiffs' goal in *In re Grant-in-Aid Litigation* is to have the athlete's on-field performance recognized as marketable.¹⁶³ This issue is decided under a Rule of Reason analysis, which analyzes whether a scheme merely regulates competition in a way to promote it, or whether it suppresses and destroys competition.¹⁶⁴ Accordingly, the plaintiffs in *In re Grant-in-Aid* litigation and in *O'Bannon* met the initial burden at the summary judgment stage under a Rule of Reason analysis, and thus the burden shifted to the NCAA, which must then establish a procompetitive justification for placing a cap on the amount of grant-in-aid available for players.¹⁶⁵

In *In re NCAA Grant-in-Aid Cap Litigation*, the plaintiff student-athletes challenged the current NCAA rules limiting the compensation programs can offer athletes in exchange for their athletic services.¹⁶⁶ The challenged NCAA rules, discussed throughout this Note, enact a cap on the amount of funds an athlete can receive during one calendar year of athletics and education.¹⁶⁷ The plaintiffs met the initial Rule of Reason burden by proving a significant anticompetitive effect, shifting the burden to the NCAA to prove a procompetitive

161. Judge Wilken presides over the *In re Grant-in-Aid Litigation* case. See John Richard Carrigan, *Play for Pay Won't Go Away: The NCAA Is Again Defending Antitrust Litigation over Limits on Payments to Student Athletes*, NAT'L L. REV. (Sept. 29, 2018), <https://www.natlawreview.com/article/play-pay-won-t-go-away-ncaa-again-defending-antitrust-litigation-over-limits> [<https://perma.cc/5XVL-SCHJ>].

162. *Conduct Detrimental Episode 35: College Sports on Trial with Andy Schwarz*, THEWHITEBRONCO 4:06--:16 (Oct. 1 2018), <http://thewhitebronco.com/2018/10/episode-35-college-sports-on-trial-with-andy-schwarz/> [<https://perma.cc/F5WP-Y63E>].

163. *Id.* at 4:20--:45. In fact, "[i]f the Plaintiffs in *Jenkins* succeed, the NCAA would not be permitted to impose any cap on student-athlete compensation." Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O'Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 359 (2016).

164. See Bd. of Trade of Chi. v. United States, 246 U.S. 231, 244 (1918).

165. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 2.

166. *Id.* at 1--2.

167. NCAA MANUAL, *supra* note 9, § 2.1.3

justification for its conduct.¹⁶⁸ Evidence of significant anticompetitive effects were clear. Judge Wilken explained that in 2013, the Power Five Conferences proposed that the NCAA allow student-athletes to receive greater direct compensation, rather than continued indirect compensation through expenditures on “opulent athletic facilities and multimillion dollar coaches’ salaries.”¹⁶⁹ However, the NCAA rejected the proposal and retained its current structure, limiting grant-in-aid athletic scholarships to the cost of attendance—the remedy fashioned in *O’Bannon*.¹⁷⁰

To justify its current regulations, the court considered two procompetitive justifications from the NCAA at trial: (1) integration of student athletes with the student body and (2) consumer demand for amateurism.¹⁷¹ The court rejected the first theory for several reasons.¹⁷² First, as compensation for athletes increased from the pre-*O’Bannon* compensation scheme to the cost of attendance payment scheme, graduation rates for student-athletes also increased.¹⁷³ Second, Judge Wilken explained that income disparities between students on campus inherently exist from varying socioeconomic backgrounds.¹⁷⁴ Additionally, the challenged rules already increase separation among students, as the compensation limits incentivize universities to spend money on “unregulated frills” in facilities that indirectly benefit athletes rather than payments which would directly benefit them.¹⁷⁵

Despite Judge Wilken’s critique of the procompetitive justification of integration, the court accepted the NCAA’s argument that consumer demand for college athletics is aided by preserving a distinction between amateur sports and professional sports.¹⁷⁶ According to the court, “[I]t follows that the distinction between college and professional sports arises because student-athletes do not receive

168. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 2.

169. *Id.* at 16.

170. *O’Bannon*, 802 F.3d at 1074.

171. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 19, 46.

172. *Id.* at 52–53 (“Because Defendants have not met their burden to show that the challenged limits are procompetitive due to an effect on promoting integration, by preventing a wedge or otherwise, the Court finds that Defendants have not shown that the challenged rules are justified based on this theory.”).

173. *Id.* at 48.

174. *Id.* at 49.

175. *Id.* at 51 (“[T]he challenged compensation limits result in schools spending their recruitment resources on ‘unregulated frills’ in facilities that benefit student-athletes exclusively.”).

176. *Id.* at 44 (“The court does credit the importance to consumer demand of maintaining a distinction between college sports and professional sports.”).

unlimited payments unrelated to education.”¹⁷⁷ In lieu of her findings, Judge Wilken issued an injunction for the NCAA to alter its compensation rules to permit payments to be made to student-athletes above the cost of attendance, so long as such payments are tailored to education.¹⁷⁸

The NCAA appealed the district court’s decision to the Ninth Circuit. Judge Wilken’s ruling continued to cut back against the NCAA’s defenses to its amateurism regime, as the *O’Bannon* court accepted the integration with the student body, but Judge Wilken rejected it.¹⁷⁹ However, the procompetitive justification of preserving a line of demarcation between professional and collegiate athletics survived, preserving the NCAA’s “revered tradition of amateurism.”¹⁸⁰ Despite the NCAA’s narrow victory, it is clear that antitrust pressure continues to mount, and the NCAA should adopt principles of federalism to relieve itself from that pressure.

III. UTILIZING PRINCIPLES OF FEDERALISM TO RELIEVE ANTITRUST PRESSURE

This Part proposes a solution to the NCAA’s inherent tension with antitrust law. As antitrust law continues to ignore value judgments and focus on economic impacts, the NCAA’s chief justification for restraining trade—amateurism—becomes inadequate. Thus, rather than waiting on Congress to carve out an exemption to the Sherman Act,¹⁸¹ relying on the courts to continue utilizing a quasi-exception to antitrust law,¹⁸² or releasing the Power Five Conferences from the NCAA altogether,¹⁸³ the NCAA should take a proactive

177. *Id.* at 45.

178. *Id.* at 97 (“The alternative being adopted would remove NCAA caps on education-related benefits only.”).

179. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 52–53.

180. *Bd. of Regents*, 468 U.S. at 120; *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 44.

181. Lazaroff, *supra* note 7, at 332–33.

182. Kargl, *supra* note 133, at 410.

183. Bush, *supra* note 41, at 10. This Note’s suggestion is limited in scope to the Power Five Conferences for several reasons. Most notably is that the gap between yearly revenue for Power Five Conferences and the remaining conferences is tremendous. For example, in 2014, the Big 12 received the lowest revenue of all Power Five Conferences at \$220 Million, while the highest non-Power Five Conference returned just over \$16 million. See Zach Barnett, *The Difference between the Power Five and the Rest of FBS: \$300 Million*, FOOTBALLSCOOP (June 12, 2014), <http://footballscoop.com/news/the-difference-between-the-power-five-and-the-rest-of-fbs-300-million/> [https://perma.cc/C8NB-W3T8]. See generally *Big 12 Conference*, XII, <http://www.big12sports.com> [https://perma.cc/NS24-Z2TY] (last visited Feb 16, 2019). Thus, the resources to offer scholarships above cost of attendance are much higher in the Power Five than in the other conferences making up the NCAA. See Erik Brady et al., *College Athletics Finance Reports: Non-Power 5 Schools Face Huge Money Pressure*, USA TODAY (May 26, 2015, 7:49 PM),

approach. Principles of federalism should be used to relieve the NCAA from antitrust pressure, while allowing the organization to continue working towards its original purpose: maintaining the safety and integrity of student-athletes in the pursuit of an education.¹⁸⁴

A. Principles of Federalism

The NCAA should utilize principles of federalism to insulate itself from antitrust scrutiny. Federalism is the vertical separation of power between the federal government and the state governments.¹⁸⁵ James Madison first articulated the value served by federalism when he wrote that “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”¹⁸⁶ Thus, the concept of federalism centers on delegating authority to several actors rather than subsuming all authority in one governing body. Federalism protects zones of authority from intrusion by the federal government when such zones are the “state’s traditional prerogative.”¹⁸⁷ Thus, states have traditionally reserved the right to control education, police powers, and the health and welfare of their citizens without federal intrusion.¹⁸⁸

Another benefit of federalism is that it allows states to serve as “laboratories of democracy.”¹⁸⁹ If one state enacts a new rule or statute, the rest of the states may benefit from the enactment by witnessing its success or failure without suffering direct consequences. For example, in Florida, the state legislature altered attorneys’ fees in medical malpractice actions by enacting “loser pays” compensation.¹⁹⁰ The experiment failed, revealing to the rest of the states that the American rule for attorneys’ fees may in fact be more desirable.¹⁹¹

<https://www.usatoday.com/story/sports/college/2015/05/26/ncaa-athletic-finances-revenue-expense-division-i/27971457/> [<https://perma.cc/YQ4F-HEN7>].

184. See NCAA MANUAL, *supra* note 9, §§ 1.2–.3 (outlining the policies and goals of the organization); *supra* Part I.

185. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPALS AND POLICIES 3 (5th ed. 2015).

186. THE FEDERALIST NO. 45 (James Madison).

187. See *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 459, 462 (1991) (“In the tension between federal and state power lies the promise of liberty.”).

188. See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (“[O]ur cases are quite clear that there are real limits to federal power.”).

189. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

190. See Francis J. Carney, “Loser Pays”—Justice for the Poorest and the Richest, Others Need Not Apply, 8 UTAH B.J. 18, 18–19 (1995).

191. *Id.*

Lastly, federalism protects individuals from potential tyranny at either the state or federal level by each level of government serving as a check on the other.¹⁹² As Justice O'Connor explained, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."¹⁹³

B. Applying Federalism Principles to the NCAA

Federalism, the vertical separation of the federal government from state governments, can be applied to the NCAA by utilizing the current vertical separation between the NCAA and the individual conferences in a governance scheme. This Note recognizes that federalism is a discrete legal concept applied to governments. While the NCAA is not a government, this Note proposes that the NCAA should adjust its governance structure drawing from *principles* of federalism. This Section examines how the above principles of federalism would apply to the NCAA, before explaining why such changes relieve the NCAA from antitrust pressure.

First, the NCAA should grant general autonomy to the conferences with limited zones of authority reserved for itself. The NCAA should retain authority over the traditional areas that the NCAA was created to govern: educational requirements and the infractions process. The traditional prerogatives of the NCAA were "keeping with the dignity and high purpose of education."¹⁹⁴ As long as students maintain academic standards and avoid violating the NCAA Code of Conduct, the NCAA's original purpose is served. Therefore, rather than enumerating specific "areas of autonomy" to the Power Five Conferences, like Amendment 5.3.2.1 in the current NCAA Manual,¹⁹⁵ the NCAA should grant general autonomy to the conferences and expressly reserve limited authority to itself.

Specifically, the NCAA's Amendment could read as follows: "The Conferences shall retain indefinite authority to adopt or amend legislation for their own member institutions as they see fit, so long as such legislation does not conflict with an area of authority reserved for the NCAA." Such traditional realms of authority that would be retained by the NCAA include the student-athlete code of conduct, infractions appeals, and minimum grade eligibility requirements. Again, this is consistent with the NCAA's original mission: regulating the dignity and

192. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 525 (1995).

193. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

194. See *Notable Educators*, *supra* note 18; *supra* Part I.

195. See NCAA MANUAL, *supra* note 9, § 5.3.2.1.

high purpose of education.¹⁹⁶ The proposed legislation above varies from the current amendment because instead of giving the Power Five Conferences the ability to adopt legislation that binds all five conferences collectively, it gives each conference the ability to adopt certain legislation for itself. It thus enables the conferences to act similarly to states, serving as “laboratories of democracy” in collegiate sports.

Lastly, the solution that federalism proposes in many courts’ interpretations of the constitutional structure is vertical separation between the governing bodies of the states and the federal government, preventing either body from garnering too much control.¹⁹⁷ This same vertical separation can be used within the NCAA by reserving compensation and name, image, and likeness legislation to the individual conferences. Federalism proposes leaving traditional state prerogatives, such as the police power of the states, to the states to govern.¹⁹⁸ Similarly, the individual conferences already retain autonomy to negotiate broadcasting rights with various media companies since the decision in *Board of Regents*.¹⁹⁹ However, the NCAA sets rules and regulations that bind all student-athletes, regardless of the conference they participate in or the demand their talent garners.²⁰⁰ The NCAA should instill vertical separation from the conferences by preserving educational requirements and student-athlete codes of conduct, while relinquishing rulemaking authority regarding compensation to the conferences. Conducting this separation would create a market among the conferences to decide the value of student-athlete services rather than operating a price-fixing monopsony like the current system.²⁰¹ Further, the Power Five Conferences would not be subject to the same antitrust challenges as the NCAA because sports leagues may adopt rules to govern themselves that promote competition.²⁰² The NCAA would struggle to make the same argument, as the Power Five already competes at an enormously

196. See *Notable Educators*, *supra* note 18; *supra* Part I.

197. Federalism arose in the early twentieth century as an interpretation of the structure between the federal government and the states as one where each retained individual zones of authority. Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 301, 313 (2017).

198. See generally *Clause 3: Federalism Limits on Exercise of Commerce Power*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-1/section-8/clause-3> [http://perma.cc/63GN-UK6G] (last visited Feb. 16, 2019).

199. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 120 (1984).

200. NCAA MANUAL, *supra* note 9, § 3.1.2.4.

201. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1075 (9th Cir. 2015).

202. Members of sports’ leagues must adopt rules that allow one another to compete. See Bush, *supra* note 41, at 10.

higher level than its peers.²⁰³ In 2014, the gap in revenue between Power Five Conferences and the “Group of 5” Conferences was near \$300 million, and it continues to grow.²⁰⁴ Thus, competition among the many conferences is already essentially nonexistent, hence why the court in *O’Bannon* rejected this procompetitive justification.²⁰⁵

C. Benefits of Federalism

The most obvious benefit of utilizing principles of federalism is the NCAA’s relief from antitrust liability. For instance, in the current NCAA landscape, setting the value of all Division I athletic scholarships at the cost of attendance shifts the burden from the plaintiff to the NCAA in an antitrust action.²⁰⁶ This burden shifting occurs because the buyers in the market for collegiate athletes, the universities, agree to offer the same amount for each scholarship.²⁰⁷ Yet, if principles of federalism are utilized and compensation rules are delegated to each conference, the individual conferences will form a competitive market with one another by making separate decisions as to the compensation package to offer each athlete. Unlike the NCAA, which established one price among all competitors, the Power Five Conferences would now individually decide the scholarship level for its members. The conferences would need to avoid making agreements on price levels with one another, however, or the antitrust challenges could simply shift to the Power Five Conferences. Regardless, the NCAA would be relieved of antitrust pressure and a market for economic competition would be created.

For example, instead of speculating that payments above the cost of attendance would decrease the popularity of the sport,²⁰⁸ one conference could adopt legislation permitting payment above the cost of attendance, and the remaining conferences would have the ability to witness the effects of such legislation. Further, conferences could elect to allow third party sponsors to contract with student-athletes for the rights to their name, image, and likeness without jeopardizing athletes’

203. See Barnett, *supra* note 183.

204. *Id.* The “Group of 5” Conferences make up the second largest group of conferences in the NCAA. The Power Five Conferences refer to the largest sixty-five schools, while the Group of 5 Conferences refer to the remaining schools that compete in NCAA football, aside from a handful of “independents,” or schools with no conference affiliation.

205. See *O’Bannon*, 802 F.3d at 1059; Barnett, *supra* note 183.

206. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98, 113 (1984).

207. See *O’Bannon*, 802 F.3d at 1055.

208. This is the justification levied by the NCAA in *In re NCAA Grant-in-Aid Litigation*. *In re NCAA Grant-in-Aid Litigation*, No. 14-md-02541 at 19.

eligibility. Again, this would allow the NCAA and the conferences to witness the positive and negative effects of certain schemes which have yet to be utilized. Even if the conferences elected not to adopt these changes, the NCAA would still be relieved from antitrust liability because unlike the current NCAA model, athletes could serve as actors in a competitive marketplace without price-fixing restrictions.

Lastly, allocating a greater zone of authority to the conferences would immediately remove the monopolizing effect that each NCAA amendment creates.²⁰⁹ Removing this monopolizing effect creates a market for competition among the many conferences and removes the NCAA from antitrust liability.

D. Downfalls of Federalism

One reservation the NCAA may have in granting such authority to the conferences is that the conferences may elect to split from the NCAA entirely.²¹⁰ However, this concern suggests a misunderstanding of the use of federalism principles. The NCAA boasts nearly 115 years of governance, thus it is equipped to handle student disciplinary conduct, disputes between conferences, national championship series, and much more. Unlike the conferences, who primarily focus on revenue generation through the relationship with media companies and the college football playoff,²¹¹ the NCAA's compliance and governance structures serve a nonrevenue generating function that would be unnecessary for each conference to develop. Additionally, the NCAA could still serve its nonprofit purpose.

Another potential downfall relates to the most valid justification for the current cap on scholarship funds: growing the output in the college education market.²¹² As mentioned in Part II, the NCAA attempted to justify its restraint on trade in *O'Bannon* by alleging that the cap on scholarships allows for *more* scholarships to be given.²¹³ This

209. Res judicata bars suits from being litigated repetitively. See *Definition: Res Judicata*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/res_judicata [<https://perma.cc/2UQ8-LNPP>] (last visited Feb. 15, 2019). However, res judicata does not apply when the NCAA changes its rules and regulations. See generally Summary Judgment Order, *In re NCAA Grant-in-Aid Litigation*, 4:14-md-02541-CW, at *21 (N.D. Cal. 2018). Thus, each time an NCAA rule is adjusted, the door is opened for classes of athletes to bring suit once again.

210. This has been argued for by some scholars, including Connor Bush. See, e.g., Bush, *supra* note 41, at 49.

211. See Taylor Branch, *NCAA to Congress: Change Is Coming*, ATLANTIC (July 24, 2014), <https://www.theatlantic.com/entertainment/archive/2014/07/the-ncaa-tells-congress-its-going-to-reform-itself/374948/> [<https://perma.cc/E6N7-FLQG>].

212. See *supra* Part II (using "growing the output" in the education market as a justification for the restraint on trade).

213. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1058 (9th Cir. 2015).

is a valid concern consistent with the original purpose of the NCAA. If the NCAA's goal is to promote the integration of sport and education, having the greatest number of scholarships possible would certainly be a way of furthering that goal.

However, the NCAA could still further this goal through its minimum sport requirement for Division I status.²¹⁴ If a program did not maintain the minimum level of requisite male and female sports, then the program could lose Division I status.²¹⁵ Furthermore, Title IX requirements will continue to encourage the maintenance of nonrevenue sports by revenue sports.²¹⁶ Lastly, the same concern offers a currently unavailable benefit: a class of individuals might be included in collegiate sports that is currently excluded. Indeed, as the Ninth Circuit noted, loosening the financial restriction might open the door for recruits to attend college who otherwise could not.²¹⁷

Finally, the benefit of the conferences serving as "laboratories of democracy" also garners the critique that a lack of uniformity might exist among the conferences, and that such disparity could undermine the product of college sports and decrease its value to viewers. However, such disparities already exist.²¹⁸ Unless the NCAA plans on creating a requisite budget for each athletic department in the country, the programs with the greatest success will achieve an advantage the following year, and the programs that struggle will be disadvantaged. The greater injustice, however, is operating a system that spends millions of dollars on unnecessary amenities and facilities²¹⁹ in an attempt to attract athletes who might be better off placing their share of such windfall in a postgraduate fund. Therefore, the potential

214. See *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> [<https://perma.cc/G6BC-65FG>] (last visited Feb. 16, 2019) (detailing the current sport requirements for divisions).

215. *Id.*

216. See Nathan Boninger, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 758 (2018). Title IX laws require the same number of male and female opportunities on campus. See *id.*

217. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d at 1073 ("Indeed, if anything, loosening or abandoning the compensation rules might be the best way to 'widen' recruits' range of choices; athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school."); Fisher, *supra* note 24, at 669 ("[Professional football] . . . is viewed in many communities as the key tool for social mobility.").

218. David Jones, *Revenue Gap Between College Football Elite and Poor Just Keeps Widening*, PENNLIVE (May 16, 2018), https://www.pennlive.com/pennstatefootball/index.ssf/2018/05/penn_state_football_revenue_pi.html [<https://perma.cc/655H-3339>].

219. See, *supra* note 110 and accompanying text.

downfalls of utilizing the principles of federalism are strongly outweighed by the potential benefits.

IV. CONCLUSION

Antitrust law frowns upon the balancing of value judgments against economic impacts.²²⁰ The NCAA's chief justification for amateurism rules is the social value they create. Thus, the NCAA structure inherently creates tension with the antitrust laws. Principles of federalism could relieve this tension by expanding conferences' autonomy from that of collective autonomy to individual autonomy, creating a market for competition amongst the conferences. Additionally, the NCAA's founding purpose of maintaining the integrity and high purpose of education could remain intact. Despite concerns of a lack of uniformity or a decreased output in the market for college education, the benefits of different legislative schemes amongst the conferences outweigh the pitfalls. The NCAA should act swiftly and utilize principles of federalism to solve its antitrust problems before it is too late to act at all.

*Grant Newton**

220. See Allensworth, *supra* note 72, at 9.

* J.D. Candidate, Vanderbilt University Law School, 2020; BSBA, Oklahoma State University, 2017. The Author would like to thank the late Professor David Williams for his feedback on this Note. His enthusiasm and encouragement to students will be dearly missed. Additionally, the Author thanks Professor Rebecca Allensworth and Dan Werly for their constructive feedback. The twitter feeds of Michael McCann and Andy Schwarz kept the Author up-to-date on the *In re Grant-in-Aid Litigation*. The staff of the *Vanderbilt Journal of Entertainment and Technology Law* provided important counsel and hard work. Lastly, the Author thanks his wife Kaci for listening to him ramble about college sports and antitrust law over the last year.

