COMMENT

THE LAST LINE OF A WEAK DEFENSE: THE WANING FORCE OF THE NCAA'S PROCOMPETITIVE DEFENSE OF AMATEURISM IN § 1 COMPENSATION CHALLENGES

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The Supreme Court in NCAA v. Alston *determined that the NCAA's education-related compensation restrictions violated § 1 of the Sherman Act. The Court, however, did not scrutinize the legality of the NCAA's athletic-related compensation restrictions, begging the question: when will the Supreme Court, if ever, stop presuming the validity of the NCAA's athletic-related compensation restrictions because they allegedly ensure that college athletics remain amateur?*

This Comment examines this question in further detail by cataloging the Court's antitrust jurisprudence involving § 1 compensation challenges and what this jurisprudence may spell for future litigation in a college athletics landscape increasingly defined by name, image, and likeness (NIL).

This Comment argues that the Court should reject the presumption of validity it has historically accorded to the NCAA's compensation restrictions. By characterizing this presumption as a noneconomic justification, this Comment

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suggests that amateurism lacks the requisite economic tether to competition to sustain its viability as a procompetitive defense under the Rule of Reason. Ultimately, this Comment contends that, in future § 1 compensation challenges, the Court should find that the NCAA's athletic-related compensation restrictions violate the Sherman Act.

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INTRODUCTION

Mere minutes after tipoff in the Iowa-Michigan women's college basketball game, the crowd erupted in cheers as the Iowa point-guard, Caitlin Clark, scored a basket from the "logo three," elevating her to a new title of all-time leading scorer in college women's basketball.[1] Excitement for this anticipated milestone was widespread as fans packed the stadium, reaching almost 15,000 people watching history unfold live and in-person.[2] A father and daughter traveled from Birmingham, Alabama, to celebrate his daughter's birthday watching the game, while two young girls, both aspiring basketball players, and their mothers drove from Canton, South Dakota, to watch their idol

1. Eric Olson, *Caitlin Clark of Iowa Breaks the NCAA Women's Career Scoring Record with a Signature 'Logo 3,'* ASSOCIATED PRESS (Feb. 16, 2024), https://apnews.com/article/caitlin-clark-iowa-12e078352a92fe2effb307888775cdb0. A "logo three" denotes a three-point jump shot taken by a player around half-court and indicates a player's long-range marksmanship. *See* Charles Curtis, *Caitlin Clark Saying We All Should Have Known She'd Break the Record with a Logo 3 Is the Ultimate Flex*, USA TODAY (Feb. 16, 2024), https://ftw.usatoday.com/2024/02/iowa-caitlin-clark-logo-three-ncaa-record-interview-video [https://perma.cc/TRH4-LJ5Y]. During the press conference following the Iowa-Michigan game, Caitlin Clark, acknowledging her record-breaking performance, offered to reporters, "Y'all knew I was gonna shoot a logo three for the record, come on now." *Id.*

2. Laken Litman, *'It's Unimaginable': Caitlin Clark's Historic Night and Its Impact on Women's Sports*, FOX SPORTS (Feb. 16, 2024), https://www.foxsports.com/stories/womens-college-basketball/its-unimaginable-caitlin-clarks-historic-night-and-its-impact-on-womens-sports [https://perma.cc/LR54-MUM3].

play live.[3] Another fan flew from San Antonio, Texas, and arrived to watch the game with a bouquet of roses he hoped to give to Clark.[4]

Excitement for the game did not dissipate by the end of the night as Clark went on to proactively rebuff counterattacks from Michigan and finished with one of her best overall scoring nights to date.[5] After Iowa's win was solidified, thanks in part to the forty-nine points Clark scored, children and teens flocked to the court with Sharpies hoping to get Clark to sign their jerseys or other merchandise they bought sporting her name, image, and likeness (NIL).[6] The post-game press conference was interrupted by fans chanting "One more year! One more year!" when Clark was asked about the likelihood of declaring her draft eligibility as the prospective No. 1 overall draft pick.[7]

The fanaticism surrounding Caitlin Clark exemplifies the larger fanaticism defining college sports fan bases.[8] It can manifest as euphoric fervor and reverence or, at the other extreme, mass lambast and serious criticism, such as when a group of Iowa State fans chanted "overrated" at Clark during a game earlier in the same season, in which she broke the all-time scoring record for women's and men's college

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3. *Id.*; *see* Olson, *supra* note 1 (addressing the travel plans of Iowa Hawkeyes fans and, specifically, fans of Caitlin Clark).

4. *See* Litman, *supra* note 2 (noting the wide reach of Caitlin Clark among fans across the country, including fans who traveled from Alabama and Texas to watch her break the all-time scoring record for women's college basketball).

5. *See* Olson, *supra* note 1 (recognizing that Clark, alongside becoming the all-time leading scorer for women's college basketball, also broke the leading single-game scoring record for Iowa women's basketball the same night).

6. *Id.*; Litman, *supra* note 2; *see infra* Section I.E (discussing the history of NIL in college athletics).

7. *See* Olson, *supra* note 1 (noting that Clark was widely expected to be the number one overall draft pick).

8. *See, e.g.*, Cindy Boren, *No, Caitlin Clark Isn't Going to Take a Pay Cut to Go to the WNBA*, WASH. POST (April 15, 2024), https://www.washingtonpost.com/sports/2024/04/15/caitlin-clark-wnba-salary (addressing the "Clarkonomics" bump in revenues generated by the University of Iowa due to the public fervor for Caitlin Clark, whose fame propelled the viewership of the women's basketball national championship between Iowa and South Carolina to exceed that of the men's basketball national championship); *see also* Dan Treacy, *Caitlin Clark's NIL Deals, Explained: How Much Money Iowa Star Makes from Nike, Other Sponsors in 2024*, SPORTING NEWS (Mar. 30, 2024), https://www.sportingnews.com/us/ncaa-basketball/news/caitlin-clark-nil-deals-money-iowa-nike-sponsors-2024/e58534cadc3b2960663a36cb [https://perma.cc/8THL-P3BN] (noting that Clark secured eleven NIL deals, estimated at $3.1 million, making her one of the highest-paid student-athletes nationwide).

basketball.[9] Even though Clark represents a special and unique phenom in the recent college sports landscape, the fanaticism surrounding student-athletes like her, and college sports more generally, is neither new nor unprecedented.[10] Likewise, discussions about student-athlete compensation are not new; instead, those discussions are becoming more relevant, especially given that student-athletes, despite the omnipresence of recruiting scandals throughout the history of intercollegiate athletics, are still prohibited from receiving compensation for their athletic performance.[11]

Despite the widespread popularity of college sports, which is partially explained by its uniquely American character, institutions have been plagued by scandals and patently improper conduct,

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9. Meghan L. Hall, *The Iowa State Student Section Trolled Caitlin Clark and It (Predictably) Backfired*, USA TODAY (Dec. 7, 2023), https://ftw.usatoday.com/2023/12/caitlin-clark-iowa-state-3000-points-overrated-quote [https://perma.cc/H8P2-4P9L]. To the dismay of Iowa State fans, their "overrated" chants, if anything, fueled another stellar performance for Clark, who ended the game with thirty-five points, secured the win for the Iowa Hawkeyes, and broke yet another NCAA record, being the first player in NCAA Division I history, for both women's and men's college basketball, to make 3,000 points, 750 rebounds, and 750 assists. *See* Eric Olson, *Caitlin Clark of Iowa Breaks Pete Maravich's NCAA Division I Scoring Record*, ASSOCIATED PRESS (Mar. 3, 2024), https://apnews.com/article/caitlin-clark-iowa-ncaa-record-8d2a9bc33a9fdc59177a5ca4fe7221a9 (discussing that, just four days after becoming the all-time leading scorer in women's college basketball, Clark broke the men's all-time scoring record previously held by Pete Maravich, who played at Louisiana State University from 1967 to 1970).

10. *See* Kristi Dosh, *New Report Shows How Attractive College Sports Fans Are to Brand Marketers*, FORBES (Aug. 17, 2021), https://www.forbes.com/sites/kristidosh/2021/08/17/new-report-shows-how-attractive-college-sports-fans-are-to-brand-marketers [https://perma.cc/5SFG-2V2S] (recognizing that college sports fans, measured cumulatively and inclusive of all college sports, "outrank[] all professional sports for percent of avid fans," even outpacing the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League as the largest fan base in the United States).

11. *See History*, NCAA, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Oct. 29, 2024) (summarizing the history of the NCAA); NCAA v. Alston, 141 S. Ct. 2141, 2147, 2162 (2021) (allowing the NCAA's athletic-related compensation rules to remain in place despite holding that restrictions on education-related benefits violate the Sherman Act); *see also* Billy Witz & Mark Shimabukuro, *Big Money. College Athletes and the N.C.A.A.: A Timeline*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/ncaa-college-athletes-pay-history.html (noting that Shabazz Napier, a former Division I basketball player at the University of Connecticut, told reporters that he often goes to bed hungry because he cannot afford meals and the NCAA's restrictions limit the food supplied to student-athletes like him).

particularly in recruiting.[12] Intercollegiate athletic programs have historically provided under-the-table payments and promises of compensation to athletes, even those not enrolled in college, for their athletic participation and performance.[13] Many athletic staff and even some academic administrators have become embroiled in scandals despite their personal and institutional liability.[14] Recruiting scandals have become so commonplace that some coaches, staff, and athletic administrators consider the provision of financial incentives during the recruiting process to be business as usual and even necessary to remain competitive in the market for high-school athletic talent.[15]

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12. *See* Ted Tatos, *Deconstructing the NCAA's Procompetitive Justifications to Demonstrate Antitrust Injury and Calculate Lost Compensation: The Evidence Against NCAA Amateurism*, 62 ANTITRUST BULL. 184, 186 (2017) (noting the uniquely American tradition of intercollegiate athletics). *See generally History*, NCAA, *supra* note 11 (providing examples of recruiting scandals in intercollegiate athletics, including a recent "federal investigation into fraud in college basketball recruiting" that resulted in the NCAA establishing a Commission on College Basketball to identify reforms needed to ensure integrity in the administration of college basketball).

13. *See* 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) (noting that, even in the earliest athletic contests predating the creation of the NCAA, non-enrolled athletes were hired by athletic programs to compete in intercollegiate competitions, such as a coxswain in one of the first regattas between Harvard and Yale in the late nineteenth century).

14. *See, e.g.*, Tatos, *supra* note 12, at 191 (referring to the Wainstein investigation that uncovered extensive academic fraud at the University of North Carolina at Chapel Hill, in which nearly forty percent of "paper classes" with little to no instruction were comprised of student-athletes between 1989 to 2012); Adam Sparks & Joel Christopher, *Meet the Culprits in Jeremy Pruitt's Tennessee Football Recruiting Scandal*, KNOXVILLE NEWS SENTINEL, https://www.knoxnews.com/story/sports/college/university-of-tennessee/football/2022/07/22/jeremy-pruitt-tennessee-football-ncaa-recruiting-scandal-everyone-involved/10124859002 [https://perma.cc/SV2A-PFPS] (July 25, 2022) (describing a recruiting scandal overseen by Jeremy Pruitt, former head coach of the football program at the University of Tennessee, and his wife, Casey Pruitt, who subsidized cash car and rent payments for recruits and enrolled student-athletes in violation of the NCAA's compensation rules, including a compensation scheme for a specific player and his mother that amounted to $12,500 in cash car payments and $3,000 in rent payments from September 2018 to March 2021).

15. *See* Dave Davies, *Corruption, Scandal and the Multi-Billion Dollar Business of College Basketball*, NPR (Oct. 25, 2018, 1:10 PM), https://www.npr.org/2018/10/25/660499130/corruption-scandal-and-the-multi-billion-dollar-business-of-college-basketball [https://perma.cc/45XB-29U2] (recognizing that the FBI's indictment of three street runners in the youth basketball circuit for cash payments promised to recruits to join certain college basketball programs, including the University of Louisville, did not come as a shock to those involved in college basketball because running afoul of the

Because of the intensifying competition among athletic programs for recruits, somewhat of an "arms race" has developed among colleges vying for revenue in the larger marketplace for intercollegiate athletics.[16]

While recruiting scandals have become part and parcel of competing in the college athletics "arms race," student-athletes have still been afforded certain forms of compensation exceeding the cost of attendance, such as loss-of-value ("LOV") insurance, reimbursements for travel expenses incurred by family members attending athletic events, and health care payments to student-athletes enduring athletics-related injuries for two years following graduation.[17] Although the NCAA continues to expand permissible forms of compensation, it still prevents student-athletes from profiting from their athletic performance.[18] By imposing compensation restrictions, the NCAA sanctions the current state of financial affairs in intercollegiate athletics: the disproportionate hoarding of revenues among coaches, athletics departments, university presidents, and athletic conferences

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NCAA's amateurism rules represents a necessary "occupational risk" of soliciting the best recruits).

16. *See, e.g.*, Nathan Boninger, Comment, *Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions*, 65 UCLA L. REV. 754, 805 (2018); *see also* Sally Jenkins, *The Problem with College Sports Isn't the Athletes. It's the Schools.*, WASH. POST (June 2, 2024), https://www.washingtonpost.com/sports/2024/06/02/ncaa-future-nil-rules (noting that, amid the rampant competition between colleges for high-level football recruits, Football Bowl Subdivision schools have undergone a sixty-seven percent median increase in revenues between 2006 and 2015).

17. *See* Boninger, *supra* note 16, at 805; *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1069 (N.D. Cal. 2019) (recognizing the NCAA's incremental expansion of permissible forms of compensation); *see also Athletes or Universities Buying Loss of Value Insurance? What You Should Know*, DARRASLAW, https://www.longtermdisabilitylawyer.com/2017/04/questions-ask-buying-loss-value-insurance [https://perma.cc/PKY3-NL3T] (last visited Aug. 6, 2024) (defining loss-of-value insurance as a type of insurance rider often appended to permanent total disability insurance policies that allows elite student-athletes to protect against the risk that their draft stock will drop if they suffer from an illness or injury before a professional draft). If a student-athlete's future contract value decreases below a predetermined amount, they receive the value of the reduction via the LOV insurance policy. Many elite student-athletes who are top contenders in future professional drafts execute LOV policies the year before they become draft eligible. *Id.*

18. *See* NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (holding that, while the NCAA's education-related compensation restrictions violate § 1 of the Sherman Act, athletic-related compensation restrictions are permissible restraints on student-athlete compensation).

to the detriment of the student-athletes largely responsible for generating those revenues.[19] In response, some student-athletes have filed antitrust claims against the NCAA,[20] alleging that the NCAA's athletic-related compensation restrictions violate § 1 of the Sherman Act, which prohibits "unreasonable restraints" of trade.[21]

In future antitrust litigation, the NCAA's procompetitive defense of amateurism, which it uses to justify its compensation rules and supposedly to differentiate intercollegiate athletics from professional sports,[22] ought to be classified as a noneconomic justification because it does not impact consumer demand for college sports and only serves to economically benefit the NCAA.[23] Ultimately, the NCAA's athletic-related compensation restrictions constitute an unreasonable restraint of trade in violation of the Sherman Act.[24]

This Comment examines the NCAA's procompetitive defense of amateurism and how the Supreme Court presumed the validity of the defense in *NCAA v. Alston*.[25] In future antitrust litigation, the Court

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19. *See* Davies, *supra* note 15 (contending that most of the revenue generated by the NCAA and college basketball programs, with annual revenue amassing nearly $6 billion from the regular season and March Madness, goes to the "adults who run the games" rather than the student-athletes who largely generate the revenue); *see also Alston*, 141 S. Ct. at 2151 (accepting the respondents' contention that those profiting from intercollegiate athletics are not the student-athletes primarily responsible for generating revenue but the president of the NCAA, commissioners of the top athletic conferences, college athletic directors, and head and assistant coaches).

20. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1055, 1074 (9th Cir. 2015) (finding that the NCAA's NIL compensation restrictions violated § 1 of the Sherman Act as an unreasonable restraint of trade, prohibiting member schools from denying scholarships up to the full cost-of-attendance). Additionally, the litigants in *Alston*—Division I football and men's and women's basketball players—sued the NCAA, arguing that education-related and athletic-related compensation restrictions violate § 1 of the Sherman Act. *Alston*, 141 S. Ct. at 2151.

21. 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."); *see* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984) (declaring the illegality of contracts and combinations, especially those resulting in conditions resembling monopolies that impose "unreasonable restraints of trade").

22. *See infra* Section II.B.

23. *See infra* Section II.A.

24. *See infra* Section II.C.

25. 141 S. Ct. 2141 (2021).

should consider rejecting the presumption altogether.[26] Part I of this Comment will introduce the history and increasing commercialization of intercollegiate athletics, the Sherman Act and its legislative history, the levels of analysis employed by federal courts to interpret alleged antitrust violations, and the increased enforcement of the antitrust laws by the U.S. government, spearheaded by the Biden Administration's recent pledge to more stringently enforce fair competition.[27] Part I also discusses noneconomic justifications in § 1 claims and introduces the NCAA's amateurism defense through analyses of various caselaw, with a specific focus on the *Alston* litigation.[28] Part II contends that the Supreme Court should classify the NCAA's procompetitive defense of amateurism as a noneconomic justification because it lacks any tenable connection to consumer demand for college sports and, therefore, fails to support the NCAA's athletic-related compensation restrictions.[29] While Part II supports the abolition of the NCAA's athletic-related compensation restrictions, it also recognizes that, although compensating student-athletes for their athletic performance may best comport with the antitrust laws, some collateral consequences, such as potential Title IX violations, may arise from upending the NCAA's current compensation scheme.[30] Nonetheless, Part II ultimately recommends allowing student-athletes to receive athletic-related compensation since revenue-sharing plans, alongside the increasing popularity of intercollegiate women's athletics, may reduce the likelihood of these violations occurring.[31]

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26. *See id.* at 2166 (holding that the restrictions on education-related compensation violate the Sherman Act, but the athletic-related compensation restrictions are necessary to distinguish college from professional sports); *see also infra* Section II.E.

27. *See infra* Part I.

28. *See infra* Section I.E.

29. *See infra* Part II.

30. *See infra* Section II.D. Specifically, some commentators fear that allowing student-athletes to receive athletic-related compensation may problematize the Title IX landscape, especially since revenue-generating student-athletes are predominantly football and men's basketball players. *See, e.g.*, Boninger, *supra* note 16, at 801 (supporting a limited procompetitive justification that ensures sexual equality, upholds the NCAA's athletic-related compensation restrictions, and complies with Title IX).

31. *See infra* Section II.D; Grant House v. NCAA, 545 F. Supp. 3d 804, 808–10 (N.D. Cal. 2021) (alleging antitrust violations arising from the NCAA's compensation rules, specifically those related to NIL). In May 2024, the litigants in *Grant House* brokered a $2.8 billion revenue-sharing settlement agreement that aims to provide former and

I. BACKGROUND

The Sherman Act prohibits unreasonable restraints of trade that undermine fair competition in consumer and labor markets.[32] Frequently, arrangements allay allegations of anticompetitive conduct by showing how this conduct yields procompetitive benefits.[33] Because procompetitive defenses often relate to competition, the Supreme Court has not yet decided if noneconomic justifications or antitrust defenses unrelated to competition are relevant to an antitrust analysis.[34] This ambiguity extends to intercollegiate athletics because the NCAA's procompetitive defense of amateurism, which the NCAA defined as prohibiting "pay for play," does not relate to consumer demand for college sports.[35] Since the Supreme Court partially presumed the validity of the NCAA's procompetitive defense of amateurism in *Alston*, the ambiguity surrounding noneconomic justifications persists.[36]

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current student-athletes back pay from NIL revenue and create a "framework for paying athletes for those rights going forward." Billy Witz, *Decades in the Making, a New Era Dawns for the N.C.A.A.: Paying Athletes Directly*, N.Y. TIMES (May 23, 2024) https://www.nytimes.com/2024/05/23/us/ncaa-athletes-payments.html. Distinguishable from revenue-sharing plans in professional sports that share about "50 percent of revenues with players," the *Grant House* settlement agreement only "calls for schools to share about 22 percent of their revenue with players." *Id. But see* Diana L. Moss, Opinion, *Press Pause on College Sports' Grand Redesign*, HILL (Aug. 22, 2024), https://www.msn.com/en-us/sports/other/opinion-press-pause-on-college-sports-grand-redesign/ar-AA1pgpsl [https://perma.cc/MPQ5-HCQH] (speculating on the impact anticipated by the settlement's revenue-sharing plan).

32. *See* 15 U.S.C. § 1.

33. *See infra* Section I.C.; *see also infra* note 78–80 and accompanying text (defining anticompetitive conduct as limits on competition that yield no benefits to consumers, such as constrained choice, increases in the price of products and services, and an associated decrease in the quality of those products and services, and denoting procompetitive defenses as limits on competition that yield benefits to consumers that generate competition in the marketplace).

34. *See infra* Sections I.C–I.D.

35. The NCAA's witnesses defined amateurism in the negative as what it is not, such as not being "pay for play," unlike the transactional character of professional sports. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1071 (N.D. Cal. 2019). Essentially, "pay for play" describes a compensation scheme where student-athletes are compensated for participating and performing in intercollegiate athletic events.

36. *See* NCAA v. Alston, 141 S. Ct. 2141, 2162–64, 2166 (2021); *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1082 (crediting that the NCAA's procompetitive defense of amateurism importantly distinguishes between intercollegiate athletics and professional sports).

A. The History and Development of Intercollegiate Athletics

While college sports are contemporarily understood as part and parcel of American popular culture, college sports sprouted from somewhat modest traditions.[37] Despite these modest beginnings, intercollegiate athletics quickly developed into a lucrative business for athletic administrators, who seized the opportunity to define and commercialize the marketplace for college sports.[38] Today, the market for college sports rakes in billions of dollars annually, resulting in an athletics "arms race" among athletic programs competing for student-athletes, revenues, and consumers' fanaticism.[39]

1. Early history of intercollegiate athletics

Before the creation of a formal rule-making body overseeing the market for intercollegiate athletics, university students spearheaded the organization of college athletic contests.[40] On December 28, 1905, the Intercollegiate Athletic Association ("IAA") was created after thirteen football-playing schools convened a meeting, spearheaded by New York University Chancellor Henry M. MacCracken, designed to effectuate safety reforms in college football.[41] Just a few years later, the IAA changed its name to the National Collegiate Athletic Association, or NCAA, which has since been recognized as the paramount organization overseeing intercollegiate athletics.[42]

2. Increasing commercialization of intercollegiate athletics in the 20th century

As college sports became more commercialized in the late nineteenth and early twentieth centuries, many colleges, to compete with other schools in the marketplace for college sports, offered under-the-table payments to recruits to incentivize their enrollment and even just their athletic performance for certain events.[43] The Carnegie

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37. *See infra* Section I.A.1.
38. *See infra* Section I.A.2.
39. *See infra* Section I.A.3.
40. *See* Smith, *supra* note 13, at 11 (explaining how students organized one of the first regattas between Harvard and Yale in the late nineteenth century).
41. *See History*, NCAA, *supra* note 11.
42. *Id.*
43. *See* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987) (comparing intercollegiate athletics to big business); Taylor P. Thompson, Note, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1353 n.34 (2022) (describing Hogan,

Foundation, responding to the somewhat exponential commercialization of intercollegiate athletics, issued a 1929 report calling for the decreased commercialization of college sports so higher education could remain a site of educational opportunity for "mature youth."[44] Nonetheless, the Carnegie Report failed to acquire support and, following World War II, commercialization further intensified, with many athletic departments adding new programs and expanding existing ones.[45]

To curb the recruiting excesses and gambling scandals associated with the rampant commercialization of college sports, the NCAA, in 1948, created and administered the Sanity Code, which strictly limited athletic scholarships and financial assistance available to student-athletes.[46] However, in 1951, the NCAA repealed the Sanity Code because the Code's oversight body, the Constitutional Compliance Committee, became obsolete as the only enforcement mechanism the Committee could use to sanction member schools in violation of the compensation rules was outright expulsion.[47] Despite the NCAA's newfound broad sanctioning authority, recruiting excesses and scandals continued to persist throughout the twentieth century.[48]

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a student-athlete at Yale in the late nineteenth and early twentieth centuries, who received compensation for playing on the football team, including a suite of rooms in his dorm, free meals at the University club, a $100 scholarship, profits from the sale of programs, an agency agreement with the American Tobacco Company in which he received commission for cigarettes sold in New Haven, and a ten-day paid vacation to Cuba).

44. *See* Smith, *supra* note 13, at 13–14 (noting that the Carnegie Report failed to gain steam because of the increasing importance of recruiting practices in attracting talent for intercollegiate athletic programs); *see also The Carnegie Foundation Report*, COLUM. DAILY SPECTATOR, Oct. 25, 1929, at 2 (questioning whether founders of American universities would approve of the highly commercialized nature of collegiate sports).

45. *See* Smith, *supra* note 13, at 14 (connecting the "advent of television, the presence radios in the vast majority of homes in the United States, and the broadcasting of major sporting events" to the rampant commercialization of intercollegiate athletics).

46. Witz & Shimabukuro, *supra* note 11.

47. *See* Smith, *supra* note 13, at 14–15 (noting that the NCAA replaced the Constitutional Compliance Committee with the Committee on Infractions, which maintains broad sanctioning authority beyond outright expulsion).

48. *See* Davies, *supra* note 15 (discussing recent recruiting scandals following the NCAA's implementation of reforms); Dave Skretta, *In the 1950s, It Was Adolph Rupp and Kentucky that Ruled College Basketball*, ASSOCIATED PRESS (Jan. 10, 2024, 12:15 PM), https://apnews.com/article/kentucky-carolina-illinois-kansas-bradley-280793c6753450ffa38c6c951de5cb4f (discussing a recruiting scandal unearthed within the University of Kentucky men's basketball program during the 1952–1953 season, where

3. Contemporary commercialization of intercollegiate athletics

Since colleges added new programs and expanded existing ones throughout the twentieth century, many schools, especially Division I programs, exponentially increased their athletic expenditures to keep up with other competitors in the athletics "arms race."[49] Many Division I schools, primarily from the Power Four conferences, operate on a frequent deficit, whereby other sources of revenue——like tuition—support certain athletic programs, especially football and men's basketball, so those programs can break even and continue to increase expenditures to maintain an edge over competitors.[50] Although many schools reserve substantial expenditures for athletic programs, they also accumulate considerable revenue through the television broadcasting of certain football and men's basketball games.[51] Commensurate with the NCAA's contemporary enjoyment of exponential revenues, the NCAA now faces considerable antitrust scrutiny under the Sherman Act that it did not previously receive by virtue of its relationship to colleges and universities.[52]

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coaches compensated current players based on their performance and compensated high school recruits to secure their enrollment).

49. Tom McMillen & Brit Kirwan, *Op-Ed: The 'Arms Race' in College Sports is out of Control. Here's How to Stop It.*, L.A. TIMES (Apr. 11, 2021, 3:05 AM), https://www.latimes.com/opinion/story/2021-04-11/ncaa-alston-professionalization-coaches-salaries [https://perma.cc/YX8E-YCFK].

50. *See* Allen R. Sanderson & John J. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSPS. 115, 121–22 (2015) (contending that Division I colleges, especially those in the Power Four conferences, spend greater amounts on coaches' salaries and on improving athletic facilities to attract more appropriations from state legislators, increase private donations and enrollment, and stay afloat in the competitive market of intercollegiate athletics). The Power Four conferences denote a cohort of Division I athletics conferences, which includes the Atlantic Coast Conference (ACC), Big Ten Conference, Big 12 Conference, and Southeastern Conference (SEC), that are considered the most elite athletic conferences in the country because of their revenues, budget, and television viewership.

51. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 99, 116–17, 120 (1984) (finding that the NCAA's broadcast restrictions on college football violated § 1 of the Sherman Act, signaling the end of the NCAA's monopoly over college football broadcasts and allowing athletic conferences to compete for broadcasting rights).

52. *Compare* Marjorie Webster Jr. Coll., Inc. v. Middle States Ass'n of Colls. & Secondary Schs., Inc., 432 F.2d 650, 653–54 (D.C. Cir. 1970) (granting an antitrust exemption to a voluntary nonprofit educational corporation because the Sherman Act is "'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions"), *with* Hennessey v. NCAA, 564 F.2d 1136, 1148–49 (5th Cir. 1977) (per curiam) (rejecting the NCAA's argument that it qualified for an antitrust exemption because of its nonprofit educational mission).

B. The Legislative History of the Sherman Antitrust Act

To eliminate the predatory business practices pursued by John D. Rockefeller's Standard Oil and Andrew Carnegie's Carnegie Steel, congressional legislators codified the Sherman Act in 1890 so smaller competitors in the oil and steel industries could fairly compete for consumption and profits.[53] Spearheaded by Senators John Sherman and George Edmunds, Congress intended the Sherman Act to ensure consumer welfare in the marketplace through the elimination of cartel agreements, such as horizontal and vertical arrangements,[54] monopolies,[55] price-fixing schemes,[56] and group boycotts.[57] Consumer

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53. Robert Harding, *Calling Time: The Case for Ending Preferential Antitrust Treatment of NCAA Amateurism Rules After* Alston, 2022 U. ILL. L. REV. 1637, 1645 (2022); *see* President Joseph R. Biden Jr., Remarks on Signing an Executive Order on Promoting Competition in the American Economy and an Exchange with Reporters, at 2 (Jul. 9, 2021, 1:48 PM) [hereinafter Remarks on Promoting Competition in the American Economy], https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07 /09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy [https://perma.cc/55NF-8YXR] (explaining that President Theodore Roosevelt confronted "an economy dominated by giants like Standard Oil and JP Morgan's railroads").

54. JAY B. SYKES, CONG. RSCH. SERV., IF11234, ANTITRUST LAW: AN INTRODUCTION (2024), https://crsreports.congress.gov/product/pdf/IF/IF11234 (distinguishing horizontal and vertical arrangements, in which horizontal arrangements denote agreements between competitors, whereas vertical arrangements denote agreements in the supply chain, such as between suppliers and retailers).

55. Whereas horizontal and vertical arrangements, which include price-fixing schemes and group boycotts, require two or more entities, monopolies denote single-firm conduct where the firm "tries to maintain or acquire a monopoly through unreasonable methods." *Anticompetitive Practices*, FTC, https://www.ftc.gov/enforcement/anticompetitive-practices [https://perma.cc/TM5L-DYSN].

56. Illegal price fixing occurs when competitors agree to manipulate prices; the Sherman Act prohibits such schemes based on the assumption that collusion leads to higher consumer prices. *Price Fixing*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing [https://perma.cc/4WP5-R46Z].

57. *See* Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7, 11–12, 36 (1966) (contending that consumer welfare is the only value Congress intended for courts to consider when determining whether an arrangement increases wealth and maximizes efficiency or decreases consumer choice by restricting output). Group boycotts denote agreements among competitors where "competitors agree not to do business with others except on agreed-upon terms." *Group Boycotts*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/group-boycotts [https://perma.cc/V25B-YANY]. The prime example of a group boycott is an agreement in which competitors concertedly reject "offer[ing] services at prevailing prices" to "achiev[e] an agreed-upon (and typically higher) price." *Id.*

welfare seemed to trump all other values during the congressional hearings preceding the passage of the Act, including the value of protecting smaller producers from predation by larger arrangements.[58] Even though the Sherman Act does not expressly define consumer welfare, Senator Sherman seemed to define it as the price reduction of an output which, in turn, increases consumption of the output.[59] Since the Sherman Act's primary purpose is to ensure consumer welfare, Senator Sherman did not necessarily believe that monopolies always violate the Act, especially if they increase business efficiency and ensure that consumers do not pay above-market prices.[60] The Sherman Act's focus on competition indicates its intended commercial character, further supporting the belief that the broad noncommercial objectives ascribed to some legislators during the congressional hearings are immaterial for judicial interpretation of the Act.[61]

1. Section 1 of the Sherman Act

Even though the Sherman Act does not expressly define "restraint of trade," the Supreme Court defined the term in *Standard Oil Co. of New Jersey v. United States*,[62] clarifying that a "restraint of trade" in violation of § 1 of the Act must be unreasonable.[63] Section 1 only applies to commercial activity, defined as any activity where a party expects economic gain, and requires some sort of concerted action among those subject to its sanctions.[64] To evaluate combinations, arrangements, and agreements falling under § 1, courts must conduct two related inquiries: a threshold inquiry and a competitive effects analysis.[65] Courts can ascertain concerted action between two or more legally distinct entities by determining whether an agreement, either written or implied, exists between the entities, and whether that agreement impacts interstate commerce, measured in terms of the

58. *See* Bork, *supra* note 57, at 10, 16–17.
59. *Id.*
60. *See id.* at 12.
61. *Id.* at 12–13.
62. 221 U.S. 1 (1911).
63. *Id.* at 64–65; *see also id.* at 87 (Harlan, J., concurring in part and dissenting in part).
64. Boninger, *supra* note 16, at 765–66.
65. *See* Thomas A. Baker III, Marc Edelman & Nicholas M. Watanabe, *Debunking the NCAA's Myth that Amateurism Conforms with Antitrust Law: A Legal and Statistical Analysis*, 85 TENN. L. REV. 661, 666 (2018).

"buying and selling of commodities . . . on a large scale involving transportation from place to place."[66]

2. Contemporary enforcement of the antitrust laws

Although the Sherman Act primarily responded to contemporaneous monopolies like Standard Oil and Carnegie Steel, the Sherman Act applies with equal force to monopsonies, which deal with the buyer-side of the market, whereby a single buyer in a marketplace effectively controls the market and provides sellers only one avenue for selling their goods or services.[67] Responding to Executive Order 14036—Promoting Competition in the American Economy—signed by President Biden in July 2021, the U.S. Department of the Treasury issued a report about competition in American labor markets expressly critical of the growing consolidation, concentration, and market power of certain markets.[68] Based on a study conducted by Prager and Schmitt, the U.S. Treasury Department concluded that companies that possess extensive labor market power often suppress the wages of their employees and illustrated this market consolidation through the example of hospitals, in which employees specific to the marketplace, such as doctors, nurses, and other medical personnel, experienced severely depressed wages, even more so than other hospital employees, like cafeteria workers, whose skillset is more transferrable to other employment

66. *Id.* (quoting Marc Edelman, *A Prelude to* Jenkins v. NCAA*: Amateurism, Antitrust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LA. L. REV. 227, 231 (2017)).

67. *See, e.g.*, U.S. DEP'T OF THE TREASURY, THE STATE OF LABOR MARKET COMPETITION 4, 54 (2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf [https://perma.cc/9QGP-9ABT] (denoting monopsonies as labor markets with single buyers, in which "workers have only one option for employment," and further explaining that the Sherman Act applies equally to all markets).

68. *Id.* at i, ii ("The Biden Administration is committed to promoting robust competition in labor markets and has directed a government-wide effort to support labor market competition."); *see also id.* at 5 (explaining that the elasticity of a market's labor supply determines the market power of the buyer overseeing the market, in which a high elasticity results in a larger swath of workers leaving the market because of a small decrease in wages, whereas a low elasticity causes more workers to remain in the market, even when firms in the market decrease wages). *See generally* Exec. Order 14,036 of July 9, 2021, 86 Fed. Reg. 36,987, 36,988 (Jul. 14, 2021) ("This order affirms that it is the policy of [President Biden's] Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony . . . .").

contexts.[69] With Executive Order 14036, the Biden Administration affirmed its commitment to enforcing the antitrust laws, with a specific focus on prioritizing consumer and worker welfare.[70] For instance, several members of the Biden Administration, including Lina Khan, the current Chair of the Federal Trade Commission, Jonathan Kantner, Assistant Attorney General of the Justice Department's Antitrust Division, and Tim Wu, Special Assistant to the President on Competition Policy at the National Economic Council, shared the view that monopolies not only hinder competition and harm consumer welfare, but they also undermine democracy.[71] In this way, the Biden Administration has adhered to the original legislative meaning ascribed to the Sherman Act.[72]

C. Judicial Frameworks for Interpreting § 1 Claims

Courts employ one of three tests when reviewing the legality of an arrangement subject to antitrust scrutiny: the per se approach, the Rule of Reason, or the quick look approach.[73] The approaches differ based on the thoroughness of the analysis and whether courts employ a fact-intensive inquiry to assess an arrangement's legality.[74] Courts conduct two types of fact-intensive inquiries when applying these tests: a threshold inquiry, which assesses whether two or more legally distinct entities combine in a manner that impacts interstate commerce, and a competitive effects analysis, which examines if an alleged restraint unreasonably suppresses competition in a relevant market.[75] The applicability of the tests depends on the type of arrangement under

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69. U.S. DEP'T OF THE TREASURY, *supra* note 67, at 23–24.

70. *See* Executive Order 14,036 of July 9, 2021, 86 Fed. Reg. 36,987, 36,987 (Jul. 14, 2021) (noting that increased competition protects consumers by ensuring more choices, better service, and lower prices and protects workers by providing them more opportunities to bargain for higher wages and better working conditions); *see also* Remarks on Promoting Competition in the American Economy, *supra* note 53, at 3 ("My [President Biden's] Executive Order includes 72 specific actions. I expect the Federal agencies . . . to help restore competition so that we have lower prices, higher wages, more money, more options, and more convenience for the American people.").

71. Stefano Kotsonis & Meghna Chakrabarti, *More than Money: Antitrust Lessons of the Gilded Age*, WBUR (Dec. 28, 2022), https://www.wbur.org/onpoint/ 2022/12/28/more-than-money-antitrust-lessons-of-the-gilded-age [https://perma.cc/XJM6-H4GJ].

72. *See supra* note 57 and accompanying text (arguing that consumer welfare is the only material value that courts should consider when assessing the legality of arrangements under the antitrust laws).

73. *See infra* Section II.C.

74. *See infra* Section II.C.

75. Baker et al., *supra* note 65, at 666.

scrutiny, leaving the courts with some leeway to determine if certain arrangements are best scrutinized using a specific test.[76]

1. The per se approach

When the concerted action of two or more legally distinct entities results in conduct harmful to consumers, courts may deem that conduct per se illegal without conducting a thorough, fact-intensive analysis of the harm brought and any positive explanations for that harm.[77] Anticompetitive effects denote limits on competition that result in no benefits to consumers, such as a decrease in the quantity of an output that dramatically increases its unit price.[78] Conversely, procompetitive benefits denote limits on competition that yield benefits to consumers, including an arrangement that maintains low prices to facilitate mass consumption.[79] Plainly anticompetitive behavior includes price-fixing arrangements, group boycotts, horizontal divisions of markets between competitors, and resale price maintenance.[80] Although there are incentives for courts that invoke the per se rule, such as saving on costs typically associated with conducting a thorough analysis of a relevant market, many courts have

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76. *See infra* Section II.C.

77. *See, e.g.*, United States v. Nat'l Ass'n of Real Est. Bds., 339 U.S. 485, 487, 489, 496 (1950) (finding that "members of the Washington Real Estate Board combined and conspired to fix the commission rates for their services when acting as brokers in the sale, exchange, lease and management of real property in the District of Columbia," which the Court deemed per se illegal no matter the objective for the price-fixing). *But see* Broad. Music Inc. v. Colum. Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) (rejecting the per se approach to evaluate the price-fixing of individual copyright holders who combined to orchestrate a joint venture issuing individual licenses because the agreement on price, which resulted in an increase in output, was necessary to market the licenses as a unique product).

78. *See* Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 53–54 (2006) (discussing nuances behind the word competition, such as when cooperation may result in more efficient processes or increased product quality beneficial to consumers).

79. *Id.* at 53.

80. Wendy T. Kirby & T. Clark Weymouth, *Antitrust and Amateur Sports: The Role of Noneconomic Values*, 61 IND. L.J. 31, 33 (1985); *Broad. Music, Inc.*, 441 U.S. at 19–20 (noting that plainly anticompetitive conduct justifies courts employing the per se approach because per se illegality "threaten[s] the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output").

established exceptions to the rule for certain industries whose conduct otherwise would be deemed per se illegal.[81]

2. The rule of reason

Since the Sherman Act was primarily codified to ensure consumer welfare, constraints on competition do not always violate the Act, especially since many arrangements result in benefits to consumers, such as increasing the diversity and availability of products in the marketplace.[82] To assess if an arrangement yields benefits to consumers, courts employ the "Rule of Reason."[83] The Rule of Reason is a three-step, burden-shifting analysis of alleged anticompetitive conduct within a relevant market.[84] First, the plaintiff bears the burden of demonstrating that the challenged restraint produces anticompetitive effects in a relevant market.[85] If the plaintiff successfully demonstrates anticompetitive effects, the burden then shifts to the defendant, who must proffer procompetitive justifications for the restraint that yield benefits to consumers.[86] For example, "widening consumer choice, enhancing product or service quality,

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81. *See, e.g.*, *Broad. Music, Inc.*, 441 U.S. at 21–25 (illustrating an exception where a joint license selling agreement did not violate the Sherman Act because it allowed for an increase in output, which the Court deemed favorable to consumer welfare); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82, 890 (2007) (rejecting application of the per se rule to a vertical minimum resale-price-agreement imposed by a belt manufacturer on retailers who sold their branded products because the agreement likely promoted interbrand competition); Kirby & Weymouth, *supra* note 80, at 34 (addressing judicial carveouts to the per se rule, such as non-compete agreements in employment contracts and alleged anticompetitive conduct in niche and unfamiliar industries).

82. *See* Kreher, *supra* note 78, at 53 (describing that some "procompetitive" agreements among competitors can be beneficial to consumers).

83. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (introducing the Rule of Reason, which involves a three-step, burden-shifting analysis of an arrangement's anticompetitive effects and procompetitive benefits).

84. *Id.*

85. *See* Boninger, *supra* note 16, at 766 (defining a relevant market as both a product or geographic market, where a product market involves goods and services "subject to the cross-elasticity of consumer demand" and a geographic market comprises where buyers can locate "alternative sources of supply") (citation omitted).

86. *Am. Express Co.*, 138 S. Ct. at 2284 (describing the three-step, burden-shifting framework); Boninger, *supra* note 16, at 767 (describing the second step in the framework as if the defendant establishes legitimate procompetitive justifications for the restraint, then the burden shifts to the plaintiff to show "that any legitimate objectives can be achieved in a substantially less restrictive manner" (citation omitted)).

preserving or increasing consumer demand, and increasing output or operating efficiencies."[87] Finally, if the defendant proves that there are procompetitive benefits to its anticompetitive conduct, the plaintiff must demonstrate that the defendant could achieve the same procompetitive benefits through less restrictive means so the anticompetitive conduct does not outweigh the procompetitive benefits.[88]

Courts use these three tests to examine anticompetitive effects and procompetitive benefits and their impact on price, output, and product or service quality.[89] The Rule of Reason requires courts to conduct a fact-intensive inquiry that closely analyzes the alleged restraint and the reasons supporting its implementation.[90] While the Rule of Reason provides courts with the most in-depth analysis of alleged predatory business practices, conducting a Rule of Reason analysis can be an enormous undertaking and expense for litigants and courts, prompting courts to employ the quick look approach.[91]

3. The quick look approach

The quick look approach constitutes a truncated version of the Rule of Reason and does not require a fact-intensive inquiry or industry analysis.[92] Courts employing the quick look approach may swiftly conclude if a defendant's anticompetitive conduct unreasonably restrains trade without conducting a detailed inquiry.[93] If a plaintiff proves that the defendant's conduct causes anticompetitive effects, the quick look approach accelerates the remaining steps of the analysis, only requiring the defendant to proffer procompetitive justifications

87. Boninger, *supra* note 16, at 767 (footnotes omitted) (first citing O'Bannon v. NCAA, 7 F. Supp. 3d 955, 965 (N.D. Cal 2014); then citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); and then citing Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998)).

88. *See id.* at 767–78 (addressing federal circuit splits about what constitutes a "less restrictive" alternative and what factors, such as cost, have been considered by various circuits in that calculus).

89. *See* Tatos, *supra* note 12, at 185–86 (acknowledging that lower prices, higher output, and higher product quality strengthen the veracity of procompetitive justifications, whereas higher prices, lower output, and lower product quality tend to demonstrate substantial anticompetitive effects).

90. Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 692 (1978).

91. Harding, *supra* note 53, at 1646.

92. Boninger, *supra* note 16, at 769.

93. *Id.*

for its market behavior without conducting a detailed inquiry into the industry or its impact on consumer welfare.[94]

D. The Supreme Court's Adjudication of § 1 Antitrust Litigation Involving Noneconomic Justifications

Noneconomic or social welfare justifications are procompetitive defenses proffered by defendants involved in antitrust litigation alleging that their conduct yields social benefits to consumers.[95] The significance of noneconomic justifications since the Supreme Court decided *Goldfarb v. Virginia State Bar*[96] and *National Society of Professional Engineers v. United States*[97] is somewhat uncertain and undefined.[98] In *Goldfarb*, a husband and wife sought an attorney in Virginia to examine the title of a prospective home they wanted to purchase.[99] The attorney charged them a minimum fee, one percent of the value of the property, for his services, as required by the minimum fee schedule overseen by the Virginia State Bar Association.[100] Although the Association could not necessarily enforce compliance with the fee schedule, it suggested in multiple ethical opinions that noncompliance raised a presumption of attorney misconduct, which essentially ensured that attorneys complied with the schedule.[101] In fact, the husband and wife sought legal services from other attorneys in the hopes that they could get the title examined for a lower fee, but all attorneys who replied to their solicitations only offered to provide their services at the minimum fee imposed by the Association.[102] Similarly,

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94. *Id.*

95. *See, e.g.*, *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 689 (rejecting a society of engineers' prohibition on competition for construction contracts because, even though the engineers defended that the prohibition better ensured consumer safety, social benefits to consumers, by themselves, cannot constitute adequate procompetitive justifications).

96. 421 U.S. 773 (1975).

97. 435 U.S. 679 (1978).

98. *Goldfarb*, 421 U.S. at 792–93 (rejecting a minimum fee schedule implemented by the Virginia State Bar because the fee schedule embodied a price-fixing scheme manifestly in violation of the Sherman Act, despite the Virginia State Bar's desire to promote social welfare by preventing unethical competition between attorneys); *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 689 (rejecting an ethical rule that reduced competition for contract bids designed to ensure safety in the performance of engineering contracts).

99. *Goldfarb*, 421 U.S. at 775.

100. *Id.* at 776.

101. *Id.* at 777–78.

102. *Id.* at 776.

in *Professional Engineers*, members of the National Society of Professional Engineers agreed to refuse to negotiate fees until a prospective client selected an engineer for a particular project.[103] The Society believed that this agreement ensured the public interest by guaranteeing that contracts were awarded to the engineer best suited for the project.[104]

While *Professional Engineers* seemed to disfavor noneconomic justifications as procompetitive defenses in antitrust litigation, *Goldfarb* was not so unequivocal, primarily because a footnote in the opinion seemed to imply the importance of the "public service aspect" of certain restraints on competition.[105] The Court questioned the salience of the *Goldfarb* footnote in proceeding litigation, notably in *FTC v. Superior Court Trial Lawyers Ass'n*,[106] by stipulating limits to defendants' use of noneconomic justifications in antitrust litigation.[107] Because the Court has not yet determined the significance of noneconomic justifications, some federal circuits have created their own definitions of noneconomic justifications and implemented certain evidentiary thresholds that must be met by defendants to negate a showing of substantial anticompetitive effects.[108]

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103. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 682–83.

104. *Id.* at 684–85.

105. *See Goldfarb*, 421 U.S. at 788–89 n.17 ("The public service aspect . . . may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.").

106. 493 U.S. 411 (1990).

107. *Id.* at 436 (finding a group boycott orchestrated by public defenders in violation of the Sherman Act because the public defenders served to economically gain from the boycott). Specifically, the Court determined that the public defenders' social welfare justification—namely, that livable wages ensure the optimal representation of indigent clients—failed to provide an adequate procompetitive defenses for the boycott's restraints on wage competition. *Id.* at 436–37.

108. In *United States v. Brown University*, 5 F.3d 658, 677 (3rd Cir. 1993), the Third Circuit held that noneconomic justifications may serve as adequate procompetitive defenses when they are cast in terms related to competition. Specifically, the Third Circuit concluded that collusion between certain colleges concerning need-based financial aid did not violate § 1 of the Sherman Act because their desire to make more money available to needy students was reasonably related to increasing the quality of the educational product and increasing consumer demand. But, in *Wilk v. American Medical Ass'n*, 895 F.2d 352, 378 (7th Cir. 1990), a national medical association initiated a boycott against chiropractors to ensure the health and safety of patients. The Seventh Circuit rejected the medical association's noneconomic justification—namely, that the boycott was necessary to secure the best interests of patients—because it lacked any evidentiary support.

Although the Supreme Court has not yet taken a definitive approach for evaluating noneconomic justifications in antitrust litigation, the Court could possibly take one of the three following approaches, as suggested by some commentators: (1) finding noneconomic justifications irrelevant to antitrust analysis; (2) holding that well-contended noneconomic justifications warrant a total exemption from the antitrust laws; or (3) concluding that noneconomic justifications warrant application of the Rule of Reason in cases involving anticompetitive conduct where per se illegality would normally be applied, such as arrangements engaged in horizontal price-fixing.[109] Even though the Court could exempt amateur organizations like the NCAA from antitrust scrutiny like it did prior to the 1970s,[110] it is quite unlikely that the Court would revive this exemption.[111]

E. The NCAA's Procompetitive Defense of Amateurism in § 1 Antitrust Litigation

The NCAA defines student-athletes as amateurs, distinguishable from professional athletes, in numerous bylaws included in the NCAA Division I 2023-2024 Manual.[112] By defining student-athletes as

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109. Kirby & Weymouth, *supra* note 80, at 32. Horizontal price-fixing, in which firms agree to fix prices at a certain minimum, maximum, or specified threshold, is normally per se illegal, primarily because horizontal price-fixing results in tremendous harm, including coordinated effects that allow firms to collude and parallel their pricing schemes to stifle consumer choice. SYKES, *supra* note 54.

110. Kirby & Weymouth, *supra* note 80, at 32. However, the Supreme Court began to subject not-for-profit organizations, including amateur sports organizations like the NCAA, to the antitrust laws during the 1970s, with some lower courts following suit. For example, in *American Medical Ass'n v. United States*, 317 U.S. 519, 535 (1943), the Court held that not-for-profit organizations do not necessarily constitute noncommercial enterprises exempt from antitrust scrutiny. Additionally, in *Tondas v. Amateur Hockey Ass'n*, 438 F. Supp. 310, 313 (W.D.N.Y. 1977), the U.S. District Court for the Western District of New York concluded that restrictions on competition imposed by non-profit amateur athletic associations may constitute unreasonable restraints of trade.

111. *See, e.g.*, Hennessey v. NCAA, 564 F.2d 1136, 1154 (5th Cir. 1977) (per curiam) (rejecting the NCAA's contention that it should be exempt from antitrust scrutiny because of its not-for-profit educational mission).

112. NCAA, DIVISION I: 2024–25 MANUAL Article 12, §§ 12.01.1, 12.01.2 (2024), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/7YLM-FFSX]; *id.* § 12.01.1 ("Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport."); *id.* § 12.01.2 ("Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

amateurs, the NCAA imposes additional limitations on the forms and amount of compensation student-athletes are authorized to receive.[113] Currently, student-athletes can receive grant-in-aid up to the full cost-of-attendance of their educational institution, which includes tuition, room and board, laundry services, and books.[114] Student-athletes who fail to comply with the compensation rules by performing in athletic competitions for pay or accepting a promise of pay to compete in an event may lose their amateur status.[115]

Courts have long presumed the validity of the NCAA's procompetitive justification of preserving amateurism in college sports without fully investigating the justification and its connection to competition and consumer demand for college sports.[116] In *NCAA v. Board of Regents of the University of Oklahoma*,[117] the Supreme Court held that the NCAA's television broadcasting restrictions on the broadcast of college football during the 1984-1985 season violated § 1 of the Sherman Act because the broadcasting restrictions unreasonably restrained competition among athletic conferences for broadcasting rights to certain games.[118] Even though Justice Stevens, who authored the opinion of the Court, found that the NCAA's broadcasting restrictions constituted an unreasonable restraint of trade, he accepted the NCAA's contention that its organizational objective of preserving amateurism justifies some restraints on competition not otherwise

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113. *Id.* § 12.01.4 ("A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.").

114. *Id.* § 15.01.6 ("An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution . . . , except as specifically authorized by NCAA legislation."); *id.* § 15.02.2 ("The 'cost of attendance' . . . includes the total cost of tuition and fees, living expenses, books and supplies, transportation, and other expenses related to attendance at the institution.").

115. *Id.* § 12.1.2 ("An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . (a) [u]ses athletic skill (directly or indirectly) for pay in any form in that sport; (b) [a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation . . . .").

116. *See* Tatos, *supra* note 12, at 187 (arguing that the presumption of validity accorded to amateurism likely arises from courts' deference to the uniquely American tradition of intercollegiate athletics); *see also* Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28, 40 (2000) ("No court, however, has actually looked behind the belief to question its validity.").

117. 468 U.S. 85 (1984).

118. *Id.* at 120.

acceptable in other industries.[119] Justice Stevens defended amateurism as "enhanc[ing] public interest in intercollegiate athletics," claiming that the NCAA's mission "plays a critical role in the maintenance of a revered tradition of amateurism in college sports."[120]

After the Court decided *Board of Regents*, some federal circuits and lower courts interpreted Justice Stevens' comments about amateurism as controlling.[121] For example, *Justice v. NCAA*,[122] involved the NCAA's "death penalty," a sanction that effectively suspends an athletic program and its players from athletic competition if they severely violate the NCAA Division 1 Manual.[123] The U.S. District Court for the District of Arizona held that the NCAA's "death penalty" had no anticompetitive purpose because strict sanctions were necessary to preserve the amateur character of college sports.[124] Also, in *McCormack v. NCAA*,[125] the Fifth Circuit upheld the suspension of the Southern Methodist University football team for the 1987 season.[126] The court found that certain players received compensation for their athletic performance, undermining the amateurism necessary to market college football as a unique product distinct from professional sports.[127] Most recently, in *Agnew v. NCAA*,[128] the Seventh Circuit presumed the validity of the NCAA's amateurism defense by dismissing a § 1 challenge to NCAA rules capping the number of scholarships allowable per team and banning multiyear scholarships.[129]

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119. *See id.* at 101 (presuming that, by preserving amateurism in college sports, the NCAA can guarantee that college sports remain a unique product in the marketplace).

120. *See id.* at 117, 120 (accepting that the NCAA needs ample latitude to preserve the tradition of amateurism in college sports). *But see* Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1316 (W.D. Okla. 1982) (noting the "tenuous relationship between such non-commercial regulations[, NCAA's amateurism rules,] and the marketplace," indicating that the district court reserved some skepticism for the NCAA's amateurism rules while scrutinizing its television broadcasting restrictions).

121. Harding, *supra* note 53, at 1649.

122. 577 F. Supp. 356 (D. Ariz. 1983).

123. *Id.* at 384.

124. *Id.* (justifying the suspension of members of a football team who could not participate in post-season competition because certain players received compensation for their athletic participation and performance).

125. 845 F.2d 1338 (5th Cir. 1998).

126. *Id.* at 1347.

127. *Id.* at 1340, 1344–45.

128. 683 F.3d 328 (7th Cir. 2012).

129. *See id.* at 341 ("[T]he first—and possibly only—question . . . is whether the NCAA regulations at issue are of the type that have been blessed by the Supreme Court, making them presumptively procompetitive.").

Although some federal circuits interpreted Justice Stevens' remarks about amateurism in *Board of Regents* as controlling, many commentators have argued that Justice Stevens' comments should be considered mere dicta.[130] These commentators contend that, because Justice Stevens failed to enumerate the types of NCAA restrictions imposed on student-athletes that "enhance public interest in intercollegiate athletics," his comments on amateurism should not control.[131] In *O'Bannon v. NCAA*,[132] the Ninth Circuit argued that other federal circuits misinterpreted Justice Stevens' remarks from *Board of Regents*.[133] The court reasoned that instead of the NCAA's procompetitive defense of amateurism automatically excusing its anticompetitive conduct, NCAA restraints on competition, while not automatically considered per se illegal, must undergo a thorough Rule of Reason analysis to determine whether they are unreasonable.[134]

1. The litigation leading to NCAA v. Alston

A cohort of class action litigants, comprised of Division I football players and men's and women's basketball players, filed a § 1 claim against the NCAA in 2019 alleging that its education-related and athletic-related compensation restrictions constituted unreasonable restraints of trade in violation of the Sherman Act.[135] Just years prior,

130. *See* Harding, *supra* note 53, at 1649 (noting that many commentators interpreted Justice Stevens' remarks about amateurism in *Board of Regents* as dicta because they had no bearing on the Court holding that the NCAA's commercial restraints on the television broadcasting rights of college football games violated § 1 of the Sherman Act).

131. *See* Pekron, *supra* note 116, at 39 (contending that Justice Stevens' amateurism remarks should be considered dicta because the "issue of payments to college athletes was not part of the case, was never briefed by the parties, and was not necessary to the decision reached").

132. 802 F.3d 1049 (9th Cir. 2015).

133. *See id.* at 1063 (explaining that Justice Stevens' remarks are best interpreted to demonstrate that the NCAA does not get blanket license to impose unreasonable restraints of trade solely by virtue of its mission to preserve amateurism in intercollegiate athletics).

134. *See id.* ("[N]o NCAA rule should be invalidated without a Rule of Reason *analysis*.").

135. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061–62, 1110 (N.D. Cal. 2019) (finding for the student-athletes). The NCAA appealed this ruling and the student-athletes cross-appealed, challenging the district court's ruling on athletic-related compensation restrictions. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020). The Ninth Circuit completely affirmed the district court's judgment. *Id.* at 1266. The NCAA appealed,

in *O'Bannon*, the Ninth Circuit held that student-athletes could profit from the use of their NIL, finding that the NCAA's NIL rules violated the Sherman Act.[136] With student-athletes authorized to receive new forms of compensation since *O'Bannon*, the claim filed by the *Alston* litigants seemed promising for the student-athletes and an unwelcome development for the NCAA.[137]

2. *The District Court and Ninth Circuit's review of* Cap Antitrust Litigation

In 2019, current and former student-athletes who competed in the Division I Football Bowl Subdivision and on various Division men's and women's basketball teams filed a class action lawsuit against the NCAA.[138] The athletes alleged that the NCAA violated antitrust laws by limiting the compensation student-athletes could receive for their athletic services.[139] After certifying the class,[140] the U.S. District Court for the Northern District of California held that the NCAA's education-related compensation restrictions, such as the provision of post-

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and the Supreme Court granted a writ of certiorari. NCAA v. Alston, 141 S. Ct. 2141 (2021). While the NCAA challenged the lower courts' decisions, the student-athletes did not renew their challenge to the athletic-related compensation restrictions. *Id.* at 2154.

136. *O'Bannon*, 802 F.3d at 1055, 1079.

137. *See Cap Antitrust Litig.*, 375 F. Supp. 3d at 1069 (recognizing the forms of compensation student-athletes may receive that exceed the cost of attendance, including loss-of-value insurance, reimbursements for family members who traveled to athletic competitions, and health care payments for injuries sustained for two years post-graduation); Brief for Respondents at 1, 11, NCAA v. Alston, 594 U.S. 69 (2021) (Nos. 20–512 and 20–520), 2021 WL 859705, at *1, *11 [hereinafter *Alston* Brief] (arguing that the petitioner's "outright exemption" argument of § 1 of the Sherman Act is an "unprecedented per se rule of lawfulness" because Congress should decide this, not the courts).

138. *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1061–62.

139. *Id.* at 1062.

140. *Alston* Brief, *supra* note 137, at *11. By certifying the class, the U.S. District Court for the Northern District of California accepted that current and former student-athletes satisfied the class requirements pursuant to Rule 23 of the Federal Rules of Civil Procedure, including the numerosity, commonality, typicality, and adequate representation requirements. *See* Fed. R. Civ. P. 23. In doing so, the U.S. District for the Northern District of California signaled to current and future student-athletes that they can try to seek redress in federal court without the fear that the NCAA will automatically receive an antitrust exemption precluding future litigants from seeking relief.

graduate scholarships and study abroad opportunities, violated § 1 of the Sherman Act.[141]

To begin its antitrust analysis, the district court defined the relevant market as the input or labor market for student-athletes.[142] Even though the district court did not define the relevant market as the output or consumer market, the court did accept the NCAA's contention that the compensation restrictions imposed on student-athletes in the labor market should be assessed "in light of their procompetitive benefits in the consumer market."[143] The district court found that the NCAA's compensation restrictions resulted in substantial anticompetitive effects, especially because the NCAA failed to dispute that its monopsonist arrangement severely limited the profitability of student-athletes.[144] In response, the NCAA proffered two procompetitive justifications for its compensation restrictions: (1) the preservation of amateurism in intercollegiate athletics allows the NCAA to market college sports as a unique product and better guarantees consumer demand; and (2) the integration of academics and athletics.[145] The district court ultimately acknowledged the importance of distinguishing intercollegiate athletics from professional sports.[146] Nevertheless, the district court recognized that

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141. However, the district court in *Cap Antitrust Litigation* allowed the NCAA to pay student-athletes education-related compensation, rejecting the student-athletes' contention that they should be paid for their athletic services. 375 F. Supp. 3d at 1062.

142. *Id.* at 1067 (describing how the Plaintiff's economic expert defined the relevant markets as national markets for Plaintiff's labor); *Alston* Brief, *supra* note 137, at *12 (noting that the District Court below had found that the relevant markets are not "the output markets for college sports (in which consumers pay to watch games) but rather the labor markets for the services of the student-athletes" (emphasis omitted)).

143. *See* NCAA v. Alston, 141 S. Ct. 2141, 2152 (quoting *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1098) (analyzing the anticompetitive effects suffered by student-athletes in the input market with the alleged procompetitive benefits experienced in the output market). *But see Sherman Act—Antitrust Law—College Athletics*—NCAA v. Alston, 135 HARV. L. REV. 471, 476–77 (criticizing the district court's multimarket balancing in the *Alston* litigation as veering from proper antitrust analysis).

144. *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1067.

145. *See id.* at 1062 ("Defendants respond that the limits are procompetitive for two reasons. First, the limits help preserve the demand for college sports because consumers value amateurism as Defendants define it. Second, the rules promote integration of student-athletes into their academic communities, which in turn improves the college education they receive in exchange for their services.").

146. *Id.* at 1082 (upholding the NCAA's athletics-related compensation restrictions despite recognizing that certain increases in permissible compensation have not reduced consumer demand for college sports).

the NCAA's definition of amateurism—the antithesis of "pay for play"—could not be found in the Division I manual.[147]

Shortly after the NCAA's appeal and the student-athletes' cross-appeal of the district court's decision in *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*,[148] California passed the Fair Pay to Play Act ("FPP"),[149] which requires the NCAA and its member institutions to allow student-athletes enrolled in California colleges and universities to earn compensation from the use of their NILs.[150] To distill the possibility of student-athletes receiving outright "pay for play," the NCAA established a working group that recommended that the NCAA allow student-athletes to receive education-related NIL compensation.[151]

On appeal, the Ninth Circuit affirmed the district court's remedy, allowing student-athletes to receive education-related compensation while upholding athletic-related compensation restrictions.[152] While the NCAA proffered two procompetitive justifications for its athletics-related compensation restrictions before the district court, it only raised its procompetitive justification of amateurism before the Ninth Circuit, indicating the NCAA's historic reliance on amateurism to allay

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147. *Id.* at 1071 (noting the inadequacy of definitions of amateurism provided by the NCAA's witnesses, such as amateurism not being "pay for play"). Just a few years prior in *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), the U.S. District Court for the Northern District of California addressed the fallibility of the NCAA's definition of amateurism and its connection to consumer demand, in which the district court noted that other factors, such as school loyalty and geography, may bear a stronger relationship to consumer demand than amateurism. *Id.* at 978.

148. 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020). A cross-appeal denotes an appeal made by an appellee in litigation that is heard at the same as the appellant's appeal. *Cross-appeal*, Black's Law Dictionary (12th ed. 2024). Since the district court found for the student-athletes, particularly regarding the education-related compensation restrictions, the NCAA initially appealed the district court's judgment and the student-athletes cross-appealed to challenge the district court's athletic-related compensation restrictions ruling. *Cap Antitrust Litig.*, 958 F.3d at 1243.

149. CAL. EDUC. CODE § 67456 (West 2024).

150. *Id.*

151. *Cap Antitrust Litig.*, 958 F.3d at 1252; *see supra* note 35 and accompanying text (defining "pay for play" as a compensation scheme that pays student-athletes for their participation and performance in intercollegiate athletic events).

152. *Alston* Brief, *supra* note 137, at *18 ("In [the Ninth Circuit's] view, the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.").

allegations of substantial anticompetitive effects.[153] Like the district court, the Ninth Circuit accepted the NCAA's procompetitive defense of amateurism to sustain athletics-related compensation restrictions, denying the student-athletes' cross-appeal for a broader injunction of the NCAA's compensation rules related to athletic performance.[154]

3. The Supreme Court's review of NCAA v. Alston

In a unanimous opinion delivered by Justice Gorsuch, the Supreme Court affirmed the Ninth Circuit's holding in *Alston*, finding that the NCAA's education-related compensation restrictions violated § 1 of the Sherman Act.[155] The NCAA appealed the Ninth Circuit's decision that found that its education-related compensation restrictions violated the Sherman Act. The NCAA claimed that it should be exempt from antitrust laws and that its compensation rules should not be subject to a thorough Rule of Reason analysis. Although the Court did not expressly classify amateurism as a noneconomic justification, it did imply that there are limits to the NCAA's procompetitive defense of amateurism and its primary purpose of promoting "societally important non-commercial objective[s]."[156] Because the student-athletes failed to "renew their across-the-board challenge to the NCAA's compensation restrictions," the Court was not prompted to decide whether athletics-related compensation restrictions violated § 1 of the Sherman Act.[157]

Even though the Court did not need to determine the validity of athletics-related compensation restrictions under the antitrust laws, Justice Kavanaugh signaled the impending demise of amateurism as a

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153. *See Cap Antitrust Litigation*, 958 F.3d at 1257 ("On appeal, the NCAA advances a single procompetitive justification: The challenged rules preserve 'amateurism,' which, in turn, 'widen[s] consumer choice' by maintaining a distinction between college and professional sports.").

154. *Alston* Brief, *supra* note 137, at *18.

155. 141 S. Ct. 2141, 2166 (2021). The Court considered the NCAA's challenge to the district court's judgment, whereby the NCAA contended that it was "immune[e] from the normal operation of the antitrust laws" and the Court should uphold all its existing compensation restrictions. *Id.* at 2147. Ultimately, the Court considered the NCAA's objections to the district court's judgment as the question presented before the Court. *Id.*

156. *Id.* at 2158–59 (recognizing that the Court has "regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition").

157. *Id.* at 2154.

procompetitive defense and its continued ability to broadly uphold the NCAA's compensation rules in his Concurrence.[158] While the Court, like the Ninth Circuit, impliedly presumed the validity of the NCAA's procompetitive defense of amateurism to distinguish intercollegiate athletics from professional sports, Justice Kavanaugh indicated that the patent price-fixing of labor, regardless of the industry where it occurs, likely violates the antitrust laws and should not receive judicial deference.[159] Justice Kavanaugh's concurrence does not control in *Alston* but it does forbode a potentially ominous future for the NCAA's procompetitive defense of amateurism in future antitrust litigation, especially § 1 compensation challenges.

II. ANALYSIS

Given the uncertainty of noneconomic justifications in antitrust analysis,[160] the Supreme Court should exclusively credit the relevance of procompetitive justifications with direct relations to competition.[161] Since the NCAA's procompetitive defense of amateurism does not relate to consumer demand for college sports or any other measures of competition, courts should no longer presume the validity of the defense as procompetitive in future § 1 litigation.[162] Relatedly, the NCAA's amateurism defense should no longer sustain its athletic-related compensation restrictions because those restrictions violate the Sherman Act.[163]

A. The NCAA's Procompetitive Defense of Amateurism Constitutes a Noneconomic Justification

Noneconomic justifications constitute procompetitive defenses provided by defendants claiming that the arrangement in which they

158. *Id.* at 2167 (Kavanaugh, J., concurring) ("*Third*, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As [Justice Kavanaugh,] see[s] it, however, the NCAA may lack such a justification.").

159. *Id.* ("The NCAA's business model would be flatly illegal in almost any other industry in America."); Austin Taylor, NCAA v. Alston*: The Future of College Sports in the Name, Image, and Likeness Era*, 75 RUTGERS U. L. REV. 363, 371 (2022) (noting that Justice Kavanaugh questioned if the NCAA's other compensation rules would "pass muster" under the rule of reason).

160. *See supra* Section II.D.

161. *See infra* Section III.A.

162. *See infra* Sections III.A.1, III.B.

163. *See infra* Section III.C.

are engaged, while anticompetitive in some respects, is justified because it yields social benefits to consumers.[164] Absent any tenable connection to competition, noneconomic justifications, such as the NCAA's amateurism defense, are irrelevant to an antitrust analysis and do not provide adequate procompetitive defenses.[165]

1. Amateurism does not impact consumer demand for college sports

As an antitrust litigant, the NCAA has claimed that consumer demand for college sports depends on the amateur status of student-athletes, which distinguishes college sports from professional sports.[166] Even though the NCAA has frequently claimed that consumer demand depends on amateurism, that claim is unfounded and has not been empirically corroborated by external researchers or the courts.[167] Absent an empirical relationship between amateurism and consumer demand for college sports, courts should classify amateurism as a noneconomic justification that lacks the requisite relation to competition to serve as an adequate procompetitive defense for the NCAA's athletics-related compensation restrictions.[168]

Testing the NCAA's claim that consumer demand for college sports depends on the persistent amateur status of student-athletes, Thomas Baker, Marc Edelman, and Nicholas Watanabe conducted a multiple regression analysis investigating the relationship between amateurism

164. *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688–89 (1978) (explaining that when the court conducts a Rule of Reason analysis, justifications for anticompetitive measures that otherwise benefit the consumer may be considered).

165. *Infra* Sections III.A.1–III.A.2.

166. Baker et al., *supra* note 65, at 681–82.

167. *See id.* at 695 (finding no statistically significant relationship in a multiple regression analysis between measures of consumer demand, such as models of live attendance and television viewership for Football Bowl Subdivision regular season games during the 2014–2015 season, and an NCAA-authorized increase of student-athletes' stipends in 2015); Casey E. Faucon, *Assessing Amateurism in College Sports*, 79 WASH. & LEE. L. REV. 3, 75 (2022) (contending that the features of amateurism that consumers value include student-athlete status, enrollment at college, and limitations on age and eligibility, notably excluding the payment of student-athletes for their athletic performance as an important feature of amateurism to consumers).

168. *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring) (questioning the continued viability of the NCAA's procompetitive defense of amateurism and the defense's ability to allay the extensive anticompetitive effects associated with the NCAA's remaining compensation restrictions).

and college sports.[169] After controlling for variables like college team popularity and winningness, they found that paying student-athletes for their athletic performance would likely not impact consumer demand for college sports.[170]

Even though courts historically presumed the validity of amateurism as a procompetitive defense, many of these same courts acknowledged the tenuous and even nonexistent connection between amateurism and consumer demand for college sports.[171] For example, in the *Alston* litigation, the district court recognized that, even when the NCAA conducted a consumer survey to test the empirical relationship between consumer demand and amateurism, the NCAA still failed to show that increases in the education-related benefits student-athletes are authorized to receive would negatively impact consumer demand for college sports.[172] Likewise, on appeal, the Ninth Circuit seemed to credit the student-athletes' counterargument to amateurism as compelling because, like the district court acknowledged, the NCAA

169. *See supra* note 167 and accompanying text (discovering no empirical relationship in a multiple regression analysis between consumer demand for college sports and an increase in the compensation student-athletes are authorized to receive).

170. *See* Baker et al., *supra* note 65 (discussing the parameters of the multiple regression analysis that tested the empirical relationship, or lack thereof, between an increase in stipends authorized for student-athletes in the Division I Football Bowl Subdivision and consumer demand for college football regular season games during the 2014 and 2015 seasons).

171. *See infra* note 172 and accompanying text (addressing the district court's acknowledgement that the NCAA failed to empirically connect consumer demand to its education-related compensation rules in the *Alston* litigation).

172. *Alston* Brief, *supra* note 137, at *14 (finding that consumer demand for college sports has only increased, tending to demonstrate that additional increases would not reduce consumer demand). The district court acknowledged that increases in education-related compensation, such as graduation incentives, post-graduate scholarships, and post-eligibility study abroad opportunities, would not likely decrease consumer demand in intercollegiate athletics. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1100 (N.D. Cal. 2019). The district court further recognized that the NCAA's "only economics expert on the issue of consumer demand," who primarily conducted and analyzed the consumer survey, did not "study any standard measures of consumer demand," instead "interview[ing] people connected with the NCAA and its schools, who were chosen for him by defense counsel." *Alston*, 141 S. Ct. at 2152–53 (quoting *Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1075 (N.D. Cal. 2019)).

failed to demonstrate an empirical relationship to support their defense.[173]

While a recurrent theme in the *Alston* litigation, the NCAA's procompetitive defense of amateurism has been criticized in other antitrust litigation involving the NCAA.[174] In the *O'Bannon* litigation, the same district court that heard *Cap Antitrust Litigation* observed that school loyalty and geography, rather than the amateur status of student-athletes, drive consumer demand for college sports.[175] Based on this observation, the Northern District held, and the Ninth Circuit and Supreme Court subsequently affirmed, that student-athletes are authorized to receive small payments from third parties that adopt student-athletes' NIL.[176]

Despite the criticisms levied against the NCAA's procompetitive defense of amateurism, many courts, including those in the *Alston* litigation, continue to credit its viability.[177] For instance, even though

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173. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1249 (9th Cir. 2020); *see also* Kirby & Weymouth, *supra* note 80, at 43–44 (discussing the district court's hesitation to unconditionally accept the NCAA's amateurism argument in *Board of Regents* without a demonstrated connection between the amateurism rules, which supported the NCAA's television broadcasting restrictions, and the marketplace). Additionally, in *Board of Regents*, the district court recognized the "tenuous relationship between such non-commercial regulations and the marketplace." Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1316 (W.D. Okla. 1982). Kirby and Weymouth expounded upon the district court's rationale and acknowledged that, within the context of *Board of Regents*, the NCAA's television broadcasting restrictions resulted in substantial anticompetitive effects which, "only indirectly, if at all," contributed to the "legitimate non-commercial goals of NCAA." Kirby & Weymouth, *supra* note 80, at 44.

174. *Infra* notes 175–76 and accompanying text (explaining how marketplace factors other than amateurism, such as geography and school loyalty, drive consumer demand for college sports).

175. *Supra* note 147 and accompanying text (recognizing the importance of other market factors in evaluating consumer demand for college sports); *see also* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014) (crediting other factors as more influential on consumer demand than amateurism, such as "feelings of 'loyalty to the school'" and proximity to geographic regions boasting notable college athletic programs).

176. *Alston*, 141 S. Ct. at 2166; *supra* note 136 and accompanying text (holding that student-athletes may negotiate with third parties for small payments generated from the use of their NIL). The court refrained from allowing student-athletes to receive larger payments from third parties adopting their NIL, primarily because, like the district court and Ninth Circuit in the *Alston* litigation, it feared that doing so would eliminate the distinction between intercollegiate athletics and professional sports. *O'Bannon*, 7 F. Supp. 3d at 1007–08.

177. *See infra* notes 178–81 and accompanying text (addressing the district court and Ninth Circuit's tendency to presume the validity of the NCAA's amateurism

the district court and Ninth Circuit acknowledged the fallibility of the NCAA's consumer survey in the *Alston* litigation, the district court and Ninth Circuit still presumed the validity of the defense by upholding the NCAA's athletics-related compensation restrictions.[178] In doing so, the district court and Ninth Circuit, even if somewhat critical of the NCAA during certain moments of the *Alston* litigation, adopted the NCAA's negative definition of amateurism, which the NCAA denoted as not being "pay for play."[179] Also, even though the district court and Ninth Circuit acknowledged the dearth of an empirical relationship between amateurism and consumer demand for college sports after conducting a factual inquiry of the relevant market, they still failed to classify amateurism as a noneconomic justification.[180] Even when presented with a factual inquiry showing no empirical foundation for the amateurism defense, the district court and Ninth Circuit continued to credit and presume the validity of the defense to the detriment of student-athletes entitled to receive compensation for their athletic performance.[181]

Without evidence showing an empirical relationship between amateurism and consumer demand, the Supreme Court should classify amateurism as a noneconomic justification irrelevant to antitrust analysis. In turn, rendering amateurism an inadequate procompetitive defense for the NCAA's athletics-related compensation restrictions.[182]

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defense even in the face of countervailing evidence that demonstrates no empirical relationship between consumer demand for college sports and amateurism).

178. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1082–83 (N.D. Cal. 2019); *Cap Antitrust Litig.*, 958 F.3d at 1258. The district court and Ninth Circuit upheld the NCAA's athletics-related compensation restrictions and accepted the NCAA's contention that, by holding otherwise, the courts would position intercollegiate athletics too akin to professional sports, undermining the amateur character of intercollegiate athletics.

179. *See supra* note 35 and accompanying text (acknowledging that the NCAA's witnesses defined amateurism as the opposite of "pay for play," which they likened to professional sports).

180. *See generally Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020); *Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020) (recognizing that the NCAA failed to demonstrate an empirical relationship between amateurism and consumer demand without broaching whether this lack of an empirical relationship should be considered noneconomic).

181. *See supra* Sections II.E.1.b–II.E.1.c (addressing how the district court credited the NCAA for distinguishing between college and professional sports despite its negative definition of amateurism).

182. *See supra* Section III.A.

2. The NCAA's procompetitive defense of amateurism only serves to economically benefit the NCAA

Even if the Supreme Court does not consider the NCAA's procompetitive defense of amateurism as noneconomic,[183] or decides to accept noneconomic justifications under limited parameters,[184] the defense still violates § 1 of the Sherman Act because it only serves to economically benefit the NCAA.[185] Because the Supreme Court's jurisprudence on noneconomic justifications is largely undecided, the Supreme Court may find, pursuant to the Court's interpretation of social welfare justifications in *United States v. Brown University*,[186] that noneconomic justifications are relevant in an antitrust analysis under limited circumstances.[187] Even if the Supreme Court adopts this interpretation of noneconomic justifications, arrangements like the NCAA that claim exemption or leniency from the antitrust laws by virtue of their not-for-profit status and because they advance social

183. *See supra* note 109 and accompanying text (listing the three approaches the Supreme Court could take in reviewing future § 1 compensation challenges, including an approach that would restore and bestow an antitrust exemption upon the NCAA).

184. *See* Boninger, *supra* note 16, at 796 (arguing that pure social welfare justifications may be considered in limited circumstances and contexts).

185. *See supra* note 107 and accompanying text (explaining that noneconomic justifications cannot serve as procompetitive defenses when those engaged in anticompetitive conduct stand to economically benefit from their conduct).

186. 5 F.3d 658 (3rd Cir. 1993).

187. In *Brown University*, the government challenged the legality of Brown University's need-based financial aid scheme because, by colluding with other schools, the scheme fixed the amount of need-based aid available. *Id.* at 677–78. The court upheld the scheme because Brown University cast its social welfare justification in terms related to competition. *Id.* at 678. Namely, Brown University justified the scheme because it made more financial aid available to needy students which, while commendable for its social utility, also elicited procompetitive benefits, such as increasing the quality of the educational product offered and, by proxy, increasing consumer demand for that product. *Id.*; *see also supra* note 108 and accompanying text (discussing the relation between Brown University's social welfare justifications and competition). If the Court applied the Third Circuit's reasoning from *Brown University* to *Alston*, social welfare justifications that bear at least *some* relevance to competition would be upheld for their narrow procompetitive purpose. Therefore, the Supreme Court could find, under limited circumstances, that the NCAA's amateurism defense, when cast in terms related to competition, could potentially justify its compensation restrictions. *See, e.g.*, Boninger, *supra* note 16, at 801 (supporting a limited noneconomic justification for the NCAA's compensation restrictions to ensure sexual equality in intercollegiate athletics to comport with Title IX).

welfare objectives must not possess an economic self-interest in the arrangement.[188]

In *Superior Court Trial Lawyers Association*, the Court determined that arrangements cannot economically benefit from the anticompetitive practice in which they are engaged.[189] Like the public defenders in *Superior Court* who served to economically benefit from increased wages, the NCAA, by overseeing a monopsony of the labor market for student-athletes, serves to economically benefit from its current arrangement.[190] Specifically, the NCAA exercises an economic self-interest in sustaining its monopsony by price-fixing the compensation student-athletes are authorized to receive.[191] The NCAA sustains its monopsony by employing labor frictions, such as its procompetitive defense of amateurism because, absent labor frictions, the NCAA's economic self-interest in restricting student-athletes' compensation would likely become even clearer and more apparent.[192] Because it

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188. *See, e.g.*, *Brown Univ.*, 5 F.3d at 677–78 (finding that certain practices by Ivy League universities fall within § 1 of the Sherman Act and that the district court should have considered the universities' procompetitive and social welfare justifications); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 436 (1990) (a group of private attorneys that acted as court-appointed counsel for indigent defendants declared a boycott of the local court system and the Supreme Court found the boycott to be violation of antitrust law while considering the attorneys' social justifications); *see also* Hennessey v. NCAA, 564 F.2d 1137, 1154 (5th Cir. 1977) (per curiam) (denying the NCAA's argument that its not-for-profit educational mission reasonably justifies its exemption from the antitrust laws).

189. *Supra* note 107 and accompanying text (describing how a group boycott orchestrated by public defenders protesting low wages violated § 1 of the Sherman Act because the public defenders served to economically benefit from increased wages).

190. Pekron, *supra* note 116, at 36; *see* Tatos, *supra* note 12, at 189–90 (defining a monopsony as an arrangement comprised of one buyer with many sellers, in which the NCAA, as the only buyer in the labor market for student-athletes wishing to compete in intercollegiate athletics, represents the quintessential monopsony); *see also* U.S. DEP'T OF THE TREASURY, *supra* note 67, at 4 (explaining that company towns provide an example of a monopsony in which "workers have only one option for employment"). The Supreme Court corroborated this definition of monopsony in *O'Bannon*, characterizing "schools . . . as buyers" and student-athletes as sellers "in a market for recruits' athletic services and licensing rights," where student-athletes sell their talents and skills for compensation and other benefits permitted by NCAA rules. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014).

191. *See* Pekron, *supra* note 116, at 36 ("Under [the *Trial Lawyers*] precedent, it seems that the NCAA would have a difficult time in arguing amateurism as a non-economic justification, because it also benefits them in an economic way.").

192. U.S. DEP'T OF THE TREASURY, *supra* note 67, at 5–7 (noting that labor frictions, which denote factors that make switching jobs more difficult, often arise when

economically benefits from its monopsony, the NCAA violates § 1 of the Sherman Act, irrespective of the Court's classification of amateurism as noneconomic or economic.[193]

B. The NCAA's Defense of Amateurism Should No Longer Be Considered Procompetitive

Absent a tenable connection to consumer demand, the Supreme Court should authorize the demise of the NCAA's amateurism defense and no longer presume its validity in § 1 compensation challenges.[194] Even though the Supreme Court did not need to determine the validity of the NCAA's athletic-related compensation restrictions in the *Alston* litigation, the Court did imply that, without an economic tether to competition, the amateurism defense may fail to sustain the restrictions since it seems to do little more than serve a "uniquely important social objective[.]"[195] While the NCAA argued that the Court should not subject it to a Rule of Reason analysis since it seeks to "oversee intercollegiate athletics 'as an integral part of the undergraduate experience[,]'" the Court rejected the NCAA's argument.[196] Although the Court could not determine whether the

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employers exercise their market power and limit worker mobility by decreasing their bargaining power and stagnating wages). By stagnating student-athletes' wages, the NCAA's procompetitive defense of amateurism represents a labor friction unilaterally imposed on student-athletes—since the NCAA defines the product of college sports as inherently amateur—that severely restrains their power to bargain for compensation commensurate with the revenues they generate. Also, like the market consolidation performed by hospitals, which causes the wage suppression of employees specific to hospitals, including doctors, nurses, and other medical personnel, the NCAA's monopsony over the labor market for Division I student-athletes results in the wage suppression of those athletes, since, currently, there are no alternatives for elite intercollegiate athletic competition. *See supra* note 67 and accompanying text.

193. *See supra* note 106 and accompanying text (describing how, even for commendable reasons, arrangements engaged in anticompetitive conduct that they serve to economically benefit from commit unreasonable restraints of trade in violation of the Sherman Act).

194. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1074 (N.D. Cal. 2019) (noting the absence of an empirical inquiry conducted by the NCAA to justify its amateurism defense as procompetitive).

195. NCAA v. Alston, 141 S. Ct. 2141, 2158–59 (2021).

196. *Id.* at 2158 (citing Brief for Petitioners at 31, NCAA v. Alston, 141 S. Ct. 2141 (2021) (Nos. 20-512), 2021 WL 408325, at *31); *see also id.* (finding that the NCAA's rules limiting education benefits were subject to the rule of reason analysis, even though "[t]he NCAA submits that a rule of reason analysis is inappropriate . . . because the NCAA and its member schools are not 'commercial enterprises' and instead

NCAA's athletic-related compensation restrictions violated § 1 of the Sherman Act because the student-athletes who brought the litigation failed to renew their challenge to those restrictions on appeal,[197] the Court could still have classified amateurism as a noneconomic justification given that the factual inquiry conducted by the district court showed no empirical relationship between amateurism and consumer demand.[198] By failing to classify amateurism as a noneconomic justification, the Court, at least for the time immediately following its decision, relinquished its opportunity to find noneconomic justifications irrelevant to antitrust analysis.[199] Nonetheless, with the tide of litigation still facing the NCAA and the recent settlement agreement brokered in *Grant House v. NCAA*,[200] the Court may consider renewing the opportunity to conclude that amateurism will always fail to justify substantial anticompetitive effects when it is proffered as a noneconomic justification.[201]

C. The NCAA's Athletic-Related Compensation Restrictions Violate § 1 of the Sherman Act

Like other unreasonable restraints of trade that violate § 1 of the Sherman Act,[202] the NCAA's athletic-related compensation restrictions

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oversee intercollegiate athletics 'as an integral part of the undergraduate experience'").

197. *Id.* at 2141.

198. *See supra* note 172 and accompanying text (impeaching the credibility of the NCAA's economics expert in the *Alston* litigation who failed to employ any standard measures of consumer demand when implementing a consumer survey, strengthening the student-athletes' contention that no empirical relationship exists between amateurism and consumer demand).

199. *See supra* Section I.E.3.

200. Grant House v. NCAA, 545 F. Supp. 3d 804 (N.D. Cal. 2021); *see* Laine Higgins & Jared Diamond, *NCAA Agrees to Share Revenue with Athletes in Landmark $2.8 Billion Settlement*, WALL ST. J. (May 23, 2024, 8:41 PM), https://www.wsj.com/sports/basketball/ncaa-revenue-athletes-settlement-0b53306d (describing the $2.77 billion settlement agreement in the *Grant House* class-action lawsuit involving former and current student-athletes, which introduces a first-of-its-kind revenue-sharing plan that compensates student-athletes for the revenue they generate athletic departments, with schools from the Power Four conferences, who were named as co-defendants in the litigation, mandated to pay student-athletes twenty-two percent of their average athletic department revenue, estimated at roughly $20 million per school).

201. Kirby & Weymouth, *supra* note 80, at 32.

202. *Id.* at 33 (listing examples of conduct deemed by courts as anticompetitive and demonstrative of what is considered an "unreasonable" restraint of trade, including price-fixing arrangements, group boycotts, horizontal divisions of markets between competitors, and resale price maintenance).

stifle student-athletes' ability to sell their talents and skills in a competitive marketplace, especially provided that the NCAA exercises a monopsony over the marketplace for intercollegiate athletics.[203] The Supreme Court should apply the Rule of Reason to athletic-related compensation restrictions in the future.[204] If the Court did so in *Alston*, it should have found that the NCAA's athletic-related compensation restrictions violate § 1 of the Sherman Act, primarily because the NCAA's compensation restrictions, which constitute horizontal restraints on competition, are not necessary to uphold the character of and demand for intercollegiate athletics.[205]

A Rule of Reason analysis requires a reviewing court to conduct a fact-intensive inquiry into alleged anticompetitive conduct, the

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203. *Supra* notes 190–93 and accompanying text (describing how the NCAA oversees a monopsony over the labor market for student-athletes by imposing labor frictions that restrict their mobility).

204. *Supra* Section I.C.2 (describing the Rule of Reason as a burden-shifting framework for analyzing the legality of commercial conduct under the antitrust laws, which involves the identification and assessment of anticompetitive conduct, procompetitive justifications for that conduct, and, if the conduct is deemed necessary for the function of a distinct marketplace, less restrictive alternatives to that conduct). The Court correctly applied a full Rule of Reason analysis in *Alston*, rather than the deferential quick look approach suggested by the NCAA, because the severity of the NCAA's anticompetitive conduct warranted its application. NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021) ("The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition . . . the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.").

205. *See supra* Section II.B (contending that, in the *Alston* litigation, the Supreme Court should have found that the NCAA failed to satisfy the second step of the Rule of Reason because amateurism, as a noneconomic justification, cannot serve as an adequate procompetitive defense). Like other examples of anticompetitive conduct, the NCAA's compensation restrictions clearly constitute anticompetitive conduct. *See supra* note 202 and accompanying text; Kirby & Weymouth, *supra* note 80, at 33. The Court first recognized the NCAA's patently anticompetitive conduct in *Board of Regents*, which involved the NCAA's television broadcasting restrictions for the 1984–1985 Division I Football Bowl Subdivision regular season. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 120 (1984). Specifically, the Court categorized the NCAA's television broadcasting restrictions as "horizontal restraints on competition" that, the Court reasoned, were "essential if the product [college sports] is to be available at all." *Id.* at 101. While the *Alston* Court properly heeded the *Board of Regents* Court's classification of the NCAA's rules as "horizontal restraints on competition," the *Alston* Court improperly adhered to the *Board of Regents* Courts' deference to the NCAA's amateurism rules as "essential" for defining intercollegiate athletics as a distinct product. *Id.*

legitimacy of procompetitive defenses, and whether, on balance, the anticompetitive conduct outweighs the procompetitive benefits flowing from that conduct.[206] First, the student-athletes who brought the § 1 claim, which included Division I football and men's and women's basketball players, met their burden of proving that the NCAA's compensation rules produced substantial anticompetitive effects.[207] Since the student-athletes proved substantial anticompetitive effects,[208] the burden shifted to the NCAA to proffer a procompetitive defense for its compensation rules that yields benefits to consumers.[209] The NCAA, however, failed to meet this burden, primarily because it could not prove that paying student-athletes for their athletic performance negatively impacts consumer demand for college sports.[210] During this step of its Rule of Reason analysis, the Court

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206. *See supra* Section I.C.2.

207. *Supra* Section I.C.2 (explaining the first step in the Rule of Reason analysis, which places the burden on the party alleging an antitrust violation to demonstrate that a challenged restraint produces anticompetitive effects in a relevant market that harms consumers); *cf. In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1068 (N.D. Cal. 2019) ("The economic analyses of Plaintiffs' experts established that the challenged rules have the effect of artificially compressing and capping student-athlete compensation and reducing competition for student-athlete recruits by limiting the compensation offered in exchange for their athletic services.").

208. *Id.* at 1067–70. The district court further noted that, because the student-athletes demonstrated evidence of a horizontal agreement between the NCAA and its member schools that the NCAA failed to materially dispute, the NCAA's inability to establish "a genuine dispute with respect to the existence of an agreement . . . is in and of itself sufficient to find that this agreement has a strong potential for significant anticompetitive effects." *Id.* at 1067.

209. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018); Boninger, *supra* note 16, at 767. When the burden shifts to the party defending against an alleged antitrust violation, that party must proffer procompetitive reasons for its anticompetitive behavior that yields benefits to consumers, such as increased consumer choice and demand, enhanced product or service quality, and optimized output or operating efficiencies. *See supra* note 87 and accompanying text (describing the types of proof used in successful procompetitive defenses).

210. *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1074–75 ("[W]hatever understanding consumers have of amateurism, they enjoy watching sports played by student-athletes who receive compensation and benefits such as these, because this compensation has been paid and increased while college athletics has become and remains exceedingly popular and revenue-producing."). Because the NCAA's economics expert, Dr. Elzinga, "did not study standard measures of consumer demand, such as revenues, ticket sales, or ratings" he ultimately failed to establish empirical support for the NCAA's compensation restrictions. *Id.* at 1075. Additionally, subject to its precedents, the Court's holdings in *National Society of Professional Engineers v. United States* and

should have expressly classified amateurism as a noneconomic justification, although the Court did imply that there are limitations to the defense when it supports purely noncommercial objectives.[211] If the NCAA somewhat demonstrated an empirical relationship between amateurism and consumer demand, this would require the Court to conduct a balancing inquiry of the NCAA's anticompetitive effects and procompetitive benefits.[212] Nonetheless, the anticompetitive effects associated with the NCAA's compensation rules largely outweigh any procompetitive benefits experienced by consumers.[213]

Goldfarb v. Virginia State Bar compel it to limit the applicability of noneconomic justifications in a Rule of Reason analysis. *See supra* Section I.D. Even adopting *Goldfarb's* more generous allowance of noneconomic justifications when they possess "public service aspects," the NCAA's compensation restrictions do not provide a "public service aspect" since most consumers themselves did not find student-athletes' amateur status material for their viewership and marketplace participation. Goldfarb v. Va. State Bar, 421 U.S. 773, 788–89 n.17 (1975); *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1078–79 (finding that the "great majority of respondents" to a consumer survey conducted by one of the NCAA's economics experts selected other reasons for watching and attending intercollegiate athletics competitions than the "amateur and/or not paid" option included in the survey).

211. NCAA v. Alston, 141 S. Ct. 2141, 2158–59 (2021). The Court should have classified amateurism as a noneconomic justification that fails to serve as an adequate procompetitive defense because, without demonstrating an empirical connection between amateurism and consumer demand, the NCAA failed to meet its burden as the party defending against an alleged antitrust violation. *See supra* note 87 and accompanying text (listing types of successful procompetitive defenses for substantial anticompetitive conduct, including proof of increased consumer demand which, within the context of the *Alston* litigation, the NCAA failed to show).

212. *See supra* Section I.C.2 (discussing the third step of a full Rule of Reason analysis where, after the party defending against an alleged antitrust violation proffers a successful procompetitive defense, the burden then returns to the challenger, who must prove that the anticompetitive effects flowing from their adversary's behavior substantially outweigh the procompetitive benefits).

213. *See supra* note 88 and accompanying text (noting that federal circuits differ in their review of "less restrictive alternatives" under the third step of a full Rule of Reason analysis). The Ninth Circuit, which reviewed both the *O'Bannon* and *Alston* litigation, requires that "less restrictive alternatives" be "virtually as effective" in creating procompetitive benefits and that these alternatives are "*substantially* less restrictive" than a defendant's original procompetitive justification. Boninger, *supra* note 16, at 767–68. Applied to *Alston*, "because elite student-athletes lack any viable alternatives to Division I," and must accept "whatever compensation is offered to them by Division I schools," the anticompetitive effects arising from the NCAA's compensation restrictions substantially outweigh alleged procompetitive defenses like amateurism. *Cap Antitrust Litig.*, 375 F. Supp. 3d at 1070. Provided that the NCAA's economics expert failed to prove an empirical relationship between amateurism and consumer

Because there are less restrictive alternatives available to maintain consumer demand in intercollegiate athletics,[214] and the NCAA's compensation rules violate the "spirit of the antitrust laws,"[215] the Court should find in future antitrust litigation that the NCAA's athletic-related compensation restrictions violate § 1 of the Sherman Act.[216]

1. Other avenues of illegality

In addition to a traditional antitrust analysis, the NCAA's athletic-related compensation restrictions may violate the Sherman Act for numerous other reasons, including the contemporaneous argument that student-athletes should be classified as employees of universities.[217] While the classification of student-athletes as university employees has been attempted before, the Dartmouth men's basketball team is the first team to successfully unionize and create a bargaining unit that can collectively bargain with Dartmouth over pay, practice hours, and other working conditions.[218] Coupled with antitrust litigation, the unionization of student-athletes and their classification as university employees presents a strong mechanism for undermining the NCAA's compensation restrictions, likely leading to more financial parity between student-athletes, coaches, and athletic

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demand, the NCAA's alleged procompetitive benefits cannot be established. *Id.* at 1075. Therefore, the anticompetitive effects arising from the NCAA's monopsony—namely, the withholding of compensation from student-athletes that they would otherwise receive in a typical marketplace subject to pressures of supply and demand—substantially outweigh any procompetitive benefits.

214. Pekron, *supra* note 116, at 29 (contending that, because amateurism is not necessary to produce intercollegiate athletics, the NCAA's compensation rules are not narrowly tailored to ensure consumer demand in college sports and do not represent the least restrictive alternative for doing so).

215. *Id.*

216. *See supra* Section II.C.2.

217. Pekron, *supra* note 116, at 29.

218. Jesse Dougherty, *After a Historic Union Vote at Dartmouth, What's Next for College Sports?*, WASH. POST (Mar. 5, 2024), https://www.washingtonpost.com/sports/2024/03/05/dartmouth-mens-basketball-union (explaining that while the Northwestern football team held a vote to unionize in 2014, the National Labor Relations Board ("NLRB"), after taking sixteen months to deliberate on the school's appeal of an NLRB regional director's ruling that the players were employees, "eventually dismissed the players' petition, saying that because [the NLRB] only has jurisdiction over private schools, Northwestern unionizing would have created an uneven labor environment in the Big Ten").

administrators for the share of revenues generated by sport-specific markets and intercollegiate athletics at large.[219]

D. The Unintended Consequences of "Pay for Play"

Although the NCAA's compensation restrictions severely restrict the compensation available to student-athletes, the compensation rules may unintentionally prevent Title IX[220] violations.[221] The NCAA's compensation rules may unintentionally circumvent potential Title IX violations by ensuring that athletic-related compensation is not distributed solely based on the share of revenue generated per sport or player which, if distributed as such, would largely go to college football and men's basketball players.[222] By placing restrictions on permissible compensation, the NCAA's compensation rules may level the playing field among male and female student-athletes and revenue-generating and non-revenue-generating sports more generally.[223]

However, with the advent of revenue-sharing plans as an antitrust remedy to the substantial anticompetitive effects wrought by the

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219. *See* NCAA v. Alston, 141 S. Ct. 2141, 2150 (2021) (recognizing the massive compensation differential between university presidents, conference commissioners, athletic directors, coaches, and the student-athletes primarily generating the revenues paying the adults in the room). Following the lead of the Dartmouth men's basketball team, student-athletes who unionize and become employees of their respective universities can collectively bargain for their pay and working conditions. *See* Dougherty, *supra* note 218. If more student-athletes and athletic programs seek to unionize, the pay differential that once separated athletic administrators from student-athletes may gradually wane and a more equitable distribution scheme may take its place.

220. *See* 20 U.S.C. § 1681 (Title IX prohibits discrimination on the basis of sex in programs receiving federal funding).

221. *See Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring) (questioning whether paying student-athletes for their athletic performance would comply with Title IX).

222. *See, e.g.*, Boninger, *supra* note 16, at 801 (supporting a procompetitive justification that permits compensation restrictions in limited circumstances to ensure sexual equality in the reception of athletic-related compensation). Under Boninger's rationale, compensation provided to just football and men's basketball players would result in unsustainable expenditures requiring cuts to other, likely nonrevenue-generating, programs. *Id.* at 804–05 ("Merely paying an additional $10,000 to the 150 student-athletes that constitute the football and men's basketball teams would total $1.5 million . . . . Such payments would rapidly cause already struggling athletics programs to consider other ways to save money, such as cutting nonrevenue women's sports."). The ultimate concern is that, by compensating student-athletes based on the revenues they generate, the strides experienced by women's college athletics since Title IX would become null and void. *Id.* at 805.

223. *Id.* at 801.

NCAA's compensation rules,[224] and the increasing popularity of women's sports, especially women's basketball,[225] the force behind the NCAA's athletic-related compensation restrictions and their unintended impact on Title IX may not be as significant as initially anticipated.[226]

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224. Witz, *supra* note 31 (describing the $ 2.8 billion settlement allowing for the creation of revenue-sharing plans); *see* Higgins & Diamond, *supra* note 200 (noting that the revenue-sharing plan established in the *Grant House* settlement agreement is in the early stages of its rollout and no definitive plan for how schools will distribute the settlement funds has yet been determined). Specifically, the *Grant House* settlement, initially pursued in *Grant House v. NCAA*, 545 F. Supp. 3d 804, 808 (N.D. Cal. 2021), compensates student-athletes for past proceeds related to their NIL that, before the Supreme Court's 2021 decision in *NCAA v. Alston*, they were unauthorized to receive. *But see* Moss, *supra* note 31 (taking issue with how the *Grant House* settlement compensates student-athletes, arguing that the settlement will create an even larger fissure between the Power Four conferences and smaller schools' football and basketball programs because more revenue will flow to student-athletes competing in the Power Four conferences). While Moss supports the direct compensation of student-athletes, she believes that the U.S. District Court for the Northern District of California is not equipped to facilitate a revenue-sharing settlement, and instead argues that Congress is best equipped to determine the future of amateurism in college sports. *Id.* Irrespective of who should oversee the administration of the revenue-sharing plan, the Supreme Court dispensing with its presumption of validity for amateurism provides a helpful starting place for reimagining college sports under the antitrust laws.

225. *See supra* note 8 and accompanying text. Since collegiate women's basketball underwent a meteoric rise in revenue, ushered by the most recent Women's March Madness tournament and the unique popularity of Caitlin Clark, the Title IX counterargument appears more speculative than consequential. There can be numerous impacts flowing from the compensation of student-athletes, especially female student-athletes, such as an increase in female youth players continuing to play well into high school and remaining in the collegiate recruiting pipeline. If more female youth players remain playing their sports, the popularity of collegiate women's sports will likely continue to increase, resulting in increased revenues. Relatedly, many female student-athletes already have "skin in the game" when it comes to § 1 compensation challenges. For instance, many of the *Alston* and *Grant House* litigants were Division I women's basketball players. The immediate participation of female student-athletes in § 1 compensation challenges indicates that the rollout of the *Grant House* settlement may not necessarily result in Title IX violations, potentially requiring a re-portrayal of female student-athletes within the college athletics landscape as an increasingly empowered group with a seat and voice at the table.

226. *See supra* note 8 and accompanying text (recognizing the financial success experienced by Caitlin Clark through her NIL deals amounting to an estimated $3.1 million and showing how her success can serve as a blueprint for future female student-athletes). Also, the unintended impacts of directly compensating student-athletes may possibly be overstated by some commentators because schools have yet to decide how

CONCLUSION

Intercollegiate athletics continues to exponentially grow in terms of revenue and viewership.[227] This exponential growth requires a more equitable approach to distributing the revenues largely generated by those who have yet to receive them: Division I student-athletes.[228] The NCAA's compensation rules, however, prevent student-athletes from receiving their due compensation and should no longer be given judicial deference by the courts.[229] Accordingly, the Supreme Court, impliedly foreboding the demise of the NCAA's procompetitive defense of amateurism in *Alston*, should finally hold that amateurism no longer serves to uphold the NCAA's compensation rules, specifically the NCAA's athletic-related compensation restrictions.[230]

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they distribute revenues. For example, the revenue-sharing plan taking shape following the *Grant House* settlement agreement does not stipulate how schools should spend the revenues they must now provide to student-athletes. Although the plan gives schools discretion in how they distribute revenues, many of these schools, especially those in the Power Four conferences who have already been the subjects of recent antitrust litigation, may consider minimizing risks and decreasing their potential for liability by closely adhering to Title IX mandates. Witz, *supra* note 31 ("Schools will have their own decisions to make on how to distribute payments to athletes. Does Michigan, for example, want to sprinkle money among its lacrosse and cross-country teams, or plow almost all of the money into football and basketball?").

227. *See supra* Section I.A.3.

228. *See supra* Part I. Before recent decades, student-athletes could only receive compensation up to the cost-of-attendance, which excluded even the education-related compensation that the *Alston* Court found permissible under the antitrust laws. *See supra* note 113 and accompanying text. Most of the revenue generated by student-athletes before *O'Bannon*, which allowed student-athletes to receive small payments related to their NIL, went to the adults in the room. *See supra* note 19 and accompanying text. Although *O'Bannon* represented an enormous stride in the compensation battle, student-athletes have yet to surmount the hurdle of athletic-related compensation restrictions.

229. *See supra* Section II.B. The presumption of validity afforded to amateurism by federal courts no longer serves a role in a full Rule of Reason analysis. Absent a connection to competition and, specifically, consumer demand, the NCAA's defense should no longer be considered "procompetitive." In lieu of the substantial anticompetitive effects arising from the compensation restrictions, such as student-athletes' inability to seek comparable competition elsewhere, judicial deference to the NCAA's amateurism defense should not be sustained.

230. *See supra* Section II.C. The U.S. District Court for the Northern District of California and the Ninth Circuit erroneously presumed the validity of the NCAA's athletic-related compensation restrictions because the restrictions allegedly helped distinguish college from professional sports. *See supra* Section I.E.2. This distinction, however, is unwarranted. Most fans do not condition their support on whether

In doing so, the Court may enter a new era of antitrust jurisprudence that more equitably compensates student-athletes for the talents and skills they provide to universities, conferences, athletic departments, and coaches.[231] Intercollegiate athletics represents a uniquely American tradition,[232] and those who most enrich that tradition, such as cultural phenoms like Caitlin Clark that generate the fanaticism quintessentially characteristic of college sports, are more than entitled to finally realize the fruits of their labor.[233]

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student-athletes receive compensation for their athletic performance. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1078–79 (N.D. Cal. 2019) (determining "t12at the great majority of respondents" in a consumer survey conducted by the NCAA's economics expert selected other reasons for watching and attending intercollegiate athletics than its amateur character). As a result, the Courts' deference only serves to insulate the NCAA from liability that, if committed in any other industry, would constitute an antitrust violation. NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J., concurring).

231. *See supra* Section II.C. Although the *Grant House* settlement agreement applies pressure on the marketplace to correct itself, the significance of the Court retiring its presumption of amateurism as a procompetitive defense in § 1 compensation challenges cannot be understated. By doing so, the Court would signal to student-athletes, and workers around the country more broadly, that their labor will be equitably compensated by virtue of the free-market principles underlying the Sherman Act.

232. *See supra* note 12 and accompanying text (noting that intercollegiate athletics represents a uniquely American tradition).

233. *See supra* Section II.C.