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Rock the Cash-bah! How *Alston* Presents a New Challenge to the Amateurism Justification and Ways the NCAA Can Modernize to Remain Afloat

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Rock the Cash-bah! How *Alston* Presents a New Challenge to the Amateurism Justification and Ways the NCAA Can Modernize to Remain Afloat

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During the last decade, antitrust litigation involving Division I athletes and the NCAA has resulted in changes to the NCAA's rules, presenting a threat to amateurism. As athletes have voiced concerns about their likeness being used without permission in video games, the difficulty of balancing sports and academics, and going to bed hungry when millions of dollars in profits are being made off of them, the NCAA has allowed conferences and schools to provide student-athletes with stipends for cost of attendance expenses. However, even though the NCAA has modified its rules, athletes continue to ask for more, and courts have responded. Recent litigation has resulted in the expansion of athletes' rights. In March 2019, U.S. District Judge Claudia Wilken declared that the NCAA and its major conferences are violating antitrust law by restricting the education related benefits athletes can receive. In May 2020, the United States Court of Appeals for the Ninth Circuit upheld Judge Wilken's decision that the NCAA cannot limit the non-cash education-related benefits available to athletes in Division I of the Football Bowl Subdivision (FBS).

This Comment will discuss how antitrust litigation has impacted amateurism. Parts III and IV will detail the Ninth Circuit's decision in Alston, examine ways the NCAA can modernize to limit athlete exploitation, and discuss how the NCAA and student-athletes can benefit from these solutions.

I. INTRODUCTION

Picture a Saturday morning in Ann Arbor, Michigan in late-August 2003. The Michigan Wolverines, a top-ranked college football team, begin their season against a middling Central Michigan team. In front of more than one hundred thousand fans at its home stadium, Michigan wins the game by nearly forty points. The stadium is filled with fans wearing maize and blue, who cheer loudly throughout the game. There isn't an empty seat in the house.

Take a moment to soak in the scene described above: because the setting at many schools now differs significantly from what existed then. Since 2003, the landscape and traditions of college athletics have changed drastically. Notably, Division I athletes competing today are unhappy with the benefits the NCAA is offering them. During the last decade, student-athletes have voiced concerns about the difficulty of balancing academics and athletics, comparing it to balancing two full-time jobs.

In 2009, Ed O'Bannon, a basketball player for UCLA during the 1990s, sued the NCAA, alleging that the use of his likeness in DVDs, video games, photographs, and apparel violated federal antitrust law.[1] After the Ninth Circuit decided the lawsuit in 2015, the NCAA modified its rules to allow schools to provide stipends to student-athletes for snacks, student fees, movies, and more.[2] However, those overtures by the NCAA hardly addressed alleged antitrust violations and the dispute over pay for name, image, and likeness remains largely unresolved.

This Comment will discuss how antitrust litigation has impacted Division I athletics. Part II will review the history of the NCAA, discuss its founding principles, and explain the standard of review for antitrust cases under the Sherman Act. Part III will discuss the NCAA's tradition of amateurism and history of antitrust lawsuits. Finally, Part IV will analyze the Ninth Circuit's decision in *Alston*[3] and discuss ways the NCAA can modernize to limit athlete exploitation in a manner consistent with the collegiate model.

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1 *Former Bruin O'Bannon sues NCAA*, ESPN (July 21, 2009), https://www.espn.com/mens-college-basketball/news/story?id=4346470.

2 Chris Isidore, *College athletes finally getting some cash*, CNN (Sept. 4, 2015, 1:43 PM), https://money.cnn.com/2015/09/04/news/companies/extra-cash-college-athletes/index.html.

3 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239 (9th Cir. 2020).

II. HISTORY

A. The NCAA

In 1852, Harvard and Yale organized the first recorded intercollegiate athletic event.[4] By 1880, intercollegiate athletics began to assume the commercial nature that is present today.[5] Efforts to form conferences and create rules began in the 1890s and continued through the beginning of the twentieth century.[6]

In 1905, eighteen deaths and over one hundred injuries in intercollegiate football spurred President Theodore Roosevelt to organize a White House conference, where officials from major football programs would meet to review football rules.[7] Unfortunately, the conference did little to lessen the toll of deaths and injuries among athletes in intercollegiate football.[8] However, a second meeting, organized by the Chancellor of New York University, led to the creation of a Rules Committee.[9] Eventually, the Rules Committee and officials from the White House worked together to reform the rules of intercollegiate football.[10] The group formed the Intercollegiate Athletic Association of the United States, which was officially renamed the NCAA in 1910.[11]

Hindered by recruiting scandals, the NCAA enacted the Sanity Code in 1948.[12] The Sanity Code was created to "alleviate the proliferation of exploitative practices in the recruitment of student-athletes."[13] Within three years, the Sanity Code was replaced by the Committee on Infractions, "an enforcement body with authority to penalize members involved in rules violations."[14]

Two events critical to the NCAA's development occurred during the 1950s: (1) Walter Byers began his tenure as the Executive Director of the NCAA; and (2) the NCAA negotiated a multi-million-dollar contract to televise intercollegiate football.[15] By 1952, Byers helped establish the

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4 Cody J. McDavis, *The Value of Amateurism*, 29 MARQ. SPORTS L. REV. 275, 287 (2018).

5 *Id*. at 288.

6 Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 990 (1987).

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.* at 991.

12 *Id.* at 992.

13 *Id.*

14 McDavis, *supra* note 4, at 290.

15 Smith, *supra* note 6, at 993.

enforcement division of the NCAA.[16] The division was formed to work in tandem with the Committee on Infractions in the enforcement process.[17] With the enforcement division and Infractions Committee working together, and television contracts providing financial support, the NCAA's role in the governance of intercollegiate athletics expanded.[18] However, as the NCAA's role grew, critics began to speak up.[19] Some asserted that college athletics had commercialized to the point where it was a big business disguising itself as an educational enterprise.[20] Others criticized the NCAA for enforcement regulations that were strict on some schools but lenient on others.[21] Moreover, legislators were critical of the NCAA.[22] In 1978, Congress investigated the alleged unfairness of the NCAA's procedures and processes.[23]

The NCAA revised its procedures in response to the investigation.[24] However, even after amending its policies, the criticism persisted.[25] Because of this, the Presidents' Commission organized a special convention in June 1985.[26] At the convention, the Presidents' Commission shifted control over intercollegiate athletics by adopting legislation that placed the Presidents and Chancellors of universities in control of the NCAA.[27] Today, the corporate structure of the NCAA mirrors the changes the Presidents' Commission made in 1985.[28] The Board of Governors is the "highest governance body"[29] and consists of twenty-five members, sixteen of whom are Presidents or Chancellors of universities across the country.[30] The NCAA President, the chairs of the Division I Council, and the Division II and Division III management counsels are ex-facto nonvoting members.[31] Therefore, the sixteen Presidents and Chancellors

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16 *Id.*
17 *Id.* at 994.
18 *See* McDavis, *supra* note 4, at 291.
19 *See id.*
20 Smith, *supra* note 6, at 994.
21 McDavis, *supra* note 4, at 291.
22 *Id.*
23 Smith, *supra* note 6, at 994.
24 McDavis, *supra* note 4, at 291.
25 Smith, *supra* note 6, at 994.
26 McDavis, *supra* note 4, at 291.
27 *Id.*
28 *Id.* at 293.
29 NCAA, *Board of Governors*, http://www.ncaa.org/governance/committees/ncaa-board-governors (last visited Nov. 6, 2019).
30 NCAA, *Board of Governors Roster*, http://web1.ncaa.org/committees/committees_roster.jsp?CommitteeName=EXEC (last visited Nov. 6, 2019).
31 *Id.*

are the only members on the board who are allowed to vote on NCAA legislation, with the exception that the President may vote to break a tie.[32]

B. Amateurism and Founding Principles

The NCAA was created to "eliminate unsavory violence" and "preserve amateurism" in collegiate athletics.[33] The lack of a common understanding of what it meant to be a student-athlete troubled intercollegiate athletics in the years prior to the formation of the NCAA and continued to be problematic for years after.[34] If fair competition was ever going to be achieved, the NCAA needed to establish limits on who could participate in intercollegiate athletics. It is through amateurism that the NCAA created these limits.[35]

Although Article VI of the NCAA's original constitution was written in part to prevent participation by non-amateurs, a clear definition of "amateurism" was not provided in the section.[36] The need to establish a definition prompted the NCAA to establish a committee to define the term.[37] In 1909, the NCAA became the first to affirmatively define an amateur in athletics as "one who enters and takes part in athletic contests purely in obedience to play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived. The nature or primary attitude of mind in play determines amateurism."[38] Since the beginning of the twentieth century, this definition has evolved but the underlying idea is still the same: "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[39]

Today, the troubling situations with amateurism arise when the NCAA relies on it to justify rules limiting student-athletes' right to compensation. Under these circumstances, the NCAA profits from the sale of merchandise, tickets, advertising, and corporate sponsorships, and uses amateurism to preclude student-athletes from obtaining benefits. Courts

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32 *Id.*

33 Smith, *supra* note 6, at 991.

34 *See* HOWARD J. SAVAGE ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, AMERICAN COLLEGE ATHLETICS 83, 87 (1929) [hereinafter CARNEGIE REPORT].

35 McDavis, *supra* note 4, at 294.

36 CARNEGIE REPORT, *supra* note 34, at 42.

37 *Id.*

38 *Id.*

39 NCAA DIVISION I MANUAL art. 2, 2.9, at 4 (Aug. 1, 2019) [hereinafter NCAA DIVISION I MANUAL].

analyze challenges to amateurism under the Sherman Antitrust Act. The next section outlines courts' antitrust framework and explains how amateurism has been challenged through the Sherman Antitrust Act.

C. Antitrust Framework

The primary authority under which student-athletes bring claims against the NCAA for restricting athlete pay is the Sherman Antitrust Act.[40] To prevail on a claim under Section 1, a student-athlete must show (1) a contract, combination, or conspiracy, (2) that the agreement restrained trade unreasonably, and (3) that the restraint affected interstate commerce.[41] In claims against the NCAA, student-athletes typically establish the first and third prongs easily.[42] The NCAA rules prohibiting student-athletes from receiving compensation are codified in the NCAA Manual, satisfying the first prong.[43] In addition, interstate commerce is affected. The NCAA is a nationally operating enterprise with member institutions operating in every state of the country.[44] Because of this, claims are often decided on the second prong: whether the agreement unreasonably restrained trade. Courts analyze the question under one of the following tests or rules: (1) the per se rule, (2) the rule of reason, or (3) the quick look analysis.[45]

1. The Per Se Rule

Courts apply the per se rule when entities engage in practices that are presumptively illegal.[46] Applying the per se rule analysis, courts have held practices such as price-fixing[47], output limitations[48], and division of markets – all of which are presumptively illegal – to be antitrust violations.[49]

Although some find it appropriate to subject the NCAA's rules to a per se rule analysis, the Supreme Court has never allowed it.[50] To exist at

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40 Sherman Antitrust Act, 15 U.S.C. § 1 (2018) ("Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

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

42 McDavis, *supra* note 4, at 299.

43 *Id.*

44 McDavis, *supra* note 4, at 299-300.

45 McDavis, *supra* note 4, at 300.

46 *See* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 691 (1991).

47 U.S. v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956).

48 U.S. v. Topco Assocs., Inc., 405 U.S. 596, 608-09 (1972).

49 Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990).

50 *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-02 (1974).

all, the NCAA must create and enforce rules defining, and in some cases, restraining the manner in which institutions compete.[51] Therefore, the practice is not presumed to be illegal and must be evaluated under the "rule of reason."[52]

2. The Rule of Reason

The rule of reason is the main framework that courts apply when analyzing student-athletes' antitrust claims against the NCAA.[53] Under the rule of reason, an agreement unreasonably restrains trade where "the relevant agreement likely harms competition by increasing the ability or incentive profitability to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[54] A burden shifting framework applies.[55]

First, the student-athlete must establish that the restraint creates anticompetitive effects within a relevant market.[56] Market power of the defendant in the relevant market usually also must be shown, however, it is not required where an unambiguous detrimental effect on price or output exists.[57] In modern antitrust jurisprudence, an "anticompetitive effect" is an adverse effect on price, output, consumer choice, or quality.[58] Product and geographic markets are considered in determining whether a market is relevant.[59] The product market includes "the pool of goods or services that have reasonable interchangeability of use and cross-elasticity of demand."[60] The geographic market incorporates the area of effective competition where buyers can look to for alternate sources of supply.[61]

If the student-athlete establishes significant anticompetitive effects in a relevant market, the burden shifts to the NCAA to show that the restraint

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51 *Id.* at 100-01.

52 *Id.* at 103.

53 *See* McDavis, *supra* note 4, at 300.

54 FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 4 (2000).

55 *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1135-36 (N.D. Cal. 2014).

56 *Id.* at 1136.

57 *See Bd. of Regents*, 468 U.S. at 109.

58 *See Anticompetitive Practices*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/enforcement/anticompetitive-practices.

59 Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988); *see* Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999).

60 *Oltz*, 861 F.2d at 1446; *see, e.g.,* Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1018 (10th Cir. 1998) (noting that the "product" made available by the NCAA in the case is college basketball).

61 *Oltz*, 861 F.2d at 1446.

has legitimate procompetitive justifications."[62] Thereafter, the NCAA must show that although it has imposed restraints, the procompetitive justification outweighs the anticompetitive harm.[63] If the NCAA makes this showing, the burden shifts back to the student-athlete to establish that the NCAA's justification could be achieved by a less restrictive means.[64] The less restrictive means must be "virtually as effective" and must come without significantly greater costs.[65] If at any point, a party cannot meet its burden, it will lose.[66]

3. The Quick Look Analysis

The quick look analysis is an abbreviated version of the rule of reason analysis. *In Cal. Dental Ass'n v. FTC*, the Supreme Court gave its seal of approval to the quick look analysis.[67] The California Dental Association ("CDA") was a non-profit organization with nearly 20,000 member dentists, and it had a code of ethics prohibiting false advertising with respect to price and quality of service.[68] The Federal Trade Commission ("FTC") FTC argued that these restrictions in themselves were not problematic but that as implemented, CDA prohibited any advertising of discounts and any advertising with respect to quality of services, and concluded that restrictions on both price advertising and non-price advertising would be unlawful under a quick look analysis.[69] Ultimately, the Court agreed, concluding that this case and its predecessors opened the door "for what has come to be called abbreviated or 'quick look' analysis under the rule of reason."[70] However, the Court merely endorsed the 'quick look' concept with this language; it declined to apply the analysis in this case. Specifying when this type of analysis is appropriate, the Court articulated that the quick look concept should be applied where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive

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62 *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014).

63 McDavis, *supra* note 4, at 301.

64 *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1136.

65 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074 (9th Cir. 2015) (citing Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).

66 McDavis, *supra* note 4, at 301.

67 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-70 (1999).

68 *Id.* at 759-60.

69 *Id.* at 762-63.

70 *See id.* at 770.

effect on customers and markets."[71] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents* is the first antitrust case where the Court applied this analysis.[72]

Significantly, the quick look analysis is distinct from the rule of reason because it allows a court to short-circuit the market power inquiry in some cases. Market power is frequently one of the most difficult issues to resolve in antitrust cases and is typically the subject of expert testimony. Supporters of the quick look rule view it as an improvement over traditional rule of reason analysis for many reasons: (1) it facilitates deterrence by encouraging lawsuits that might otherwise be intimidated by the burdens of a rule of reason analysis; (2) it reduces litigation costs; and (3) it encourages cost savings without preventing defendants from presenting justifications for their conduct.[73]

III. NCAA ANTITRUST LAWSUITS

A. History

In 1984, the Supreme Court decided *Board of Regents*. Supporters of amateurism rules assert that the case stands for the proposition that student-athletes should not be compensated.[74] Surprisingly, the NCAA has relied on this decision most in defending its amateurism rules, even though the antitrust challenge in the case had nothing to do with amateurism.

In *Board of Regents*, the Universities of Oklahoma and Georgia sued the NCAA, alleging that its television plan, which limited the number of times a member institution could appear on air, violated antitrust law.[75] The NCAA adopted its first restrictive television policy in 1951, after a study revealed that television has "an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system."[76] In 1979, after

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71 *Id.*

72 In *Board of Regents*, Justice Stevens commented that the quick look "can sometimes be applied in the twinkling of an eye." Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 109 n.39 (1974).

73 Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 837 (2016).

74 *Bd. of Regents*, 468 U.S. at 102. ("In order to preserve the character and quality of [college football], athletes must not be paid, must be required to attend class, and the like."); Ben Strauss, *30-Year-Old Decision Could Serve as Template for N.C.A.A. Antitrust Case*, N.Y. TIMES (June 30, 2014), https://www.nytimes.com/2014/06/14/sports/ncaabasketball/30-year-old-decision-could-serve-as-template-for-ncaa-antitrust-case.html ("The fundamental premise of the case, as has been cited a number of times, is that student-athletes should not be paid.").

75 *Bd. of Regents*, 468 U.S. at 92-94.

76 *Id.* at 99 (citing the NCAA Television Committee Report).

member institutions began negotiating their own agreements, the NCAA announced that it would take disciplinary action against any member that entered into a separate agreement.[77] The universities sued the NCAA.[78]

In antitrust terms, the television restrictions were both a horizontal agreement not to compete and a limitation on output.[79] In normal circumstances, these would be per se unlawful.[80] However, since they were the product of NCAA rule-making, the Court indicated that the rule of reason was the proper mode of analysis.[81] The issue was whether the television restriction had a negative effect in the market for televised collegiate athletics.[82] If the restraint had a negative effect in the relevant market, then the plan violated antitrust law.[83] The universities met their burden of establishing significant anticompetitive effects in a relevant market.[84] The television agreement restricted their ability to sell television rights in the market of college football broadcasts, making the prices they could receive for television rights lower and the output lower than it might have been in a free market.[85] The burden then shifted to the NCAA, which asserted the procompetitive effects of live, televised games, and competitive balance.[86] Since the NCAA did not rely on these effects in trying to justify restraints on college basketball telecasts, the Court did not agree they were legitimate, and found in favor of the universities.[87]

Even though the Court ruled for the universities in *Board of Regents*, supporters of the NCAA's amateurism rules assert that the decision stands for the proposition that the NCAA's role is to preserve and maintain the tradition of amateurism in college athletics and it can impose restrictions to protect amateurism.[88] In the opinion, Justice Stevens opined that "the role of the NCAA must be to preserve a tradition that might otherwise die."[89] Further, "in order to preserve the character and quality of [college sports], athletes must not be paid, must be required to attend class, and the like."[90] Thus, from the NCAA's perspective, *Board of Regents* can be understood to support the proposition that even though amateurism is not

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77 *Id.* at 94-95.
78 *Id.*
79 *Id.* at 99-100.
80 *Id.* at 100.
81 *Id.* at 103.
82 *See id.* at 95.
83 *Id.* at 95-96.
84 *Id.* at 112-13.
85 *Id.* at 105-07, 112-13.
86 *Id.* at 117.
87 *Id.*
88 *See id.* at 102, 120.
89 *Id.* at 120.
90 *Id.* at 102.

perfect, it is a reasonable justification for *some* restrictions as long as the restrictions further educational objectives of the organization and its purpose of preserving the character and quality of intercollegiate athletics.[91] However, most court decisions that have defended amateurism and the NCAA's educational objectives as justifications for restraints rely on *Board of Regents*. Thus, if Stevens' language was to ever be challenged, then every case upon which the NCAA relied on the language to uphold amateurism based restrictions would be contested.[92] The Northern District of California dealt with this issue in *O'Bannon v. NCAA*.

B. O'Bannon

In July 2009, Ed O'Bannon, a former basketball player for UCLA, filed suit against the NCAA.[93] Recognizing that his image was being used in a video game for which he was not being compensated, O'Bannon argued that the NCAA violated antitrust law by forbidding student-athletes from being compensated for the use of their names, images, and likeness in broadcasts.[94] O'Bannon alleged that the NCAA fixed the amount student-athletes are paid for their name, image, and likeness at zero and prohibited student-athletes from accessing the market.[95] He sought to restrain the NCAA from creating and enforcing rules that restrict Division I football and basketball players' ability to receive "any compensation, beyond the value of their athletic scholarships for the use of their names, images, and likeness in videogames, live game telecasts, re-broadcasts, and archival game footage."[96]

As with most antitrust lawsuits against the NCAA, *O'Bannon* would turn on the second prong of the Sherman Act, whether the agreement restrained trade unreasonably.[97] At trial, the plaintiffs met their burden of showing that the NCAA created significant anticompetitive effects in a relevant market.[98] The burden then shifted to the NCAA to show that the

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91 McDavis, *supra* note 4, at 307.

92 *Id.* at 308.

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

94 Steve Elder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html.

95 Third Consolidated Amended Class Action Complaint, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-01967 CW, 2013 WL 3810438, at 14, (N.D. Cal. July 19, 2013).

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

97 McDavis, *supra* note 4, at 310.

98 *O'Bannon*, 7 F. Supp. 3d at 999.

compensation restrictions were justified.[99] Although noting faulty reasoning in many of its arguments,[100] the court ultimately found that the NCAA met its burden through two justifications: amateurism and the integration of academics and athletics.[101] Thus, the burden shifted back to the plaintiffs to establish that these justifications could be accomplished through a less restrictive means.[102]

The plaintiffs identified two legitimate less restrictive alternative measures: (1) permit schools to allow scholarships to cover the full cost of attendance at any Division I school; and (2) allow schools to hold limited and equal shares of licensing revenues in a trust to be distributed to athletes after their eligibility is up.[103] The court found that these were reasonable alternative measures and that the practice of prohibiting payments to athletes violated antitrust law.[104] However, for the second alternative, the court noted that the NCAA could still cap name, image, and likeness trusts at $5,000 per year.[105] The court highlighted that NCAA broadcast expert Neal Pilson admitted he "would not be troubled" by $5,000 payments to athletes since consumers would continue to patronize intercollegiate athletics even if athletes were paid that amount.[106]

In September 2015, the Ninth Circuit heard the case. On appeal, the NCAA relied on *Board of Regents*, arguing that the decision established that amateurism restrictions are "presumptively valid."[107] However, the Ninth Circuit reasoned that the decision only discussed amateurism rules in the context of the rule of reason, as an important factor distinguishing the market for collegiate athletics from the market for professional athletics, and noted that the television restrictions challenged in *Board of Regents* had nothing to do with amateurism.[108]. Therefore, the language in *Board of Regents* regarding amateurism is dicta that will be given deference "[w]here applicable."[109]

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99 *Id.*

100 The NCAA relied on *Board of Regents* to argue that its compensation restrictions promote consumer demand by preserving its tradition of amateurism and identity of college sports. However, the court rejected the argument and found that the *Board of Regents* language stating that student-athletes cannot be paid did not serve to resolve any disputed issues of law in the case and "was not based on any factual findings." The court decided that Stevens' language was an "incidental phrase" that did not establish compensation restrictions as procompetitive. *Id.* at 999-1000.

101 *Id.* at 1004.

102 *Id.*

103 *Id.* at 1005.

104 *See id.* at 983-84.

105 *Id.* at 1008.

106 *Id.* at 983.

107 O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015).

108 *Id.* (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984)).

109 *Id.*

Ultimately, the Ninth Circuit agreed with the district court's holdings regarding the justifications.[110] The restrictions on compensation play a role in integrating academics with athletics and preserving consumer demand by promoting amateurism.[111] In evaluating the legitimacy of the plaintiffs' less restrictive alternatives, the Ninth Circuit relied heavily on Stevens' contention in *Board of Regents* that the NCAA must be afforded 'ample latitude' to superintend college athletics.[112] Affording the NCAA that deference, the Ninth Circuit made clear that only a "strong evidentiary showing" that the proposed alternative is "virtually as effective" at achieving the justification is sufficient to satisfy the plaintiff's final burden.[113]

On the first alternative to restricting compensation – allowing schools to offer full cost of attendance scholarships – the Ninth Circuit held that the plaintiffs met their burden.[114] Thus, the Ninth Circuit affirmed the district court's finding that restricting scholarships to only grant-in-aid violated antitrust law.[115] As for the other alternative – paying athletes cash compensation and holding licensing revenues in a trust to be distributed to athletes after their eligibility is up – the Ninth Circuit reversed the district court.[116] Referring to the ample latitude the NCAA must be afforded, the Ninth Circuit held that "the [r]ule of [r]eason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."[117]

Judge Thomas, the Chief Judge for the Ninth Circuit, dissented with the majority's conclusion that payments of up to $5,000 in deferred compensation above student-athletes' full cost of attendance should not be allowed.[118] Thomas argued that the majority erred in dismissing the testimony of Neal Pilson, who stated that paying student-athletes $5,000 per year in a trust would not significantly impact consumer demand, and of Dr. Daniel Rascher, who testified that consumer demand in rugby, tennis, and the Olympics increased after the sports' governing boards allowed athletes to be paid.[119] Importantly, Thomas asserted that "in terms

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110 *Id.* at 1074.
111 *Id.* at 1073.
112 *Id.* at 1074 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984)).
113 *Id.* at 1074, 1076.
114 *Id.* at 1075-76.
115 *Id.*
116 *See id.* at 1076.
117 *Id.* at 1079.
118 *Id.* (Thomas, J., concurring and dissenting in part)
119 *Id.* at 1080-81.

of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest."[120]

The decision in *O'Bannon* established two important principles. First, student-athletes are allowed to receive compensation equal to the cost of attendance at their respective institution.[121] Second, *Board of Regents* does not give the NCAA point blank authority to enforce compensation restrictions and justify them with amateurism.[122] As Judge Thomas implied in the dissent, amateurism is a relevant inquiry only to the extent that it impacts consumer interest.[123] Thus, it is only an appropriate justification if it protects the distinctness of the NCAA's product and if the benefits to athletes would ruin consumer demand.[124] As we will see, Judge Thomas had an opportunity to vindicate this view in *Alston*. *O'Bannon* is still critical to law on athlete compensation today. However, a landmark decision in March 2019 by the United States District Court for the Northern District of California, upheld by the United States Court of Appeals for the Ninth Circuit in May 2020, reaffirmed the proposition that the NCAA's rules governing the grant-in-aid or scholarships that schools offer athletes constitute a restraint on trade.[125] The next section discusses *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litigation* (*Alston*)[126] and its implications on athlete compensation in collegiate athletics.

C. Alston

Since *O'Bannon*, several Division I athletes have challenged the compensation restrictions that the NCAA relies on to protect amateurism. In *Alston*, the lead plaintiffs, Shawne Alston, a former West Virginia running back, and Justine Hartman, a former Cal women's basketball player, sought to eliminate all of the NCAA's restrictions on student-athlete compensation, creating a free market where conferences have the option to offer compensation packages to recruits.[127] Observing that the

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120 *Id.* at 1081.
121 *Id.* at 1074.
122 *Id.* at 1061.
123 *See Id.*
124 *See id.*
125 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d 1239 (9th Cir. 2020); *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).
126 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019).
127 John Wolohan, *A further anti-trust challenge to the NCAA's athlete compensation cap (In Re: NCAA Athletic Grant-in-Aid Cap..)*, LAWINSPORT (April 11, 2019), https://www.lawinsport.com/topics/item/a-further-anti-trust-challenge-to-the-ncaa-s-athlete-compensation-cap-in-re-ncaa-athletic-grant-in-aid-cap#references.

allegations made by the plaintiffs were nearly identical to the allegations made by O'Bannon, the NCAA moved to dismiss the claim under the doctrine of stare decisis.[128] Judge Claudia Wilken, who presided in the district court in *O'Bannon* and made the initial decision of allowing cash payments to athletes, denied the NCAA's motion.[129]

After the court denied the NCAA's motion, both parties moved for summary judgment.[130] As in *O'Bannon*, the NCAA's motion was premised on amateurism being significant to consumer appeal for collegiate athletics and the NCAA being afforded ample latitude to protect it.[131] The motion was denied.[132] The plaintiffs argued that the NCAA's approach to restricting financial aid was inconsistent: in some cases, aid was limited to the cost of attendance.[133] In others, aid exceeded the cost of attendance.[134] Thus, the restrictions were restraints that create unjustified anticompetitive effects.[135] In response, the NCAA asserted the two justifications that survived in *O'Bannon*: integration of academics and athletics[136] and preservation of consumer demand for the product by

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128 Defendants' Motion for Judgment on the Pleadings and Memorandum of Points and Authorities in Support Thereof, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14MD02541, 2016 WL 4943915 (N.D. Cal. 2016).

129 Order Denying Motion for Judgment on the Pleadings, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-md-2541-CW, 2016 WL 4154855 (N.D. Cal. 2016).

130 Plaintiffs' Notice of Motion and Motion for Summary Judgement; Memorandum of Points and Authorities in Support Thereof, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541 CW).; Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541 CW).

131 Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment; Memorandum of Points and Authorities in Support Thereof at 39-45, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541 CW).

132 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston), 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (No. 14-md-02541 CW).

133 *See Id.* at *9.

134 *Id.*

135 *Id.* at *7.

136 On appeal, the NCAA abandoned this justification. The only justification that survived was preservation of consumer demand. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1249 n.8 (9th Cir. 2020).

promoting amateurism.[137] The court found a factual dispute and held that these justifications would have to be proved at trial.[138]

Responding to the justifications, the plaintiffs offered two less restrictive alternatives: (1) allow conferences to set rules for education and athletic participation expenses that member institutions can provide; and (2) eliminate all rules prohibiting payments of any kind related to educational expenses and payments that are incidental to athletic participation.[139] In reviewing the athletes' claims at trial, the court applied a rule of reason analysis.[140] Having identified the relevant market of Division I intercollegiate athletics, the court established that the NCAA and its member schools effectively have monopsony power to restrain athletes' compensation without risk of diminishing their market power.[141] The NCAA wields monopsony power because college football and basketball lack *elite* viable alternative competitions.[142] To attend college and compete in athletics at such a level, athletes must accept the NCAA's compensation rules, regardless of whether the rules accurately reflect the competitive value of their services.[143] Thus, the plaintiffs established significant anticompetitive effects in a relevant market.[144]

The burden then shifted to the NCAA to provide legitimate procompetitive justifications for the restraint.[145] The NCAA argued that the restraint was justified since amateurism remains significant to the consumer demand for college athletics.[146] Specifically, if student-athletes were not amateurs, attendance at games, TV ratings, and revenues would drop.[147] In support of the justification, the NCAA contended that consumers enjoy college sports because they are an alternative form of entertainment to professional sports, and that the levels of competition differ due to the amounts and types of compensation players receive.[148] The court, however, found that the distinction between college and professional sports primarily lies in college athletes not receiving

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137 *Alston*, 2018 WL 1524005, at *8.
138 *Id.* (citing O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1064 (9th Cir. 2015)).
139 *Id.* at *12-13.
140 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1066 (N.D. Cal. 2019).
141 *Id.* at 1070.
142 *Id.*
143 *Id.*
144 *Id.*
145 *See Id.*
146 *Id.*
147 *Id.*
148 *Id.* at 1082.

unlimited cash payments, especially those unrelated to education expenses.[149]

The court concluded that some of the NCAA's compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education expenses.[150] The challenged compensation limits can be divided into three categories: (1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits unrelated to education paid on top of a grant-in-aid; and (3) compensation and benefits related to education provided on top of a grant-in-aid.[151] The court found that the limits in the first and second categories have a procompetitive effect related to having limits, and help maintain consumer demand for intercollegiate athletics as a distinct product by preventing cash payments unrelated to education.[152] As for the third category, the court found that the NCAA's limits on benefits related to education (e.g., scholarships for graduate programs) do not have an effect on enhancing consumer demand for college sports.[153]

The burden then shifted back to the plaintiffs to show that the justifications could be accomplished through a substantially less restrictive means.[154] The plaintiffs proposed the alternative of eliminating all rules prohibiting payments of any kind related to educational expenses and payments that are incidental to athletic participation.[155] In finding this alternative to be less restrictive, the court held that providing additional education-related benefits would be less harmful to competition in the relevant market.[156] Specifically, the types of benefits that should not be limited by the NCAA "include items like computers, science equipment, musical instruments, and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies."[157] Also included would be "post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; expenses related to studying abroad that are not covered by the cost of attendance; and paid post-eligibility internships."[158]

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149 *Id.* at 1083.
150 *Id.* at 1101.
151 *Id.*
152 *Id.* at 1102.
153 *Id.*
154 *Id.* at 1086.
155 *Id.*
156 *Id.* at 1087.
157 *Id.* at 1088.
158 *Id.*

The court found that the alternative rules would only expand education-related compensation and benefits, without resulting in cash payments, unrelated to education, like payments in professional sports.[159] In addition, the NCAA would still have the right to define the education-related benefits and create rules on how schools provide them to athletes.[160]

On May 18, 2020, a three-judge panel for the Ninth Circuit upheld the district court's decision that the NCAA cannot restrict colleges from providing "non-cash education-related benefits" to athletes in Division I of the Football Bowl Subdivision (FBS).[161] Judge Thomas, who dissented with the majority's conclusion in *O'Bannon* that payments of up to $5,000 in deferred compensation above student-athletes' full cost of attendance are not permissible, wrote for the panel.[162]

The panel reviewed the less restrictive alternative identified by the district court[163] and found that the court did not err in determining that it would be "virtually as effective" in serving the procompetitive purposes of the NCAA's rules because such an alternative would not have a negative effect on consumer demand.[164] In reaching this conclusion, the panel discussed the district court's reliance on Dr. Rascher's testimony about a University of Nebraska program that permits student-athletes to receive up to $7,500 in post-eligibility aid (for study-abroad expenses, scholarships, and internships) which the University's former chancellor conceded did not erode demand, the expansion of SAF and AEF payments, and a Student-Athletes' survey which indicated that consumers would continue to patronize college sports even if student-athletes received academic or graduation incentive payments of up to $10,000.[165] Keeping these expansions of benefits in mind, the panel concluded that the district court fairly found that the NCAA's compensation limits preserve demand only to the extent that they prevent unlimited cash payments akin to professional salaries.[166]

In addition, the plaintiffs' attorneys requested that the court expand the district court's ruling and allow colleges to compensate athletes in any

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159 *Id.* at 1088-89.

160 Wolohan, *supra* note 127.

161 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1239 (9th Cir. 2020).

162 *Id.* at 1242.

163 The less restrictive alternative "would prohibit the NCAA from (i) capping certain education-related benefits and (ii) limiting academic or graduation awards or benefits below the maximum amount that an individual may receive in athletic participation awards, while (iii) permitting individual conferences to set limits on education-related benefits." *Id.* at 1260 (citing *Alston*, 375 F. Supp. 3d at 1087).

164 *Id.*

165 *Id.* at 1250.

166 *Id.* at 1260.

manner, rather than limiting the options to education-related expenses.[167] The panel declined to broaden the scope of the district court's ruling. In reaching its conclusion on this matter, the panel discussed the Fair Pay for Play Act, enacted in California in 2019.[168] The law will go into effect in January 2023, and allows college athletes in California to be paid for use of their name, image, and likeness.[169] The plaintiffs argued that the NCAA's creation of a group to explore name, image, and likeness benefits invalidates the argument that benefits would diminish the amateurism model, and therefore the NCAA, in prohibiting pure cash compensation, can no longer rely on *O'Bannon's* conclusion that limits on cash payments untethered to education are critical to preserving consumer demand.[170] However, the panel said this argument was "premature" and "the NCAA has not endorsed cash compensation untethered to education."[171]

Although the Ninth Circuit upheld the district court's ruling for the student-athletes in *Alston*, many argue the decision is a victory for the NCAA since a free-market for the athletes' services has not been established. However, in concluding that some pure cash payments for non-education reasons and payments to athletes for products and services used for education beyond the cost of attendance would not erode consumer demand, the panel did what the Ninth Circuit in *O'Bannon* prohibited. The next section analyzes this decision.

IV. ANALYSIS

A. The Ninth Circuit Properly Decided Alston

Proponents of athletes' rights argue that student-athletes were the losers in *Alston* since it did not create a free market for their services. However, student-athletes still benefitted from *Alston* since the Ninth Circuit exceeded what it disallowed in *O'Bannon*. Specifically, the Ninth Circuit concluded that SAF and AEF payments and other above cost of attendance payments,[172] are allowed even in spite of the "Not One Penny"

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167 *See id*. at 1265.
168 *Id.* at 1252.
169 *See id.*
170 *Id.* at 1265.
171 *Id.*
172 "Without losing their eligibility, student-athletes may receive, for instance: (i) awards valued at several hundred dollars for athletic performance ("athletic participation awards") . . . (ii) disbursements—sometimes thousands of dollars—from the NCAA's Student Assistance Fund ("SAF") and Academic Enhancement Fund ("AEF") for a variety of purposes, such as academic achievement or graduation awards, school supplies, tutoring, study-abroad expenses, post-eligibility financial aid, health and safety expenses, clothing,

standard. Relying on expert testimony and distinguishing these payments from professional salaries, the Court concluded that they would not negatively impact consumer demand, and therefore are permissible in intercollegiate athletics.[173] For the following reasons, the Ninth Circuit properly upheld the district court's findings.

1. Student-Athletes' Rights are Growing

Even though *Alston* did not establish a free market, student athletes' rights and the benefits afforded to them continue to grow. Some of the ways conferences and the NCAA have modified rules after *O'Bannon* and *Alston* are detailed below.

a. Athletic Scholarships Receive Greater Protection Now

Although the NCAA does not require schools to offer guaranteed multi-year scholarships to athletes, the practice of offering four-year scholarships is more common now than it was before *O'Bannon* and *Alston*.[174] After *O'Bannon*, the NCAA Division I "Power Five" Schools and Notre Dame implemented a rule that precludes student-athletes from having their athletic scholarships terminated or not renewed for any athletics reason.[175] Even though non-Power Five schools are not required to follow this rule, its implementation was significant for reasons including over-signing at powerhouse Division I football programs. Over-signing occurs when college athletic departments sign more prospective student-athletes to National Letters of Intent than the maximum number of

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travel, "personal or family expenses," loss-of-value insurance policies, car repair, personal legal services, parking tickets, and magazine subscriptions . . . (iv) mandatory medical care (available for at least two years after the athlete graduates) for an athletics-related injury . . . ." *Id.* at 1244-45.

173 *Id.* at 1260.

174 *See* Jon Solomon, *Schools can give out 4-year athletic scholarships, but many don't*, CBS SPORTS (Sep. 16, 2014), https://www.cbssports.com/college-football/news/schools-can-give-out-4-year-athletic-scholarships-but-many-dont/.

175 Termination or non-renewal of an athletic scholarship is allowed if an athlete (1) is ruled ineligible for competition, (2) provides fraudulent information on an application, letter of intent, or financial aid agreement, (3) voluntarily quits their team, (4) engages in serious misconduct that rises to the level of being disciplined by the university's regular student disciplinary board, or (5) violates a university policy or rule which is not related to athletic conditions or ability, but a coach cannot take away an athlete's scholarship for poor athletic performance. Rick Allen, *The Facts About "Guaranteed" Multi-Year NCAA DI Scholarships*, INFORMED ATHLETE (June 12, 2016), https://informedathlete.com/the-facts-about-guaranteed-multi-year-ncaa-di-scholarships/.

scholarships permitted by NCAA rules.[176] It typically occurs in two ways: a school could sign a number of National Letters of Intent that may bring its total number of counters[177] above the NCAA limit of eighty-five; or a school could sign more than twenty-five National Letters of Intent during the period between National Signing Day and May 31.[178]

This rule enhancing the protection of athletic scholarships prevents unfair practices like over-signing since a coach cannot terminate or fail to renew an athletic scholarship for underperformance or medical reasons. Therefore, a coach is not incentivized to sign more players than he or she is permitted by NCAA rules. Although the rule does not guarantee athlete pay, it provides athletes with protection they weren't afforded prior to *O'Bannon*.

b. *Alston* Could Motivate Student-Athletes to Pursue Graduate Degrees

The Ninth Circuit's decision in *Alston* represents a significant increase in student-athletes' rights for two reasons. First, the NCAA cannot limit benefits student-athletes are allowed to receive as long as they are related to education.[179] Although the NCAA would be permitted to create rules defining the benefits student-athletes can receive and how they can receive them, within the category of types of benefits that can no longer be limited by the NCAA are "other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies."[180] The language is open-ended and depending on interpretation, could result in massive increases in benefits to athletes.

Second, student-athletes are now entitled to post-eligibility scholarships to complete undergraduate or graduate degrees at any school and scholarships to attend vocational school.[181] Due to the time commitment required, costs, and difficulty of obtaining a graduate degree relative to an undergraduate degree, it is fair to assume that in the past, few student-athletes would have opted to pursue a graduate degree without

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176 *See* Timothy Threadcraft, *Oversigning: The unexamined immoraility of the SEC*, YALE NEWS (Nov. 16, 2011), https://yaledailynews.com/blog/2011/11/16/oversigning-the-unexamined-immorality-of-the-sec/.

177 NCAA DIVISION I MANUAL, *supra* note 39, art. 15.02.3, at 202 ("A counter is an individual who is receiving institutional financial aid that is countable against the aid limitations in the sport.").

178 *See* Threadcraft, *supra* note 176.

179 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d 1239, 1252 (9th Cir. 2020).

180 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1088 (N.D. Cal. 2019).

181 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig*., 958 F.3d at 1251.

financial aid. With scholarship money on the table now, more could opt to pursue graduate degrees in the future. Given that *Alston* increases the education benefits and money available to athletes, it continues to expand the benefits that they can receive.

2. Inequity of Illegal Restraints of Trade

In *Alston*, the Ninth Circuit upheld the finding in *O'Bannon* that the NCAA's rules governing athletic scholarships that schools offer constitute an illegal price-fixing agreement in restraint of trade.[182] However, the agreements are allowed because the NCAA's structure necessitates a "certain degree of cooperation."[183]

Price-fixing occurs when competitors agree to raise, lower, or stabilize prices or competitive terms.[184] Since customers choose what products and services to buy, and expect prices to be determined freely on the basis of supply and demand (not competitively fixed), antitrust law generally requires that companies establish prices and other terms on their own, without agreeing with competitors.[185] Applying this idea to college athletics, horizontal price fixing occurs if conferences and schools agree to not pay athletes with the understanding that it would lead to fairness and competitiveness across the board.[186] Considering that the NCAA is a conglomerate of horizontal competitors and it caps the benefits athletes receive for participating in sports, there is no dispute that the NCAA engages in price-fixing. However, because of the degree of cooperation required by the NCAA's structure, courts have never subjected scholarship agreements to a per se analysis.[187] In spite of this, the Ninth Circuit's affirmation of *O'Bannon* and recognition of the illegality of scholarship agreements in *Alston* is significant. Certainly, *Alston* stuck to the guns of earlier decisions, distinguishing the legality of awards such as Pell Grants, which are intended for education-related expenses, from pure cash

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182 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1254 (9th Cir. 2020).

183 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. at 1066.

184 *Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing.

185 *Id.*

186 Hayes Rule, *A breakdown of Alston v. NCAA: What is the future of paying college athletes, and what would it mean for athletes to be paid?* THE BEARFACED TRUTH (May 4, 2019), https://medium.com/the-bearfaced-truth/a-breakdown-of-alston-v-ncaa-what-is-the-future-of-paying-college-athletes-3483569905b4.

187 *See In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. at 1066.

compensation.[188] However, the recognition of the inequity of scholarship agreements by the *O'Bannon* and *Alston* courts indicates that this issue is on the horizon. Although the modification of scholarship agreements will have to occur within the confines of recent decisions, the recognition of these issues suggests that this may be the first of many incremental changes to the NCAA's model in the foreseeable future.

3. Additional Changes Coming?

As student-athletes benefitted from *Alston* in the ways discussed in this section, the NCAA, which consistently contends that student-athlete compensation will destroy consumer demand for its product, benefitted in the sense that the panel did not broaden the district court's holding to incorporate unlimited cash payments to student-athletes. In its review of the district court's decision in *Alston*, the Ninth Circuit may not have necessarily felt that allowing athlete pay for name, image, and likeness would destroy consumer demand. However, there are still hurdles that student-athletes must overcome before a free market can be properly incorporated in NCAA's model.

Although name, image, and likeness pay does not yet fit into the NCAA's model, Division I athletics may be trending in that direction. In 1984, Justice Stevens opined in *Board of Regents* that the NCAA should be afforded "ample latitude" to superintend college athletics,[189] and that "athletes must not be paid."[190] Although the Court ruled against the NCAA, the NCAA has incessantly relied on this dictum over the years in arguing that restraints should be allowed to protect consumer demand. In 2015, the Ninth Circuit upheld the Northern District of California's ruling in *O'Bannon* in part. Specifically, it affirmed that Stevens' language in *Board of Regents* is only applicable in specific instances and permitted universities to offer athletes cost of attendance scholarships.[191] In *Alston*, the panel upheld *O'Bannon* and eliminated the cap on education-related benefits to athletes.[192] Recently, the NCAA President and Board of Governors appointed a task force to examine issues highlighted in recently proposed federal and state legislation related to student-athlete name,

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188 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1255 (9th Cir. 2020).

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

190 *Id.* at 102.

191 *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1000-01 (N.D. Cal. 2014).

192 *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1240.

image, and likeness.[193] With courts becoming more lenient in affording benefits to student-athletes, and the NCAA beginning to examine how name, image, and likeness pay can properly fit into its model, courts and state legislatures may ultimately determine payments of this type should be permitted, and significant change may be forthcoming.

At this point in time, the Ninth Circuit's decision in *Alston* strikes the best possible balance between the financial and educational interests of all parties. Eliminating the cap on education-related benefits continues expanding benefits available to athletes while maintaining the consumer demand for the NCAA's distinct product. However, with experts continuing to present evidence that payments to athletes of higher value would not substantially impact consumer demand, and states beginning to establish legislation for athlete pay, it may only be a matter of time before things change for good. The next section discusses what *Alston* could mean in the future, considers long-term solutions to restraints on student-athlete compensation, and analyzes issues which ultimately will require change to be incremental.

B. Application & Long-Term Solutions

Under the Ninth Circuit's ruling in *Alston*, universities, if permitted by their conferences, can provide student-athletes with benefits that further their education, such as computers and other devices.[194] However, the Ninth Circuit and courts across the country have not yet allowed athletes to receive name, image, and likeness pay.[195]

As discussed in the previous section, *O'Bannon* and *Alston* represent an increase in student-athletes' rights. Because of the holdings of these cases, student-athletes may now receive benefits they weren't afforded in the past. Furthermore, in 2019, the NCAA's top governing board voted unanimously to allow student-athletes the opportunity to benefit from the use of their name, image, and likeness in a manner consistent with the collegiate model, and the NCAA appointed a task force to examine name, image, and likeness pay.[196] Specifically, Michael Drake,

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[193] Michelle Brutlag Hosick, *NCAA Working Group to Examine Name, Image, and Likeness*, NCAA (May 14, 2019), http://www.ncaa.org/about/resources/media-center/news/ncaa-working-group-examine-name-image-and-likeness.

[194] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d at 1251.

[195] *See id.* at 1265.

[196] *Board of Governors starts process to enhance name, image, and likeness opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities.

the Chair of the Board of Governors and President of The Ohio State University, said:

> "We must embrace change to provide the best possible experience for college athletes. Additional flexibility in this area can and must continue to support college sports as a part of higher education. This modernization for the future is a natural extension of the numerous steps NCAA members have taken in recent years to improve support for student-athletes, including full cost of attendance and guaranteed scholarships."[197]

The Board asserted that the modernization of collegiate athletics would have to occur within a specific set of principles and guidelines.[198] Because of the *O'Bannon* and *Alston* decisions, the number of antitrust lawsuits that continue to be brought against the NCAA, and complaints of the exploitative practices of the institution, the NCAA has been compelled to modify its rules to ensure fairness for student-athletes.[199] A number of ideas have been proposed for modernizing college athletics. This Comment examines three.

1. Free Market

a. How it Would Work

If collegiate athletics became a free market, the NCAA's restraints on athlete compensation would be eliminated. With a free market approach, the NCAA could replace its current rules with one rule: "NCAA student-athletes must be enrolled at the school and in good academic standing when practicing with an NCAA-sanctioned team or playing in an NCAA-sanctioned event."[200] In other words, student-athletes would be treated like all other students. If a school wanted to pay players a market rate, it could. If a booster wanted to buy a player a car or contribute to his salary, he could.[201] The idea behind the free market model is to make the NCAA honest. Athletes that generate wealth would be properly compensated.[202]

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197 *Id.*
198 *Id.*
199 *See id.*
200 David French, *An Open Letter to Conservatives about the NCAA*, NAT'L REV. (Sep. 29, 2017), https://www.nationalreview.com/2017/09/ncaa-college-sports-reform-student-athletes-free-market-incentives/.
201 *Id.*
202 *Id.*

b. Pros

Fairness motivates rule makers, the NCAA, and state legislative bodies to consider granting college athletes access to the marketplace. Under the NCAA's current rules, college students can use their talent or skills to earn a living while in school, but athletes cannot.[203] If athletes are paid, they would lose their scholarships and be banned from competing in collegiate athletics, likely forcing many of them to drop out of school.[204] Despite the fact that their skills generate billions of dollars each year for their schools, the NCAA, corporate sponsors, and television networks, athletes continue to be treated this way.[205]

Proponents of athletes' rights argue that the NCAA's practice of prohibiting athletes from accessing the marketplace is unfair.[206] This practice violates the tenet of the United States' free market economic system that people should be permitted to receive pay for their hard work and talent.[207] Athletes could be fairly compensated for what they contribute to their school and the NCAA by negotiating endorsement agreements and being paid salaries by donors.[208]

While courts and the NCAA continue to prohibit athletes from accessing the market, states have started proposing legislation that would overrule the NCAA's anti-competitive rules and grant athletes the right to participate in the free market, like other college students can.[209] California recently passed Senate Bill 206, the Fair Pay to Play Act.[210] Similar legislation was proposed in Colorado and a bipartisan bill was introduced by Congress.[211] As states continue passing laws giving athletes the right to profit from their name, image, and likeness, the NCAA may be forced to adjust its rules to remain afloat. Allowing access to the marketplace is a solution.

c. Cons

At this point in time, the cons of the free market idea may outweigh the pros for a few reasons. In *Alston*, the lower court asserted that the distinction between college and professional sports primarily lies in

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203 Nancy Skinner & Scott Wilk, *College athletes deserve access to the marketplace*, THE ORANGE CNTY. REG. (June 2, 2019), https://www.ocregister.com/2019/06/02/college-athletes-deserve-access-to-the-marketplace/.

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *See* French, *supra* note 200.

209 *See* Skinner & Wilk, *supra* note 203.

210 *Id.*

211 *Id.*

student-athletes not receiving *unlimited* cash payments.[212] It is possible that a free market could harm consumer demand for the NCAA's product since athletes would inevitably receive cash payments from agents, businesses, and schools for their services. Under this type of model, recruiting would become a competitive bidding process. With no limits on what schools could provide, donors would contribute more to recruiting, and schools and coaches would dive into these funds to make the best offers to talented prospects. In addition, athletes could sign endorsement deals and be paid salaries by their universities. If this were to occur, the distinction noted by the lower court in *Alston* would be destroyed. It remains to be seen whether this would have an adverse effect on consumer demand, however, the NCAA has noted that this is a massive concern.

Significantly, the free market could also harm college athletics since only big schools with rich donors that generate significant revenues from ticket and merchandise sales and publicity could compete for the best players. In other words, the free market could put schools which cannot pay for the best recruits out of business. However, it's arguable that both college football and basketball are already dominated by the schools that recruit the best players. Each year, the same ten or so college football teams have top-rated recruiting classes, and the same six – Alabama, LSU, Georgia, Oklahoma, Ohio State, and Clemson – typically compete for spots in the College Football Playoff. This is also observed in college basketball, where teams that recruit the best players – Duke, Kansas, North Carolina, Kentucky, and Michigan State – regularly compete for conference championships and #1 and #2 seeds in the NCAA Tournament. If athletes were given access to the market, the best recruits would likely still choose to attend the schools that recruit the best players now, since only those schools could generate enough revenue to compete for these players. Even so, the free market idea likely isn't accomplishable until it can be shown that *unlimited* payments to student-athletes would not have a significant impact on demand. Modernization and incremental adjustments to rules may be required before this can become a reality.

2. Universal Stipends for Athletes

The NCAA could solve its problem with athlete compensation by allowing schools to provide stipends to all athletes, regardless of the amount in revenue they generate for the school.[213] The payments would be

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[212] *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1083 (N.D. Cal. 2019).

[213] Jonathan Chait, *How to Pay College Athletes Without Ruining NCAA Sport*s, INTELLIGENCER (Mar. 31, 2018), http://nymag.com/intelligencer/2018/03/how-to-pay-college-athletes-without-ruining-ncaa-sports.html.

shared equally, on the basis of hours of effort put in.[214] Providing universal stipends to athletes may sound like a reasonable solution to the compensation issue. Every athlete, whether on the football, basketball, or tennis team, would be paid equally based on the time they put into their sport. If the alternative was not receiving a stipend at all, athletes would support this idea. However, there is a significant problem with universal stipends that likely prohibits this type of measure from being implemented: fairness.

For instance, during the 2012-2013 college basketball season, University of Indiana won twenty-nine games and the Big Ten regular season title, was a #1 seed in the NCAA Tournament, and advanced to the Sweet Sixteen.[215] Indiana's best player was Victor Oladipo, who was selected as the second overall pick in the 2013 NBA Draft and is still a starter in the NBA. As a member of the 2012-2013 Indiana team, Oladipo produced 7.37 wins which, was estimated to be about $737,129 in revenue.[216] Will Sheehey also played for Indiana and contributed 22.3 minutes per game, 9.5 points, and 3.5 rebounds. Sheehey produced 2.42 wins for Indiana, which was estimated to be about $242,386 in revenue.[217]

If student-athletes were to receive universal stipends, Sheehey and Oladipo would be compensated equally, based on hours of effort put in. Although Oladipo generated nearly three times as much revenue for Indiana as Sheehey, both would be paid the same amount. The universal stipend becomes an even bigger problem when you consider that walk-ons, who typically do not play as much as highly rated recruits and in turn fail to generate as much revenue, would also be paid as much as the best players.[218]

The problem with universal stipends is also encountered at the professional level in the U.S. Soccer Equal Pay lawsuit.[219] Female soccer players earned a $15,000 bonus for the World Cup whereas male players

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214 *Id.*

215 *2012-13 Indiana Hoosiers Schedule and Results*, SPORTS REFERENCE, https://www.sports-reference.com/cbb/schools/indiana/2013-schedule.html.

216 Dave Berri, *How About a Free Market for College Athletes?* FREAKONOMICS (Mar. 22, 2013), http://freakonomics.com/2013/03/22/how-about-a-free-market-for-college-athletes/?c_page=2.

217 *Id.*

218 The danger also exists when walk-ons become instrumental to their college teams, and in turn generate more revenue than players who were recruited exhaustively. *See* Brandon Hall, 15 Star Athletes Who Had to Walk On to Their College Teams, STACK (June 8, 2018), https://www.stack.com/a/9-star-athletes-who-had-to-walk-on-to-their-college-teams?slide=9 (noting that J.J. Watt and Scottie Pippen walked-on to their college teams and became elite professional athletes).

219 Chait, *supra* note 213.

earned $55,000.[220] However, the Men's World Cup in 2018 generated 45.8 times more revenue than the 2019 Women's World Cup.[221] Even though as a team, the American women have performed better than the men in recent World Cups, the problem with paying men and women equal salaries is comparable to paying Sheehey and walk-ons as much as Oladipo in the Indiana example. Given the concern and difficulty with implementing a similar measure at the professional level, it is unlikely that universal stipends will become the norm at the collegiate level soon.

3. Trust Funds: Setting Aside Revenues Until Graduation

Perhaps the most feasible solution for modernizing amateurism while maintaining consumer demand is setting aside revenues until student-athletes graduate. In 2018, Josh Rosen proposed that the NCAA modernize amateurism by allowing athletes to profit, after they graduate, from various revenue opportunities that arise during their college careers.[222] The key element of Rosen's proposal is a "Clearinghouse" that works with the NCAA and acts as an intermediary between the players and potential endorsers.[223] The intermediary becomes an athlete's licensing representative. It would negotiate on behalf of athletes with interested business parties and money earned for name, image, and likeness would go into a trust that the players can access after they graduate.[224]

Under Rosen's proposal "revenue would be generated on three tiers: national, regional and local agreements. It would then be distributed into individual player accounts; an NCAA-wide player pool; the NCAA itself; the clearinghouse; and a general scholarship fund that would funnel financial aid for academic purposes back into communities that produce the athletes."[225]

At the moment, Rosen's proposal may be the best means of modernizing amateurism. The proposal is fair to athletes since it affords them revenue seeking opportunities that are not currently allowed under NCAA rules. In addition, it is ideal for the NCAA; if athletes do not profit

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[220] Jennifer Bendery, *Chuck Schumer Says U.S. Women's National Soccer Team Is Still Not Paid Fairly*, HUFFINGTON POST (June 11, 2019), https://www.huffingtonpost.ca/entry/us-womens-national-soccer-team-equal-pay_n_5cfff0d3e4b011df123bd172?utm_hp_ref=ca-us-politics.

[221] John Glynn, *Yes, There is a Soccer Pay Gap: The Women Make More Than The Men Do*, THE FEDERALIST (July 8, 2019), https://thefederalist.com/2019/07/08/yes-soccer-pay-gap-women-make-men/.

[222] Pat Forde, *How Josh Rosen would overhaul college sports so athletes can get their cut (if they earn it)*, YAHOO (July 16, 2018), https://sports.yahoo.com/josh-rosen-overhaul-college-athletics-want-idea-get-people-talking-074448893.html?guccounter=1.

[223] *Id.*

[224] *Id.*

[225] *Id.*

from revenue opportunities until after graduation, amateurism is preserved. Furthermore, everybody would benefit from revenue being distributed to a player pool, the NCAA itself, and a scholarship fund that could incentivize prospects to attend college.

Although Rosen's proposal may currently be the most achievable means of modernizing amateurism, it could be improved by removing the stipulation that athletes graduate from college to access revenues. While Rosen's plan incentivizes student-athletes to earn their degrees – which benefits both athletes and universities in the long-run – graduating is not a feasible means for many *elite* athletes. Some athletes who play football or basketball in college come from low-income neighborhoods, and playing sports professionally affords them the opportunity to provide for their families. Moreover, an underclassman, or a student-athlete who has played three seasons of college football and is projected first-round pick in the NBA or NFL Draft, is not incentivized to stay in school given the prospect of injury, which could preclude him from signing a guaranteed professional contract. Therefore, removing Rosen's graduation requirement, and giving players who generate significant revenues for their schools[226] access to that revenue after they leave school, may be a more feasible means of resolving the problem with student-athlete compensation.

C. Title IX's Impact on Proposed Solutions

Although each of the proposed solutions would increase the benefits available to student-athletes, the ability of colleges to pay athletes more than the grant-in-aid poses an unavoidable Title IX issue. Title IX refers to Title IX of the Education Amendments of 1972, which prohibits colleges that receive federal funding from discriminating on the basis of sex.[227] Since nearly every college receives federal financial assistance,

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[226] Michael Porter Jr. was a top-rated basketball recruit in the Class of 2017 and committed to the University of Missouri in the Spring. Although Porter got injured and played only fifty-three minutes during the 2017-18 season, Missouri collected $5,287,785.15 in total revenue from the season, a 70.9 percent increase from the previous season's figure of $3,094,448.62. It is impossible to know how much of the revenue boost was caused by Porter, but season ticket sales surged after his commitment, and Missouri sold out of tickets and led the country with its season-to season attendance increase. Alex Schiffer, *After MPJ's arrival, Mizzou basketball revenue surged in a way that's hard to compare*, THE KANSAS CITY STAR (June 15, 2018), https://www.kansascity.com/sports/college/sec/university-of-missouri/article213236704.html.

[227] Michael McCann, *Examining the Broader Fallout After the Historic Grant-in-Aid Cap Ruling Against the NCAA*, SPORTS ILLUSTRATED (Mar. 8, 2019), https://www.si.com/college/2019/03/09/fallout-grant-aid-cap-ncaa-litigation-title-ix-sports-betting-law.

Title IX is almost always applicable.[228] Title IX surfaces in intercollegiate athletics in a number of ways, and its purpose is to hold colleges accountable for failing to rectify sexually antagonistic environments.[229] Specifically, Title IX requires college athletic programs to provide roughly equal opportunities to male and female student-athletes.[230]

First off, each of the proposed solutions invites Title IX challenges since payments to football or men's basketball players – whether in scholarship dollars, trust disbursements, or cash stipends – in amounts that exceed what is paid to athletes on women's teams could mean that a school has violated with Title IX. However, a school does not automatically fail to comply with Title IX simply by paying male athletes more.[231] In the context of scholarships higher than grant-in-aid, the relevant analysis is complex and requires a closer look at the extent of disparity between scholarship values at an institution.[232] Title IX does not necessarily require identical treatment of male and female athletes, nor does it stipulate that the same amount of money must be spent on both.[233] Instead, the relevant inquiry is whether a school provides substantially equal opportunities to athletes of both genders.[234]

Allowing a college student-athlete to make money from the use of his or her name, image and likeness – in other words, "free market" – is a proposal that has seen support from nearly every area of the country. However, it may pose a unique challenge to Title IX for many reasons. Although some have dismissed Title IX as a nonissue since payments would be made directly from third parties to athletes, legal experts have argued that an additional analysis is required before these payments are dismissed.[235] Specifically, experts have asserted that an approval process requiring university involvement when student athletes engage with third parties may be necessary.[236] Thus, to comply with Title IX, universities may be obligated to ensure there are equal opportunities for male and female athletes to interact with sponsors.[237]

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228 *Id.*
229 *Id.*
230 *Id.*
231 *Id.*
232 *Id.*
233 *Id.*
234 *Id.*
235 Kristi Dosh, *Name, Image and Likeness Legislation May Cause Significant Title IX Turmoil*, FORBES (Jan. 21, 2020), https://www.forbes.com/sites/kristidosh/2020/01/21/name-image-and-likeness-legislation-may-cause-significant-title-ix-turmoil/#21ec5c607625.
236 *Id.*
237 *Id.*

Significantly, Title IX may also pose an issue to the athletic budgets of Division I universities.[238] Since name, image, and likeness payments would come from third parties, the financial impact on budgets is nil.[239] However, there is not an infinite supply out there, both in terms of universities budgeting for additional payments to student-athletes and third parties making name, image, and likeness payments. It is possible, perhaps likely, that every payment made from a car dealer, booster, institutional employee, or trustee to a student-athlete will be one less donated to universities. And if universities see less money from the outside, they may be forced to cut the budgets of sports not making any money. A Title IX issue obviously arises where women's sports generate substantially less revenue.

Legislation expanding the ability of universities and third parties to pay student-athletes may also result in universities wanting to compensate athletes based on performance. For instance, what if a university endorsed a policy where male basketball players would be paid individually for double-doubles or all players on a team would be compensated based on conference and NCAA Tournament victories? Further, what if universities offered a significant sum for a male athlete of the year award? Because of Title IX, schools would be required to make substantially similar offerings to female athletes. It is easy to see how Title IX could stretch a university's athletic budget thin; as discussed, there is not infinite supply out there, and if universities are not careful, there could be detrimental results.

Since Title IX is a significant obstacle in the way of any of the proposed solutions, changes to college athletics will depend greatly on what new legislation looks like and the ideas conferences propose. Ultimately, legislation and solutions will have to be interpreted by courts and the Office of Civil Rights. Thus, even though *O'Bannon*, *Alston*, and proposed legislation in states point to significant modifications to scholarship agreements and benefits available to athletes in the future, it is extremely likely that change will be incremental. Because of Title IX, new policies will have to be specifically tailored to comply with corresponding rules. Moreover, since payments in what may not seem like excess amounts may pose a significant problem to universities' athletic budgets, schools must slowly and carefully enact new policies for the benefit of student-athletes to avoid negative results.

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238 Mark Zeigler, *Column: Name, Image and License, and Unintended Consequences in College Sports*, THE SAN DIEGO UNION-TRIBUNE (Apr. 30, 2020), https://www.sandiegouniontribune.com/sports/sports-columnists/story/2020-04-30/ncaa-name-image-license-budget-sports-nil-title-ix-athletes-pay-college-sports.

239 *Id.*

V. CONCLUSION

As student-athletes continue to bring antitrust challenges against NCAA rules, courts will be forced to make decisions that may result in the overhaul of the NCAA's model. Although the alleged unfairness and presumed illegality of scholarship agreements requires the evolution of rules, further modification of the rules will come at a cost, and a significant question that judges will be forced to answer is whether the cost is worth it. In many ways, the tradition of collegiate athletics that currently exists is special. Fans and alumni at some schools live and die for their football and basketball programs. They attend home and away games, cherish magical runs in the NCAA Tournament, and chew their nails during close games against rivals. However, in areas of the country where stadiums are empty on game days, fans and alumni contend that the tradition is dying and in need of a shock to revive interest. Considering recent court decisions and legislation like that passed in California, the modernization of NCAA rules is likely to continue. What remains to be seen is how much more change courts are willing to allow to protect the rights of student-athletes while still seeking to preserve the traditions of intercollegiate athletics as they existed in the past.

Change is the law of life. And those who look only to the past or present are certain the miss the future.[240]

- President John F. Kennedy

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[240] Alana Ross & Barry Ross, *Change is the Law of Life – JFK*, ROSS & ROSS INTERNATIONAL (March 14, 2017), https://www.rossross.com/blog/change-is-the-law-of-life-jfk.