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## JUMP BALL: THE UNSETTLED LAW OF REPRESENTING COLLEGE BASKETBALL STARS AND MONETIZING THEIR NAMES, IMAGES, AND LIKENESSES

MCCANN, MICHAEL A.

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**JUMP BALL: THE UNSETTLED LAW OF  
REPRESENTING COLLEGE BASKETBALL STARS AND  
MONETIZING THEIR NAMES, IMAGES AND  
LIKENESSES**

**Michael A. McCann\***

*The legal framework governing college athletes is in a transformative era. Under pressure by state governments and members of Congress, the NCAA is contemplating structural changes that would permit college athletes to license their names, images and likenesses. Should these changes come to pass, college athletes—most likely through the negotiation vehicle of trade associations—would be compensated for the use of their identities in apparel, merchandise, video games, television broadcasts and related goods and services. The changes would upend decades of NCAA adherence to “amateurism,” a controversial system of rules that denies compensation opportunities on the logic that pay would corrupt college athletes, betray educational goals and undermine the consumer appeal of collegiate athletic contests.*

*This Article examines the mechanisms by which college athletes should be able to secure representation for their commercial interests. Within that area of study, this Article focuses on men’s college basketball players who declare for the annual National Basketball Association (“NBA”) Draft while preserving the option to return to school. The NCAA has proposed requirements for agents to represent these players. Such requirements are of questionable merit and raise concerns about the demographics of persons they might tend to exclude as agents. This Article contends that while the NCAA may have the legal capacity to exclude agents, it should weigh potential adverse consequences on competition and socioeconomic status. This argument has concrete*

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\* Director of the Sports and Entertainment Law Institute and Professor of Law, University of New Hampshire Franklin Pierce School of Law; Legal Analyst and Senior Sports Legal Reporter, Sportico; On-Air Legal Analyst, NBA TV. The author would like to thank: his colleagues for reviewing drafts and offering suggestions; Donald Polden and the *Santa Clara Law Review* staff for their invitation to participate in the symposium and excellent work on this article; and Kara McCann and Willa Rose McCann for their support and inspiration.

*implications on college basketball and more broadly on the economics of college sports.*

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#### I. INTRODUCTION

Why does a job require a college degree? For decades, employers have reflexively attached a college degree requirement to many positions that can be performed without one. Some have argued that earning a college degree signifies basic competency in reading, writing and critical analysis—even though no two paths to a college degree are the same. Others have presupposed that a college degree is a reasonable yardstick for measuring whether a person is “educated”—even though college degrees demand varying degrees of effort and knowledge. And still others focus on the sheer obtainment of a piece of paper that signifies a degree, even though “diploma mills” and other dubious entities bestow thousands of college degrees every year.<sup>1</sup>

This dynamic has changed in recent years. Google, Apple, Whole Foods and many other successful companies have dropped the college

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1. See George Gollin et al., *Complexities in Legislative Suppression of Diploma Mills*, 21 STAN. L. & POL’Y REV. 1, 1-3 (2010) (discussing the proliferation of diploma mills, including the possibility that diploma mills “sell” more degrees than in any one state except California and New York).

degree requirement in lieu of more holistic evaluations of candidates' experiences and skills.<sup>2</sup> In this more contemporary light, a degree is no longer viewed as the exclusive marker of a candidate's achievement or potential. It instead constitutes one type of proxy for employers to consider.

In August 2019, the governing body of college sports, the National Collegiate Athletic Association (NCAA), bucked this modern-day trend.<sup>3</sup> At that time, the NCAA announced that it would adopt certification requirements for agents who seek to advise college basketball underclassmen on whether they ought to leave college early for the National Basketball Association (NBA).<sup>4</sup> A player advised by an unauthorized agent risks forfeiting the remainder of his eligibility to play.<sup>5</sup> He can also imperil his team's chances to compete in the NCAA, which can sanction colleges that play ineligible players. In fact, prior to 2019, men's college basketball players who retained *any* agent forfeited their remaining eligibility.<sup>6</sup> The NCAA has long prohibited college athletes from professional representation. Absent narrow exceptions discussed below, NCAA bylaws express that a college player who signs an agent, or who hires an attorney to represent him or her in contract negotiations, is subject to forfeiting their NCAA eligibility.<sup>7</sup>

Pursuant to the 2018 recommendation of a college sports reform commission led by former U.S. Secretary of State Condoleezza Rice, the NCAA recently permitted college basketball players to hire "NCAA-certified" agents.<sup>8</sup> Specifically, between the end of a college player's season and the second week of April, the player can solicit an evaluation from the NBA Undergraduate Advisory Committee.<sup>9</sup> "This committee

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2. Courtney Connley, *Google, Apple and 12 other companies that no longer require employees to have a college degree*, CNBC (Oct. 8, 2018, 12:51 PM), <https://www.cnbc.com/2018/08/16/15-companies-that-no-longer-require-employees-to-have-a-college-degree.html>.

3. Cindy Boren, *New Rules Proposal for Agents Draws Ire*, WASH. POST, Aug. 8, 2019, at D2.

4. *Id.*

5. NCAA, 2018-2019 NCAA DIVISION I MANUAL § 12.3 (2019) [hereinafter NCAA MANUAL].

6. *Id.* § 12.3.1.2; Press Release, NCAA, NCAA amends agent certification requirements (Aug. 12, 2019, 2:00 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-amends-agent-certification-requirements> [hereinafter NCAA].

7. See NCAA MANUAL, *supra* note 5, §§ 12.2.1, 12.3.2.

8. Marc Tracy, *N.C.A.A. Alters Rules for Agents and Draft in Wake of Basketball Corruption Scandal*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/sports/ncaa-basketball-agents.html>.

9. Michael McCann, *How Rich Paul Could Build a Case Against the NCAA Over Its New Criteria for Agents*, SPORTS ILLUSTRATED (Aug. 6, 2019), <https://www.si.com/college-basketball/2019/08/06/ncaa-criteria-exclude-rich-paul-others-certified-nbpa> [hereinafter McCann, *How Rich Paul Could Build a Case*].

includes NBA team executives who provide candid and confidential projections of a player's draft stock."<sup>10</sup> Provided the underclassman makes such a request by the April deadline, he can retain an NCAA-certified agent.<sup>11</sup> The player then has until the end of May to decide whether to leave school in hopes of becoming an NBA player.<sup>12</sup>

Representation by an agent enables underclassmen who are unsure if, and when, they would be selected in the annual NBA draft to work out for NBA teams and discuss their prospects with experts. They might also use that time to assess the value of potential endorsement deals. If an underclassman gains unfavorable insights, he can remove himself from draft consideration and return to college. The annual NBA Draft tends to be heavily populated by underclassmen. Of the twenty-seven college players selected in the first round of the 2019 NBA Draft, twenty-four were underclassmen.<sup>13</sup>

The NCAA initially classified agents who were certified by the National Basketball Players' Association (NBPA), the union for players in the National Basketball Association, as NCAA-certified agents.<sup>14</sup> The NCAA, in other words, trusted the judgment of the NBPA with respect to the qualifications of agents. As the players' exclusive bargaining representative and pursuant to Section 7 of the National Labor Relations Act, the NBPA determines which individuals are qualified to advise NBA players and represent them in employment contract negotiations.<sup>15</sup> To that end, the NBPA defines several conditions for certification of agents: possessing a bachelor's degree *or* relevant negotiation experience; passing a standardized test; paying an annual fee; negotiating a contract between a player and an NBA team at least once every five years; and satisfying other measures purportedly designed to assess basic competencies.<sup>16</sup>

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10. *Id.*

11. *Id.*

12. Jeremy Woo, *Stay or Go? With NBA Draft Deadline Looming, These Players Face Pivotal Decisions*, SPORTS ILLUSTRATED (May 23, 2019), <https://www.si.com/college-basketball/2019/05/23/nba-draft-decisions-kansas-kentucky-louisville-lsu-virginia>.

13. NBA.com Staff, *2019 NBA Draft results: Picks 1-60*, NBA (June 21, 2019, 2:55 AM), <http://www.nba.com/article/2019/06/21/2019-nba-draft-results-picks-1-60>.

14. See McCann, *How Rich Paul Could Build a Case*, *supra* note 9.

15. Wagner Act, ch. 372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-68 (1982)), amended by Labor-Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136, and Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519.

16. NATIONAL BASKETBALL PLAYERS ASSOCIATION, NBPA REGULATIONS GOVERNING PLAYER AGENTS AS AMENDED FEB. 2018 [hereinafter NBPA REGULATIONS GOVERNING PLAYER AGENTS], <https://cosmic-s3.imgix.net/e3bb4d60-7b1a-11e9-9bf5-8bad98088629-NBPAAgentRegulations.pdf> (last visited, Mar. 1, 2020).

In August 2019, NCAA terminated its reliance on the NBPA qualification and announced that it would define its own criteria for certification process for agents.<sup>17</sup> One of NCAA's proposed criterion included the requirement that agents possess a bachelor's degree.<sup>18</sup> Stressing the importance of education level, the NCAA insisted that an agent who graduated from college is uniquely capable of providing advice on the choice between remaining in school and turning pro.<sup>19</sup> Implementation of NCAA agent requirements is set to begin in 2020, with the first exam currently scheduled for November 2020.<sup>20</sup>

A college degree requirement would bar some agents who are already certified to represent NBA players. Rich Paul, known in NBA circles as “the King Maker,”<sup>21</sup> is one of them. He is among the most successful and skilled sports agents in the American sports industry.<sup>22</sup> Paul is the founder of Klutch Sports Group.<sup>23</sup> He represents LeBron James, Anthony Davis, Draymond Green, John Wall, Ben Simmons, and other NBA superstars.<sup>24</sup> Paul bypassed college to instead obtain “real world” experience.<sup>25</sup>

Judged by metrics that measure capacity to advise basketball players on professional matters, Paul is unquestionably qualified. During the 2019-20 NBA season alone, Paul's clients will collectively earn an astonishing \$264 million.<sup>26</sup> He is especially heralded for his business acumen and his capacity to maximize player preferences.<sup>27</sup> *Black Sports Online* columnist Mark Gunnels recently hailed Paul as “the best agent

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17. *NCAA amends agent certification requirements*, NCAA (Aug. 12, 2019, 2:00 PM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-amends-agent-certification-requirements>.

18. *Id.*

19. *Agent Certification*, NCAA, <http://www.ncaa.org/enforcement/agents-and-amateurism/agent-certification> (last visited, Mar. 1, 2020).

20. *Agent Certification*, *supra* note 19; see also NCAA LEGISLATIVE SERVICES DATABASE, AMATEURISM—USE OF AGENTS—NCAA-CERTIFIED AGENTS—MEN'S BASKETBALL, NCAA (2018-2020), <https://web3.ncaa.org/lstdbi/search/proposalView?id=102758>.

21. S.L. Price, *The King Maker: Why Rich Paul Will Own the NBA Summer*, SPORTS ILLUSTRATED (June 12, 2019), <https://www.si.com/nba/2019/06/12/rich-paul-klutch-sports-group-lakers-pelicans-lebron-james-anthony-davis>.

22. Nathan Ocampo, *Everything we know about Rich Paul*, CLUTCHPOINTS (June 15, 2020), <https://clutchpoints.com/everything-we-know-about-rich-paul/>.

23. McCann, *How Rich Paul Could Build a Case*, *supra* note 9.

24. *Id.*

25. Price, *supra* note 21.

26. *Rich Paul-NBA Agents*, HOOPSHYPE, <https://hoopshype.com/reps/rich-paul/> (last visited, Mar. 1, 2020).

27. See Clay Skipper, *Rich Paul: Power Broker of the Year*, GQ (Dec. 16, 2019), <https://www.gq.com/story/rich-paul-powerbroker-interview>.

in the game. Period.”<sup>28</sup> Yet Paul is not a college graduate.<sup>29</sup> A college degree requirement would thus deny him a chance to share his wisdom with underclassmen who are debating whether to turn pro or stay in school. The college degree requirement attracted immediate scorn from influential members of the basketball community.<sup>30</sup> They dismissed it as substantively unwise and racially insensitive.<sup>31</sup> To that point, James derisively termed the exclusion of Paul and others like him “The Rich Paul Rule.”<sup>32</sup> The label stuck. Soon other NBA stars weighed in. Oklahoma City Thunder guard Chris Paul, for instance, tweeted, “This is crazy!” while stressing “some life experiences are as valuable, if not more, than diplomas.”<sup>33</sup> Politicians also sensed an opportunity to express a critical view. Entrepreneur and former presidential candidate Andrew Yang tweeted, “Instead of putting arbitrary requirements on agents, the NCAA should pay Division I athletes who generate millions in revenue for their schools. Coaches and athletic directors make millions while the kids pretend to be amateurs and scrounge for meal money.”<sup>34</sup>

Paul’s story *should* resemble oft-cited American success stories. Thomas Edison, Maya Angelou, Bill Gates, Ellen DeGeneres, and Steve Jobs are among noteworthy figures who ascended to professional heights without earning a college degree.<sup>35</sup> Yet agents who bypassed college are sometimes cynically nicknamed “street agents.”<sup>36</sup> The phrase attempts to conjure racially tinged stereotypes of persons who work “on the street” and infer that these agents are somehow connected to bribes to

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28. Mark Gunnels (@MarkAGunnels), TWITTER (Aug. 3, 2019, 8:55 AM), <https://twitter.com/MarkAGunnels/status/1157681349722955776>.

29. McCann, *How Rich Paul Could Build a Case*, *supra* note 9.

30. Tyler Lauletta, *LeBron James praises agent Rich Paul, who quickly helped to bring an end to NCAA's 'Rich Paul Rule,'* BUSINESS INSIDER (Aug. 12, 2019, 4:26 PM), <https://www.businessinsider.com/lebron-james-ncaa-rich-paul-rule-reversed-2019-8#:~:text=James%20dubbed%20the%20rule%20the,talented%20players%20in%20the%20world>.

31. *Id.*

32. Boren, *supra* note 3.

33. Chris Paul (@CP3), TWITTER (Aug. 6, 2019, 9:25 PM), <https://twitter.com/CP3/status/1158957194513145856>.

34. Andrew Yang (@AndrewYang), TWITTER (Aug. 7, 2019, 5:44 AM), <https://twitter.com/AndrewYang/status/1159082916007202816>.

35. Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269, 298 (2006); *see also* Paul Schmitz, *Lessons from famous college dropouts*, CNN (Dec. 31, 2011, 2:24 PM), <https://www.cnn.com/2011/12/30/opinion/schmitz-college/index.html> (detailing a list of accomplished persons who never earned college degrees).

36. D. Watkins, *What happens to the young basketball stars who don't go pro?*, SALON (May 4, 2019, 5:00 PM), <https://www.salon.com/2019/05/04/when-the-angel-investors-of-the-street-ball-court-come-to-collect/>.

recruits and other corruptive acts.<sup>37</sup> Use of “street agent” thus casts the person’s lack of education as suggestive of unscrupulous qualities.

Many commentators explicitly linked their critiques of a college degree requirement to race. Fox Sports commentator Chris Broussard bluntly labeled the requirement as “racist.”<sup>38</sup> Commentators observed that many NBPA-certified agents eschewed higher education.<sup>39</sup> They gained relevant experience by working with players and, in that forum, honing their abilities.

The college degree requirement was perceived as an attempt by the NCAA to keep so-called “street agents” from advising college players.<sup>40</sup> In that light, many perceived the requirement as racially insensitive.<sup>41</sup> Compounding the issue of race is that African American players disproportionately comprise the population of American players who generate the most revenue for the NCAA and who are most likely to be selected in the NBA draft.<sup>42</sup> Approximately eighty-five percent of the NCAA’s revenue derives from the annual tournament for men’s college basketball, a sport where more than half of the players are African American.<sup>43</sup> African American players also comprise the largest demographic group of players selected within the “lottery” (top) portion of the NBA draft.<sup>44</sup> In the 2019 NBA draft, twelve of the first fourteen picks were African

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37. Watkins, *supra* note 36; see Michael Wilbon, *The ‘One-and-Done’ Song and Dance*, WASH. POST (June 25, 2009), [https://www.washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062403396\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062403396_pf.html) (noting that “street agents” are associated with corrupting youth basketball).

38. Jack Winter, *FOX Sports’ Chris Broussard says NCAA’s ‘Rich Paul Rule’ is racist*, CLUTCHPOINTS (Aug. 7, 2019), <https://clutchpoints.com/nba-news-chris-broussard-says-ncaas-rich-paul-rule-is-racist/>.

39. Mark Schlabach, *NCAA amends ‘Rich Paul Rule’ amid blowback*, ESPN.COM (Aug. 12, 2019), [https://www.espn.com/mens-college-basketball/story/\\_id/27374124/ncaa-amends-rich-paul-rule-amid-blowback](https://www.espn.com/mens-college-basketball/story/_id/27374124/ncaa-amends-rich-paul-rule-amid-blowback) (referring to some NBA agents having not gone to college).

40. See, e.g., Scott Harris, *Is The NCAA Just Trying To Eliminate The Street Agent?*, BEAT OF SPORTS (Aug. 9, 2019), <https://969thegame.iheart.com/content/2019-08-09-is-the-ncaa-just-trying-to-eliminate-the-street-agent/> (describing suspicions in the basketball community that the NCAA is attempting to eliminate opportunities for interaction between certain agents and college athletes).

41. Alex Galbrath, *Why NBA Fans Are Calling out NCAA’s Reported New Agent Restrictions*, COMPLEX (Aug. 6, 2019), <https://www.complex.com/sports/2019/08/ncaa-agents-restrictions-reactions>.

42. See ED O’BANNON & MICHAEL MCCANN, *COURT JUSTICE: THE INSIDE STORY OF MY BATTLE AGAINST THE NCAA* 88 (2018).

43. See Nick Moyle, *Emmert discusses FBI probe, what makes San Antonio special Final Four host*, SAN ANTONIO EXPRESS-NEWS (Mar. 26, 2018), <https://www.express-news.com/sports/colleges/article/Emmert-discusses-FBI-probe-what-makes-San-12782587.php> (noting revenue for the NCAA); see also *infra* Section III (providing demographic data on NCAA athletes).

44. NBA.com Staff, *2019 NBA Draft results: Picks 1-60*, NBA (June 21, 2019, 2:55 AM), <https://www.nba.com/article/2019/06/21/2019-nba-draft-results-picks-1-60>.

American players.<sup>45</sup> The exclusion of agents denies players the chance to gain representation from many agents who are deemed qualified by the NBPA and are clearly adept at their work.

After hearing critical commentary, the NCAA abruptly tabled the college degree requirement.<sup>46</sup> This was striking on a number of levels, most notably that the NCAA seldom pivots from its positions—even in the face of intense condemnation.<sup>47</sup>

The college degree requirement is not the only source of controversy for the NCAA's proposed certification criteria. Commentators have also criticized other NCAA certification criteria. For example, the NCAA announced that it would only certify agents who (1) have been certified by the NBPA for at least three consecutive years and (2) pass an in-person NCAA qualification exam.<sup>48</sup> The “experiential” requirement would exclude newer and younger agents. Such agents are thought to include a disproportionate percentage of African Americans.<sup>49</sup> Many of these agents are also without NBA player clients. According to a recent survey by *The New York Times*, sixty percent of NBPA-licensed agents do not represent any NBA players.<sup>50</sup> In contrast, a relatively small number of NBPA-licensed agents represent a disproportionately high percentage of NBA players: nine agents represent twenty-five percent of players and twenty-seven agents represent fifty percent of players.<sup>51</sup> These data reflect the increasingly common practice of NBA players to be represented by “super agencies.”<sup>52</sup> These well-funded firms, such as Creative Artists Agency or Wasserman, provide numerous services to clients and position them to land opportunities in the entertainment industry.<sup>53</sup> Newly certified NBPA agents often can't compete with this range of services, leaving them without clients and discouraged about

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45. *Id.*

46. Michael Shapiro, *NCAA Amends 'Rich Paul Rule', Won't Require Agents to Have Bachelor's Degree*, SPORTS ILLUSTRATED (Aug. 12, 2019), <https://www.si.com/college-basketball/2019/08/12/ncaa-agent-requirements-bachelors-degree-rich-paul-rule>.

47. See ROGER ABRAMS, *SPORTS JUSTICE: THE LAW AND THE BUSINESS OF SPORTS* 73 (2010) (maintaining that the NCAA engages in an inflexible administration of rules).

48. NCAA, *supra* note 6.

49. Jemele Hill, *The NCAA Doesn't Speak for College Athletes*, ATLANTIC (Aug. 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/ncaa-puts-squeeze-black-agents/596041/>.

50. Kevin Draper, *Congratulations, You're a Certified N.B.A. Agent. Good Luck Finding a Client*, N.Y. TIMES (Oct. 17, 2018), <https://www.nytimes.com/2018/10/17/sports/nba-agents.html>.

51. *Id.*

52. See Jason Gershwin, *Will Professional Athletes Continue to Choose Their Representation Freely? An Examination of the Enforceability of Non-Compete Agreements Against Sports Agents*, 5 BUS. L. 585, 586 (2003).

53. Matthew Blake, *CAA Scores for Athletes*, LA BUS. J., Aug. 30, 2019, <https://labusinessjournal.com/news/2019/aug/30/caa-scores-athletes/>.

their chances. Those who do manage to gain a foothold sometimes find themselves “loaning” money to their clients and clients’ family members, while continuously worrying those clients will be poached by the super agencies.<sup>54</sup>

As an added source of pressure, even if an NBPA-licensed agent has retained clients, the agent needs to negotiate an employment contract with an NBA team. Under NBPA rules, an agent is subject to losing his or her license if the agent does not negotiate a player contract with an NBA team at least once every five years.<sup>55</sup> This means an agent who secures clients whose talent level only attracts the interest of teams in Europe or Asia, or only the NBA’s minor league (the G League), will eventually find himself or herself up against the five-year mark.

In September 2019, another line of agent opposition to the NCAA’s proposed rules surfaced.<sup>56</sup> According to *The Athletic*’s Shams Charania, a group of NBA agents intend to boycott the taking of NCAA in-person examinations.<sup>57</sup> These agents, who were not named, contend that they should not have to take an exam administered by the NCAA when they already passed one administered by the NBPA.<sup>58</sup> As of April 2020, only twenty-four NBPA-certified agents had pursued NCAA certification whereas hundreds had taken no action.<sup>59</sup>

These numerous criticisms of NCAA’s proposed rules raise crucial questions about prerequisites for agent representation in college sports and, more broadly, limitations on employment in the modern workplace. The NCAA pledges to continually evaluate its pending agent requirements,<sup>60</sup> but is self-review sufficient to protect student athletes and agents from the harms described in these criticisms? Should the NCAA prohibit college basketball players from gaining the advice of agents who may be of a similar age and perhaps seem more relatable? Should an agent’s lack of experience in representing NBA players automatically

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54. Alex Kennedy, *An inside look at the stressful, chaotic lives of NBA agents*, HOOPSHYPE (May 8, 2017), <https://hoopshype.com/2017/05/08/an-inside-look-at-the-stressful-chaotic-lives-of-nba-agents/>.

55. NBPA REGULATIONS GOVERNING PLAYER AGENTS, *supra* note 16, at 22.

56. Jason Owens, *Report: Agencies to boycott NCAA demands that agents take tests tied to ‘Rich Paul rule,’* YAHOO! SPORTS (Sept. 5, 2019, 4:41 PM), <https://sports.yahoo.com/report-agencies-to-boycott-ncaa-demands-that-agents-take-mandatory-testing-tied-to-rich-paul-rule-234128921.html>.

57. *Id.*

58. *Id.*

59. Brad Spain, *Testing The NBA Draft Waters Will Be Much More Difficult For Prospects*, SPORTS AGENT BLOG (Apr. 6, 2020), <http://sportsagentblog.com/2020/04/06/testing-the-nba-draft-waters-will-be-much-more-difficult-for-prospects/>.

60. Press Release, NCAA, NCAA amends agent certification requirements (Aug. 12, 2019), <http://www.ncaa.org/about/resources/media-center/news/ncaa-amends-agent-certification-requirements>.

foreclose him or her from advising college students about the choice between staying in school or turning pro? Could agents who are excluded by the NCAA pursue an antitrust claim and maintain that they have been unlawfully boycotted? Alternatively, could they explore a claim under Title VII of the federal Civil Rights Act of 1964 and insist that the NCAA's agent rule unlawfully discriminates on the bases of race and sex?

## II. THE NCAA AND ITS UNIQUE BRAND OF "PROTECTING" COLLEGE ATHLETES

The NCAA and sports agents are not a necessary pairing. A brief retelling of the NCAA's history evidences that point. The NCAA is a not-for-profit entity that governs most college sports in the U.S.<sup>61</sup> Its membership includes 1,098 colleges and 102 athletic conferences.<sup>62</sup> The NCAA was founded in 1906 at the urging of President Theodore Roosevelt. Roosevelt was dismayed by the deaths of college football players.<sup>63</sup> He demanded that college presidents join hands to develop safety rules.<sup>64</sup> Stated differently, the NCAA wasn't conceived to foreclose compensation opportunities for student athletes or to draw purported lines between amateur and professional sports but to protect the physical health and safety of college athletes.

Over time, the NCAA would acquire other functions far afield from player safety. Among them is the enforcement of "amateurism," a term coined to describe NCAA rules that attempt to distinguish college athletes from professional athletes.<sup>65</sup> To that end, the NCAA's Manual defines the "principle of amateurism" as stressing "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-athletes should be protected from exploitation by professional and commercial enterprises."<sup>66</sup> A hallmark of

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61. NCAA, WHERE DOES THE MONEY GO?, <http://www.ncaa.org/about/resources/finances> (last visited Aug. 24, 2020).

62. NCAA, WHAT IS THE NCAA?, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Aug. 24, 2020).

63. Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Society*, 3 WM. & MARY BUS. L. REV. 203, 211 (2012); see also JOHN J. MILLER, *THE BIG SCRUM: HOW TEDDY ROOSEVELT SAVED FOOTBALL* (2011) (offering a comprehensive account of the relationship between President Roosevelt and college sports).

64. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 490-91 (1995).

65. Richard Morrison, *Price Fixing Among Elite Colleges and Universities*, 59 U. CHI. L. REV. 807, 821-22 (1992).

66. NCAA MANUAL, *supra* note 5, § 2.9.

amateurism is the “student-athlete,” a moniker imagined by the NCAA in the 1950s.<sup>67</sup> It was created as a litigation device in legal proceedings where players and former players argued that they were university employees within the meaning of state workers’ compensation statutes.<sup>68</sup> The term explicitly labeled the players as “students,” a designation which enabled universities to evade the reach of those statutes.<sup>69</sup>

The supposed separation of college athletes from professional sports has been the subject of much incredulity and litigation. The commercialization of college sports has often blurred meaningful demarcations between “amateur” and “professional.” The NCAA, along with coaches, athletic department staff, network executives, and numerous others—save for the players—earn considerably from college sports. The NCAA, for instance, receives approximately \$800 million each year in revenue from the Division I Men’s Basketball Tournament, better known as NCAA March Madness.<sup>70</sup> This is up from just \$1 million in 1973 and \$9 million in 1980.<sup>71</sup> The salaries of head coaches in the “Power Five” conferences, which represent the highest level of college football in the U.S., is also telling.<sup>72</sup> Their average annual salary is \$3.9 million.<sup>73</sup> High coaching salaries extend well beyond football. Among

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67. Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>.

68. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 84 (2006).

69. Kathryn Kisska-Schulze & Adam Epstein, *Northwestern, O’Bannon and The Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771, 777 (2016).

70. Darren Geeter, *March Madness makes enough money to nearly fund the entire NCAA—here’s how*, CNBC (Mar. 22, 2019, 2:45 PM), <https://www.cnn.com/2019/03/22/ncaa-march-madness-tournament-basketball.html>; see also Ben Strauss, *Disillusioned ex-NCAA investigator launches new player advocacy group*, WASH. POST (Mar. 18, 2019, 6:01 AM), <https://www.washingtonpost.com/sports/2019/03/18/disillusioned-ex-ncaa-investigator-launches-new-player-advocacy-group/> (noting that total revenue from March Madness is approximately \$1 billion).

71. Mark Francescutti, *Inside the Final Four finances: The march toward \$1 billion in revenue*, DALLAS MORN. NEWS (Apr. 3, 2014, 10:21 PM), <https://www.dallasnews.com/business/2014/04/04/inside-the-final-four-finances-the-march-toward-1-billion-in-revenue/> (expressing the 1973 revenue figure of \$1 million); STATISTA, TELEVISION REVENUE NCAA COLLEGE BASKETBALL TOURNAMENT FROM 1980 TO 2013, <https://www.statista.com/statistics/287522/ncaa-basketball-tournament-television-revenue/> (last visited Mar. 1, 2020) (expressing the 1980 revenue figure of \$9 million).

72. The Power Five conferences are the Atlantic Coast Conference (ACC), Big 12 Conference, Big Ten Conference, Pacific-12 Conference and the Southeastern Conference. For a detailed discussion on the economics of the Power Five conferences, see William W. Berry III, *Enhancing “Education”: Rebalancing the Relationship Between Athletics and the University*, 78 LA. L. REV. 197, 214-15 (2017).

73. George Schroeder, *College Football Insider: Head coaches who could make the coaching carousel spin*, USA TODAY (Oct. 5, 2018, 11:27 PM),

Power Five public colleges, head coaches in twenty-three sports other than football, men's basketball, and women's basketball saw their compensation increase by forty-three percent from 2013 to 2018, with many earning in excess of \$300,000 per year.<sup>74</sup> These salaries far exceed faculty and, in many cases, senior university administrators.<sup>75</sup> In fact, in forty of the fifty states, the highest-paid public employee is a coach at a state university rather than the governor or highest-ranking public health official.<sup>76</sup> There is no shortage of data points which communicate the same message: college sports constitute a big business.

Meanwhile, serious questions have been raised about the quality of education provided to student-athletes. Researchers have found that athletic departments routinely engage in "academic clustering," whereby they direct student-athletes to enroll in majors and other disciplines that are relatively easy and that feature courses that would not interfere with athletic commitments.<sup>77</sup> Researchers have also discovered that many students who play football or basketball can only read up to an eighth-grade level.<sup>78</sup> Other studies have found the reading level of college athletes can be as low as a fourth-grade level.<sup>79</sup> Some college athletes are even encouraged to take advantage of ghostwriters masquerading as "tutors."<sup>80</sup>

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<https://www.usatoday.com/story/sports/ncaaf/columnist/george-schroeder/2018/10/05/college-football-head-coaches-who-could-make-coaching-carousel-spin/1524761002/>.

74. Steve Berkowitz et al., *NCAA's Power 5 schools see steep raise in pay for non-revenue coaches*, USA TODAY (Aug. 13, 2019, 9:11 AM), <https://www.usatoday.com/story/sports/2019/08/12/ncaa-power-5-schools-steeply-raising-pay-non-revenue-sport-coaches/1946843001/>.

75. Zach Barnett, *Study: The 25 highest-paid university presidents vs. their coaches*, FOOTBALL SCOOP (May 19, 2014), <https://footballscoop.com/news/salary-study-the-25-highest-paid-university-presidents-vs-their-coaches/>.

76. Charlotte Gibson, *Who's Highest-Paid In Your State?*, ESPN, [http://www.espn.com/espn/feature/story/\\_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees](http://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees) (last visited Mar. 1, 2020).

77. Kristal S. Stippich & Kadence A. Otto, *Carrying a Good Joke Too Far? An Analysis of the Enforceability of Student-Athlete Consent to Use of Name & Likeness*, 20 J. LEGAL ASPECTS OF SPORT 151, 175-78 (2010); see also Geoffrey J. Rosenthal, *College Play and the FLSA: Why Student-Athletes Should be Classified as "Employees" Under the Fair Labor Standards Act*, 35 HOFSTRA LAB. & EMP. L.J. 133, 154 (2017) (describing time limitations for college athletes with respect to their academic studies).

78. Sara Ganim, *CNN analysis: Some college athletes play like adults, read like 5th-graders*, CNN (Jan. 8, 2014, 1:05 PM), <https://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/index.html>.

79. *Id.*; see also JAY SMITH & MARY WILLINGHAM, CHEATED: THE UNC SCANDAL, THE EDUCATION OF ATHLETES, AND THE FUTURE OF BIG-TIME COLLEGE SPORTS 28-29 (2015) (highlighting the use of no-show lecture courses, unauthorized grade changes and plagiarism to inflate the grades of college athletes).

80. Joe Nocera, *Academic Counseling Racket*, N.Y. TIMES (Feb. 4, 2013), <https://www.nytimes.com/2013/02/05/opinion/nocera-academic-counseling-racket.html>; see also Emily James, *Former Missouri tutor completed coursework for 12 student-athletes*,

Critics have likewise rebuked the NCAA for its measurement of student-athlete graduation rates.<sup>81</sup> Using the “Graduation Success Rate” (GSR) statistic that it introduced in 2002, the NCAA insists that Division I athletes graduated at eighty-eight percent in 2018, a fourteen percent increase from 2002 and a higher graduation rate than students who aren’t athletes.<sup>82</sup> On the surface, the NCAA has seemingly succeeded in ensuring academic success. The devil is in the details, namely the manner in which GSR is constructed. GSR omits a large data set of student athletes who transfer to another college.<sup>83</sup> Of transferees, only about one-third are included in graduation rates at their new colleges.<sup>84</sup> Studies indicate that approximately sixteen percent of all student-athletes are not counted in GSR figures.<sup>85</sup> This reveals that GSR offers a misleadingly favorable take on the propensity of student-athletes to graduate.

Individual universities have been implicated in particularly irksome controversies involving the education—or lack thereof—of athletes. In 2017, the NCAA confirmed that the University of North Carolina at Chapel Hill (UNC) had offered “fake courses” to students.<sup>86</sup> The courses generally involved no teaching.<sup>87</sup> Students would submit papers at the end of the semester and those papers would be graded easily.<sup>88</sup> These courses were offered over a twenty-year-period, with 3,100 students enrolling in them.<sup>89</sup> Of those students, forty-seven were student-athletes, about half of whom were football players.<sup>90</sup> The NCAA investigated UNC for failing to adequately monitor student-athletes’ course work.<sup>91</sup> In a report, the NCAA concluded that the courses betrayed any logical

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NCAA (Jan. 31, 2019, 12:00 PM), <http://www.ncaa.org/about/resources/media-center/news/former-missouri-tutor-completed-coursework-12-student-athletes>.

81. Brad Wolverton, *NCAA’s Graduation Rates Don’t Necessarily Prove Success*, CHRON. OF HIGHER EDUC. (Oct. 27, 2014), <https://www.chronicle.com/article/ncaas-graduation-rates-dont-necessarily-prove-success/>.

82. CHRIS MURPHY, MADNESS, INC.: HOW COLLEGES KEEP ATHLETES ON THE FIELD AND OUT OF THE CLASSROOM, <https://www.murphy.senate.gov/download/madness-inc-2> (last visited Mar. 1, 2020).

83. NCAA, GRADUATION RATES, <http://www.ncaa.org/about/resources/research/graduation-rates> (last visited Aug. 7, 2020).

84. MURPHY, *supra* note 82, at 4.

85. *Id.*

86. Chris Chavez, *Here’s What’s on the Line at UNC’s Committee on Infractions Hearing*, SPORTS ILLUSTRATED (Aug. 15, 2017), <https://www.si.com/college-basketball/2017/08/15/unc-academic-scandal-ncaa-investigation-infractions-hearings>.

87. MURPHY, *supra* note 82, at 8.

88. *Id.*

89. Chavez, *supra* note 86.

90. *Id.*

91. Jeremy Bauer-Wolf, *NCAA: No Academic Violations at UNC*, INSIDE HIGHER ED (Oct. 16, 2017), <https://www.insidehighered.com/news/2017/10/16/breaking-ncaa-finds-no-academic-fraud-unc>.

conception of “academic freedom” and traveled into the domain of academic fraud.<sup>92</sup>

The NCAA nonetheless declined to punish UNC since the courses were available to the student body at large, rather than only to student-athletes.<sup>93</sup> From that lens, the NCAA reasoned, there was no “systemic effort to impermissibly benefit student-athletes.”<sup>94</sup> This distinction, while empirically true, highlights the relative ease by which a university can lessen the burdens of college courses so that athletes can focus on athletics and not run afoul of the NCAA eligibility requirements.

UNC is hardly the only school to orchestrate academic policies that prioritize athletic achievements at the expense of academic integrity. In 2019, a tutor to student-athletes at the University of Missouri at Columbia was found to have taken online courses for twelve of the student-athletes she tutored.<sup>95</sup> A similar finding was made that year at Mississippi State University, where a tutor took exams and completed online course assignments for members of the football and men’s basketball teams.<sup>96</sup> Given that the cheating had occurred for the specific benefit of college athletes, the NCAA sanctioned both schools for academic misconduct.<sup>97</sup> These examples illuminate the incongruity of “big time” college sports, where athletes are expected to function as de facto employees of their teams while somehow meeting the academic requirements of full-time students. Illustratively, during courtroom testimony in 2014, former UCLA basketball star Ed O’Bannon bluntly observed he “was an athlete masquerading as a student.”<sup>98</sup>

The integrity of college academics has also been implicated in criminal prosecutions of college basketball coaches, sneaker company executives, and sports marketing professionals. In trials in 2018, a group of

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92. See UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL PUBLIC INFRACTIONS DECISION (Oct. 13, 2017), [http://www.ncaa.org/sites/default/files/Oct2017\\_University-of-North-Carolina-at-Chapel-Hill\\_InfractionsDecision\\_20171013.pdf](http://www.ncaa.org/sites/default/files/Oct2017_University-of-North-Carolina-at-Chapel-Hill_InfractionsDecision_20171013.pdf).

93. *Id.*

94. *Id.* at 2.

95. Doug Lederman, *NCAA Punishes Missouri in Blatant Academic Fraud Case*, INSIDE HIGHER ED (Feb. 1, 2019), <https://www.insidehighered.com/news/2019/02/01/ncaa-punishes-missouri-blatant-case-academic-fraud>.

96. Tyler Horka, *Mississippi State hit with NCAA sanctions: Tutor took exams for football, basketball players*, CLARION LEDGER (Aug. 23, 2019, 5:58 PM), <https://www.clarion-ledger.com/story/sports/2019/08/23/mississippi-state-university-athletics-academic-violations-ncaa-penalties-john-cohen-mark-keenum-msu/2041804001/>.

97. Dave Matter, *Sterk: NCAA ruling on Mississippi State shows Mizzou penalties were ‘excessive, inconsistent’*, ST. LOUIS POST-DISPATCH (Aug. 25, 2019), [https://www.stltoday.com/sports/college/mizzou/sterk-ncaa-ruling-on-mississippi-state-shows-mizzou-penalties-were-excessive-inconsistent/article\\_3897875d-dd10-5bff-984d-30e829446707.html](https://www.stltoday.com/sports/college/mizzou/sterk-ncaa-ruling-on-mississippi-state-shows-mizzou-penalties-were-excessive-inconsistent/article_3897875d-dd10-5bff-984d-30e829446707.html).

98. GERALD GURNEY ET AL., UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 74 (2017).

such persons were found guilty of conspiracy and wire and bank fraud.<sup>99</sup> They conspired in a “pay-for-play” scheme whereby they wired money to families of top recruits.<sup>100</sup> In exchange, the recruits agreed to attend colleges with teams sponsored by Adidas.<sup>101</sup> After these players turned pro at the conclusion of their collegiate experience, the bribe made them more inclined to sign endorsement deals with Adidas.<sup>102</sup> The players involved often spent only a semester and a half as college students.<sup>103</sup> That is, they played a season of college basketball, which runs from November to February or March, and then dropped out after their season ended in the spring semester. They did so to prepare for the NBA draft.<sup>104</sup> The prosecutions underscore how college can have little to do with education when the student is marketable to his or her school.

In a different light, the so-called “Operation Varsity Blues” scandal reveals how college athletics can be manipulated to procure the admissions to children of parents who bribe coaches.<sup>105</sup> The twist with Operation Varsity Blues is that the athletes were themselves “fake.”<sup>106</sup> They lacked the requisite academic credentials to be admitted into such schools as Stanford University, Georgetown University and the University of Southern California, and they weren’t star athletes, either.<sup>107</sup> But they held one (decidedly unearned) comparative advantage: their parents

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99. Marc Tracy, *Three Found Guilty in N.C.A.A. Basketball Recruiting Scheme*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/sports/ncaa-basketball-adidas-guilty.html>.

100. Rob Goldberg, *Former Nike, Adidas Employee Merl Code Jr. Alleges Both Pay NCAA Athletes*, BLEACHER REPORT (Feb. 15, 2019), <https://bleacherreport.com/articles/2821028-former-nike-adidas-consultant-merl-code-jr-alleges-both-pay-ncaa-athletes>; Tracy, *supra* note 99.

101. Tracy, *supra* note 99.

102. Brad Schmidt & Jeff Manning, *Basketball bribes: How Adidas bankrolled a black market for top teenage talent*, OREGONIAN (Feb. 3, 2019), <https://www.oregonlive.com/business/2019/02/basketball-bribes-how-adidas-bankrolled-a-black-market-for-top-teenage-talent.html>.

103. Hunter Sharf, *Golden State Warriors Defy Norm Again By Not Selecting One-And-Done In NBA Draft*, FORBES (June 23, 2017), <https://www.forbes.com/sites/hunter-sharf/2017/06/23/golden-state-warriors-defy-norm-again-by-not-selecting-one-and-done-in-nba-draft/#600730e61e21> (“Top players instead enroll for about a semester and a half, as they often drop out of class once the NCAA season is over.”).

104. Chip Alexander, *‘One and done’: How an NBA rule change helped create a mess for college basketball*, NEWS & OBSERVER (Mar. 20, 2018, 2:41 PM), <https://www.newsobserver.com/sports/college/acc/article206009149.html#storylink=cpy>.

105. Michael McCann, *Potential Fallout From The Latest FBI-Investigated College Sports Scandal*, SPORTS ILLUSTRATED (Mar. 12, 2019), <https://www.si.com/college-football/2019/03/12/admissions-scandal-fbi-investigation-ncaa-violations-felicity-huffman-lori-loughlin-rick-singer> [hereinafter McCann, *Potential Fallout*].

106. Graham Kates, *Lori Loughlin and Felicity Huffman among dozens charged in college bribery scheme*, CBS NEWS (Mar. 12, 2019, 8:35 PM), <https://www.cbsnews.com/news/college-admissions-scandal-bribery-cheating-today-felicity-huffman-arrested-fbi-2019-03-12/>.

107. *Id.*

were wealthy and willing to cheat the system.<sup>108</sup> To that end, the parents bribed college coaches, who then falsely portrayed the applicants to admissions officers as coveted student-athletes whose contributions to the university would outweigh their middling academic talents.<sup>109</sup> The admissions officers were then more inclined to admit the students who would matriculate as supposed student-athletes.<sup>110</sup> Operation Varsity Blues is further evidence that college athletics and college education often operate on separate tracks but when those tracks merge, suspicions ought to be raised.

Meanwhile, the NCAA has refrained from adopting measures that would enlarge its authority over academic fraud. In 2019, the NCAA rejected a proposed bylaw that would have made member schools accountable “for activities or conduct that clearly demonstrates a disregard for academic integrity as it relates to student-athletes.”<sup>111</sup> In private conversations, university leaders expressed concerns about conveying such authority to the NCAA over academic matters.<sup>112</sup> It is perplexing that as the NCAA plans to impose agent requirements that raise legal and social policy concerns, it has abandoned proposed reforms that are designed to combat academic shams.

### III. CHALLENGES TO AMATEURISM AND IMPACT ON AGENT CERTIFICATION

There have been three major legal challenges to amateurism over the last fifteen years. Each has impacted the NCAA’s capacity to control the access of representation to college athletes.

#### *A. Ed O’Bannon Proves Amateurism Violates Federal Antitrust Law While NCAA Pledges to Reform Name, Image and Likeness Policies*

The first major challenge was raised by Ed O’Bannon.<sup>113</sup> In 2009, O’Bannon was a thirty-six-year-old retired NBA player and a married father of three living comfortably in a Las Vegas suburb.<sup>114</sup> A former college basketball superstar and top NBA draft pick, O’Bannon had earned millions of dollars playing for NBA teams and later for European

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108. *Id.*

109. *Id.*

110. McCann, *Potential Fallout*, *supra* note 105.

111. Dan Kane, *NCAA needs more authority in academic misconduct cases, reform group says*, NEWS & OBSERVER (Feb. 1, 2019, 3:24 PM), <https://www.newsobserver.com/latest-news/article225286245.html>.

112. *Id.*

113. O’BANNON & MCCANN, *supra* note 42, at 1-6 (O’Bannon describing the moment he saw himself in the video game NCAA March Madness 09 and how it motivated him to act).

114. *Id.* at 22-23.

teams. His basketball career would end at age thirty-two after multiple knee surgeries.<sup>115</sup> O'Bannon is highly recognizable in the sports industry, in part because of the national profile he gained in 1995.<sup>116</sup> It was during that year when O'Bannon was awarded college basketball's player of the year at UCLA, which he had led to a national championship.<sup>117</sup> He appeared on the Jay Leno Show<sup>118</sup> and the sitcom *Hope & Gloria*,<sup>119</sup> and visited with President Bill Clinton at the White House.<sup>120</sup> He was also featured on the cover of *Sports Illustrated*.<sup>121</sup> O'Bannon was, in every sense of the phrase, a basketball legend. Yet by 2009, O'Bannon was long past basketball stardom.<sup>122</sup> He was thus surprised to see that the video game publisher Electronic Arts ("EA") had featured him and other former players as digital "avatars" in a new college basketball video game that had been licensed by the NCAA and sold for sixty dollars a copy.<sup>123</sup>

Granted, O'Bannon's name wasn't present in the game, but O'Bannon's jersey number, height, weight, race and talents were nonetheless present.<sup>124</sup> EA hoped that removing the names would create the illusion of avatars' anonymity though later, in pretrial discovery, it was revealed that EA had stripped the game of players' names right before publication.<sup>125</sup> Video game players could also edit the avatars to contain the basketball players' names—and, as luck would have it, an announcer in the game would then say those names.<sup>126</sup> The avatar, then, clearly represented O'Bannon.

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115. *Id.* at 153.

116. Sam Connon, *25 years later, former men's basketball players reflect on their 1995 championship*, DAILY BRUIN (Apr. 3, 2020, 5:35 PM), <https://dailybruin.com/2020/04/03/25-years-later-former-mens-basketball-players-reflect-on-their-1995-championship>.

117. *Id.*; O'BANNON & MCCANN, *supra* note 42, at 13.

118. Daily Bruin Staff, *For UCLA, the party has just begun*, DAILY BRUIN (Apr. 4, 1995, 9:00 PM), <https://dailybruin.com/1995/04/04/for-ucla-the-party-has-just-be>.

119. *Ed O'Bannon*, IMDB, <https://www.imdb.com/name/nm2258140/> (last visited Aug. 8, 2020).

120. Bob Egelko, *Ed O'Bannon takes stand in landmark NCAA suit*, SEATTLE TIMES (June 10, 2014, 1:42 PM), <https://www.seattletimes.com/sports/college/ed-orsquobannon-takes-stand-in-landmark-ncaa-suit/>.

121. O'BANNON & MCCANN, *supra* note 42, at 40.

122. Chris Chase, *NCAA Riches to NBA Rags: No. 1, Ed O'Bannon*, YAHOO! SPORTS (June 25, 2009, 10:06 AM), <https://sports.yahoo.com/blogs/ncaab-chris-chase/ncaa-riches-nba-rags-no-1-ed-obannon.html>.

123. O'BANNON & MCCANN, *supra* note 42, at 6.

124. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014).

125. O'BANNON & MCCANN, *supra* note 42, at 3.

126. See Thomas Baker, *The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity*, 35 J. LEGAL ASPECTS OF SPORT 5-6 (2010); see also *NCAA March Madness Press Kit*, IGDD, <https://www.igdd.com/games/ncaa-march-madness-07/presskit> (last visited Oct. 18, 2020).

O'Bannon had never given permission for his image and likeness to appear in the game.<sup>127</sup> He soon filed a complaint in the U.S. District Court for the Northern District of California against the NCAA and EA, arguing that they had violated his right of publicity under California law and Section 1 of the Sherman Antitrust Act.<sup>128</sup> O'Bannon's core argument was that the defendants had prevented him and other former college players from negotiating the commercial use of their names, images and likenesses in video games, trading cards, apparel and re-broadcasts of "classic games."<sup>129</sup>

In this context, the individual members of the NCAA—the colleges and conferences—constitute the competing businesses. They are subject to the Section 1 requirement that they not constrain competition in ways that are more anti-competitive than procompetitive.<sup>130</sup> As O'Bannon argued, these competing colleges and conferences had conspired to set the value available to college players for use of their identities at zero dollars.<sup>131</sup> O'Bannon's complaint was eventually certified as a class action.<sup>132</sup>

O'Bannon stressed the troubling racial implications of rules designed to deprive players of licensing revenue from the use of their names and likenesses.<sup>133</sup> He emphasized that the vast majority of revenue generated through NCAA sports is derived from Division I men's basketball and Division I Football Bowl Subdivision football, both of which are comprised mostly of Black players.<sup>134</sup> Revenue generated through these players' labor, names, images and likenesses primarily

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127. O'BANNON & MCCANN, *supra* note 42, at 3; *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

128. *O'Bannon v. NCAA*, No. C 09-3329 CW, 2009 U.S. Dist. LEXIS 122205 (N.D. Cal. Dec. 11, 2009).

129. *Id.*

130. See generally Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 874 (2010); see also Malcolm B. Coate, *Efficiencies in Merger Analysis: An Institutional View*, 13 SUP. CT. ECON. REV. 189, 191 (2005) (discussing anti-competitive effects).

131. O'BANNON & MCCANN, *supra* note 42, at 34; *O'Bannon*, 802 F.3d at 1057-58.

132. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at \*10 (N.D. Cal. Nov. 8, 2013) (citing Order Granting in Part and Denying in Part Motion for Class Certification, *id.* at \*23 n.4); see also Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2325 (2014) (discussing impact of certification).

133. O'BANNON & MCCANN, *supra* note 42, at 88-89.

134. *Id.* at 88; see also Vince Thompson, *NCAA can embrace logic of NIL, take progressive action*, SPORTS BUS. J. (Nov. 4, 2019), <https://www.sportsbusinessdaily.com/Journal/Issues/2019/11/04/Opinion/Thompson.aspx> (noting that football and men's basketball generate ninety-five percent of revenue).

benefits coaching staffs, athletic departments and university leaderships.<sup>135</sup>

In response to O'Bannon's arguments, the NCAA asserted that his claims were barred by amateurism, specifically its prohibition of college athletes receiving compensation other than reimbursement for tuition, room, board, books and related costs of education.<sup>136</sup> The NCAA drew on the language of U.S. Supreme Court Justice John Paul Stevens, who in 1984 held that

the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports . . . there can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics.<sup>137</sup>

This oft-cited passage from *NCAA vs. Board of Regents* is routinely used to profess that amateurism exempts the NCAA from the normal rigors of antitrust scrutiny.<sup>138</sup> In *Board of Regents*, the Supreme Court held that while antitrust laws forbid the NCAA from restricting colleges' television contracts, the NCAA implicitly enjoyed the right to restrain competition in other ways—including through the prohibition of college athlete pay.<sup>139</sup>

Justice Byron White, who remains the only person to have served on the highest court in the land and play in the NFL, offered a memorable dissent in *Board of Regents*.<sup>140</sup> In it, he warned of a future college sports landscape where commercialization would easily eclipse education.<sup>141</sup> Thirty-six years later, Justice White's admonition has proven prophetic. Each year billions of dollars are spent on broadcasts, licenses, arenas, facilities, coaches, trainers, and numerous other beneficiaries orbiting the lives of unpaid college athletes.<sup>142</sup> Colleges can recruit athletes by spending on virtually everything *around* the athlete, but not on the

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135. MURPHY, *supra* note 82, at 6.

136. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

137. NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

138. Michael A. Carrier & Marc Edelman, *College Athletics: The Chink in the Seventh Circuit's "Law and Economics" Armor*, 117 MICH. L. REV. ONLINE 90, 92-95 (2019).

139. *Bd. of Regents*, 468 U.S. at 120.

140. See Stanley Kay, *The Highest Court in the Land*, SPORTS ILLUSTRATED (July 25, 2018), <https://www.si.com/nba/2018/07/25/supreme-court-building-basketball-court> (discussing Justice White's sports and legal careers).

141. *Bd. of Regents*, 468 U.S. at 135-37.

142. See Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

athlete himself or herself.<sup>143</sup> This framework has led to spending wars between colleges with major athletics programs, where they are free to compete except through direct payment to recruits.<sup>144</sup>

O'Bannon prevailed, albeit in a targeted way. He negotiated a settlement with EA whereby EA agreed to pay about \$40 million to more than 29,000 current and former players.<sup>145</sup> These players received a check worth up to \$7,200, depending on the number of times they appeared in video games.<sup>146</sup> O'Bannon also defeated the NCAA in court. U.S. District Judge Claudia Wilken held that, under Section 1 of the Sherman Act, the NCAA and its members cannot conspire to use college players' names, images and likenesses in video games and other commercial products without their consent.<sup>147</sup> The victory was constrained on appeal, when the U.S. Court of Appeals for the Ninth Circuit limited the remedy.<sup>148</sup> Specifically, the Ninth Circuit held that colleges can comply with Section 1 by being able to provide up to the full cost of attendance—an amount that is normally between \$3,000 and \$6,000 per academic year and reflects cost of living and other factors.<sup>149</sup>

The NCAA has not changed its core rules denying players the right to negotiate contracts with third parties, be they video game publishers or clothing manufacturers, for the use of those players' names, images, and likenesses ("NIL").<sup>150</sup> One such rule is Bylaw 12 of the NCAA's Division I Manual.<sup>151</sup> It warns that a college student becomes ineligible for any sport if, after enrolling in college, he or she accepts pay for promoting a product or service or allows his or her name or picture to be

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143. See LeRoy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 272 (1993) (explaining how college athletes comprise the one group in the college sports economy without an organization designed to ensure access to benefits).

144. See Mark Schlabach, *Inside Georgia's \$200 million quest to take down Alabama*, ESPN (Sept. 20, 2019), [https://www.espn.com/college-football/story/\\_/id/27647608/inside-georgia-200-million-quest-take-alabama](https://www.espn.com/college-football/story/_/id/27647608/inside-georgia-200-million-quest-take-alabama) (illustrating a spending war between the football programs for the University of Georgia and the University of Alabama).

145. O'BANNON & MCCANN, *supra* note 42, at 167; SI Wire, *Judge approves \$60 million video games settlement*, SPORTS ILLUSTRATED (July 17, 2015), <https://www.si.com/college/2015/07/17/ncaa-video-game-60-million-settlement>.

146. O'BANNON & MCCANN, *supra* note 42, at 167.

147. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

148. O'Bannon v. NCAA, 802 F.3d 1049, 1075-76 (9th Cir. 2015).

149. *Id.*; see also Michael McCann, *Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019), <https://www.si.com/college/2019/03/09/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins> (discussing range of typical full cost of living stipend); Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12> (noting inputs for full cost of attendance) [hereinafter McCann, *What's Next*].

150. NCAA MANUAL, *supra* note 5, § 12.

151. NCAA MANUAL, *supra* note 5, § 12.5.2.1.

used for promoting a product or service.<sup>152</sup> Ineligibility in a sport is more consequential than merely sitting out games and practices. It endangers a student-athlete's scholarship, the loss of which could make attending college financially unaffordable for the student-athlete.<sup>153</sup>

In October 2019, the NCAA signaled openness to revisiting its longstanding opposition towards student-athletes licensing their NIL.<sup>154</sup> The NCAA announced it is contemplating concepts to provide "opportunities" for college athletes to "benefit" from the licensing of their identities in ways that are consistent with amateurism.<sup>155</sup> It is unclear whether such opportunities would authorize pay and, if so, how or whether payments would be restricted.<sup>156</sup>

For instance, student athletes might be able to sign endorsement deals or group licensing contracts and accrue earnings while they play college sports, but they would need to exhaust their NCAA eligibility before gaining permission to receive payments. Another possibility is that student-athletes would be able to spend NIL earnings pursuant to highly restricted terms. For example, they might be limited to purchases of items that meet qualifying "academic" conditions, such as goods sold in the college bookstore.

Compliance officers at schools might also be empowered to approve or reject a student-athlete's pending endorsement deal. Imagine a student-athlete enrolled at a religiously affiliated university. Now envision this student-athlete wishing to sign an endorsement deal with a company that espouses values which conflict with those of the university and its mission. It is conceivable that this "opportunity to benefit" would be rejected.

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152. *Id.* (instructing that college athletes are barred from both accepting "any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind" and receiving "remuneration for endorsing a commercial product or service through the individual's use of such product or service").

153. See Benjamin A. Menzel, *Heading Down the Wrong Road?: Why Deregulating Amateurism May Cause Future Legal Problems for the NCAA*, 12 MARQ. SPORTS L. REV. 857, 866 (2002) (discussing how a prospective student-athlete can lose the award of a scholarship if he or she is later deemed ineligible).

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

155. *Id.*

156. Michael McCann, *Key Questions, Takeaways From the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions> [hereinafter McCann, *Key Questions*].

Notably, the NCAA's announcement omitted reference to college players being able to hire agents, a practice long barred by the NCAA.<sup>157</sup> Denying college players the ability to hire agents would limit players' access to the agents' expertise in business dealings and negotiation of NIL contracts.<sup>158</sup>

In April 2020, the NCAA announced that its Board of Governors—the highest governing body of college sports—supports modification of existing NCAA rules in order to permit college players to sign endorsement deals.<sup>159</sup> Although rule changes have not been adopted, it is expected that college players will be able to receive endorsement compensation while in school.<sup>160</sup> However, the Board of Governors opposes group licensing for college athletes in the short-term and remains silent on the question of agents.<sup>161</sup> The three divisions of college sports, Division I, II and III, are expected to adopt rules by January 2021, with changes going into effect at the start of the 2021-22 academic year.<sup>162</sup>

### *B. College Athletes not Declared Employees but Landscape is Shifting*

The second major challenge to amateurism in college sports occurred in 2014 when a group of Northwestern University football players petitioned the National Labor Relations Board (“NLRB”) for recognition as employees.<sup>163</sup> The players argued that their collegiate experience was tantamount to an employee-employer existence.<sup>164</sup> They stressed that they devoted between fifty and sixty hours per week to football-related activities, including playing, traveling, practicing, and training.<sup>165</sup>

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157. *Board of Governors starts process*, *supra* note 154.

158. McCann, *Key Questions*, *supra* note 156.

159. Board of Governors moves toward allowing student-athlete compensation for endorsements and promotions, NCAA (Apr. 29, 2020, 8:30 AM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions> [hereinafter *Board of Governors moves toward allowing student-athlete compensation*].

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

161. *Board of Governors moves toward allowing student-athlete compensation*, *supra* note 159; Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games—So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020), <https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing>.

162. *Board of Governors moves toward allowing student-athlete compensation*, *supra* note 159.

163. Nw. Univ., 362 N.L.R.B. No. 167, at 1350 (2015).

164. *Id.*

165. *Id.* at 1358; *see also* George J. Bivens, *NCAA Student Athlete Unionization: NLRB Punts on Northwestern University Football Team*, 121 PENN ST. L. REV. 949, 967-69 (2017) (detailing the players' rationales).

Further, Northwestern football players' management of time while functioning as college students—including which courses they took—was prioritized on account of obligations to the team.<sup>166</sup> This led the players to compare themselves to graduate teaching assistants, who have been recognized as employees under the National Labor Relations Act (“NLRA”).<sup>167</sup> Both college athletes and graduate teaching assistants enjoy a multipurpose relationship with their universities in that both function as students and workers. This hybrid relationship could mean they are owed minimum wage, overtime pay, and other benefits accorded to more conventional categories of workers.<sup>168</sup>

The five-member NLRB unanimously declined to exercise jurisdiction and therefore dismissed the players' petition.<sup>169</sup> The NLRB reasoned that it would be inappropriate to render a decision in light of “the situation of scholarship players” being subject to “change in the near future.”<sup>170</sup> The NLRB also suggested that it “would not promote stability in labor relations” if players at public universities, which are governed by state law, are employees whereas those at private universities, which are governed by the NLRA, are not.<sup>171</sup> The NLRB's unwillingness to exercise jurisdiction with respect to college athletes surprised some observers of the NLRB, particularly since the NLRB had ruled on the similar question of whether graduate assistants and teaching assistants at both public and private universities ought to be classified as employees.<sup>172</sup>

The Northwestern decision does not change the potential value of agents to college athletes. Those athletes could gain from the advocacy and strategy of seasoned business professionals in regard to when, and if, to turn pro—and, should college athletes obtain NIL rights, how to

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166. Nw. Univ., 362 N.L.R.B. No. 167.

167. See Steven L. Willborn, *College Athletes as Employees: An Overflowing Quiver*, 69 U. MIAMI L. REV. 65, 72-75 (2014).

168. See generally McCormick & McCormick, *supra* note 68 (advocating that college athletes fit any sensible definition of employee given their commitments to their schools and the manner in which their time is structured).

169. Nw. Univ., 362 N.L.R.B. No. 167 at 1350.

170. *Id.* at 1355.

171. *Id.*; see also Michael McCann, *Breaking down implications of NLRB ruling on Northwestern players union*, SPORTS ILLUSTRATED (Aug. 17, 2015), <https://www.si.com/college-football/2015/08/17/northwestern-football-players-union-nlr-ruling-analysis> (discussing unintended and undesired consequences for college sports if public and private universities featured different rules for paying players).

172. See generally Sheldon D. Pollack & Daniel V. Johns, *Northwestern Football Players Throw a “Hail Mary” but the National Labor Relations Board Punts: Struggling to Apply Federal Labor Law in the Academy*, 15 VA. SPORTS & ENT. L.J. 77 (2015); see also McCann, *Legal Challenges Await*, *supra* note 160 (speaking with a person who is familiar with the NLRB who believed the NLRB “blinked under some very bright lights”).

negotiate endorsement and licensing contracts. Further, the decision does not foreclose the possibility that students at public universities could pursue employee status under respective state laws. Although the NLRA governs private employers—including private universities—public employers are governed by state laws. As commentators have noted, certain states' labor laws appear more favorable to recognition of college athletes as employees than does the NLRA.<sup>173</sup>

While college athletes have been unable to gain recognition as university employees, they have used litigation to narrow the scope of NCAA restrictions on student compensation from universities. This is most apparent in *Alston v. NCAA*, also known as the Grant-in-Aid Cap Antitrust Litigation.<sup>174</sup> The case concerned the legality of college programs adhering to amateurism rules that cap the value of athletic scholarships to tuition, room, board and books to levels consistent with other students at the school.<sup>175</sup> The plaintiffs contended that athletic scholarships should be priced in accordance with the competitive marketplace of universities' athletic programs competing against one another.<sup>176</sup> Put more concretely, if several top college football programs recruit the same high school star athlete, those schools—which are competing businesses—should be precluded from colluding, through amateurism, to cap how much they can offer in athletic scholarships.<sup>177</sup> Competitive bidding should occur, particularly in light of competition in numerous other facets of the game, including with respect to salaries of coaches and stadium amenities.

Following a bench trial in late 2018, Judge Wilken permanently restrained the NCAA from agreeing to limit education benefits for student-athletes when those benefits are related to “computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation but nonetheless related to the pursuit of academic studies.”<sup>178</sup> In addition, the NCAA will be barred from

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173. See, e.g., Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1645-48 (2017) (detailing how college athletes in Wisconsin, Florida, Massachusetts, Nebraska, and Oregon contain labor laws that constructed as more inclusive of employee recognition than the NLRA).

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

175. *Id.* at 1244-45.

176. Consolidated Complaint at 1-2, *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 2541, 2014 U.S. Dist. LEXIS 115122 (N.D. Cal. July 11, 2014), ECF No. 61.

177. See *id.* at 6-7.

178. Michael McCann, *Why the NCAA Lost Its Latest Landmark Case in the Battle Over What Schools Can Offer Athletes*, SPORTS ILLUSTRATED (Mar. 8, 2019),

denying expenses spent on tutoring.<sup>179</sup> However, Judge Wilken's ruling permits the NCAA to prohibit "cash for grades" and similar pay instruments in that the NCAA can continue to restrict academic or graduation awards and related incentives that are linked to pay.<sup>180</sup> The NCAA has appealed the ruling, which has been stayed pending appeal.<sup>181</sup>

### C. *The Fallout of California Enacting the Fair Pay to Play Act*

The third challenge to amateurism is one that could significantly impact agents. California is the first of several states which have or are likely to adopt a statute that requires colleges to permit their student athletes to hire agents and negotiate the commercial use of their NIL.<sup>182</sup> In September 2019, California Governor Gavin Newsom signed the Fair Pay to Play Act.<sup>183</sup> The Act, which goes into effect in 2023, empowers athletes enrolled at California universities to hire agents, sign endorsement deals, negotiate for inclusion in video games, enter into contracts with apparel companies, and sponsor camps in exchange for financial compensation.<sup>184</sup> For that reason, it largely takes O'Bannon's victory and enshrines it in California law. Legislators in Florida, Illinois, New York, South Carolina, Nevada, Pennsylvania, Colorado, Kentucky, and Minnesota have proposed, or plan to propose, similar bills.<sup>185</sup>

California's Act is nonetheless vulnerable to arguments that it would unduly interfere with interstate commerce under Article I, Section

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<https://www.si.com/college-football/2019/03/08/ncaa-antitrust-lawsuit-claudia-wilken-alston-jenkins>.

179. *Id.*

180. *Id.*

181. *Id.*

182. Jon Wilner, *Hotline newsletter: Washington and Colorado (and others) move to NIL compensation, Larry Scott as you haven't heard him, and more*, MERCURY NEWS (Oct. 4, 2019, 11:24 AM), <https://www.mercurynews.com/2019/10/04/hotline-newsletter-washington-and-colorado-and-others-move-to-nil-compensation-larry-scott-as-you-havent-heard-him-and-more/>.

183. CAL. EDUC. CODE § 67456 (2020); Jack Kelly, *Newly Passed California Fair To Play Act Will Allow Students Athletes To Receive Compensation*, FORBES (Oct. 1, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#751ead657d02>.

184. Jack Kelly, *Newly Passed California Fair To Play Act Will Allow Students Athletes To Receive Compensation*, FORBES (Oct. 1, 12:36 PM), <https://www.forbes.com/sites/jackkelly/2019/10/01/in-a-revolutionary-change-newly-passed-california-fair-pay-to-play-act-will-allow-student-athletes-to-receive-compensation/#751ead657d02>; Michael Shapiro, *LeBron James Calls for Support of California Student Athlete Compensation Bill*, SPORTS ILLUSTRATED (Sept. 5, 2019), <https://www.si.com/nba/2019/09/05/lebron-james-california-student-athlete-compensation-bill-sb-2016>.

185. McCann, *Key Questions*, *supra* note 156.

8 of the U.S. Constitution.<sup>186</sup> In general, the Commerce Clause empowers Congress with the exclusive power to regulate interstate commerce.<sup>187</sup> In interpreting the Commerce Clause, courts have identified a “Dormant Commerce Clause,” a judicial interpretation that states are barred from regulating the economy in ways that would significantly impact the economies of other states.<sup>188</sup>

The NCAA used the Commerce Clause to defeat an attempt by the State of Nevada to empower college students and college administrators with more procedural rights than were recognized by the NCAA.<sup>189</sup> In the early 1990s, Nevada adopted a series of measures in response to the NCAA sanctioning the University of Nevada at Las Vegas in a much-publicized basketball recruiting scandal.<sup>190</sup> One measure required that athletic association disciplinary hearings must be conducted by an “impartial” tribunal.<sup>191</sup> This policy conflicted with NCAA rules, which gave authority to discipline to the NCAA’s own Committee on Infractions.<sup>192</sup>

In *NCAA v. Miller*,<sup>193</sup> the U.S. Court of Appeals for the Ninth Circuit held that Nevada’s attempts to add due process protections that exceeded those enjoyed by NCAA member schools in other states interfered with the NCAA’s capacity to establish national and uniform rules.<sup>194</sup> Judge Ferdinand Fernandez highlighted Nevada’s added protections would necessarily compel the NCAA to change its national rules to comport to those in Nevada.<sup>195</sup> This is because, as a national governing entity, the NCAA needs to treat member schools equally.<sup>196</sup>

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186. U.S. CONST. art. I, § 8; see *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 382-83, 395 (1983) (discussing dormant commerce clause as applied in California and, by inference, suggesting NCAA would need to follow the rules of a single state if Fair Pay to Play Act became law).

187. “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .” U.S. CONST. art. I, § 8, cl. 3; see also David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 46-47 (2006) (discussing relationship between interstate commerce and federalism).

188. See generally Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); see also John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 929-31 (2014) (detailing application of the Dormant Commerce Clause by the U.S. Supreme Court).

189. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

190. Debra D. Burke & Angela J. Grube, *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L.J. 265, 290, 290 n.134 (2011).

191. NEV. REV. STAT. § 398.195 (1991).

192. Glenn Wong et al., *The NCAA’s Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47, 53-55 (2009).

193. *Miller*, 10 F.3d at 633.

194. *Id.* at 639-40.

195. *Id.*

196. *Id.*

In opposing the Fair Pay to Play Act, the NCAA is also poised to draw support from the California Supreme Court's 1983 ruling in *Partee v. San Diego Chargers*.<sup>197</sup> In *Partee*, an NFL player challenged collectively bargained rules concerning hours, wages, and other working conditions of NFL players.<sup>198</sup> Those rules were exempt from scrutiny under Section I of the Sherman Act due to the non-statutory labor exemption.<sup>199</sup> The exemption adheres to a series of Supreme Court decisions which collectively instruct that when management and labor bargain workplace rules, those rules—irrespective of whether they could be termed “anti-competitive”—ought to fall outside the scope of Section I.<sup>200</sup> The exemption is premised on the idea that labor and management should be rewarded for collaborating on the creation of workplace arrangements.<sup>201</sup>

Dennis Partee insisted that collectively bargained rules can still violate California's state antitrust law, known as the Cartwright Act, when those rules unduly constrain players' earning opportunities.<sup>202</sup> This is true, Partee insisted, when competing NFL teams agree to not tamper.<sup>203</sup> In the sports industry, “tampering” refers to officials of one team contacting players who are employed by other teams to let them know they are interested in hiring them.<sup>204</sup> “Tampering” has a negative

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197. *Partee v. San Diego Chargers Football Co.*, 34 Cal. 3d 378, 385 (1983).

198. *Id.*

199. See Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, OXFORD HANDBOOK OF AM. SPORTS L. 209-24 (Feb. 2018), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190465957.001.0001/oxfordhb-9780190465957-e-10?print=pdf> (Michael A. McCann ed., 2018) (detailing the relationship between collective bargaining in pro leagues and application of antitrust law).

200. See *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657, 664-65 (1965); see also Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 58-63 (1986) (discussing the legal history of the nonstatutory labor exemption).

201. See, e.g., *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (“The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws.”); see also Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 185-86 (2001) (suggesting that professional baseball players have historically received significantly higher compensation, relative to other workers in the economy, when bargaining as a union rather than individually).

202. CAL. BUS. & PROF. CODE § 16720 (Deering, LEXIS through 2020 Sess.); *Partee*, 34 Cal. 3d at 389-90.

203. *Partee*, 34 Cal. 3d at 381 n.2, 389-90.

204. Each major professional league defines “tampering” in its own words, but the NBA's definition is especially instructive:

connotation. For one, it derives from the word “tamper,” which *Merriam-Webster* defines as “to interfere so as to weaken or change for the worse.”<sup>205</sup> Tampering also elicits criticism from league officials as obstructing their efforts to assure fans that teams respect one another.<sup>206</sup> Yet viewed from a different light, “tampering” is merely a pejorative word for healthy competition amongst employers for the services of skilled employees.<sup>207</sup> While leagues frown upon such competition—“tampering”—the U.S. Department of Justice has opined that “no poach” agreements among competing employers are presumed unlawful under federal antitrust law.<sup>208</sup> Such agreements diminish the freedom of movement for workers.<sup>209</sup>

Courts have not resolved whether a prohibition on tampering in professional sports violates the Cartwright Act. The Cartwright Act largely mimics the Sherman Act but is “broader in range and deeper in reach.”<sup>210</sup> The non-statutory labor exemption does not govern state antitrust laws and thus does not apply to the Cartwright Act.<sup>211</sup> Furthermore, the

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No person may, directly or indirectly, (i) entice, induce, persuade, or attempt to entice, induce or persuade, any Player who is under contract to, or whose exclusive negotiating rights are held by, any other Member of the Association to enter into negotiations for or relating to his services or negotiate or contract for such services or (ii) otherwise interfere with any such employer-employee relationship (or prospective employer-employee relationship in the case of a Player subject to exclusive negotiating rights) of any other Member of the Association.

NBA, CONST. AND BYLAWS OF THE NATIONAL BASKETBALL ASSOC., ART. 35A, § (f) (2012).

205. *Tamper*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/tamper> (last visited Mar. 1, 2020).

206. See, e.g., Candace Buckner, *Adam Silver on NBA's stricter tampering rules: Fans 'were losing confidence in our system,'* WASH. POST (Sept. 26, 2019, 1:47 PM), <https://www.washingtonpost.com/sports/2019/09/26/adam-silver-nbas-strict-tampering-rules-fans-were-losing-confidence-our-system> (quoting NBA commissioner Adam Silver, “what we were hearing back from our fans was that to a certain extent, they were losing confidence in our system and at the end of the day, that’s part of what we’re selling. It’s a competition but along a set of rules.”).

207. See Robert J. Pelletier, *The National Tampering League*, 52 SUFFOLK U. L. REV. 525, 540-45 (2019) (discussing the contrast of pro leagues’ tampering rules with normal competition between employers in the U.S. workplace for skilled employees).

208. Michael A. Lindsay, *McDonald's and Medicine: Developments in the Law of No-Poaching and Wage-Fixing Agreements*, 33 ANTITRUST MAG. 18 (2019) (citing Statement of Interest of the United States at 4, *In re Railway Industry Employees No-Poach Antitrust Litig.*, Civil No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019) (No. 158)).

209. Robert W. Gomulkiewicz, *Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation*, 49 U.C. DAVIS L. REV. 251, 261 (2015).

210. Sean P. Gates, *California Antitrust: Standing Room for the Wrongfully Discharged Employee?*, 47 HASTINGS L.J. 509, 530 (1996).

211. Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277, 297 (2015).

Sherman Act does not preempt state antitrust laws.<sup>212</sup> Those factors reflected favorably on *Partee*'s case.

The California Supreme Court, however, declined to consider whether a Cartwright Act violation had occurred.<sup>213</sup> The court held that application of the Cartwright Act in the context of collectively bargained policies would unreasonably burden interstate commerce and thus violate the Commerce Clause.<sup>214</sup> Writing for the Court, Justice Allen Broussard enunciated reasoning that resembles the logic of Judge Fernandez offered in *Miller* a decade later. Broussard stressed that the NFL cannot effectively function as a national entity in the absence of harmonious policies.<sup>215</sup> "The necessity of a nationwide league structure for the benefit of teams and players for effective competition," Broussard observed, "is evident as is the need for a nationally uniform set of rules."<sup>216</sup> In that same vein, Broussard warned that should California accord new rights to NFL players employed by NFL franchises, the NFL would be shoehorned into offering those rights to all NFL players: "Fragmentation of the league structure on the basis of state lines would adversely affect the success of the competitive business enterprise, and differing state antitrust decisions if applied to the enterprise would likely compel all member teams to comply with the laws of the strictest state."<sup>217</sup>

*Miller* and *Partee* would prove advantageous to the NCAA should it challenge the Fair Pay to Play Act in court. The rulings affirm a core NCAA postulation that it cannot effectively function as a national entity in the absence of the ability to enforce national rules.<sup>218</sup> To that point, the NCAA could credibly highlight the inconsistent obligations of legislative proposals governing NIL in other states. Some of those proposals feature important variances from the Fair Pay to Play Act. These variances, the NCAA would contend, hinder the organization's ability to identify a harmonized, national approach to NIL. New York's proposed legislation, for example, features a requirement that an injured athlete account be adopted and funded through NIL revenues and that schools

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212. See *California v. ARC Am. Corp.*, 490 U.S. 93, 105-106 (1989) (holding "[o]rdinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law").

213. *Partee*, 34 Cal. 3d at 384-85.

214. *Id.* at 410.

215. *Id.* at 384-85.

216. *Id.* at 384.

217. *Id.*

218. See Josephine R. Potuto & Matthew J. Mitten, *Comparing NCAA and Olympic Athlete Eligibility Dispute Resolution Systems in Light of Procedural Fairness and Substantive Justice*, 7 HARV. J. SPORTS & ENT. L. 1, 8 (2016) (discussing the "unique need" of sports, including the NCAA, to feature uniform rules).

must share licensing revenue with its athletes.<sup>219</sup> These constraints envision the NIL relationship as between the athlete, his or her school and third party licensees—in other words, the “school” enters the NIL relationship in a way that the Fair Pay to Play Act does not contemplate. The NCAA could persuasively maintain that a patchwork approach of conflicting states’ NIL statutes would make it impossible for the NCAA to comply with the laws of each and every state.<sup>220</sup>

On the other hand, *Miller* and *Partee* could be distinguished from California creating a statutory right for college athletes to be able to negotiate with third parties through the Fair Pay to Play Act. *Miller* involved procedural and fairness assurances related to NCAA allegations of misconduct.<sup>221</sup> *Partee*, meanwhile, centered on the economic relationship between NFL players and their employing NFL teams.<sup>222</sup> The Fair Pay to Play Act, in contrast, concerns the rights of college athletes outside of their responsibilities to their school, conference, and the NCAA.<sup>223</sup> Stated differently, the “commerce” implicated through the Fair Pay to Play Act is contained within the relationship between college athletes and entities that fall outside of the boundaries of amateurism.<sup>224</sup>

In addition, the NCAA has, to some degree, conceded some ground on the claim that uniform rules are necessary for amateurism to properly function. Most notably, the NCAA has relaxed the relationship between amateurism and college athletes who earn Olympic medals, prize money, and stipends.<sup>225</sup> Those athletes are permitted to accept prize payments from the U.S. Olympic Committee for medal wins at the Olympics, World Championships, and other competitions without jeopardizing their amateurism status.<sup>226</sup> Likewise, they can accept various “commemorative items” including mobile phones, earbuds, footwear,

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219. N.Y. Collegiate Athletic Participation Compensation Act, S.B. S6722B, 2019-2020 Reg. Sess. (N.Y. 2019).

220. See Erin Tanimura, *Pacific Merchant II’s Dormant Commerce Clause Ruling: Expanding State Control Over Commerce Through Environmental Regulations*, 47 U.C. DAVIS L. REV. 419, 430 (2013) (noting that the original purpose of the Commerce Clause was to avoid a patchwork system of divergent state rules on commerce); see also Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 792 (2001) (discussing how a patchwork of states’ Internet regulations violated the Commerce Clause and why that finding could be raised in other industries impacted by conflicting state laws).

221. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

222. *Partee v. San Diego Chargers Football Co.*, 668 P.2d 674, 679 (1983).

223. McCann, *What’s Next*, *supra* note 149.

224. *Id.*

225. See Tyler Dumler, *Amateurism Interplay Between Olympic Excellence and NCAA Eligibility*, 15 U. DENV. SPORTS & ENT. L. J. 27, 32-35 (2013) (discussing multiple NCAA modifications to rules that permit Olympic athletes who are college students to earn in ways that would otherwise run afoul of amateurism).

226. *Id.*

and apparel, and are allowed to receive training stipends and various payments for travel, room and board, and health expenses.<sup>227</sup>

Olympic athletes are not the only beneficiaries of NCAA deviations from a mostly absolutist view of amateurism. For instance, prior to full-time enrollment in college, tennis players can retain up to \$10,000 in annual prize money while maintaining amateur status.<sup>228</sup> After enrolling, college tennis players can accept prize money at tournaments provided the prize does not exceed necessary expenses for tournament participation.<sup>229</sup> Meanwhile, colleges in Power Five conferences can admit and enroll high school baseball players who are drafted by Major League Baseball teams and who hire agents.<sup>230</sup> With the NCAA's blessing, these conferences have agreed to expand the scope of allowable representation without triggering amateurism violations.<sup>231</sup> If the player declines to sign and instead goes to college, he must terminate his contract with the agent.<sup>232</sup> Other types of college athletes would forfeit their eligibility by hiring an agent. These concessions are narrow. They also do not vary by state, which would be a manifestation of divergent NIL statutes. Still, they undermine the NCAA's capacity to persuasively assert that uniform policies for college athletes are an essential ingredient for amateurism.

With uncertainty over the compatibility of states' NIL statutes and the Commerce Clause, national legislation for NIL might prove to be a super vehicle. To that end, U.S. Rep. Mark Walker has introduced House Resolution 1804, also known as the "Student-Athlete Equity Act" (Equity Act).<sup>233</sup> The Equity Act proposes that the Internal Revenue Code

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227. NCAA MANUAL, *supra* note 5, § 12.1.2.4.13 (discussing amateurism exception for "[c]ommemorative Items for Student-Athletes Participating in Olympic Games, World University Games (Universiade), World University Championships, Pan American Games, World Championships and World Cup Events").

228. *Id.* §§ 12.1.2.4.1, 12.1.2.4.2; *see also* *Division I Proposal-2007-23-A*, NCAA, <https://web3.ncaa.org/lstdbi/search/proposalView?id=2086> (last visited Aug. 16, 2020). In 2007, the Student-Athlete Reinstatement Committee opposed the change that would allow tennis players to receive up to \$10,000: "The committee does not see a compelling reason to support allowing tennis players to accept prize money up to \$10,000. The prohibition on acceptance of money for an individual's athletics ability is a fundamental principle of amateurism. Carving out an exception for tennis would create a major shift in the Association's amateurism principle." *Id.*

229. NCAA MANUAL, *supra* note 5, § 12.1.2.4.1, 12.1.2.4.2.

230. Glenn M. Wong & Christopher R. Deubert, *Eligibility Rules in Professional Sports*, OXFORD HANDBOOK OF AM. SPORTS L. 240-41 (Michael A. McCann ed., 2018).

231. Eric Olson, *Advisers aid baseball prospects, might do same in basketball*, ASSOCIATED PRESS (May 8, 2018), <https://ap-news.com/19e80dcc5b2a472ca50ff25c05029af7/Advisers-aid-baseball-prospects,-might-do-same-in-basketball>; *see also* Austin Malinowski, *The Adidas College Basketball Scandal and its Aftermath*, 30 MARQ. SPORTS L. REV. 243, 261 (2019) (discussing context of these rule changes with respect to NCAA operations).

232. Wong & Deubert, *supra* note 230, at 240-41.

233. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

of 1986 be amended to condition the NCAA's status as a non-profit to the NCAA permitting college athletes to gain compensation for their names, images, and likenesses.<sup>234</sup> If the Equity Act became law, it would avoid potential Commerce Clause challenges since it would establish uniform NIL rules for college sports in the U.S.<sup>235</sup>

#### IV. THE HAZY LEGAL FRAMEWORK FOR NCAA AGENT CERTIFICATION

This Article has analyzed an evolving space for the commercialization of college athletes' labor and identities. While the NCAA opposes athletes receiving monies that exceed categories of allowable reimbursements, there is increasing external pressure on the NCAA to revisit its resistance.<sup>236</sup> Today's system of amateurism will likely transform as the 2020s play out.

The roles played by agents in this changing world are likewise mutable. NCAA rules currently permit the work of "advisors" to counsel college athletes. These advisors are often agents.<sup>237</sup> Advisors cannot be compensated for future services and cannot represent an athlete in negotiations for a contract.<sup>238</sup> An advisor can, however, discuss the merits of a possible contract and guide the athlete's parents as well as the athlete himself or herself through the decision-making process on whether to

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234. *Id.*

235. See Michael McCann, *California's New Law Worries the NCAA, but a Federal Law Is What They Should Fear*, YAHOO! SPORTS (Oct. 4, 2019, 11:26 AM), <https://sports.yahoo.com/californias-law-worries-ncaa-federal-182655143.html#:~:text=California's%20New%20Law%20Worries%20the%20NCAA%2C%20but%20a%20Federal,Is%20What%20They%20Should%20Fear&text=Scheduled%20to%20go%20into%20effect,their%20names%2C%20images%20and%20likenesses> (discussing the political uncertainty of the Equity Act).

236. There appears to be a clarion for transformative change from many influential groups. Members of Congress from both parties are among those seeking reform. See Justin Wise, *2020 politics adds momentum to paying college athletes, unionization*, HILL (Dec. 1, 2019, 7:30 AM), <https://thehill.com/homenews/campaign/471553-2020-politics-adds-momentum-to-paying-college-athletes-exploring>; see also Justin W. Aimonetti & Christian Talley, *Game Changer: Why and How Congress Should Preempt State Student-Athlete Compensation Regimes*, 72 STAN. L. REV. ONLINE 27, 35-39 (Dec. 2019), <https://www.stanfordlawreview.org/online/game-changer/> (describing political alignments that are pressuring the NCAA to reform amateurism).

237. Dayn Perry, *Phillies acknowledge role in Ben Wetzler investigation*, CBS SPORTS (Feb. 22, 2014, 6:51 AM), <https://www.cbssports.com/mlb/news/phillies-acknowledge-role-in-ben-wetzler-investigation/>.

238. MICHIGAN TECH DEPARTMENT OF INTERCOLLEGIATE ATHLETICS, NCAA RULES & REGULATIONS GUIDEBOOK, <https://www.ncaa.org/sites/default/files/mf-f-michigan-tech-booster-club.pdf> (last visited, Mar. 1, 2020).

turn pro.<sup>239</sup> Advisors' capacity to offer advice suggests that they function in many ways as agents.<sup>240</sup>

Advisors are commonly used in baseball and hockey.<sup>241</sup> In both sports, the NCAA permits players to be drafted professionally and then matriculate, or return, to school.<sup>242</sup> A player drafted by a National Hockey League ("NHL") team out of high school, for instance, can decline to sign with the NHL team and instead attend college. While in college, he and the NHL team can negotiate a contract.<sup>243</sup> In this situation, the NHL team benefits a great deal. The player develops his game playing college hockey without the NHL team incurring cost for that development.<sup>244</sup> The "advisor," though technically barred from negotiating, tends to play an instrumental role in discussions as to when the player ought to leave college for a pro contract.<sup>245</sup> The NCAA does not require advisors to meet any certification or equivalent measures.

In recent years, the NCAA has expanded the scope of allowable representation—for certain college athletes, that is. As noted above, in 2014, the NCAA permitted the five largest conferences (i.e., the Atlantic Coast Conference ("ACC"), Big 12, Big Ten, Pac-12, and Southeastern Conference ("SEC")) to modify their rules on representation for baseball players.<sup>246</sup> These conferences have all agreed to permit high school players drafted by Major League Baseball teams to hire an agent.<sup>247</sup> If the player declines to sign and instead goes to college, he must terminate his contract with the agent.<sup>248</sup>

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239. *Id.*

240. Robert P. Garbarino, *So You Want to Be a Sports Lawyer, or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative*, 1 JEFFREY S. MOORAD Sports L.J. 12, 31 (1994); see also Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 217 (2005) (describing the extent of advice an advisor can provide).

241. Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. J. SPORTS & ENT. L. 159, 176 (2012).

242. *Id.* at 176.

243. *Id.* at 176-77.

244. See Dave Molinari, *NHL Draft: Rangers' fan worth taking a flyer on*, PITT. POST-GAZETTE (June 20, 2007, 9:15 PM), <https://www.post-gazette.com/sports/penguins/2007/06/20/NHL-Draft-Rangers-fan-worth-taking-a-flyer-on/stories/200706200223> (citing comments by E.J. Maguire, head of NHL Central Scouting, regarding development of drafted players).

245. To illustrate, in 2009, a high school hockey player from Rhode Island named Mac Bennett was advised by agent and retired NHL player Bobby Orr on whether to turn pro after the 2009 NHL draft. Although Orr was an agent, he served as an "adviser" to Bennett, who therefore retained his NCAA eligibility. See John Gillooly, *Economy Can Ruin Scholarships*, PROVIDENCE J., Apr. 21, 2009, at D-05.

246. See *supra* Section II.C.

247. Wong & Deubert, *supra* note 230, at 241.

248. *Id.* at 240-41.

The fact that college students who play hockey, tennis, baseball, and Olympic sports are the main beneficiaries of nuances to amateurism is not without sociological implications. These players are mostly or significantly white, whereas men's basketball and football players—who are denied access to representation and who generate the vast majority of revenue in college sports—are predominantly Black.<sup>249</sup> The following table describes NCAA data published in 2020 and displays racial compositions of Division I student athletes from selected sports.<sup>250</sup>

Division I Sport	Percentage of Black	Percentage of White	Percentage of Other
Baseball	4.4%	78.2%	17.4%
Men's Basketball	51%	26%	23%
Women's Basketball	48.4%	24.2%	27.4%
Football	46%	37%	17%
Men's Gymnastics	3.4%	65.2%	31.4%
Women's Gymnastics	11%	62%	27%
Men's Ice Hockey	1%	76%	23%
Women's Ice Hockey	>1%	68%	32%
Men's Swimming	2%	68%	30%
Women's Swimming	1%	76%	23%
Men's Tennis	2%	45%	53%
Women's Tennis	5%	42%	53%

Sports figures have taken note of this dynamic. O'Bannon, for instance, opines that "it's hard to ignore race" when studying amateurism rules.<sup>251</sup> "A system in which basketball and football players are treated differently from hockey and baseball players," O'Bannon writes, "raises questions about why certain groups are treated differently. You could argue that it seems discriminatory, if not in intent then in effect."<sup>252</sup>

Within this backdrop, the NCAA now intends to certify agents to represent men's basketball players as they potentially transition into the NBA.<sup>253</sup> It is unclear that the NCAA possesses a legal right to certify agents or from where such a right would emanate. Unlike the NBPA,

249. O'BANNON & MCCANN, *supra* note 42, at 88; Thompson, *supra* note 134.

250. *Diversity Research*, NCAA, <http://www.ncaa.org/about/resources/research/diversity-research> (last visited Oct. 18, 2020).

251. O'BANNON & MCCANN, *supra* note 42, at 231-32.

252. *Id.*

253. NCAA MANUAL, *supra* note 5, § 12.3.1.2.

the NCAA is not a labor organization. The NCAA is, as mentioned earlier, a not-for-profit entity that represents colleges and conferences in collegiate athletics.<sup>254</sup> It therefore is not recognized by the NLRB as the exclusive bargaining agent of employees that, in turn, licenses and regulates agents to represent those employees.<sup>255</sup> The NCAA is also not affiliated with a labor organization, such as the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”).<sup>256</sup> There is no associated entity that would bestow the NCAA with authorities under labor law.<sup>257</sup> The NCAA therefore can’t “license” agents to represent college athletes, at least as that term is understood under the NLRA.<sup>258</sup> Further, the NCAA is unlike an insurance company, which employs “agents” who function as salespersons because there would be no agency relationship between players agents’ and the NCAA.<sup>259</sup>

Likewise, the NCAA is not an arm of the government statutorily empowered to license agents. Whereas a state board of registration functions as a licensor of real estate brokers, there is no equivalent entity for NCAA agents.<sup>260</sup> In that same vein, the NCAA, as a private entity, is not empowered as a state agency to require agents to register.<sup>261</sup> It also

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254. See *supra* Section I.

255. See *supra* Section II.B.

256. See Kenneth Quinnell, *8 Reasons College Athletes Need a Union*, AFL-CIO (Jan. 30, 2014), <https://aflcio.org/2014/1/30/8-reasons-college-athletes-need-union>.

257. See Michael Z. Green & Kyle T. Carney, *Can NFL Players Obtain Judicial Review of Arbitration Decisions on the Merits when a Typical Hourly Union Worker Cannot Obtain This Unusual Court Access?*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 403, 442 (2017) (noting that the NFLPA is affiliated with the AFL-CIO).

258. See generally David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining By Professional Employees?*, 99 YALE L.J. 689 (1990) (discussing the history of collective bargaining agreements among professional employees in the U.S.).

259. Daniel Gregory Sakall, *Can the Public Really Count on Insurance Agents to Advise Them? A Critique of the “Special Circumstances” Test*, 42 ARIZ. L. REV. 991, 993-95 (2000) (discussing majority view of insurance agents as salespersons). See generally DARREN A. HEITNER, *HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW* (2d ed. 2018) (detailing the necessary steps for agents to comply with state and other laws).

260. See Quintin Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently has Been Changing, and Its Future Prospects*, 26 QUINNIPIAC L. REV. 737, 749-50, 749 n.41, 750 n.42 (2008) (noting the role of state governments in licensing professionals, including real estate brokers).

261. In New York, for example, agents who intend to practice in the state must apply to the New York Department of Licensing Services. See N.Y. DEP’T. OF ST., ATHLETE AGENT APPLICATION, <https://www.dos.ny.gov/forms/licensing/1640-a.pdf> (last visited, Mar. 1, 2020); see also Zach Schreiber, *Leveling the Playing Field for Sports Agents: How the Two-Hat Theory and the Model Rules of Professional Conduct Collide*, 19 TEX. REV. ENT. & SPORTS L. 13, 15-16 (2018) (discussing state agencies that regulate sports agents).

does not function as a law enforcement agency that upholds state registration requirements.<sup>262</sup>

For their part, college athletes are unlike professional athletes employed by teams and members of unions. College athletes are not employees of their colleges, conferences, or the NCAA.<sup>263</sup> Indeed, NCAA rules forbid them from invoking the rights of workers to freely associate and organize as a labor organization, unlike professional athletes.<sup>264</sup> Under the NLRA, a union can negotiate on behalf of employees and represent the interests of prospective employees, too.<sup>265</sup> However, a union cannot bargain on behalf of students—athletes or otherwise—since the students are not employees of their schools, conferences, or the NCAA.<sup>266</sup> Unless courts, state agencies, or legislatures recognize them as employees under an applicable statutory definition, college athletes are simply enrolled students who play a sport in addition to pursuing a degree.<sup>267</sup>

This characterization of the relationship between student-athletes and universities signifies two relevant points for purposes of the NCAA attempting to “certify” agents to represent college students. First, the NCAA adopting the role of an agent licensor would be a unique creation. It would not fit traditional conceptions of an agent. No other private entity wields an equivalent power over the agents of others within a contractual relationship and without any government authority to do so. The NCAA would position itself simultaneously in a legislative and administrative role due to its purported duty to certify agents in order to protect vulnerable students. Second, the NCAA’s capacity to exclude agents

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262. See ROBERT H. RUXIN, AN ATHLETE’S GUIDE TO AGENTS 114-16 (2011) (highlighting the role of law enforcement agencies in enforcing state laws, including adoptions of the Uniform Athlete Agents Act).

263. See *supra* Section II.B.

264. See Patrick Kessock, *Out of Service: Does Service Time Manipulation Violate Major League Baseball’s Collective Bargaining Agreement?*, 57 B.C. L. REV. 1367, 1371-72 (2016) (detailing the underlying purpose of unions within the context of sports).

265. Leigh Steinberg & William David Cornwell Sr., *Level Playing Field*, 22 L.A. LAW. 30, 57 (1999).

266. See NCAA MANUAL, *supra* note 5, § 2.9 (describing student-athletes not as employees but as being “motivated primarily by education and by the physical, mental and social benefits to be derived”); see also Billy Witz, *N.C.A.A. Is Sued for Not Paying Athletes as Employees*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html> (explaining the dispute over whether student-athletes should be considered employees).

267. The possibility of college athletes gaining recognition as employees remains a focal point of sports law scholarship. See, e.g., Richard T. Karcher, *Big-Time College Athletes’ Status as Employees*, 33 ABA J. LAB. & EMP. L. 31, 33 (2018) (presenting an argument in favor of employee status for certain types of college athletes); see generally Richard Schmalbeck & Lawrence Zelenak, *The NCAA and the IRS: Life at the Intersection of College Sports and the Federal Income Tax*, 92 S. CAL. L. REV. 1087 (2019) (discussing the federal income tax implications of classifying college athlete as employees).

who refuse to follow NCAA procedures is uncertain. The NCAA could enact exclusionary rules for agents without government or regulatory oversight as to how those rules impact the livelihoods of both agents and athletes.

The “unique creation” of the NCAA as an entity that grants permission to agents to represent college basketball players would necessitate a contractual relationship between the NCAA and agents. The contract would presumably involve the would-be agent applying to the NCAA, meeting criteria mentioned earlier in this Article and receiving a conditional license from the NCAA.<sup>268</sup> The contract and its related features would also need to comply with state laws that require registration of sports agents and impose requirements on their interactions with college athletes.<sup>269</sup>

Furthermore, the NCAA may lack the requisite expertise to evaluate sports agents and oversee them. Professional players’ associations are in the business of representing the interests of players, some of whom lack business savvy and financial literacy.<sup>270</sup> Players have been victimized by fraudsters, including unscrupulous agents.<sup>271</sup> Mindful of their memberships’ vulnerabilities, players’ associations provide workshops and forums to educate their memberships on basic account and money management.<sup>272</sup> The associations also tightly regulate agents for

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268. See *supra* Introduction.

269. See Ricardo J. Bascuas, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603, 1613-17 (1996) (explaining the role of states in restricting agents, including sports agents); see also Michael McCann, *Examining What Comes Next for Zion Williamson in Legal Battle With a Former Representative*, SPORTS ILLUSTRATED (Dec. 20, 2019), <https://www.si.com/nba/2019/12/20/zion-williamson-legal-dispute-former-representative-endorsements-florida> (discussing role of North Carolina law requiring agents to make a series of disclosures to college athletes in the context of litigation involving former Duke basketball player Zion Williamson).

270. See Michael Lee, *Wall, rookies learn that life in NBA is more than just about hardwood*, WASH. POST, Aug. 21, 2010, at D3 (discussing NBA rookie program sponsored by the NBPA and NBA which helps to prepare new NBA players for handling financial matters and carefully managing their money).

271. See Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 811-13 (2006) (discussing regulation of the agent industry, including with respect to fraudulent acts by agents); see also Pablo S. Torre, *HOW (AND WHY) ATHLETES GO BROKE*, SPORTS ILLUSTRATED (Mar. 23, 2009), <https://vault.si.com/vault/2009/03/23/how-and-why-athletes-go-broke> (detailing how “seventy-eight percent of former NFL players have gone bankrupt or are under financial stress because of joblessness or divorce” and “within five years of retirement, an estimated sixty percent of former NBA players are broke.”).

272. See, e.g., AJ Neuharth-Keusch, *NBA transition program helps rookies avoid financial, social pitfalls*, USA TODAY (Aug. 15, 2017, 7:01 PM), <https://www.usatoday.com/story/sports/nba/2017/08/15/nba-transition-program-helps-rookies-avoid-financial-social-pitfalls/565654001/> (discussing a mandatory four-day program, run collaboratively by

financial propriety and hold them accountable.<sup>273</sup> It's unclear if NCAA has the wherewithal, expertise or desire to take on these types of safeguarding activities.<sup>274</sup>

The impact of NCAA agent certification on the supply and availability of agents also raises concerns. NCAA certification rules would exclude categories of agents from representing college basketball players. This exclusion could undermine competition and lower the potential output of agent representation.<sup>275</sup> Fewer agents would be able to ply their craft and thus fewer would compete for securing the representation of player clients.

Meanwhile, players would have a smaller group of agents from which to hire. Some might be denied a chance to retain an agent. Others would be denied the fruits of agents competing for their services. Still others might hire an agent, but their agents may not have sufficient time to spend with their clients.<sup>276</sup> This forecasts a less competitive marketplace for agents, which would have the peculiar consequence of hurting

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the NBA and NBPA, for NBA rookies to learn about business choices and related pressures on their careers).

273. See Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355, 399 (2007) (providing an example of an agent who was disciplined for improperly purchasing airline tickets for student athletes); see also Davis, *supra* note 271, at 785 (illustrating how a players' association can punish an agent for misconduct through the NFLPA suspending agent Carl Poston due to his client's contract not including a bonus that had been negotiated with the team); see Hannah Gordon, *In the Replay Booth: Looking at Appeals of Arbitration Decisions in Sports Through Miami Dolphins v. Williams*, 12 HARV. NEGOT. L. REV. 503, 520 (2007) (detailing boundaries of financial relationships between agents and players).

274. The NCAA has not yet addressed online fraudsters, who pose as college coaches to attempt to steal money from high recruits. See Michael McCann, *What Can Be Done About Fake Recruiting Twitter Accounts?*, SPORTS ILLUSTRATED (Feb. 13, 2020), <https://www.si.com/college/2020/02/13/college-football-recruiting-twitter-ncaa>. See also David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 203-04 (2017) (noting that the NCAA attempts to educate college athletes on financial literacy but could expand those efforts).

275. Fewer sellers of a service or good is generally associated with fewer and inferior choices for buyers. See, e.g., Brandon H. Ito, *Price Controls in Paradise: Foreshadowing the Legal and Economic Consequences of Hawai'i's Gasoline Price Cap Law*, 27 U. HAW. L. REV. 549, 577-78 (2005) (noting the impact of fewer sellers of policies); see also NCAA v. Bd. of Regents, 468 U.S. 85, 103 (1984) (explaining that "output," in the context of an antitrust, consists of the amount of a good or service produced and is a component of antitrust analysis).

276. Agents to NBA players are often hard-pressed for time, particularly as some clients are highly demanding. See Tim Kawakami, *Bob Myers interview: How the Warriors GM was hired five years ago, what he was thinking during his interview with Jacob, and much more*, MERCURY NEWS (Feb. 22, 2017, 8:51 AM), <https://www.mercurynews.com/2016/03/11/bob-myers-interview-how-the-warriors-gm-was-hired-five-years-ago-what-he-was-thinking-during-his-interview-with-jacob-and-much-more/> (quoting Bob Myers, general president of basketball operations for the Golden State Warriors and former agent to NBA players, stating that being an NBA team executive and an agent are "both really hard").

the very people—the players—whom the NCAA insists it is trying to protect.

This dynamic also raises a potential complication for the NCAA in its compliance with Section 1 of the Sherman Act.<sup>277</sup> As discussed above, Section 1 prohibits competing businesses—including colleges and athletic conferences—from conspiring to unreasonably restrain trade.<sup>278</sup> College athletes have employed Section 1 to challenge, albeit unsuccessfully, the legality of the longstanding NCAA prohibition on agents.

Most notably, in *Banks v. NCAA*, a Notre Dame football player signed with an agent in preparation for participating in the 1990 NFL Draft.<sup>279</sup> By signing, Braxton Banks forfeited his remaining NCAA eligibility to play college football.<sup>280</sup> Banks went undrafted and then returned to Notre Dame to complete his degree.<sup>281</sup> He also hoped to resume his college football career but was ineligible to play.<sup>282</sup> Banks then challenged the NCAA no-agent rule as a violation of Section 1 of the Sherman Act.<sup>283</sup> He asserted that the NCAA and its members effected a boycott of his football talents.<sup>284</sup> This boycott, Banks maintained, harmed his ability to develop his football skills, prevented him from marketing his identity, and denied him the opportunity to gain the wisdom of a skilled agent.<sup>285</sup>

Writing for the U.S. Court of Appeals for the Seventh Circuit, Judge John Louis Coffey rejected Banks's arguments, finding that Banks had failed to adequately explain how the restraint of "no agents" diminished competition for his services in the marketplace for college football.<sup>286</sup> Coffey also highlighted "procompetitive" arguments raised by the NCAA for amateurism rules.<sup>287</sup> By excluding agents and imposing other measures that ostensibly insulate college sports from professional influences, amateurism rules might enhance the integrity of college

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277. 15 U.S.C.A. § 1 (West 2020).

278. *Id.*; see *supra* Section II.C; see also *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238-39 (1918); see also *Standard Oil Co. v. United States*, 221 U.S. 1, 58-60 (1911).

279. *Banks v. NCAA*, 977 F.2d 1081, 1083-84 (7th Cir. 1992).

280. *Id.*

281. *Id.*

282. William C. Rhoden, *Player Sues N.C.A.A. Over Eligibility Rules*, N.Y. TIMES, Aug. 14, 1990, at B10.

283. *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1302 (1992).

284. *Id.*

285. See *id.* at 1302-03 (discussing arguments raised by Banks in his complaint).

286. *Banks v. NCAA*, 977 F.2d 1081, 1093-94 (7th Cir. 1992).

287. *Id.* at 1089.

football.<sup>288</sup> Such rules are also thought to enhance greater consumer interest since some fans perceive college sports as less corrupted than professional sports.<sup>289</sup>

*Banks* suggests that the NCAA can lawfully prohibit sports agents under federal antitrust law.<sup>290</sup> However, *Banks* doesn't address the NCAA's role as a licensing and regulating entity of a group of professionals.<sup>291</sup> This role is appreciably different from its role as an entity that categorically bars that group. In the former, the NCAA unlawfully influences a market—the market for agent services—that antitrust law obligates to remain competitive.<sup>292</sup> Stated differently, precedent favorable to the NCAA for the purpose of banning all agents does not insulate the NCAA from antitrust scrutiny for banning only some agents.

In addition, *Banks* wouldn't assist a court in understanding why the NCAA deemed NBPA certification rules sufficient for underclassmen who pursued the 2019 NBA Draft but insufficient for underclassmen who pursue the 2020 NBA Draft and other drafts.<sup>293</sup> A set of rules regarded as protecting underclassmen in one year would, absent a convincing explanation to the contrary, presumably hold true for subsequent years.

If the NCAA's certification of agents were challenged in an antitrust suit by an excluded agent, the NCAA would assert that agent restrictions constitute reasonable measures to protect student athletes. The NCAA would stress that agents to college athletes must be capable of providing advice that blends professional aspirations with educational goals. Agents to college underclassmen who are in the midst of making a decision regarding whether to turn pro are advising individuals with unique and temporal considerations. These agents should, to some degree, have relevant expertise and be able to objectively explain the educational ramifications of leaving school. Of course, college is not a "one-shot" deal. Students who leave college for the workplace before

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288. *Id.*; see also *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (determining that the NCAA's exclusion of agents enhances the NCAA's ability to promote its core objectives, including academic goals).

289. *Banks*, 977 F.2d at 1089; but see Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 359 (2007) (attempting to debunk the notion that consumers are attracted to college sports because they seem less corrupted than pro sport and noting that schools that violate NCAA amateurism rules have not seen "diminished student, faculty, or alumni support for successful college football or basketball teams.").

290. *Banks*, 977 F.2d at 1087.

291. See generally *Banks*, 977 F.2d 1081.

292. See generally Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343 (2020).

293. See *supra* Introduction.

graduating can later complete degrees by taking online courses, adopting a part-time student status, or reenrolling as full-time students.<sup>294</sup> Still, an agent who is mindful of near-term educational considerations would possess the knowledge to address one piece of the player's decision. In contrast, agents to NBA players and other professional athletes are almost entirely focused on professional objectives, be they negotiations of contracts, cultivation of marketing opportunities, or planning for retirement.<sup>295</sup>

The persuasiveness of the NCAA's arguments would hinge on its ability to empirically prove that certification steps are predictive of an agent's capacity to effectively advise the player.<sup>296</sup> Likewise, the NCAA would be tasked with establishing that less restrictive measures would fail to achieve the same results.<sup>297</sup> The NCAA would also need to explain its methodology for addressing agents who fail to seek or obtain certification. In assessing the restrictiveness of the certification process, courts would examine whether any remedial measures exist, such as alternative methods to obtain certification.<sup>298</sup>

## V. CONCLUSION

The NCAA is capable of defending certification provisions for would-be agents to men's college basketball players from antitrust scrutiny. The cogency of such a defense would turn on whether certification rules are carefully designed to meet the unique educational and

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294. NBA players have completed degrees during their careers. *See, e.g.*, Dana Hunsinger Benbow, *Shelvin Mack is still a Butler student cramming for tests, even as he plays in NBA*, INDYSTAR (June 17, 2019, 2:50 PM), <https://www.indystar.com/story/sports/college/butler/2019/06/17/shelvin-mack-still-butler-student-cramming-tests-even-nba/3634674002/> (interviewing NBA player Shelvin Mack who left Butler University in 2011 before completing his degree but, eight years later, was enrolled in online courses in hopes of getting his degree from Butler).

295. *See* Matt Dollinger, *B.J. Armstrong, from MJ's sidekick to NBA powerbroker*, SPORTS ILLUSTRATED (July 10, 2017), <https://www.si.com/nba/2017/07/10/bj-armstrong-chicago-bulls-michael-jordan-where-are-they-now> (NBA player agent B.J. Armstrong discussing his responsibilities as an agent and his prioritization of player objectives).

296. *See* Sarah L. Geiger, *The Ailing Labor Rights of Medical Residents: Curable Ill or a Lost Cause?*, 8 U. PA. J. LAB. & EMP. L. 523, 538 (2006) (noting that lack of data makes it more difficult to assert a "pro-competitive" argument under Section I).

297. *See* Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts With Cable Networks*, 39 EMORY L.J. 463, 489-97 (1990) (discussing judicial consideration of less alternative measures under Section I); *but see* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U.L. REV. 561, 564-70 (2009) (highlighting historical difficulties in assessing less alternative measures).

298. *See* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U.L. REV. 1, 7-10 (1999) (explaining how application of federal antitrust law requires a balancing of considerations, with constraints that permit modification more likely to gain favorable review by courts).

professional needs of college students who are contemplating leaving school early for the NBA draft and exploring the commercial value of their NIL with prospective sponsors. A more disruptive concern is whether the NCAA ought to impose restrictions that extend beyond those required by the NBPA. The market for agents to basketball players is already structured in ways that have effectively excluded many younger agents and women agents. The fundamental goal of agent certification should be to enhance the welfare of the client. The NCAA would be wise to embrace that goal in the policies it pursues.