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LAW SUMMARY

The Path to Antitrust Success Against the NCAA Is More Limited Than You Think

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I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") has recently run into a bit of an antitrust problem. Although the NCAA has been challenged by parties claiming antitrust injury in the past, it has never before seen the onslaught of antitrust attacks currently pending against it. Further complicating the matter is that applying the federal antitrust laws to the NCAA's more restrictive rules and regulations is judicially-uncharted territory. In Part II, this Law Summary provides a brief background on the federal antitrust laws and how they have previously applied to the NCAA. In Part III, this Summary discusses some of the more important antitrust challenges currently pending against the NCAA. Lastly, in Part IV, this Summary recommends at least one potential change that the NCAA can undertake to address some of the antitrust issues caused by the restrictive nature of its rules and regulations.

II. LEGAL BACKGROUND

The law of antitrust is founded in the statutory language of the United States Code, but the law as applied is mostly judge-made common law.[1] This is because the law is simply written and broadly applicable. The letter of the law contains a number of absolutisms which, if read literally, would produce an absurd result.[2] Over time, judges have read the common law of restraints into the antitrust statutes.[3] Accordingly, courts have tended to apply the law

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1. *See* Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 328-29 (2007).

2. *See* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 875 (2011) ("Read literally, [S]ection 1 [of the Sherman Act] is so broad as to be nonsensical, for *every* executory contract restrains trade . . . .").

3. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 530-32 (1983); *see also* Einer Elhauge, *Harvard, Not Chicago: Which*

in a way that would be economically reasonable, producing a result that would promote competition between individual economic entities.[4]

This Summary focuses specifically on how the Sherman Antitrust Act[5] – the bedrock of federal antitrust law in the United States – has been used to challenge the NCAA's governance of non-professional athletes and how the Sherman Act may be used against the NCAA in the immediate future.[6] However, as a preliminary matter, this Summary walks through a quick history of the Sherman Act in order to lay the foundation for the law's application to the NCAA.

A. The Sherman Antitrust Act

The Sherman Act, enacted in 1890, was designed to protect and promote economic competition.[7] The law is founded on the basic economic concept of supply and demand.[8] The law assumes that an increase in economic competition will create market efficiencies and benefit consumers by protecting them from the evils of diminished competition.[9]

Initially, the law's true purpose was overshadowed by the Supreme Court's strict adherence to the letter of the law.[10] This should not have been unexpected, as the law clearly states, "*Every* contract . . . in restraint of trade or commerce . . . is declared to be illegal."[11] Thus, the Court, at first, simply read and applied what the law literally said.[12] For example, in *United States v. Trans-Missouri Freight Association*, the Court read the Sherman Act as "prohibit[ing] all agreements and combinations in restraint of trade . . . regardless of . . . whether such agreements were reasonable or the reverse."[13] Essentially, for a brief time after its enactment, the Sherman Act was read to

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Antitrust School Drives Recent U.S. Supreme Court Decisions?, 3 COMPETITION POL'Y INT'L 59, 61-62 (Autumn 2007).

4. *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918).

5. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2012).

6. *See generally* Drew N. Goodwin, Note, *Not Quite Filling the Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C. L. REV. 1277, 1280, 1287 (2013).

7. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 788 (1984).

8. *See generally* Brown Shoe Co. v. United States, 370 U.S. 294, 319-21 (1962).

9. *See* Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983).

10. *See generally* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290 (1897).

11. 15 U.S.C. § 1 (2012) (emphasis added).

12. *See Trans-Mo. Freight Ass'n*, 166 U.S. at 335.

13. *Id.*

prohibit almost every contract that restrained interstate trade.[14] However, everything changed in 1898 when William Howard Taft, then federal circuit judge, decided *United States v. Addyston Pipe & Steel Company*.[15]

B. The Journey to Reasonable Restraints

In *Addyston Pipe*, Taft and the Court of Appeals for the Sixth Circuit incorporated the common law of restraints to determine that the Sherman Act should only prohibit agreements whose main purpose was to restrain competition.[16] In other words, if the restraint was merely ancillary to some other reasonably beneficial and procompetitive purpose it should be upheld.[17] However, if the "sole object . . . in making the contract . . . [was] merely to restrain competition, and enhance or maintain prices," then it should be prohibited.[18] *Addyston Pipe*, later affirmed by the Supreme Court, was instrumental in establishing the modern doctrinal foundations of federal antitrust law: (1) the *per se* violation and (2) the rule of reason inquiry.[19]

Generally, conduct that amounts to a "naked" restraint of trade is deemed to be *per se* illegal.[20] A "naked" restraint is a restraint that serves no justifiable business purpose other than the depression of competition.[21] Courts will not inquire into the reasonableness of a "naked" restraint because often there is no need to inquire: the type of restraint at issue is often blatantly anticompetitive.[22]

On the other hand, a rule of reason inquiry is made when a restraint is ancillary to a larger agreement and can arguably serve an alternative procompetitive motive.[23] For example, courts will inquire into the reasonableness of a restraint that may create a new product[24] or lower transaction costs.[25] However, applying the rule of reason is judicially taxing: the reasonableness of a trade restraint can only be determined by analyzing the restraint's economic

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14. The Sherman Act was applied in this manner for almost a decade after its enactment. *See id.*; *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE. L. J. 775, 785-88 (1965).

15. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

16. *Id.* at 282.

17. *Id.*

18. *Id.* at 282-83.

19. *See* Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1041-44 (1989); *see also* Bork, *supra* note 14, at 796-801.

20. *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

21. *Id.*

22. *Id.* at 607-10 (quoting N. Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958)).

23. *Id.* at 606-07.

24. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23-24 (1979).

25. *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 240-41 (1918).

impact in the relevant market. In other words, courts must look to a number of technical and often theoretical economic factors in order to determine if an agreement is procompetitive (and legal) or anticompetitive (and illegal).[26]

Further complicating the matter is the fact that these doctrines are frequently applied arbitrarily.[27] Judicial familiarity with the particular type of restraint is important in deciding which doctrine to apply,[28] but typically courts will inquire into the restraint only as much as necessary to decide the case at bar. The applied doctrine in any given case is often merely a *post hoc* label and does not necessarily reflect the nature of the inquiry undertaken.[29]

C. The Basics of a Sherman Act Section 1 Claim

Antitrust claims against the NCAA have typically failed at the motion to dismiss stage.[30] Although reasonableness is essential as to the question of whether a claim is ultimately successful on the merits, there are certain elements a plaintiff must show to state a viable Sherman Act Section 1 claim.[31]

The first element that needs to be shown is an *agreement* between independent economic entities in the form of a *contract*, *combination*, or *conspiracy*.[32] Although an agreement can be expressed (i.e. orally or in writing), it is often inferred by conscious parallel conduct.[33] If separate economic entities have consciously engaged in similar conduct and if the challenged conduct would not make business sense absent an unexpressed agreement, then a court will likely determine that an agreement exists.[34] Thus, evidence of an agreement is often circumstantial.[35]

The second element requires a showing that the agreement has resulted in an *unreasonable restraint of trade in a relevant market*.[36] As a threshold matter, the alleged behavior must restrain a *commercial* market.[37] This is because antitrust exists solely for the protection of commerce. Therefore, if the alleged behavior affects some noncommercial activity then the law will be

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26. *See* Bork, *supra* note 14, at 820-28.

27. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779-81 (1999).

28. *See* United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1365 (5th Cir. 1980).

29. *Cal. Dental Ass'n*, 526 U.S. at 781.

30. *See* Christian Dennie, *White Out Full Grant-in-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 109-11 (2007).

31. Agnew v. NCAA, 683 F.3d 328, 334-35 (7th Cir. 2012).

32. *Id.* at 335.

33. Interstate Circuit v. United States, 306 U.S. 208, 225-27 (1939); *see also Agnew*, 683 F.3d at 335.

34. Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954).

35. *Id.*

36. *See Agnew*, 683 F.3d at 335.

37. *See id.* at 337.

inapplicable.[38] As previously mentioned, once a commercial market has been identified, any naked restraint is typically found to be *per se* unreasonable and illegal.[39] A restraint that arguably serves a procompetitive purpose, however, will be analyzed in depth to determine whether the restraint actually protects and promotes competition in the relevant commercial market at issue.[40]

The last element a plaintiff must prove is that the agreement has resulted in an *antitrust injury implicating interstate commerce*.[41] An antitrust injury is an injury caused by the type of behavior that the antitrust laws seek to avert: anticompetitive commercial practices.[42] The alleged injury cannot be the result of *increased* market competition, such as the loss of profits caused by the entry of a new firm into the relevant market.[43] However, engaging in behavior such as horizontal price-fixing[44] is a textbook example of the type of behavior that may cause an antitrust injury.[45] Furthermore, courts routinely find that an antitrust injury has affected interstate commerce.[46] This is especially true when the alleged injury has occurred in a substantial economic market.[47] Yet, the substantiality of the market, for interstate commerce purposes, is often a non-issue in Section 1 cases.[48]

Finally, in order to bring a cause of action for an alleged violation of the antitrust laws, a claimant must have *antitrust standing*.[49] Because anticompetitive behaviors often cause injuries that ripple throughout the economy, the standing requirement serves to limit the number of people who can sue.[50] Factors that bear on whether a claimant has antitrust standing include the existence of a more direct victim and the potential difficulty in allocating damages.[51] There are, however, a number of other factors that weigh on whether a claimant will have standing to bring an action under Section 1 of the Sherman Act.[52]

Antitrust law presents many hurdles that must be thoughtfully navigated before challenging the NCAA under the Sherman Act. In the past, the NCAA

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38. *See id.*
39. *See supra* Part II.B.
40. *See Agnew*, 683 F.3d at 336.
41. Apex Hosiery Co. v. Leader, 310 U.S. 469, 484-85 (1940).
42. Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477, 489 (1977).
43. *Id.* at 488.
44. *Agnew*, 683 F.3d at 336.
45. *See id.*
46. McClain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242 (1980).
47. *Id.*
48. Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611 (1953).
49. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 (1983).
50. *Id.* at 534-35 (quoting Blue Shield of Va., Inc. v. McCready, 457 U.S. 465, 476-77 (1982)).
51. *Id.* at 537-38.
52. *Id.*

has stood up to most every antitrust challenge it has faced.[53] The history of antitrust suits against the NCAA, however, is instructive as to how antitrust law will be applied to NCAA rules and regulations in the future.

D. The Application of Section 1 to the NCAA

The NCAA, a not-for-profit organization, is the most powerful force in collegiate sports in the United States.[54] The NCAA governs the way in which hundreds of collegiate athletic programs are operated by setting the rules of the games and determining the eligibility of the athletes.[55] The NCAA also exercises some control over what athletes do when not competing.[56] Not surprisingly, since the NCAA influences the way in which hundreds of colleges[57] and collegiate athletic programs are operated, the organization has been challenged under the federal antitrust laws on numerous occasions.[58]

In *NCAA v. Board of Regents of University of Oklahoma*, the Supreme Court of the United States essentially insulated the NCAA from traditional *per se* analysis.[59] In that case, the NCAA had restrained trade by blatantly fixing the price of football television contracts while constricting the number of football games that could be televised during any given week.[60] The Court refused to apply the *per se* doctrine to the NCAA:

> [The] decision [was] not based on a lack of judicial experience with [the] type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or [out of] respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what [was] critical is that [the] case involve[d] an industry in which *horizontal restraints on competition are essential if the product is to be available at all*.[61]

The Court noted that, in order for national-level collegiate sports to exist in the first place, it was necessary for competing colleges to agree to certain common rules and regulations essential to the creation and sustained exist-

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53. *See* Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 229 (2012).

54. *See* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 330-36 (2007).

55. *Id.* at 334-36.

56. *Id.*

57. NCAA colleges are known as "member institutions" by the NCAA. They will be addressed as such for the remainder of this Summary.

58. *See* Lazaroff, *supra* note 54, at 329-30.

59. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100-01, 117-20 (1984).

60. *Id.* at 94-95.

61. *Id.* at 100-01 (emphasis added).

ence of national collegiate sports.[62] To that end, the NCAA served as the conduit by which member institutions could agree to those common rules. And although the common rules are technically in restraint of trade, they are necessary and justified because they lead to the creation of a national collegiate sports league.[63] These agreed-upon NCAA rules – which are restraints on trade – are contained in the NCAA Division 1 Manual in the form of bylaws.[64]

For the most part, the NCAA bylaws can be scrutinized under the federal antitrust laws.[65] In fact, the Supreme Court acknowledged as much in *Board of Regents*.[66] But the business of big-time college sports and the commercial nature of the member institutions that sponsor big-time college sports cannot be denied.[67] The largest collegiate athletic programs are multi-million dollar enterprises.[68] They earn their money on the backs of the athletes – the *student-athletes*.[69] Student-athletes are collegiate amateurs that earn no money for their labor – their play on the field or court – but instead receive a portion of what it takes to attend their chosen college in the form of scholarships.[70] These exchanges – "full scholarships in exchange for athletic services – are not noncommercial, since schools can make millions of dollars as a result of these transactions."[71] Thus, seemingly any bylaw that restrains these commercial transactions between student-athletes and member institutions can be subjected to an inquiry under the law of antitrust.[72]

III. RECENT DEVELOPMENTS

In the past few years, the NCAA and its bylaws have endured under ever-increasing scrutiny.[73] Recently, there have been a number of successful preliminary challenges to the legality of certain bylaws under the antitrust laws – a number of those challenges lodged by current or former student-

62. *Id*. at 101.
63. *Id*. at 102.
64. Lazaroff, *supra* note 54, at 334-36.
65. *Id.* at 329-30.
66. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 117.
67. *See* NCAA v. Agnew, 683 F.3d 328, 340 (7th Cir. 2012).
68. *See id.*
69. *See* Robert A. McCormick & Amy Christian McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 640 (2010).
70. *See Agnew*, 683 F.3d at 340-41.
71. *Id.* at 340.
72. *See id.*
73. *See generally* Justin M. Hannan, Comment, *Antitrust Law – Seventh Circuit Sees Through Façade, Exposes NCAA Scholarship Limits to Sherman Antitrust Scrutiny* – Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012)*, 18 SUFFOLK J. TRIAL & APP. ADVOC. 345 (2013).

athletes.[74] Surprisingly, one of those cases endured long enough to see a determination on the merits in federal district court,[75] though the ultimate decision has yet to be determined due to a pending NCAA appeal, as of this writing.[76] The NCAA has responded to these looming threats by changing or altering certain existing bylaws.[77] Some of the pending suits, though, concern issues that cannot be addressed by a simple rule change.[78] Those suits threaten to affect the core of the NCAA's existence: the amateur collegiate model.[79] Although the threat of sweeping change may loom in the background, the most immediate path to antitrust success against the NCAA will not require the NCAA to undertake a drastic revolution.[80] Of the pending antitrust suits against the NCAA, only one subset of cases has the potential to effect real change to the way the NCAA operates: suits challenging the NCAA's scholarship bylaws.[81]

A. The Student-Athlete Labor Market

In *Agnew v. NCAA*, two current student-athletes challenged the validity of NCAA bylaws regulating the number and length of scholarships that could be awarded by member institutions.[82] Specifically, the student-athletes claimed that bylaws "cap[ping] . . . the number of scholarships given per team and . . . prohibit[ing the granting] of multi-year scholarships" were illegal restraints on trade in violation of the Sherman Act.[83] However, even after amending their complaint two times, the student-athletes failed to identify a relevant commercial market upon which the bylaws acted.[84] The district

74. *See, e.g.*, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996 (N.D. Cal. 2013).

75. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962 (N.D. Cal. 2014); *see also Judge Rules Against NCAA*, ESPN (Aug. 9, 2014, 5:12 PM), http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case.

76. *See* Associated Press, *NCAA Files Appeal of O'Bannon Ruling*, ESPN (Aug. 21, 2014, 2:14 PM), http://espn.go.com/college-football/story/_/id/11387865/ncaa-files-intent-appeal-obannon-decision.

77. *See* Jon Solomon, *NCAA Correctly – and Barely – Passes Multiyear Scholarship Rule Whose Time Has Come*, AL.COM (Feb. 18, 2011, 5:00 AM), http://www.al.com/sports/index.ssf/2012/02/ncaa_correctly_passes_multiyea.html.

78. *See* Stewart Mandel, *USC's Haden: Ed O'Bannon Case Could Cause Seismic NCAA Change*, SPORTS ILLUSTRATED (Apr. 1, 2013, 10:57 AM), http://sportsillustrated.cnn.com/college-football/news/20130401/pat-haden-ed-obannon-ncaa/.

79. *See* Warren Zola, *NCAA Amateurism Is an Illusion*, US NEWS & WORLD REPORT (Apr. 1 2013), http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/ncaa-amateurism-is-an-illusion.

80. *See infra* Part IV.

81. NCAA v. Agnew, 683 F.3d 328, 344 (7th Cir. 2012).

82. *Id.* at 332-33.

83. *Id.* at 332.

84. *Id.* at 347-48.

court dismissed the complaint and the student-athletes appealed.[85] Seemingly, the student-athletes were of the belief that a relevant commercial market need only be inferred and not expressly identified.[86] The Seventh Circuit disagreed, stating that the identification of a relevant commercial market upon which the alleged illegal restraint acted was a threshold matter for Sherman Act applicability.[87] Ultimately, the Seventh Circuit affirmed the dismissal of the student-athletes' complaint.[88]

In *Agnew*, although the student-athletes failed to state a viable claim, the court was surprisingly instructive in describing what it would take to state a successful claim against the NCAA in the future.[89] The *Agnew* court discussed the applicability of the Sherman Act to a cognizable student-athlete labor market at length.[90] It ultimately stated, in dicta, that there was no doubt that member institutions were engaged in a "competitive market to attract student-athletes whose athletic labor [could] result in many benefits . . . including economic gain."[91] Thus, the *Agnew* court recognized (1) that a labor market did exist between member institutions for student-athlete labor and (2) that the "proper identification of [that] labor market . . . would meet [a claimant's] burden of describing a cognizable market under the Sherman Act."[92]

Subsequently, in *Rock v. NCAA*, a former student-athlete sued the NCAA claiming almost exactly the same antitrust injury as what was at issue in *Agnew*.[93] This time, however, the former student-athlete had "narrowed his proposed market to one sport in one division of the NCAA."[94] In other words, he had identified the national market for the labor of student-athletes in football at the NCAA Division I level as the relevant commercial market.[95] The NCAA filed a motion to dismiss the former student-athlete's complaint.[96] However, the U.S. District Court for the Southern District of Indiana accepted the former student-athlete's proffered market and it determined that the market was cognizable under the Sherman Act.[97] In response, the NCAA first argued that the identified market was overly broad because it included two NCAA Division I subdivisions.[98] The court rejected this argument, finding that the "NCAA's own structure classifying both FBS and FCS football

85. *Id.* at 333-34.
86. *Id.* at 333.
87. *Id.* at 345.
88. *Id.* at 347-48.
89. *Id.* at 346.
90. *Id.* at 338-45.
91. *Id.* at 347.
92. *Id.* at 346-47.
93. Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *4 (S.D. Ind. Aug. 16, 2013).
94. *Id.* at *11.
95. *Id.* at *9-10.
96. *Id.* at *4.
97. *Id.* at *11.
98. *Id.* at *10.

as part of the same division supports [the fact] that those subdivisions could be part of the same overarching market of Division I football."[99] The NCAA next argued that the identified market was "impermissibly small because it ignore[d] substitute opportunities outside of Division I football . . . ."[100] The court again disagreed, finding that the opportunities outside of Division I football (i.e. NCAA Division II, Division III, and the NAIA) were "not adequate substitutes for Division I football and, thus, not part of the same relevant market."[101] Ultimately, the court in *Rock*, unlike the courts in *Agnew*, denied the NCAA's motion to dismiss and upheld the former student-athletes' challenge to the NCAA's scholarship-related bylaws.[102]

B. The Protection of the Amateur Student-Athlete

In *Rock*, a former student-athlete used the Seventh Circuit's reasoning in *Agnew* to attack the legality of the NCAA's scholarship bylaws.[103] In *Agnew*, the Seventh Circuit also addressed the susceptibility of NCAA bylaws in general.[104] The *Agnew* court, in dicta, reasoned that while some bylaws were presumptively procompetitive because they were necessary for the product of national-level collegiate sports to exist, certain other bylaws did not seem necessary for the end-product and, thus, were likely open to traditional antitrust analysis.[105] The *Agnew* court relied heavily on the Supreme Court's decision in *Board of Regents* in describing which bylaws were to be granted a favorable presumption and which bylaws were not to be granted such a presumption:

> [W]hen an NCAA bylaw is clearly meant to help maintain the revered tradition of amateurism in college sports or the preservation of the student-athlete in higher education, the bylaw will be presumed procompetitive, since we must give the NCAA ample latitude to play that role. But if a regulation is not, on its face, helping to preserve a tradition that might otherwise die, . . . a more searching . . . analysis will be necessary to convince us of its procompetitive or anticompetitive nature[.][106]

Thus, the *Agnew* court left open the possibility for future antitrust challenges to certain NCAA bylaws.[107] And seemingly, while certain bylaws (e.g. the NCAA's eligibility bylaws) were necessary for big-time college

99. *Id.*
100. *Id.* at *11.
101. *Id.* at *13.
102. *Id.* at *16.
103. *See id.* at *14.
104. *See* NCAA v. Agnew, 683 F.3d 328, 338-45 (7th Cir. 2012).
105. *Id*. at 342-43.
106. *Id.* (internal quotation marks omitted).
107. *See id.* at 344.

sports to exist in the first place, those bylaws dealing with other aspects of the NCAA student-athlete experience (i.e. the NCAA's scholarship and financial aid bylaws) were not presumed lawful and could be analyzed for anticompetitive effect under the federal antitrust laws.[108]

The susceptibility of certain NCAA bylaws to antitrust scrutiny is not a new concept; courts have previously recognized this vulnerability. However, until now, no parties have successfully advanced to have their cases heard on the merits.[109] In *In re NCAA 1-A Walk-on Football Players Litigation*, for example, a federal district court found that certain bylaws do not "clearly implicate student-athlete eligibility in the same manner as" other bylaws designed to advance amateurism.[110] In that case, although the class of student-athlete plaintiffs survived a motion for judgment on the pleadings, it did not achieve class certification.[111]

Recently, there has been a veritable tidal wave of successful lawsuits challenging the NCAA bylaws.[112] Many of these suits have relied heavily on the Seventh Circuit's decision in *Agnew*.[113]

In *Rock*, a single student-athlete plaintiff prevailed against the NCAA at the motion to dismiss stage while challenging the NCAA's scholarship bylaws.[114] As of this writing, the case was proceeding to a decision on the merits.[115] In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, a class of current and former student-athletes prevailed against the NCAA at the motion to dismiss stage while challenging bylaws restricting student-athletes' right to publicity.[116] In that case, restyled *O'Bannon v. NCAA*,[117] the class of current and former student-athletes found success at trial as well.[118] There the district court found that the NCAA had violated antitrust laws by prohibiting student-athletes from generating income from their own publici-

108. *See id.* at 343-44.

109. *See* Lazaroff, *supra* note 54, at 345-49.

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

111. *See In re* NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 WL 1207915, at *1 (W.D. Wash. May 3, 2006).

112. *See* Jerry Hinnen, *Labor Attorney Jeffrey Kessler Files Antitrust Lawsuit v. NCAA*, CBSSPORTS.COM (Mar. 17, 2014, 11:42 AM), http://www.cbssports.com/collegefootball/eye-on-college-football/24488838/labor-attorney-jeffrey-kessler-files-antitrust-lawsuit-vs-ncaa.

113. *See* Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, *4 (S.D. Ind. Aug. 16, 2013); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1004 (N.D. Cal. 2013).

114. *See Rock*, 2013 WL 4479815, at *1.

115. *See* Randy Haight, *Alleging an Anticompetitive Impact on a Discernible Market: Changing the Antitrust Landscape for Collegiate Athletics*, 21 JEFFERY S. MOORAD SPORTS L.J. 19, 37 (2014) (discussing *Rock* and its implications in detail).

116. *See* In re *NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 997-98.

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

118. *See Judge Rules Against NCAA*, *supra* note 75.

ty.[119] The district court entered a permanent injunction against the NCAA, requiring the organization to share at least some of the proceeds derived from student-athlete publicity with the student-athletes.[120] This case, however, is far from resolved, as the NCAA has appealed the decision.[121] These "successful" lawsuits, now either proceeding to a decision on the merits or pending appeal, will help determine the future applicability of the NCAA's bylaws to student-athletes.

IV. DISCUSSION

For the first time since the Supreme Court's decision in *Board of Regents*, the future of the NCAA is in the hands of the courts. Unlike *Board of Regents*, though, the more recent antitrust challenges in *Rock* and in *O'Bannon* have been brought by or on behalf of student-athletes.[122] The cases threaten to change some of the core bylaws of the NCAA.[123] In other words, these recent challenges will test the legality of the NCAA's control over student-athletes and may change the way in which the NCAA governs the student-athlete experience going forward. It is impossible to know how these cases will be decided for certain. However, a couple of things *are* certain. First, assuming the NCAA remains unchanged, there will at least be additional challenges to its scholarship bylaws.[124] Second, assuming the NCAA loses any or all of the more recent antitrust challenges brought by student-athletes, it will have to change.[125]

A. The Potential for Additional Challenges to the NCAA's Operating Bylaws

The NCAA's Division I is the home of big-time collegiate sports.[126] The NCAA governs Division I member institutions by way of the NCAA Division I Manual.[127] This Manual is comprised of hundreds of bylaws con-

119. *See id.*

120. *See id.*

121. *Id.*

122. *See* Doug Lederman, *College Sports' Antitrust Vulnerability*, INSIDE HIGHER ED (Apr. 16, 2014), http://www.insidehighered.com/news/2014/04/16/sports-antitrust-lawyers-latest-target-ncaa-scholarship-limits#sthash.AHo9NWGn.dpbs.

123. *Id.*

124. *See id.*

125. *See id.*

126. *See* Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Million Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 336 (2003).

127. *See* Gibson, *supra* note 53, at 217-18; *see also* Robert John Givens, Comment, *"Capitamateuralism": An Examination of the Economic Exploitation of Stu-*

tained in thirty-three articles.[128] Articles 1 through 6 contain the NCAA's constitution.[129] Articles 10 through 22 contain "operating bylaws, which consist of legislation adopted . . . to promote the principles enunciated in the constitution and to achieve the [NCAA's] purposes."[130] Articles 31 and 33 contain administrative bylaws that govern the process by which the NCAA certifies member institutions and enforces its operating bylaws.[131] The NCAA exercises most of its control over the member institutions and student-athletes by way of its operating bylaws.[132] While many of the bylaws are necessary for the existence of the NCAA's amateur collegiate model, some of its operating bylaws do not implicate the existence of the amateur student-athlete.[133] Thus, there is the potential that certain NCAA bylaws may be subjected to viable antitrust claims in the future.

As mentioned above, there are two major federal antitrust lawsuits outstanding against the NCAA.[134] These lawsuits are focused on two types of bylaws. The class of current and former student-athlete plaintiffs in *O'Bannon* is challenging bylaws that restrict student-athletes' use of their own publicity rights while allowing member institutions to freely use student-athletes' publicity rights for their own purposes.[135] These bylaws are mostly contained in Article 12 – which governs the amateur status of student-athletes – but can be seen throughout the NCAA Manual.[136] The plaintiff in *Rock* is challenging financial aid bylaws restricting the duration of athletic scholarships contained in Article 15, which were formerly limited to renewable one-year periods.[137] Both Article 12 and Article 15 contain a number of other bylaws that arguably serve no legitimate business purpose other than to restrain competition.[138] Thus, there may be potential for future inquiries into the economic reasonability of their existence. However, it is unlikely that the courts will invalidate any bylaw dealing with the amateur status of student-athletes. Therefore, it may be that the only bylaws truly susceptible to suc-

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dent-Athletes by the National Collegiate Athletic Association, 82 UMKC L. REV. 205, 208-09 (2013).

128. *See* NCAA Academic & Membership Affairs Staff, 2014-15, NCAA Division I Manual (2014), *available at* https://www.ncaapublications.com/p-4355-2014-2015-ncaa-division-i-manual-august-version.aspx.

129. *Id.* at viii, §§ 1-6.

130. *Id.* at viii, §§ 10-23.

131. *Id.* at viii, §§ 31-33.

132. *See* sources cited *supra* note 75.

133. *See* Agnew v. NCAA, 683 F.3d 328, 338-45 (7th Cir. 2012).

134. *See supra* Part IV.

135. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 998 (N.D. Cal. 2013).

136. *See generally* NCAA Division I Manual, *supra* note 128, at § 12.

137. *See id.* at § 15.

138. *See id.* at §§ 12, 15.

cessful antitrust challenges are those dealing with scholarships and financial aid.

1. The Susceptibility of Amateurism-Related Bylaws to Antitrust Scrutiny

Article 12 ensures that student-athletes do not use their athletic talents to earn money outside of their NCAA-sponsored scholarships.[139] Along with controlling how a student-athlete uses his or her likeness, Article 12 also governs the way in which a student-athlete participates in off-season, non-NCAA amateur sports.[140] If a valid antitrust claim can be stated based on the belief that student-athletes should be able to use their own likeness to obtain some sort of compensation, then it would seem to be likely that a valid claim could be stated based on the NCAA's restraint of non-NCAA amateur sports. In other words, it would seem as if the NCAA's restrictions on participation in non-NCAA amateur sports serve no purpose but to dampen competition between the NCAA and other amateur sports organizations.

However, unlike the NCAA's restraint of publicity rights, the NCAA's restrictions on participation in non-NCAA amateur sports do not necessarily involve a restraint on the market for student-athlete labor.[141] They implicate restrictions on non-NCAA sports organizations and arguably lack the requisite commercial-market component for Sherman Act applicability.[142] The NCAA bylaws restricting participation in non-NCAA sports do not restrain the million-dollar competition between member institutions for the labor of student-athletes.[143] Other amateur sports organizations do not compete for athletes on the same level as the NCAA and are not economically comparable to the NCAA.[144] Also, non-NCAA amateur sports, such as the Amateur Athletics Union[145] and various other sports clubs, are not likely to comprise a "relevant market" due to the fact that these organizations can be broadly defined and are highly substitutable.[146]

It would seem that unless a valid commercial activity could be implicated and a relevant market sufficiently delineated, a valid Section 1 claim would likely be non-cognizable against the majority of bylaws contained in Article 12. Thus, outside of the NCAA's restrictions on publicity rights, Ar-

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139. *See id.* at § 12.1.2.

140. *See, e.g.*, *id.* at § 12.1.2.1.4.3.

141. *Cf.* Agnew v. NCAA, 683 F.3d 328, 342-44 (7th Cir. 2012).

142. *Cf. id.* at 338.

143. *See* Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *13 (S.D. Ind. Aug. 16, 2013).

144. *See id.*

145. *See generally The Government of Amateur Athletics: The NCAA-AAU Dispute*, 41 S. CAL. L. REV. 464, 464 (1968).

146. *See Rock*, 2013 WL 4479815, at *11.

ticle 12 may not provide ample opportunity for additional antitrust challenges.

Additionally, Article 16 contains various bylaws that would seem to directly affect the student-athlete labor market.[147] Article 16 controls awards, benefits, and expenses that student-athletes can receive while enrolled at member institutions.[148] However, unlike Article 15, which deals with scholarships and the like, Article 16 pertains to extra benefits awarded to student-athletes *because of* their athletic ability.[149] In that sense, Article 16 is similar to Article 12: they both govern NCAA amateurism.[150] The NCAA's prohibition on pay-for-play – outside of the permissible scholarship limits sanctioned by the association – is ostensibly *required* for the existence of the amateur student-athlete.[151] Therefore, it is highly unlikely that the bylaws in Article 16 are susceptible to antitrust scrutiny based on the Supreme Court's reasoning in *Board of Regents*.[152]

2. The Susceptibility of Scholarship-Related Bylaws to Antitrust Scrutiny

On the other hand, Article 15 does provide an opportunity for antitrust applicability. Article 15 limits the manner by which student-athletes are allowed to finance their college education.[153] Student-athletes can only receive financial aid per NCAA legislation.[154] The maximum allowable scholarship that can be awarded to any individual is limited to the cost of attendance – i.e. the total cost to attend an institution including tuition, fees, books, travel, food, and other related expenses.[155] The NCAA limits the number of scholarships that can be awarded per team.[156] The limits are calculated by determining grant-in-aid, which includes only tuition, fees, room, and books.[157] The team-specific limitation of the number of scholarships that can be awarded is called the *countable aid* limitation.[158] The countable aid limits in Article 15

147. *See* NCAA Division I Manual, *supra* note 128, at § 16.

148. *See id.* at § 16.02.3.

149. *See id.* at § 16.01.1.

150. *Compare id.* at § 16 *with id.* at § 12.

151. *See* Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS L. J. 221, 225-26 (2005).

152. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

153. *See* NCAA Division I Manual, *supra* note 128, at § 15.

154. *See* Christopher Davis, Jr. & Dylan Oliver Malagrino, *The Myth of the "Full Ride": Cheating Our Collegiate Athletes and the Need for Additional NCAA Scholarship-Limit Reform*, 65 OKLA. L. REV. 605, 610 (2013).

155. *Id.* at 608.

156. *Id.*

157. *Id.*

158. *See, e.g.*, BYU Athletic Communication, *Financial Aid*, BYU COUGARS (May 18, 2011, 2:12 PM), http://byucougars.com/compliance/student-athletes/financial-aid.

work against the awarding of full cost of attendance scholarships – member institutions are incentivized to limit scholarships to grant-in-aid in order to maximize the efficient allocation of those scholarships.[159]

Based on the reasoning in *Agnew* and *Rock*, it appears that scholarship bylaws are susceptible to antitrust scrutiny.[160] The student-athlete plaintiff in *Rock* challenged only the prohibition of multi-year scholarships and the limit on the number of scholarships contained in Article 15, but the *Rock* court's reasoning seemingly applies throughout Article 15 due to the fact that *all* of the Article 15 bylaws limit a student-athlete's ability to receive NCAA scholarships.[161] But for the scholarship limitations, member institutions could award more scholarships (i.e. higher number and higher amount) to more student-athletes.[162]

Further, while these scholarship limitations may provide equity between member institutions, they do not necessarily implicate amateurism or the existence of the student-athlete because, as noted in *Rock* and *Agnew*, those products *could* continue to exist.[163] In fact, removing limits on financial aid would seem to promote those concepts. Amateurism, as defined by the NCAA, allows for the award of scholarships to play for NCAA member institutions.[164] Without scholarship restrictions, member institutions could continue to award scholarships to student-athletes and student-athletes could continue to play and go to school.[165] Seemingly, member institutions would be free to award better scholarships in a more competitive student-athlete labor market – thereby resulting in a better product.[166] However, since Article 15 currently lessens the competition for student-athletes between member institutions by way of restricting the awarding of scholarships, it would seem to have a clear anticompetitive effect resulting in an antitrust injury.[167] Further, the relevant market has already been identified in *Rock* – i.e. the specific NCAA sport in the specific NCAA division.[168] Thus, with the relevant market defined and alleged anticompetitive effect identified, the potential for antitrust challenges to the Article 15 bylaws is highly plausible.

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159. *See* Kemper C. Powell, *A Façade of Amateurism: An Examination of the NCAA Grant-in-Aid System Under the Sherman Act*, 20 SPORTS L.J. 241, 259-60 (2013).

160. *See* Agnew v. NCAA, 683 F.3d 328, 343-44 (7th Cir. 2012).

161. *See* Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815, at *14-16. (S.D. Ind. Aug. 16, 2013).

162. Davis, Jr., *supra* note 154, at 618-19.

163. *See id.*

164. *See* Gibson, *supra* note 53, at 218-21, 232-34.

165. *See* Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8, 2014, 1:22 PM), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences.

166. *See* Dennie, *supra* note 30, at 125.

167. *See* Davis, Jr., *supra* note 154, at 633-36.

168. Rock v. NCAA, No. 1:12-cv-1019-JMS-DKL, 2013 WL 4479815 at *10 (S.D. Ind. Aug. 16, 2013).

Challenging the NCAA's bylaws under the federal antitrust law can be done. However, the types of bylaws that can be analyzed are very limited. Article 12 and Article 16 both seem to implicate the existence of NCAA amateurism, and both articles are likely practically impervious to antitrust attack.[169] On the other hand, Article 15 does not seem to necessarily directly implicate amateurism or the NCAA's collegiate model. Thus, Article 15 and the NCAA's scholarship bylaws may, at the very least, be capable of being analyzed under the rule of reason. The future disposition of *Rock* – and other pending cases – will determine whether or not Article 15 stands up to antitrust scrutiny. However, it would seem as if it is only a matter of time before the NCAA's scholarship bylaws will be radically changed.

B. A Potential Change to the NCAA's Financial Aid Bylaws

It is apparent that, regardless of whether the NCAA survives its most recent challenges, something will have to change. There are a number of ways in which the NCAA can mold its scholarship-related bylaws to fit its amateurism model without micromanaging the member institutions or the student-athletes. This section focuses specifically on the scholarship bylaws in Article 15 because, as previously mentioned, many of the recent challenges to the NCAA's structure have focused on scholarships.[170] Further, promoting the equitable distribution of scholarships through deregulation would most likely quell complaints of unfairness from both student-athletes and the public.[171] For instance, allowing for more scholarship-related competition in the market for student-athlete labor would lead to better scholarships and, thus, student-athletes would likely feel less exploited by the member institutions and the NCAA.[172] This section will discuss at least one potential change to the NCAA's scholarship bylaws: the restructuring of the NCAA's grant-in-aid system. This proposed change would benefit student-athletes while staying true to the NCAA's amateur collegiate model.

There are a number of possible changes that the NCAA could undertake when overhauling its scholarship bylaws. However, countable aid limitations – restrictions on the size and number of scholarships that can be awarded per team – can be easily changed to better provide for student-athletes.[173] Specifically, the NCAA could abolish the current countable full grant-in-aid scholarship[174] and replace it with a countable full cost of attendance scholarship.[175] This change would benefit student-athletes in two ways.

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169. *See supra* Part IV.A.1.

170. *See supra* Part IV.A.

171. *See In re* NCAA Student Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1004 (N.D. Cal. 2013); *Rock*, 2013 WL 4479815, at *4.

172. *See* Davis, Jr., *supra* note 154, at 642-43.

173. *See* Powell, *supra* note 159, at 259.

174. *See* Dennie, *supra* note 30, at 102 n.33.

175. *See* Goodwin, *supra* note 6, at 1313-15.

First, it would allow for more vigorous competition between member institutions for the labor of student-athletes and member institutions would be incentivized to offer more lucrative scholarships to the student-athletes.[176] Second, providing for cost of attendance would allow student-athletes to live comfortably during their time in college.[177] This sounds paternal but it should be recognized that many if not all student-athletes spend the majority of their time in the gym or on the field and the rest of their time in the classroom.[178] They have very limited opportunity to support themselves outside of those demands. Accordingly, providing for ordinary living expenses – through a cost of attendance scholarship – could help replace the opportunities forgone by student-athletes due to their demanding sport-dominated schedules.

Providing cost of attendance, especially in regard to those student-athletes who come from economically disadvantaged backgrounds, would also reduce the stress of obtaining necessities while increasing the amount of time student-athletes could spend at school.[179] This benefit for student-athletes would benefit the NCAA as well. It would arguably create a better collegiate product. This is because more time spent in the classroom will increase academic results and more time spent in the gym or on the field would increase the quality of play as well.[180] Also, it would lessen the number of NCAA bylaw violations because it would essentially deregulate a large portion of the current NCAA manual and the NCAA would exercise considerably less control over member institutions.

Changing the countable aid limitations from grant-in-aid to cost of attendance would also allow the NCAA to stay true to its amateur-collegiate model. For starters, awarding cost of attendance scholarships is already allowable per the NCAA's scholarship bylaws.[181] However, member institutions are incentivized to award grant-in-aid scholarships due to the countable aid limitations.[182] If these limits were abolished, the NCAA scholarship and amateurism bylaws would not have to undergo any drastic changes; the NCAA would not have to set new limits for the maximum number of scholarships that can awarded. Also, changing the countable aid limitations would preserve the NCAA's scholarship-for-play collegiate model.

The NCAA has recently taken steps to give more autonomy to its more powerful Division I member institutions.[183] This autonomy measure was ultimately adopted[184] and gave these schools – which constitute approximate-

176. *See* Dennie, *supra* note 30, at 123-24.
177. *See* Davis, Jr., *supra* note 154, at 620-21.
178. *Id.* at 621.
179. *Id.* at 620-21.
180. *Id.* at 622.
181. *Id.* at 608.
182. *See* Goodwin, *supra* note 6, at 1277-80.
183. *See* Bennett, *supra* note 165.
184. The autonomy legislation entered an "override" period on August 8, 2014, during which other schools had the opportunity to block its adoption. *See id*. It was

ly twenty percent of the NCAA's Division I membership – the choice to relax the NCAA's scholarship restrictions.[185] Although providing autonomy to the more powerful member institutions may ultimately benefit the less powerful ones as well,[186] it is unclear why the NCAA has chosen to create a disparity. Deregulating Article 15, as applied to *all* member institutions, would be mutually beneficial for both the NCAA and the student-athletes. Although inequity in the type and size of scholarships that member institutions could offer would persist, those inequities would likely work themselves out eventually. Regardless, there is already vast inequality between member institutions. If deregulated, the scholarship bylaws would simply incentivize member institutions to allocate their resources more efficiently while providing them with a powerful recruiting tool. Student-athletes would benefit from the increase in the depth and breadth of scholarships. And, finally, the NCAA would create a better product, which in turn would make it more money.

V. CONCLUSION

Antitrust is a tool that can be used to effect commercial change. Currently, student-athletes are using the antitrust laws to effect a change in the NCAA's bylaws. While these changes will not necessarily go to the core of the NCAA's operations, they will likely benefit student-athletes financially. Specifically, using antitrust to effect change to the NCAA's scholarship bylaws will have a positive effect on the market for the labor of student-athletes. Member institutions will be able to award more creative scholarships and student-athletes will receive better scholarships. This will work out for the NCAA as well; the NCAA will have fewer bylaws to regulate and the association as a whole will produce a better product. However, any changes to the NCAA's bylaws will be on hold pending disposition of the current NCAA-related antitrust cases in federal court. Although the path to antitrust success against the NCAA may be limited, one thing is certain: the current direction of the NCAA is unpopular. Regardless of whether the ultimate disposition of the pending suits is for or against the NCAA, it is apparent that the NCAA will have to continue to change and evolve to better serve whom they purport to serve: the student-athletes.

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not overridden by the membership at-large. *NCAA Autonomy Structure Moves Forward After Avoiding Override*, USA TODAY (Oct. 6, 2014, 7:34 PM), http://www.usatoday.com/story/sports/college/2014/10/06/ncaa-autonomy-structure-moves-forward-after-avoiding-override/16831123/.

185. *See* Bennett, *supra* note 165. Recently, the most powerful NCAA schools enacted the "first package of autonomous legislation, headlined by a full cost-of-attendance measure" intended to align full grant-in-aid scholarships with cost of attendance. Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 18, 2014, 12:25 AM), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

186. *See* Bennett, *supra* note 165.