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Kamron Cox

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ABSTRACT

This paper explores a future in which two "super conferences" dominate college football. Considering the erosion of the PAC 12 Conference and the looming threats to the Atlantic Coast Conference against the skyrocketing media rights revenues of the Big Ten Conference and the Southeastern Conference ("Power Two"), thought leaders across college athletics anticipate that future industry changes will be characterized by a continued consolidation of valuable college football brands into fewer high major conferences than we see today. At the same time, the frequency and public sentiment toward legal attacks on student-athlete compensation restrictions are now such that major college football student-athletes are soon likely to gain access to greater compensation, through employment, collective bargaining, revenue-sharing, or otherwise. As college football becomes captured by the Power Two, there will be a greater incentive for the two rival conferences to work together to maximize the revenues associated with their media rights agreements and minimize the expenses associated with student-athlete compensation. This article argues that antitrust concerns related to media rights agreements are more salient than those related to student-athlete compensation, because courts will be more likely to find that the Power Two controls the relevant product market with respect to high major college football broadcasts than with respect to elite football student-athlete talent. The distinction is grounded in the

[*] Mr. Cox has a B.A. from Auburn University and a J.D. from Vanderbilt University. He serves as the Assistant Director of Athletics, Strategic Initiatives within the Division of Intercollegiate Athletics at the University of Illinois Urbana-Champaign. He is also an Adjunct Professor at the University of Illinois College of Law, where he teaches a course on the legal landscape of student-athlete name, image, and likeness. Mr. Cox would like to recognize Rebecca Haw Allensworth, Roger Denny, and Samantha Turk for their respective manuscript reviews.

presence or absence of a reasonable substitute for Power Two products in the context of different consumer groups. Regardless of the legal viability, this article also argues that public perception is such that conferences should avoid using their authority to cap student-athlete benefits. Instead, each institution should decide to compensate its student-athletes at fair, but fiscally responsible, levels that will sustain the college athletics framework.

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College football occupies a special place in American hearts, minds, and television sets. The uptick in higher education enrollment during the 1960s and 1970s coincided with an explosion in the popularity of television to create new synergies between the largest alumni bases and the institutions sponsoring the most popular college football programs.[1] By the late 1970s, college football had become especially popular at a handful of large state institutions. This concentrated focus threatened the competitive balance of the sport, especially when several prominent college football programs affiliated with a small number of conferences began to earn outsized revenues.[2] By the 2000s, college football was a big business, driven mostly by large institutions in the largest conferences.[3] Primarily due to the value of college football broadcasts, conference media rights earnings widely began to surpass ticket sales as the primary source of athletic revenue for the institutions that sponsored the most popular teams.[4] In short, the college athletics enterprise began to generate more money from those fans that could not attend the games than from those fans that could attend. Major institutions with longstanding geographic ties to certain conferences began a pattern of searching for new conferences in hopes of gaining access to more lucrative media rights

[1] *See* Tom Shales, *TV in the '70s*, WASH. POST (Dec. 26, 1979, 7:00 PM), https://www.washingtonpost.com/archive/lifestyle/1979/12/27/tv-in-the-70s/6a3a1ac0-d251-428c-acf7-1e227488474a/ [https://perma.cc/DVY5-YGZ5] ("In 1970, there were only 2,490 cable TV systems in the United States, serving 4.5 million subscribers. By the end of the decade, the number of systems had risen to 4,150 and the number of subscribers to 15.5 million."); John A. Centra, *College Enrollment in the 1980s*, 51 J. HIGHER EDUC. 18, 18 (1980) ("In the 1960s alone, undergraduate enrollment doubled to 4 million and total enrollment rose to 8.6 million. A number of conditions have combined to produce this growth. Foremost is a population boom that doubled not only the college-age population between 1953 and 1977 but also the demand for college-trained teachers at all levels."); Michael Weinreb, *The Age of the Giants: How College Football's Arms Race Took Off in the 1970s*, THE ATHLETIC (Jun. 17, 2019), https://theathletic.com/1026003/2019/06/17/college-football-1970s-power-major-schools-ncaa/ [https://perma.cc/NU4N-3N2U].

[2] *See* Michael Weinreb, *An Era of Excess: In the 1980s, College Football Outgrew NCAA Rules*, THE ATHLETIC (Jul. 1, 2019), https://theathletic.com/1050606/2019/07/01/college-football-1980s-ncaa-scandals-money/ [https://perma.cc/CMG2-L4LG].

[3] *See The Most Valuable College Football Teams*, FORBES (Nov. 20, 2007, 10:00 AM), https://www.forbes.com/2007/11/20/notre-dame-fooball-biz-sports-cx_ps_1120collegeball.html?sh=66b95b607395 [https://perma.cc/XQ25-5AH7] ("Last year, 10 college football teams raked in at least $45 million in revenues—among them, the University of Notre Dame, University of Georgia, Ohio State and Auburn University—compared to none five years ago.").

[4] *Id.*

arrangements that could help finance their growing athletic operations.[5] Initial public skepticism surrounding the viability of college football schedules that abandoned traditional rivalries and regionalized contests in favor of manufacturing marquee matchups proved to be unwarranted in a nationalized marketplace.[6] Today, the most popular college football programs garner attention on both coasts, and media rights revenues continue to skyrocket.[7]

Since the 1906 formation of the Intercollegiate Athletic Association of the United States, the predecessor to the National Collegiate Athletic Association ("NCAA"), American college football has distinguished itself from professional football primarily through its affiliation with higher education institutions and its stringent restrictions on athletic compensation for student-athletes.[8] By the turn of the millennium, the increased revenues in college athletics correspondingly increased the persuasiveness of public criticism attacking prohibitions against student-athlete compensation.[9] Critics of the amateurism tradition argued that the various NCAA rules barring student-athletes from receiving a direct share

[5] *See* Tom Fornelli, *Big Ten Football Schedule Model: Incredible TV Prioritized with Built-in Flexibility Set to Serve League Well*, CBS SPORTS (June 8, 2023, 7:18 PM), https://www.cbssports.com/college-football/news/big-ten-football-schedule-model-incredible-tv-prioritized-with-built-in-flexibility-set-to-serve-league-well/ [https://perma.cc/XXC4-6A86] ("Television is why USC, UCLA, Nebraska, Rutgers and Maryland are in the Big Ten. While it may go against tradition and our finer sensibilities, it should be at the heart of scheduling decisions.").

[6] *See* Brett Gibbons, *College Football Rivalries Going Extinct with Conference Realignment*, SPORTS ILLUSTRATED (Sept. 21, 2023, 2:32 PM), https://www.si.com/college/tcu/football/college-football-rivalries-going-extinct-oklahoma-state-bedlam-tcu-smu-iron-skillet-usc-stanford-oregon-state [https://perma.cc/3555-4XTJ] ("Major conference realignment brings a lot of changes, but perhaps none more detrimental to the sport than the eradication of some of its most storied rivalries.").

[7] *See* Sam Cooper, *Power Five Conferences Brought in More Than $3.3 Billion in 2022 with Big Ten, SEC Leading the Way*, YAHOO SPORTS (May 19, 2023), https://sports.yahoo.com/power-five-conferences-brought-in-more-than-33-billion-in-2022-with-big-ten-sec-leading-the-way-221807825.html [https://perma.cc/TT3F-QPZL].

[8] Intercollegiate Athletic Ass'n of the United States, BYLAWS art. VII, PROCEEDINGS OF THE FIRST ANNUAL CONVENTION OF THE INTERCOLLEGIATE ATHLETIC ASS'N OF THE UNITED STATES 34 (1906) ("No student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession.").

[9] *See* Michael Steele, O'Bannon v. NCAA: *The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation*, 99 MARQ. L. REV. 511, 512 (2015); *Judge's Ruling in Latest Antitrust Lawsuit Against NCAA Could Lead to Billion in Damages*, ASSOC. PRESS (Nov. 3, 2023, 10:29 PM), https://apnews.com/article/ncaa-lawsuit-house-3c6b373a3c18cd02be0f2f9abcfcfdbf [https://perma.cc/4UAA-KA8E] [hereinafter *Judge's Ruling in Latest Antitrust Lawsuit*].

of growing revenue pies became hypocritical after prominent head coaches and athletic directors commanded seven-figure salaries.[10] Without allowing direct student-athlete compensation, the NCAA acquiesced in 2014 to permit different benefit standards for the institutions affiliated with the Atlantic Coast Conference ("ACC"), Big Ten Conference ("Big Ten"), Big 12 Conference ("Big 12"), Pac-12 Conference ("PAC 12") and Southeastern Conference ("SEC") (collectively, the "Power Five"), thus formally acknowledging their distinction from the remainder of the NCAA membership and effectively legitimizing their supremacy.[11] Meanwhile, recent legal challenges to longstanding NCAA rules have allowed student-athletes at all institutions to gain additional benefits beyond the traditional package of athletic scholarships and necessary expenses.[12] Even so, the NCAA remains strongly opposed to institutions compensating student-athletes directly for their athletic abilities, despite continued public protests.[13]

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[10] Steele, *supra* note 9, at 534–35. It is worth noting that this argument has often included a racial component that tends to attract additional public criticism from social activists, college professors, and groups like the National Association for the Advancement of Colored People (NAACP) that are primarily concerned with historical inequities rather than sports economics. *A Call to Stop the Exploitation of National College Athletes*, NAACP (2012), https://naacp.org/resources/call-stop-exploitation-national-college-athletes [https://perma.cc/ZBH6-3YZ3]. The NCAA Demographic Database indicates that since 2012 the majority of head football coaches and athletic directors at Power Five institutions have been White, and the plurality of football student-athletes at those institutions have been Black. *See NCAA Demographic Database*, NCAA (OCT. 2023), https://www.ncaa.org/sports/2018/12/13/ncaa-demographics-database.aspx [https://perma.cc/PZN2-3964].

[11] *See Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014, 11:49 AM), https://www.ncaa.org/news/2014/8/7/board-adopts-new-division-i-structure.aspx [https://perma.cc/2GPJ-U38T] (detailing the new governance framework); *but see Statement from American Athletic Conference Commissioner Mike Aresco*, AM. ATHLETIC CONF. (Mar. 9, 2023), https://theamerican.org/news/2023/9/1/general-statement-from-commissioner-mike-aresco.aspx [https://perma.cc/6F6V-FMR5] ("It is troubling to see media-manufactured labels, confirmed by college sports leadership, which do not reflect the reality of college sports going forward. This creates a divide at five that should not exist and creates harmful effects.").

[12] O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015) (affirming ruling permitting student-athletes to receive an additional stipend to cover the full cost of attending their specific institution); NCAA v. Alston, 594 U.S. 69, 107 (2021) (from which student-athletes gained access to additional education-related benefits); *Interim NIL Policy*, NCAA (June 30, 2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf [https://perma.cc/88EY-FUX4] (allowing student-athletes to earn compensation through the licensing of their names, images, and likenesses).

[13] *Interim NIL Policy*, *supra* note 12 (reinforcing NCAA prohibitions against pay-for-play).

College athletics now finds itself with a complex, but enviable, problem. On the one hand, sports programming has broadly come to dominate live television viewership, helping to provide Power Five conferences with tremendous leverage to negotiate the media rights agreements that generate substantial revenues for their institutions.[14] Furthermore, flexibility in conference affiliations and scheduling rules have enhanced the visibility of marquee college football competitions that now set the most prominent teams against each other with a degree of regularity that was previously unfeasible.[15] On the other hand, the increase in revenue and popularity has led to louder cries to allow student-athlete compensation through the structures of employment, collective bargaining, revenue-sharing, or otherwise.[16] The NCAA has already lost a host of major legal challenges in recent years, and continued legal pressure threatens the NCAA's stronghold on college athletics policy and governance overall.[17] Its authority has diminished on the same timeline that conference affiliation has become paramount, and individual

[14] *See* Lucas Shaw, *Live TV has been Collapsing for a Decade. Why Hasn't Football*, BLOOMBERG (Nov. 19, 2023, 5:00 PM), https://www.bloomberg.com/news/newsletters/2023-11-19/live-tv-has-been-collapsing-for-a-decade-why-hasn-t-football [https://perma.cc/9QGU-62QS] ("The explanation for this seems simple. Programming that must be consumed live, like sports and breaking news, is immune to cord-cutting, smartphones and the collapse of what was once TV. Even if the number of people paying for live TV is in decline, sports fans are canceling at lower rates because cable is the only place where they can watch most of their games."); David Jarvis et al., *Live Sports: The Next Arena for the Streaming Wars*, DELOITTE INSIGHTS (Nov. 30, 2022), https://www2.deloitte.com/xe/en/insights/industry/technology/technology-media-and-telecom-predictions/2023/live-sports-streaming-wars.html [https://perma.cc/HR8G-RZ6A].

[15] Ralph Russo, *Big Ten Grabs Oregon, Washington; Big 12 Completes Pac-12 Raid with Arizona, Arizona State and Utah*, ASSOC. PRESS (Aug. 5, 2023, 1:07 PM), https://apnews.com/article/pac12-big-ten-big12-conference-realignment-washington-oregon-f9f066d554b54ab600f798d91193aee4 [https://perma.cc/96W2-PANQ]; Casey Smith, *Big Ten Eliminating East, West Divisions in 2024*, SPORTS ILLUSTRATED (June 8, 2023, 4:26 PM), https://www.si.com/college/ohiostate/football/ohio-state-buckeyes-football-big-ten-eliminating-east-west-divisions-2024-ucla-bruins-usc-trojans-michigan-wolverines-the-game-illinois-fighting-illini-illibuck-trophy [https://perma.cc/T3FN-VMFU].

[16] *See* Michael McCann, *College Athletes as Employees: Answering 25 Key Questions*, SPORTICO (Dec. 19, 2023, 10:00 AM), https://www.sportico.com/feature/college-athletes-employees-complete-primer-1234758491/ [https://perma.cc/43TS-4QX9] (detailing the litany of ongoing means through which college athletes could earn compensation and the hurdles of each).

[17] *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 115 (1984); *O'Bannon*, 802 F.3d at 1053; *Alston*, 594 U.S. at 107; *Judge's Ruling in Latest Antitrust Lawsuit*, *supra* note 9.

conferences may eventually replace the NCAA as the primary locus of power in college football.[18]

This article will explore a future in which multiple conferences exercise concurrent control over college football. As conferences take on a leading role, antitrust concerns will continue to inform the acceptable degree of control over both the broadcast rights of college football games and the benefits available to college football student-athletes.

II. ANTICIPATING THE FUTURE: CONSOLIDATING CONTROL AND STUDENT-ATHLETE WAGES

The tensions throughout the modern college athletics business and legal landscapes muddy the waters for the industry. Despite legislative efforts to maintain the current structure, it seems likely that significant changes will alter the college athletics framework in the immediate future.[19] A critical eye yields two reliable predictions with respect to conference realignment. First, conferences will likely gain increased control over college football, vis-a-vis the NCAA.[20] Second, major conference power will likely be more concentrated than it has been in the past. Conference realignment has recently gutted the PAC 12, and disagreements related to conference revenue distributions and competitive spending threaten the long-term viability of the ACC.[21] The Big 12

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[18] *See* Michael Smith, *After Emmert, NCAA Power Shift Could Give Power Five and Other Conferences More Authority*, SPORTS BUS. J. (May 2, 2022), https://www.sportsbusinessjournal.com/Journal/Issues/2022/05/02/Upfront/NCAA-future.aspx [https://perma.cc/LDR2-TDRQ].

[19] *See, e.g.*, *NCAA Focused on Employment Status of Athletes at Senate Hearing*, ESPN (Oct 17, 2023, 11:27 AM), https://www.espn.com/college-sports/story/_/id/38678809/ncaa-focused-employment-status-athletes-senate-hearing [https://perma.cc/SY5Z-AYDP]. Over ten federal legislative hearings addressing NCAA governance have taken place in the past four years, but no piece of federal legislation has advanced beyond the initial stages of the legislative process. *Id.*

[20] *See* Smith, *supra* note 18; *see also* Manu Raju et al., *NCAA Leaders Warn College Sports at Risk of 'Permanent Damage' Without Action from Congress*, CNN (Dec. 3, 2023, 11:30 AM), https://www.cnn.com/2023/12/03/politics/ncaa-college-sports-at-risk-nil/index.html [https://perma.cc/B8BF-7FFA].

[21] *See* Doug Lederman, *Conference Realignment Poses Threats to Big-Time Sports*, INSIDE HIGHER ED. (Sept. 5, 2023), https://www.insidehighered.com/news/students/athletics/2023/09/05/conference-realignment-poses-risks-big-time-college-sports [https://perma.cc/W77U-2PRP] ("The Atlantic Coast Conference made an aggressive move Friday to preserve its status as a major college football league, in part by putting what appears to be the final dagger in the heart of the Pacific-12 Conference, effectively dissolving the Power Five."); Nicole Auerbach, *Florida State Board of Trustees Threatens to Leave ACC Over Media Revenue Imbalance*, THE ATHLETIC (Aug. 2, 2023), https://theathletic.com/4744003/2023/08/02/florida-state-acc-realignment/ [https://perma.cc/4DXC-NHHR]; Lynn Hatter, *Florida State Sues ACC in Fight to*

remains solidly in existence, but the publicized value of its 2022 media rights agreement is far below that of the Big Ten and the SEC, placing it firmly behind the two leading conferences.[22] Most telling has been the changing conference affiliations of institutions that sponsor the most prominent football programs. In 2021, the University of Texas and the University of Oklahoma made plans to move to the SEC, despite their historic dominance within the Big 12.[23] Similarly, the University of Southern California ("USC"), the University of California, Los Angeles, the University of Oregon, and the University of Washington subsequently announced their defections from the PAC 12 to join the Big Ten.[24] Together, it seems that the SEC and the Big Ten are poised to displace the Power Five in terms of both their dominance of college football and their influence over college sports policy, more broadly.[25] Recognizing their

Leave Conference Over Revenue Complaints, NPR (Dec. 23, 2023, 5:38 PM,) https://www.npr.org/2023/12/23/1221455744/florida-state-sues-acc-in-fight-to-leave-conference-over-revenue-complaints [https://perma.cc/4DXC-NHHR].

[22] *See* Brett Gibbons, *Big 12 Conference Inks $2.3 Billion Media Rights Deal With ESPN, Fox Sports*, SPORTS ILLUSTRATED (Oct. 31, 2022, 4:53 PM), https://www.si.com/college/tcu/football/big-12-conference-inks-2-3-billion-media-rights-deal-with-espn-fox-sports [https://perma.cc/R6NG-HSXQ] ("The [$2.3 billion] Big 12 deal follows the blockbuster $7 billion media rights deal finalized by Big Ten with NBC, CBS, and Fox in August.").

[23] *See* Heather Dinich & Mark Schlabach, *Texas Longhorns, Oklahoma Sooners Unanimously Accept Invitation to SEC*, ESPN (July 30, 2021, 11:08 AM), https://www.espn.com/college-football/story/_/id/31920686/texas-longhorns-oklahoma-sooners-unanimously-accept-invitation-sec [https://perma.cc/3XFF-BXDU].

[24] Adam Rittenberg, *Big Ten adds Oregon, Washington as Newest Members in Blow to Pac-12*, ESPN (Aug. 4, 2023, 7:35 PM), https://www.espn.com/college-football/story/_/id/38135852/big-ten-adds-oregon-washington-newest-members-blow-pac-12 [https://perma.cc/67SC-5NU7] ("The Big Ten added Oregon and Washington as new members Friday, strengthening the Western flank of the rapidly growing conference while dealing a major blow to the Pac-12.").

[25] With the exceptions of Clemson University (2016 and 2018), Florida State University (1993, 1999, and 2013), and the University of Miami (2001), no team outside of the SEC or the Big Ten has won a college football national championship since 1990. *Championship History*, NCAA, https://www.ncaa.com/history/football/fbs [https://perma.cc/5FCG-LVYT] (last visited Mar. 7, 2024). Both Florida State University and Clemson University have reportedly considered a departure from the ACC. *See* Pat Forde, *Florida State Exit Watch Continues Despite ACC's 2024 Deadline Passing*, SPORTS ILLUSTRATED (Aug. 15, 2023), https://www.si.com/college/2023/08/16/florida-state-acc-exit-watch-2024-deadline-passing [https://perma.cc/NT6Y-YG5J] ("The Seminoles are expected to stay put for the 2024 season, but the conference is bracing for an attempted exit—with FSU potentially being followed by Clemson and others."). With the exception of the University of Notre Dame (1946, 1947, 1949, 1964, 1966, 1973, 1977, 1988), no team outside of the Power Five has won a college football national championship since 1945. *See Championship History*, *supra*.

mutual distinction and importance in shaping industry outcomes, the two rival conferences formed a joint advisory group in February 2024 to provide their collective perspectives on the most pressing issues in college athletics.[26]

Separately, current legal challenges in several circuits have combined with regulatory and legislative activity to attempt to force the NCAA to abandon its amateur framework in favor of a new student-athlete compensation scheme that adopts elements of a professional model.[27] The actions of the judges, regulators, and legislators involved with these efforts suggest that they are likely to find in favor of further student-athlete compensation in the future.[28] Anticipating that NCAA institutions will

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[26] *See Big Ten Conference, Southeastern Conference Form Advisory Group*, BIG TEN CONF. (Feb. 2, 2024), https://bigten.org/news/2024/2/2/general-big-ten-conference-southeastern-conference-form-advisory-group.aspx [https://perma.cc/5LAK-ADB7] (SEC Commissioner Greg Sankey: "There are similar cultural and social impacts on our student-athletes, our institutions, and our communities because of the new collegiate athletics environment . . . . We do not have predetermined answers to the myriad questions facing us. We do not expect to agree on everything but enhancing interaction between our conferences will help to focus efforts on common sense solutions.").

[27] *See* Jesse Dougherty, *The Legal Challenges that Could Overhaul College Sports*, THE WASHINGTON POST (Nov. 9, 2023, 1:33 PM), https://www.washingtonpost.com/sports/2023/11/09/ncaa-legal-cases-nil/ [https://perma.cc/TM3P-658F].

[28] *See generally* Jennifer Abruzzo, General Counsel Memorandum GC 21-08, *Statutory Rights of Players at Academic Institutions (Student Athletes) Under the National Labor Relations Act*, NLRB (Sept. 29, 2021) (in which the General Counsel of the National Labor Relations Board explains why the student-athlete moniker is a misnomer to bar student-athletes from accessing their rights as employees); Assemb. B. 252, 2023–2024 Reg. Sess. (Cal. 2023) (in which the California state legislature proposes to mandate a profit-sharing arrangement between student-athletes and their institutions. The California state legislature also set forth the Fair Pay to Play Act in 2019, the first of many state laws that guaranteed student-athletes the right to earn compensation from their names, images, and likenesses (NIL)); *In re* Coll. Athlete NIL Litig., No. 20-CV-03919 CW, 2023 WL 7106483, at *1–2 (N.D. Cal. Sept. 22, 2023) (in which class status is certified for plaintiffs setting forth antitrust claims against the NCAA's NIL restrictions, creating a pathway for the plaintiffs to claim (i) backpay for NIL opportunities previously barred by NCAA rules and (ii) shares of institutional media and licensing revenues. Settlement discussions for this matter were ongoing as of the time of writing. Judge Wilken of the Northern District of California will adjudicate this matter and certify any settlement agreements that may be reached. Judge Wilken also adjudicated *O'Bannon v. NCAA* and *Alston v. NCAA*, two significant antitrust actions that resulted in rulings against the NCAA and the deterioration of traditional student-athlete amateurism.); Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Penn. 2021) (the denial of the motion to dismiss this case arguing for student-athlete employment status under the Fair Labor Standards Act is up for appeal in the Third Circuit. Questions from the bench during oral arguments suggest that the Third Circuit is not likely to dismiss the case); Trs. of Dartmouth Coll. and Serv. Emps. Int'l Union, Local 560, Region 01, NLRB (2024) (the decision of the

soon be legally obligated to pay direct compensation to student-athletes, policy leaders in college athletics are considering financially and competitively sustainable ways that such compensation may be structured.[29]

III. ANTICIPATING THE FUTURE: TWO POWERS, TWO PROBLEMS

The progression of the most powerful forces in college athletics has moved along a cognizable trajectory over the past several decades such that it is plausible to anticipate the key pillars of its immediate future with some level of confidence.[30] After the conference realignments of 2024, the most important policy changes to the college athletics framework will almost certainly be driven by (i) competitive pressures related to the growth of media rights revenues and (ii) financial pressures related to the

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Regional Director that men's basketball student-athletes at Dartmouth College are considered employees that are entitled to the right to unionize under the National Labor Relations Act is under appeal).

[29] *See e.g.*, Billy Witz, *NCAA Proposes Uncapping Compensation for Athletes*, N.Y. TIMES (Dec. 5, 2023), https://www.nytimes.com/2023/12/05/us/ncaa-athlete-compensation-cap-proposal.html [https://perma.cc/ZN46-UBFG] ("Under the plan, schools would set aside educational trust funds of at least $30,000 per year for at least half of their athletes, and would have to comply with Title IX laws."); Michael Casagrande, *Nick Saban Doesn't Hold Back When Asked About Paying Players*, AL.COM (Mar. 14, 2024, 3:18 PM), https://www.al.com/alabamafootball/2023/05/nick-saban-doesnt-hold-back-when-asked-about-paying-players.html [https://perma.cc/M2QY-S2YJ] (In which University of Alabama head football coach Nick Saban states, "Unionize [college football], make it like the NFL. . . . I think that's better than what we have now because what we have now is we have some states and some schools in some states are investing a lot more money in terms of managing their roster than others and I think this is going to create a real competitive disadvantage for some in the future."); Ralph Russo, *Revenue-Sharing with Major College Football Players Seems 'Inevitable.' How Could it be Done?*, ASSOCIATED PRESS (Sept. 12, 2023, 12:30 PM), https://apnews.com/article/college-athletes-revenue-sharing-726b9a5a8aa9a28575fe8001ee19582d [https://perma.cc/5HRV-ZY38]; Ross Dellenger, *Would Collective Bargaining Solve College Sports' NIL Issues? Notre Dame AD: 'You've Got to Create Something New,'* YAHOO SPORTS (Oct. 17, 2023), https://sports.yahoo.com/would-collective-bargaining-solve-college-sports-nil-issues-notre-dame-ad-youve-got-to-create-something-new-214936402.html [https://perma.cc/X2ZZ-H7YA] (In which University of Notre Dame Vice President and Director of Athletics Jack Swarbrick states, "There is a challenge here. Are they bargaining with the NCAA or the conference? [Collective bargaining] can't be school by school. You need some competitive equity.").

[30] Scott Dochterman, *How Conference Realignment Shaped College Sports, in Ex-Big Ten Boss Jim Delany's Words*, THE ATHLETIC (July 12, 2023), https://theathletic.com/4670429/2023/07/12/conference-realignment-big-ten-jim-delany/ [https://perma.cc/9WAL-6EYK].

significant cost of increased student-athlete benefits.[31] The future of college athletics likely entails the emergence of the Big Ten and the SEC (the "Power Two") as the only super conferences following their planned additions of premier college football brands from the Big 12 and the PAC 12.[32] Relatedly, the future necessarily anticipates a regression in the relative strength of the Big 12 and the ACC, along with the extinction of the PAC 12.[33] The number of institutions in individual conferences may shift, but the most meaningful changes will continue to be the additions of major football brands into one of the Power Two conferences.[34] While some have predicted that the Power Two conferences will eventually expel less prominent members, this article assumes that continued expansion is

[31] Starting in 2024, the list of Big Ten institutions will be University of Illinois Urbana-Champaign (Urbana, Ill.), Indiana University (Bloomington, Ind.), University of Maryland College Park (College Park, Md.), University of Michigan (Ann Arbor, Mich.), Michigan State University (East Lansing, Mich.), The Ohio State University (Columbus, Ohio), Pennsylvania State University (University Park, Pa.), Rutgers University (Piscataway, N.J.), University of Iowa (Iowa City, Iowa), University of Minnesota-Twin Cities (Minneapolis, Minn.), University of Nebraska-Lincoln (Lincoln, Neb.), Northwestern University (Evanston, Ill.), Purdue University (West Lafayette, Ind.), University of Wisconsin-Madison (Madison, Wis.), University of Washington (Seattle, Wash.), University of Oregon (Eugene, Or.), University of California-Los Angeles (Los Angeles, Cal.), and University of Southern California (Los Angeles, Cal.). Starting in 2024, the list of SEC institutions will be University of Florida (Gainesville, Fla.), University of Georgia (Athens, Ga.), University of Kentucky (Lexington, Ky.), University of Missouri-Columbia (Columbia, Mo.), University of South Carolina (Columbia, S.C.), University of Tennessee (Knoxville, Tenn.), Vanderbilt University (Nashville, Tenn.), University of Alabama (Tuscaloosa, Ala.), University of Arkansas (Fayetteville, Ark.), Auburn University (Auburn, Ala.), Louisiana State University (Baton Rouge, La.), University of Mississippi (Oxford, Miss.), Mississippi State University (Starkville, Miss.), Texas A&M University (College Station, Tex.), University of Texas-Austin (Austin, Tex.), and University of Oklahoma (Norman, Okla.); *see also* Tommy Beer, *NCAA Athletes Could Make $2 Million A Year If Paid Equitably, Study Suggests*, FORBES (Sept. 1, 2020, 1:02 PM), https://www.forbes.com/sites/tommybeer/2020/09/01/ncaa-athletes-could-make-2-million-a-year-if-paid-equitably-study-suggests/?sh=31bba40c5499 [https://perma.cc/9RX2-TD69]; Pat Forde & Richard Johnson, *College Football's Inevitable Conclusion? Two 20-Team Megaconferences*, SPORTS ILLUSTRATED (Aug. 30, 2023), https://www.si.com/college/2023/08/30/college-footballs-inevitable-conclusion-is-a-40-team-mega-alliance [https://perma.cc/2URZ-4JT5].

[32] Nicole Auerbach, *Will the Power 5 Soon Become the Power 2? Unpacking New TV Revenue Projections for a 12-team CFP World*, THE ATHLETIC (Mar. 29, 2022), https://theathletic.com/3215360/2022/03/29/will-the-power-5-soon-become-the-power-2-unpacking-new-tv-revenue-projections-for-a-12-team-cfp-world/ [https://perma.cc/VET4-JAK7] ("Forget about the Power 5. College athletics is headed toward a financial reality that looks more like a Power 2.").

[33] Gibbons, *supra* note 6; Forde & Johnson, *supra* note 31.

[34] Dochterman, *supra* note 30.

the only path forward for the immediate future.[35] The future will also likely bring direct compensation for student-athlete labor that allows all Football Bowl Subdivision ("FBS") football student-athletes to earn substantial amounts of money from their institutions.[36]

Each Power Two conference will eventually come to see the other as its primary peer and most serious competitor. In jockeying for lead position, each will try to anticipate the moves of the other to gain an advantage with respect to both (i) maximizing its media rights revenues and (ii) minimizing the costs of student-athlete wages. There are several scenarios where such maneuvering may conflict with antitrust laws, and this article sets forth two realistic hypothetical scenarios in which the Power Two conferences take concerted actions that could invite antitrust scrutiny. As to maximizing media rights revenues, it is plausible that the Power Two will work together to minimize the threat of competing games that may detract from the viewership and value of their respective marquee matchups. It is also plausible that the Power Two will collectively determine a single wage structure that would be applied to football student-athletes in both conferences. In both scenarios, an important legal point will be the determination of the relevant product market based on the presence of reasonable substitutes for the consumers specific to that market.

IV. FOUNDATIONS OF ANTITRUST: SUMMARIZING SECTION ONE OF THE SHERMAN ACT

A cursory understanding of antitrust is necessary to appreciate the most immediate legal concerns of the Power Two framework. Federal legislation to protect Americans from concerted activity that may be detrimental to consumer interests was first set forth in the Sherman Act of 1890 ("Sherman Act"), following the rise of commercial schemes that generated extravagant wealth for early capitalists.[37] Section 1 of the

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[35] Forde & Johnson, *supra* note 31; David Ubben, *College Football's Ruthless Next Step is a Matter of When, Not If*, THE ATHLETIC (Aug. 17, 2023), https://theathletic.com/4782053/2023/08/17/college-football-conference-realignment-contraction/ [https://perma.cc/RQK8-SEMM] ("We're not far from the two biggest leagues having no more options in expansion to earn more money. If a revenue gap grows, the next option seems obvious: contraction.").

[36] *See* B. David Ridpath & Mit Winter, *Direct Bargaining with Athletes is Best Way Forward for College Sports*, SPORTICO (July 6, 2022, 8:45 AM), https://www.sportico.com/leagues/college-sports/2022/direct-bargaining-with-college-athletes-1234680498/ [https://perma.cc/9G5C-G69Z].

[37] 15 U.S.C. § 1. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911) ("[T]he main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of

Sherman Act ("Section 1") reads plainly, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[38] The language is clearly broad, but the long-settled interpretation is that a Section 1 plaintiff generally must prove three elements: (i) the presence of a contract, combination, or some other conspiracy, (ii) an unreasonable restraint of trade in a relevant market, and (iii) harm to consumers.[39] The language of Section 1 implicitly speaks only to parties agreeing to act together, since there can be no legal conspiracy with oneself.[40] The making of the agreement is itself illegal, separate from any subsequent acts that may follow.[41] Courts will ordinarily undertake another three-step burden-shifting sub-analysis to determine the reasonableness of an alleged illegal restraint of trade (the "Rule of Reason"). First, the plaintiff must show that the challenged restraint has a substantially anticompetitive and harmful effect in the relevant product and geographic markets.[42] Second, the defendant must offer a procompetitive rationale for the challenged restraint with respect to those markets.[43] Finally, if the defendant successfully carries such burden, then the plaintiff must offer an achievable alternative action that is both less restrictive than the challenged restraint and equally effective with respect to the procompetitive rationale.[44]

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corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally."); *see generally* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON., 7–48 (1966); *see also* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer Welfare Hypothesis*, 53 J. ECON. HIST., 359–76 (1993) (rejecting Bork's analysis and insisting that the Sherman Act was set forth instead to protect producers).

[38] 15 U.S.C. § 1.

[39] Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (citing Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)).

[40] *See* Iannelli v. United States, 420 U.S. 770, 777 (1975) ("Unlike some crimes that arise in a single transaction, the conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act.") (citations omitted).

[41] *Id.*

[42] *See* Ohio v. Am. Express Co., 585 U.S. 529, 530 (2018). While the full definition of the relevant market for antitrust purposes includes a determination of the relevant geographic market, this component will not be analyzed and explored herein because the geographic market was not a key component of the case precedent and it is not likely to be disputed in the hypothetical scenarios set forth later.

[43] *Id.* at 541.

[44] *Id.* at 542.

In setting forth a Section 1 challenge under the Rule of Reason, a plaintiff must demonstrate that the defendant possesses sufficient market power to cause consumer harm within a defined market.[45] Thus, a critical step at the outset of many Rule of Reason analyses is to determine the specific parameters of the defendant's power.[46] Without market power, the defendant survives the Rule of Reason analysis because the defendant necessarily lacks the capacity to harm consumers in "the area of effective competition" by raising prices above those which could be charged in a properly competitive market.[47] In an ideal product market, consumers can simply look elsewhere if the defendant's price is too high, unless the defendant controls pricing in the product market.[48] Defining the relevant product market generally requires the use of econometric data, industry-specific analyses, and a contentious sparring match between experts during discovery.[49] The crux of the matter is the determination of whether consumers can purchase another product that would be *reasonably*

[45] Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998).

[46] *See* Banks v. NCAA, 746 F. Supp. 850, 858 (N.D. Ind. 1990) ("In any Rule of Reason case, the threshold issue is market power, which is the ability to raise prices above the competitive level by restricting output.") (citing Wilk v. Am. Med. Ass'n, 895 F.2d 352 (7th Cir. 1990); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987)).

[47] *Am. Express Co.*, 585 U.S. at 543 ("Thus, the relevant market is defined as the 'area of effective competition.'") (citing Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965); *accord* 2 KALINOWSKI § 24.01[4][a]); *see also* NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 109 (1984). The plaintiff need not show consumer harm in a relevant market under "per se" or "quick look" Section 1 analysis, but the consumer harm should be discernable. *See* Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 308 (2d Cir. 2008) ("Salvino has not offered any evidence of an adverse effect on competition resulting from MLBP's licensing authority. Indeed, Salvino did not respond to MLBP's arguments regarding the rule of reason analysis and instead urged the Court to analyze its claims under the per se rule or quick look doctrine, neither of which would require Salvino to make a showing of adverse effect on the market."); Agnew v. NCAA, 683 F.3d 328, 337 (7th Cir. 2012) ("The quick-look doctrine permits plaintiffs to forgo any strict showing of market power, and thus a specific definition of the relevant market. ('[W]here a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power.'). This does not mean, however, that there need not be a relevant market on which actions have an anticompetitive effect.") (citing *Law*, 134 F.3d at 1020).

[48] *Am. Express Co.*, 585 U.S. at 2295 (Breyer, J., dissenting) ("The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather than pay the higher prices.").

[49] *See e.g.*, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1075–77 (N.D. Cal. 2019); O'Bannon v. NCAA, 7 F. Supp. 3d 955, 966–68 (N.D. Cal. 2014).

substitutable with the product that is the focus of the challenged restraint.[50] One product does not have to be fungible with another to be considered in the same relevant product market.[51] Rather, it only must be demonstrated that there is a cross-elasticity between the two products such that changes in the price of one product would directly affect changes in the demand of another.[52] If no reasonably substitutable product exists for the consumer other than that which is controlled by the defendant, then the defendant necessarily must hold sufficient power over the relevant market.[53] Once market power is established, the three-part Rule of Reason analysis proceeds according to the framework outlined above.[54]

It is worth noting that courts do not always take the full Rule of Reason approach to a Section 1 analysis. Instead, courts can find anticompetitive activity through abbreviated forms of review. When the challenged action "facially appears to be one that would always or almost always tend to restrict competition and decrease output," it may be considered a "per se" violation of Section 1.[55] In the case of per se review, courts may consider the defendant's market power to determine whether the per se standard of review should be applied, but the plaintiff is not required to demonstrate that the defendant possesses market power for the

[50] *See Am. Express Co.*, 585 U.S. at 543–54 ("Thus, the relevant market is defined as 'the area of effective competition.' Typically this is the 'arena within which significant substitution in consumption or production occurs.'") (citing AREEDA & HOVENKAMP § 5.02; *accord*, 2 KALINOWSKI § 24.02[1]; United States v. Grinnell Corp., 384 U.S. 563, 571 (1966)); *see also Am. Express Co.*, 585 U.S. at 561 (Breyer, J., dissenting) ("Once a court has identified the good or service directly restrained, as *Times–Picayune Publishing Co*. requires, it will sometimes add to the relevant market what economists call 'substitutes': other goods or services that are reasonably substitutable for that good or service.") (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395–96 (1956); 2B AREEDA & HOVENKAMP ¶ 561, at 378).

[51] Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 962 (6th Cir. 2004) (citing United States v. Cont'l Can Co., 378 U.S. 441, 449 (1964)).

[52] *Id.*; *see also* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392 (1984) ("Product market definition involves the process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.") (citing Kaplan v. Burroughs Corp., 611 F.2d 286, 292 (9th Cir. 1979)).

[53] *See e.g.*, Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 252 (1959) (holding that market power over championship boxing exists because championship boxing is a distinct product from non-championship boxing).

[54] *See e.g.*, *Am. Express Co.*, 585 U.S. at 541.

[55] Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) ("We have recognized, for example, that 'there is often no bright line separating per se from Rule of Reason analysis,' since 'considerable inquiry into market conditions' may be required before the application of any so-called 'per se' condemnation is justified.") (citing NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 n.26 (1959)).

court to find that a Section 1 violation occurred.[56] Additionally, courts may also employ another abbreviated Rule of Reason analysis, aptly named a "quick look" analysis, where the per se approach is not appropriate but it is otherwise unnecessary to conduct an "elaborate industry analysis . . . to demonstrate the anticompetitive character of . . . an agreement."[57] Here, as in per se analyses, the plaintiff is not required to demonstrate that the defendant possesses market power, but the court will proceed directly to considering the procompetitive justifications for the alleged anticompetitive behavior.[58]

V. ANTITRUST CONCERNS: DEFINING THE RELEVANT SPORTS MEDIA MARKET

A. Professional Sports Cases

Determining the relevant product for which to consider consumer harm in the context of sports media can be a delicate legal undertaking. Though the language of Section 1 is conceptually designed to bar collusion among competitors, the business of sports inherently requires some level of competitive cooperation for the sake of the popularity of the contests. With respect to professional sports, courts have made a practice of prioritizing data related to consumer choice when deciding whether a specific product is so distinct from others as not to be considered substitutable.[59]

In 1949, separate owners of the Chicago Stadium, the Detroit Olympia Arena, and the St. Louis Arena approached Madison Square Garden for the purpose of acquiring its business interests in championship boxing.[60] After doing so, the owners quickly made a series of business

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[56] *Id.* at 769–70.

[57] *Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 109, 104.

[58] Law v. NCAA, 134 F.3d 1010, 1020 (10th Cir. 1998) ("Thus, where a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason."); Max R. Shulman, *The Quick Look Rule of Reason: Retreat from Binary Antitrust Analysis*, 2 SEDONA CONF. J. 89 (2001) ("The quick look rule incorporates aspects of both the per se rule and the rule of reason. Courts apply quick look to market restraints that appear to be facially anticompetitive but occur in markets or contexts that are new, unusual or unfamiliar to traditional antitrust analysis. The courts are therefore willing to consider possible procompetitive justifications that would not be considered under the per se rule.").

[59] *See e.g.*, Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 250–51 (1959); *Bd. of Regents of Univ. of Oklahoma*, 468 U.S. at 115; Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1385 (9th Cir. 1984).

[60] *Int'l Boxing Club*, 358 U.S. at 246.

maneuvers to gain control of essentially all the major arenas where championship boxing contests would plausibly be hosted.[61] In *International Boxing*, the defendants argued in federal district court that championship boxing could not be a distinct market from that of all professional boxing because the products were logistically identical.[62] All professional boxing contests include two boxers, a standard sized ring, and one referee who moderates according to the same rules, irrespective of the stakes or spectators.[63] However, the Supreme Court upheld the district court's finding that a different market exists for championship boxing based on the significant disparities in average revenues, Nielsen viewership ratings, and the values of distribution rights between championship and non-championship boxing.[64] The Court held championship boxing to be "the 'cream' of the boxing business," and likewise concluded that championship contests are a relevant product submarket distinct from non-championship boxing contests.[65]

Without specific consumer data, courts have been reluctant to find the existence of a relevant sports product market in which the defendant sports entity has market power. The exclusive licensing agent for the intellectual property rights of all thirty Major League Baseball clubs, Major League Baseball Properties ("MLBP"), successfully withstood a Section 1 claim in *Major League Baseball Properties, Inc. v. Salvino, Inc*.[66] In *Salvino*, an aggrieved product seller argued that the action of centralizing MLBP licensing was an unreasonable restraint of trade.[67] The district court found that MLBP did not have sufficient market power to survive the Rule of Reason analysis.[68] Upon review, the Second Circuit

[61] *Id.* at 249–50.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 249–51 ("This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; that television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same two fighters; that the average 'Nielsen' ratings over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over $600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay 'substantially more' for tickets to championship fights than for nontitle fights.").

[65] *Id.* at 252.

[66] 542 F.3d 290 (2d Cir. 2008).

[67] *Id.* at 295.

[68] MLBP, Inc. v. Salvino, Inc., 420 F. Supp. 2d 212, 221 (S.D.N.Y. 2005) ("The Court finds that Salvino has failed to offer any evidence of MLBP's actual adverse effect on the market or its sufficient market power. Accordingly, Salvino cannot

quickly noted a market research study stating that baseball competes with several sports before also referencing an MLBP business plan which listed a broad slate of MLBP competitors beyond the sports industry.[69] Conversely, the court examined another report prepared by an expert economist for the plaintiff, but ultimately rejected the plaintiff's argument that the MLBP was an "economic cartel" because that report could not show empirical evidence of "product uniqueness."[70] Because the expert's report did not include "factual support … for the suggestion that there are no available substitutes for MLB Intellectual Property," the court held that the pieces of evidence offered were merely "guesses."[71]

Consumer data are not the only metrics that can be used to define a sports product market. Around the time of *Salvino*, the owners of the Chicago Bulls franchise sued the National Basketball Association ("NBA") in *Chicago Professional Sports Ltd. Partnership* after the NBA proposed a cap on the number of nationally-televised games that a single team may broadcast on local channels in a single season.[72] In response to a Section 1 suit challenging the seasonal cap, the NBA argued that it lacked product market power because NBA broadcasts were only a small part of the broader television entertainment market and its viewers did not have qualities uniquely attractive to advertisers.[73] When assessing the validity of the claim, the district court looked first to consumer harm in the form of price, noting that the consumers—advertising companies—paid less for NBA games than for other types of television programming, including programming outside of sports.[74] The district court also

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demonstrate under the rule of reason that MLBP places unreasonable restraints on trade.").

[69] *MLBP*, 542 F.3d at 299. ("Thus, the MLBP 1996 Business Plans' list of MLBP's major competitors for intellectual property licensing included the following: branded apparel manufacturers such as Nike, Reebok, Russell, Champion, Big Dog, and No Fear; other sports entities such as the NBA, the NFL, the NHL, NASCAR, collegiate groups, and the 1996 Summer Olympics; and entities, such as Warner Brothers and Disney, that offered licenses to use intellectual property relating to, e.g., Looney Tunes, Power Rangers, Peanuts, Nickelodeon, Batman, SpaceJam, and Goosebumps.").

[70] *Id.* at 301, 328.

[71] *Id.* at 329 ("While Guth had not conducted the empirical studies that he testified were needed before he could do more than make guesses as to what might be substitutable for MLB Intellectual Property licenses, there was ample evidence in the record that prospective licensees of MLB Intellectual Property displayed interest in using intellectual property of, inter alia, other sports entities and leagues").

[72] Chicago Prof. Sports Ltd. Partn. V. NBA, 961 F.2d 667 (7th Cir. 1992).

[73] *Id.* at 673.

[74] *Id.* ("During 1990 the cost per thousand viewers (CPM) of a regular-season NBA network game was $8.17. NCAA football fetched $11.50, and viewers of prime-time programs were substantially more expensive. The CPM for L.A. Law was

considered the number of games shown when determining whether NBA broadcasts constituted a separate relevant market.[75] In doing so, the court made clear that the live sports broadcasting market could theoretically be defined based on information other than audience metrics, even though audience metrics are a relevant consideration.[76] The Seventh Circuit affirmed the district court's approach, stating unequivocally that "[a] market defined by TV viewers is not the only way to look at things."[77]

B. The Board of Regents *Case*

Perhaps no single case has had a greater impact on the landscape of college football than *Board of Regents*.[78] In the 1950s, the NCAA obtained survey evidence that television had a negative effect on live college football attendance.[79] In response, the NCAA developed a television plan in which only one college football game per week could be televised in a given area, effectively allowing the NCAA to exercise sole control over the flow of live college football games in a type of benevolent strategy.[80] Because less popular college football games were unlikely to be televised, the NCAA's plan was purposely designed to protect consistent attendance revenues for the great majority of its members, rather than allowing the small subset of the most prominent institutions to leverage exorbitant revenues from emerging television viewership.[81] This NCAA strategy of tickets-over-TV continued for nearly thirty years, and a modified approach was introduced in 1981 to limit each college football team to six televised games per season ("1981 Plan").[82] Importantly, the

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$19.34, the CPM for Coach $13.40. The NBA hardly has cornered the market on the viewers advertisers want to reach.").

[75] *Id.* at 673–74.

[76] *Id.* at 673; *see also* Am. Needle, Inc. v. New Orleans La. Saints, 385 F. Supp. 2d 687, 695 (N.D. Ill. 2005) (discussing *Chicago Professional Sports Ltd. Partnership*, "[a]lthough the Seventh Circuit did not find that the audience for NBA games distinguished a unique market for these broadcasts, it rejected the notion that the market could only be defined by the audience").

[77] *Chicago Prof. Sports Ltd. Partn*., 961 F.2d at 673.

[78] Dochterman, *supra* note 30 ("No singular event had more impact on expansion and conference realignment than the *NCAA v. Board of Regents* case, which included Oklahoma and Georgia universities as primary plaintiffs.").

[79] NCAA v. Bd. of Regents of Univ. or Oklahoma, 468 U.S. 85, 89–90 (1984).

[80] *Id.* at 90.

[81] *Id.* at 115.

[82] *Id.* at 94. For context, the most popular college football programs, such as those sponsored by the University of Georgia, the University of Alabama, and the University of Michigan, played twelve games during the 1981 season. 1981 *Football Schedule*, UNIV. OF GA. ATHLETICS, https://georgiadogs.com/sports/football/schedule/1981 [https://perma.cc/CTH3-KEXE] (last visited Feb. 27 2024); *1981 Football Schedule*, UNIV. OF ALA.,

NCAA continued to hold the exclusive right to negotiate the price to broadcast each game on behalf of the competing institutions.[83]

The University of Oklahoma and the University of Georgia, both of which sponsored especially popular college football programs, brought suit against the NCAA for the 1981 Plan based on Section 1 of the Sherman Act.[84] The district court found that live college football television provided a "unique product" for which "there is no substitute in the minds of the networks and advertisers," such that it should be considered a distinct market for Sherman Act purposes.[85] Therefore, the court found the NCAA's 1981 Plan attempted to restraint trade over the entirety of a relevant product market.[86] Interestingly, the opinion parried any product comparison of college football played outside of the NCAA framework, insisting that "[t]he amount of televised college football not involving NCAA members is negligible, if it exists at all."[87] The court applied the Rule of Reason to the NCAA's anticompetitive behavior, rejecting the NCAA's assertion that the protection of live attendance served a procompetitive interest.[88] The court also rejected the notion that the NCAA had a sufficiently procompetitive interest in trying to "preserve a competitive balance" through the 1981 Plan that sought to redistribute the revenue generated by the popularity of the most prominent programs across the NCAA membership.[89]

The case eventually reached the Supreme Court, which held that the NCAA possessed market power over the relevant product market that is "live college football television."[90] In affirming the district court's method of defining the relevant market based on consumer demand, the Court referred back to *International Boxing* and noted that college football should be considered a unique product as evidenced by advertisers' willingness to pay a premium price per viewer to reach a specific

https://rolltide.com/sports/football/schedule/1981 [https://perma.cc/H3YK-MADT] (last visited Feb. 27, 2024); *1981 Football Team*, UNIV. OF MICH., https://bentley.umich.edu/athdept/football/fbteam/1981fbt.htm [https://perma.cc/SMA8-5NZK] (last visited May 30, 2024).

[83] *Bd. of Regents*, 468 U.S. at 90–92.

[84] *Id.* at 88. The University of Georgia's football program won the national championship in the previous year (1980), and the University of Oklahoma's football program won two national championships during the 1970s. *Championship History*, *supra* note 25.

[85] Bd. of Regents of Univ. of Oklahoma v. NCAA, 546 F. Supp. 1276, 1323 (W.D. Okla. 1982).

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1314–20.

[89] *Id.* at 1316.

[90] NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 8, 95, 111 (1984).

demographic.[91] The Court also affirmed the application of the Rule of Reason approach in sports cases.[92] Even though the type of framework proposed by the 1981 Plan would generally be considered illegal per se under horizontal price-fixing and output limitation antitrust prohibitions, the Court purposely granted some leeway for the college sports industry because "horizontal restraints on competition are essential if the product is to be available at all."[93] The Court sympathetically acknowledged that college sports needed to be given "ample latitude" to preserve college athletics but stopped short of altogether exempting the NCAA from Section 1 liability.[94] Ultimately, the Court rejected the NCAA's argument that either protecting live attendance or maintaining competitive balance was a sufficiently procompetitive justification for the 1981 Plan, and it held the 1981 Plan violated Section 1 as an unreasonable restraint of trade.[95]

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[91] *Id.* at 111–12 ("Moreover, the District Court's market analysis is firmly supported by our decision in *International Boxing Club of New York, Inc. v. United States*, that championship boxing events are uniquely attractive to fans and hence constitute a market separate from that for non-championship events.") (internal citation omitted); Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 250–51 (1959) ("This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs; that television rights to one championship fight brought $100,000, in contrast to $45,000 for a nontitle fight seven months later between the same two fighters; that the average 'Nielsen' ratings over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over $600,000, no full-length motion picture rights were sold for a nonchampionship contest; and that spectators pay 'substantially more' for tickets to championship fights than for nontitle fights.").

[92] *Bd. of Regents*, 468 U.S. at 101.

[93] *Id.* Several courts have since followed this approach with respect to sports leagues. *See e.g.*, Chicago Prof. Sports Limited Partn. v. NBA, 961 F.2d 667, 673 (7th Cir.1992)(reviewing the NBA's restriction on television broadcast output limitations under the rule of reason); Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir.1998) (stating that since athletic league competition requires horizontal agreements, "all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis").

[94] *Bd. of Regents*, 468 U.S. at 120.

[95] *Id.* at 119–20 ("The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product. The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.").

C. The CFA Case

In response to *Board of Regents*, institutions quickly granted the rights to televise their football games to individual conferences, which then sold those collections of rights to television networks in lucrative media agreements.[96] Thus, the immediate consequence of *Board of Regents* was that individual conferences began to control the distribution of the bundles of college football games between their affiliate institutions, and the longstanding practical effect was that the college football programs affiliated with the strongest conferences that were party to the most lucrative media agreements became more profitable than the vast majority of the NCAA membership.[97] After *Board of Regents*, it was clear that television would inevitably become a greater priority than tickets.

In certain circumstances, a subgroup of NCAA institutions can take on antitrust liabilities similar to the NCAA. In 1984, several conferences and a handful of prominent institutions came together as the College Football Association ("CFA") and signed an exclusive broadcasting agreement with ABC.[98] Rather than signing with ABC, the Pacific-10 Conference (precursor to the PAC 12) and the Big Ten signed with CBS for the 1984 college football season.[99] The latter coalition brought suit against ABC under Section 1 to challenge a crossover restriction in the ABC-CFA agreement which prohibited the broadcast of CFA member football games on networks other than ABC, even where a CFA member was set to compete against a non-CFA member.[100] The district court issued a preliminary injunction against the enforcement of the crossover provision of the ABC-CFA agreement and ABC appealed to the Ninth Circuit.[101] The Ninth Circuit looked back at the NCAA's position in *Board of Regents*, reaffirmed a Rule of Reason market share analysis in the college football television market, and insisted that the CFA was similarly

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[96] *See* Thomas A. Baker III & Natasha T. Brison, *From* Board of Regents *to* O'Bannon*: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331, 341 (detailing the transition of power from the NCAA to conferences with respect to football broadcast rights following the *Board of Regents* decision).

[97] Amanda Christovich, *TV Money Built the Modern Power 5. Then Destroyed It*, FRONT OFFICE SPORTS (Aug. 7, 2023, 12:12 PM), https://frontofficesports.com/tv-money-built-power-5-then-destroyed-it/ [https://perma.cc/36AL-MZZK].

[98] Regents of Univ. of California v. Am. Broad. Cos., Inc., 747 F.2d 511, 512–13 (9th Cir. 1984).

[99] *Id.* at 513.

[100] *Id.*

[101] *Id.* at 516.

situated to the NCAA, despite its lack of governance responsibilities.[102] As a result, the court upheld the preliminary injunction due to the plaintiffs' likelihood of success on the merits of a Section 1 case.[103]

VI. ANTITRUST CONCERNS: DEFINING THE RELEVANT STUDENT-ATHLETE MARKET

Courts have taken a different approach when defining the product market with respect to student-athlete talent than with respect to sports media. Specifically, courts analyze Section 1 violations in the context of consumer-specific protections and harms, so the same laws necessarily require a different lens when applied to a different set of consumers.[104]

A. Student-Athlete Benefit Challenges

Courts have determined the relevant product market for student-athlete talent based mostly on distinctions in student-athlete participation opportunities. With a specific focus on the package of benefits offered to student-athletes, courts have indicated that the interchangeability of institutions that compete for student-athlete talent can be used to determine whether subsets of the NCAA present a separate relevant product market.

In 1990, a college football student-athlete at the University of Notre Dame sought to enter the National Football League ("NFL") draft.[105] After later deciding to forego the NFL draft and return to the University of Notre Dame, his decision triggered an NCAA prohibition that rendered him ineligible for future competition after declaring for the draft and hiring a sports agent.[106] The football student-athlete challenged the NCAA's prohibitions on antitrust grounds, and the case was dismissed by the district court.[107] In *Banks*, the Seventh Circuit reviewed the case under the Rule of Reason and "charitably" read two relevant markets into a subpar case complaint: (i) NCAA football student-athletes who enter the draft and

[102] *Id.* at 518 ("It is unclear how the CFA, which does not even purport to perform the supervisory functions undertaken by the NCAA, occupies a different posture with respect to its member institutions.").

[103] *Id.* at 521–22.

[104] *See* NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107 (1984) ("Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. This latter point is perhaps the most significant, since 'Congress designed the Sherman Act as a 'consumer welfare prescription.'' A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.") (citing Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

[105] *See* Banks v. NCAA, 977 F.2d 1081, 1083 (7th Cir. 1992).

[106] *Id.*

[107] *Id.* at 1084.

(ii) NCAA member institutions.[108] Ultimately, the court held that the complaint was deficient, because it failed to illustrate how the NCAA prohibitions at issue created an anticompetitive effect in either of the relevant markets.[109] But, in readily adopting the two markets listed above, the Seventh Circuit legitimized the existence of a student-athlete talent market that may be broad enough in scope to encompass the entire NCAA, yet limited by sport and by the characteristics of certain consumers (i.e., only those student-athletes pursuing professional opportunities).[110]

In 1995, a soccer student-athlete at USC decided to transfer to the institution's biggest rival, the University of California, Los Angeles ("UCLA").[111] USC sought to enforce an intraconference rule that imposed burdensome sanctions on student-athletes seeking to transfer within the conference ("Transfer Rule").[112] The district court in *Tanaka* initially found that the Transfer Rule was beyond the reach of Section 1 and dismissed the student-athlete's challenge.[113] Upon review, the Ninth Circuit assumed *arguendo* that the Transfer Rule was subject to Section 1 and considered the case under the Rule of Reason framework.[114] The court began its analysis by attempting to define the relevant product market.[115] The student-athlete argued that the market was limited to the UCLA women's soccer program because of its uniqueness in location and prestige, but the court disagreed that a single team could constitute an

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[108] *Id.* at 1088 ("Another reading of the complaint might even have deduced a third market, the NFL player recruitment market. But regardless of how charitably the complaint is read, it has failed to define an anti-competitive effect of the alleged restraints on the markets.").

[109] *Id.* at 1093.

[110] *Id.*

[111] *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059 (9th Cir. 2001).

[112] *Id.* at 1061. In relevant part, Pac–10 Rule C 8–3–b provided:

> Each institution, before it permits a student who has transferred directly or indirectly from, or practiced at, another Pacific–10 member institution to compete in intercollegiate athletics, shall require the student to fulfill a residence requirement of two full academic years . . . and shall charge the student with two years of eligibility in all Pacific–10 sports, and during the period of ineligibility shall not offer, provide, or arrange directly or indirectly any earned or unearned athletically related financial aid.

Id.

[113] *Id.* at 1062.

[114] *Id.* ("We need not reach the difficult issue of whether collegiate athletic association eligibility rules such as the Pac–10 transfer rule do not involve commercial activity and hence are immune from Sherman Act scrutiny. For purposes of our analysis, we assume, without deciding, that the transfer rule is subject to the federal antitrust laws.").

[115] *Id.* at 1063.

entire product market, as sports programs necessarily require competitor products for their own existence.[116] Because "such programs compete in the recruiting of student-athletes," the court held that competitor programs are "interchangeable with each other for antitrust purposes."[117] The court pointed out that the student-athlete in question was recruited by several other programs both inside and outside of the conference, and the suggestion that UCLA was her only potential destination amounted to "nothing beyond her personal preferences."[118] The Ninth Circuit affirmed the district court's ruling and dismissed the case for failure to define a relevant product market.

A few years later, a group of non-scholarship football student-athletes brought a claim against the NCAA alleging that its rule restricting Division I institutions from providing football scholarships to more than eighty-five student-athletes violated Section 1.[119] In *Walk-On Football Players*, the district court found that the plaintiffs sufficiently articulated a relevant product market by alleging that "there are no other viable options" beyond the NCAA Division I-A framework for football student-athletes looking to use their skills at the highest level.[120] Even though NCAA Division I-A football is a subset of NCAA football more broadly, the court still reasoned that it constitutes the entirety of the relevant product market, because it fully encompassed "the pool of goods or services that enjoy 'reasonable interchangeability of use and cross-elasticity of demand.'"[121]

B. The O'Bannon *Case*

O'Bannon v. NCAA draws attention to one of the most important legal inquiries into the relationship between NCAA member institutions and student-athlete talent.[122] In 2009, former UCLA men's basketball student-athlete Ed O'Bannon brought a class action suit against the NCAA, arguing that rules prohibiting student-athletes from monetizing their names, images, and likenesses ("NIL") were in violation of Section 1.[123]

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[116] *Id.* at 1063–64 ("[T]he very existence of any given intercollegiate athletic program is predicated upon the existence of a field of competition composed of other, similar programs."). The court briefly addressed the relevant geographic market as well, finding that the market was national in scope. *Id.* at 1064–65.

[117] *Id.* at 1064.

[118] *Id.*

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

[120] *Id.* at 1050.

[121] *Id.* (first citing *Tanaka*, 252 F.3d at 1063; and then Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242, 249–52 (1959)).

[122] 802 F.3d 1049 (9th Cir. 2015).

[123] *Id.* at 1055.

Ultimately the district court certified classes of all current and former student-athletes who could have earned compensation for the use of their NILs in game footage or videogames licensed or sold by institutions.[124] Following a two-week bench trial, the district court entered judgment in favor of the plaintiffs and identified two relevant product markets affected by the NCAA's restraints related to student-athlete NIL: (i) the college education market and the (ii) group licensing market.[125]

Analyzing the college education market, the district court noted that NCAA institutions serve as the sellers of "unique bundles of goods and services to elite football and basketball recruits."[126] The opinion broadly lists tuition coverage, room and board, books, high-quality coaching, state-of-the-art athletic facilities, "and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences" as parts of the bundle that institutions offer to student-athlete consumers.[127] The court noted that only the subset of NCAA institutions which comprise FBS football and Division I basketball are able to supply such a unique bundle of goods and services.[128] Therefore, lower levels of football were not considered substitutable for the FBS product with respect to elite football recruits.[129]

The court, however, did not find it worthwhile to further narrow the appropriate market to include only the Power Five, in part because a detailed recruiting analysis revealed that the competition for recruits between Power Five institutions and the rest of the FBS was much harder to predict than FBS and non-FBS recruiting competitions, in which the former "almost always defeated" the latter.[130] Thus, consumer choices indicated that non-Power Five FBS institutions are substitutable for other

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[124] *Id.* at 1055–56.

[125] *Id.* at 1056–57. The district court ultimately held that the NCAA rules against student-athlete NIL compensation did not have an anticompetitive effect in any of the three submarkets of the broader student-athlete group licensing market (1) live game telecasts, (2) sports video games, and (3) game rebroadcasts, advertisements, and other archival footage. *Id.* at 1057. Accordingly, this section proceeds without further discussion of the court's Rule of Reason analysis with respect to the group licensing market. *Id.* However, it should be noted that the district court recognized the student-athlete group licensing market as cognizable under Section 1. *Id.*

[126] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014).

[127] *Id.* at 965–66.

[128] *Id.* at 966.

[129] *Id.* ("Thus, the bundles of goods and services offered by schools in FCS, Divisions II and III, and other non-NCAA collegiate athletics associations are not substitutes for the bundles of goods and services offered by FBS football and Division I basketball schools.").

[130] *Id.* It is important to mention that this analysis occurred before the NCAA granted additional autonomy allowing the Power Five conferences to provide different sets of student-athlete benefits than other conferences. *See supra* note 11 and accompanying text.

Power Five institutions.[131] Furthermore, the district court noted that very few young people with the prowess to pursue the FBS or Division I basketball choose to forgo those opportunities in favor of minor leagues or foreign professional sports leagues, further indicating that such leagues are not a substitute for FBS football or Division I basketball.[132] Following the Rule of Reason analysis, the district court ultimately mandated that the NCAA pursue less restrictive alternatives to its prohibitions against student-athletes monetizing their NILs.[133] The NCAA did not challenge the district court's definition of the college education market at the appellate stage, and ultimately, O'Bannon prevailed.[134]

C. The Alston *Case*

The Supreme Court provided another critical review of the NCAA's parameters around student-athlete benefits in *NCAA v. Alston*.[135] Following *O'Bannon*, the Northern District of California similarly found the relevant product market in *Alston* to be the market for "athletic services in men's and women's Division I basketball and FBS football."[136] The opinion noted that the concentration of student-athlete talent at the highest

[131] *O'Bannon*, 7 F. Supp. 3d at 967.

[132] *Id.* at 967–68.

[133] *Id.* at 1007 ("In particular, Plaintiffs have shown that the NCAA could permit FBS football and Division I basketball schools to use the licensing revenue generated from the use of their student-athletes' names, images, and likenesses to fund stipends covering the cost of attendance for those student-athletes. It could also permit schools to hold limited and equal shares of that licensing revenue in trust for the student-athletes until they leave school. Neither of these practices would undermine consumer demand for the NCAA's products nor hinder its member schools' efforts to educate student-athletes."). Upon review, the Ninth Circuit upheld the student-athlete stipends for the full cost of institutional attendance, but struck down the post-participation payments as ineffective to help the NCAA maintain the distinctions between college and professional sports, which was one of the NCAA's procompetitive justifications for the challenged restraints. *Id.* at 1074–77.

[134] O'Bannon v. NCAA, 802 F.3d 1049, 1070 (9th Cir. 2015) ("By and large, the NCAA does not challenge the district court's findings. It does not take issue with the way that the district court defined the college education market. Nor does it appear to dispute the district court's conclusion that the compensation rules restrain the NCAA's member schools from competing with each other within that market, at least to a certain degree."). The *O'Bannon* case spurred momentum for the California Fair Pay to Play Act, the first of many state laws which explicitly granted student-athletes the ability to earn compensation from licensing their NIL. *See* Michael McCann, *The Fair Pay to Play Act and Dignity in College Athletics*, SPORTS ILLUSTRATED (Oct. 2, 2019), https://www.si.com/college/2019/10/02/ed-obannon-fair-pay-act-california [https://perma.cc/G9CQ-XJVE].

[135] NCAA v. Alston, 594 U.S. 69, 74 (2021).

[136] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019).

levels supported "the absence of any viable substitutes," and explained that "[c]lass members cannot obtain the same combination of a college education, high-level television exposure, and opportunities to enter professional sports other than from Division I schools."[137] The court's focus on concentration is important, as the opinion suggests that the talent concentration could be reshaped if student-athlete compensation was determined at the conference level as opposed to the divisional level.[138] Again, the viability of this approach relates to market control, and the court stated clearly that conference limitations on student-athlete benefits "would not have an anticompetitive effect because no individual conference dominates nearly the entire market, like the NCAA does."[139] The NCAA did not offer an alternative market definition.[140] Both the Ninth Circuit and the Supreme Court adopted the district court's definition of the relevant product market in their respective Rule of Reason analyses, and the final ruling led to the end of the NCAA's mandated limitations on student-athlete benefits related to education.[141]

As if in response to the district court's market concentration analysis, dicta in the Supreme Court majority opinion briefly addressed the viability of conference compensation restraints. The *Alston* majority stated in its syllabus that "individual conferences remain free to impose whatever rules they choose."[142] The body of the majority opinion, however, more fully explains that individual conferences "may adopt even stricter" rules than the NCAA only with respect to defining education-related benefits.[143] There may be a meaningful distinction between these two excerpts, which makes it difficult to determine where the law sits on this point. One could reasonably take the Court's ambiguous words to mean that *Alston* explicitly permits conferences, but not the NCAA, to limit student-athlete benefits of any type. Alternatively, it is reasonable to believe that *Alston* only permits conferences to add further limits on those specific types of student-athlete benefits that the NCAA may otherwise limit.

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[137] *Id.* at 1097.

[138] *Id.* at 1068 ("Because of the absence of viable alternatives to Division I basketball and FBS football, and because of reduced competition among conferences due to the challenged compensation limits, the market for recruits in these sports is highly or perfectly concentrated under the current NCAA compensation limits. By contrast, if each conference were free to set its own compensation limits in competition with other conferences, the market concentration would decrease from highly or perfectly concentrated, to "moderately concentrated" for FBS football and "unconcentrated" for Division I basketball.").

[139] *Id.*

[140] *Id.* at 1068.

[141] *Alston*, 594 U.S. at 107.

[142] *Id.* at 72.

[143] *Id.* at 105.

Justice Kavanaugh issued a separate concurrence to the unanimous majority Supreme Court opinion.[144] The concurrence holistically attacked the NCAA model, going so far as to state that "[t]he NCAA's business model would be flatly illegal in almost any other industry in America."[145] After a powerful rebuke, the concurrence ends with simply, "The NCAA is not above the law."[146] The unanimous majority opinion and the scathing concurrence work in tandem to illustrate how strongly *Alston* signaled a policy shift against limiting student-athlete compensation.[147] Where *Board of Regents* suggested that the NCAA would be awarded "ample latitude" in its operations, *Alston* made clear that the NCAA will be subject to scrutiny under the Sherman Act, and that it should not expect a generous review.[148]

VII. HYPOTHETICAL CHALLENGES: POWER TWO TIMESLOTS

Marquee football games can create exponentially higher broadcast values than standard conference matchups.[149] To maximize the potential television exposure, the Power Two conferences will likely want to avoid scheduling their most important football games at conflicting times. While the geographic footprint of the SEC will include much of the South and parts of the Great Plains, the Big Ten will include multiple institutions on both coasts and span fully across the upper United States.[150] College football is traditionally scheduled for Fall Saturdays at Noon, 3:30 p.m., evening primetime (approximately 6:30 p.m.), or 10:30 p.m. (EST) as determined by the conference of the host team. Conferences schedule marquee matchups in hopes of maximizing viewership, and they are wary

[144] *Id.* at 107–12 (Kavanaugh, J., concurring).

[145] *Id.* at 109.

[146] *Id.* at 112.

[147] *See e.g.*, Robert Harding, *Calling Time: The Case for Ending Preferential Antitrust Treatment of NCAA Amateurism Rules after Alston*, U. ILL. L. REV. 1637 (2022) (arguing that NCAA actions should not be granted latitude under antitrust laws following Alston); Michael A. Carrier & Christopher L. Sagers, *The* Alston *Case: Why the NCAA Did Not Deserve Antitrust Immunity and Did Not Succeed under a Rule-of-Reason Analysis*, 28 GEO. MASON L. REV. 1461 (2021) (arguing that the NCAA should not be entitled to antitrust immunity but instead that its anticompetitive behavior should be reviewed under the Rule of Reason).

[148] *See* Baker III & Brison, *supra* note 96.

[149] *See* Nielsen Data #2 (on file with author). For instance, The Ohio State University played against the University of Michigan in a marquee rivalry Big Ten matchup on November 25, 2023. *Id.* Data indicate that game generated over $182 million of broadcast value. *Id.* However, the same data set indicates that another Big Ten rivalry matchup on the same date between the University of Wisconsin-Madison and the University of Minnesota-Twin Cities generated only $3.65 million of broadcast value. *Id.*

[150] *See supra* note 31.

of cannibalizing their efforts if there are multiple marquee matchups on the same day.[151] Naturally, the conventional solution is for conferences to place their marquee matchups into different time slots. Conference realignment will intentionally result in significantly more marquee matchups per week, necessarily increasing the potential for cross-conference scheduling conflicts.

The remainder of this section is based on a hypothetical written agreement between only the Power Two conferences in which the Big Ten agrees not to schedule any of its football competitions during the 3:30 p.m. or primetime timeslots in exchange for an agreement from the SEC not to schedule games during the noon and 10:30 p.m. timeslots ("Timeslot Agreement").[152] The Timeslot Agreement is designed to ensure that the conferences are not competing for viewership for games scheduled for the same time, and likely invites a challenge under Section 1.[153] The plaintiffs would conceivably be television networks forced to pay greater prices to secure college football programming during the timeslots. First, the Timeslot Agreement itself would likely serve as evidence of a conspiracy triggering scrutiny under Section 1.[154] Second, precedent has made clear that the Timeslot Agreement is fairly likely to be considered under the Rule of Reason. The abbreviated "quick look" analysis would arguably be appropriate for such a blatant anticompetitive action, but the precedential value of *Board of Regents* makes it unlikely that a court would select an alternative test in the context of college football viewership.[155]

In examining the Timeslot Agreement under the Rule of Reason, the most critical question will be whether there are reasonable substitutes for Power Two football broadcasts from the perspective of the television

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[151] Fornelli, *supra* note 5 ("I appreciate when conferences are forthright, and the Big Ten was just that in its release. When explaining why the conference chose the model, it said the goal was to 'balance and maximize television inventory each season.'").

[152] The Timeslot Agreement assumes a scenario in which conferences choose to exercise complete control over the scheduling of their games. Currently, there is significant collaboration between conferences and their television partners in determining game times before those game times are ultimately announced by the conferences.

[153] *Bd. of Regents*, 468 U.S. at 115.

[154] Dochterman, *supra* note 30.

[155] *Bd. of Regents*, 468 U.S. at 117 ("Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."); *Alston*, 594 U.S. at 90 ("We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible.") (citing *Bd. of Regents*, 468 U.S. at 101).

networks purchasing the media rights for football broadcasts. The Court's opinion in *International Boxing* indicates that a distinct portion of a larger sports product market may present a unique submarket when consumer data suggest that the products in such submarket command prices and viewership at a much higher level than the broader product market.[156] *Salvino* teaches that persuasive data must go beyond suspicions, inferences, and groupthink, and instead provide clear, statistical evidence.[157] Here, outsized viewership and exorbitant media rights agreements of Power Two college football serve as strong indicators that its football broadcasts probably should be fairly characterized as the "cream" of college football broadcasting.[158] Specifically, across the 2021-2023 seasons, Nielsen data reveal that the three-year average of the season-long broadcast values for the football programs in both Power Two conferences were greater than double the same metric for any other conference.[159] The disparities in the prices of the recent media rights agreements between the Power Two conferences and the other conferences further suggest that Power Two football broadcasts provide a value to their consumers that cannot be substituted with other college football programming.[160] Even though the value of conference media rights agreements is based on a combination of several sports, football is clearly the primary asset in those agreements, and courts are likely to find the disparity in the size of the media rights agreements is persuasive market evidence specific to college football.[161] The plaintiffs will thus have

[156] *See e.g.*, Int'l Boxing Club of N.Y. v. United States, 358 U.S. 242 (1959) (holding that market power over championship boxing exists because championship boxing is a distinct product from non-championship boxing).

[157] *See generally* MLBP v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008).

[158] *See generally* NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).

[159] The 2021-2023 average total football game broadcast values for the programs that will make up the SEC, Big Ten, Big 12, and ACC (starting in 2024) were $249M, $237M, $109M and $78M, respectively. The total broadcast values for all of the remaining conferences were lower than the ACC. Correspondingly, there was also a significant gap in the average viewership per football game of the SEC (3.7M) and the Big Ten (2.9M) as compared to the Big 12 and the ACC (both approximately 1.7M). *See* Nielsen Impact Score College Data 2024 (on file with author).

[160] Cooper, *supra* note 7 (Reporting 2022 media rights earnings for the Big Ten and the SEC to be $845.6 million and $802 million, respectively, dwarfing the ACC and the Big 12, which earned $617 million and $480.6 million, respectively).

[161] For instance, Nielsen benchmarking data indicate that the total broadcast value of college football was approximately 140% greater than that of men's college basketball from the 2019-2020 season through the 2022-2023 season. *See* Nielen Impact Score College Data 2024 (on file with author); *see also* David Hookstead, *College Football is So Popular Bad Bowl Games are Beating Major College Basketball TV Ratings*, OUTKICK (Dec. 20, 2023, 10:41 AM), https://www.outkick.com/college-football-bowl-games-rating-college-basketball/ [https://perma.cc/E6QN-PZ2S] (explaining that viewership of college football dwarfs

multiple pieces of empirical data to support the argument that Power Two football broadcasts are not reasonably interchangeable with the remainder of the college football contests that the Supreme Court has already held are "uniquely attractive to advertisers."[162] While neither Power Two conference alone has sufficient market power, the conferences' uniquely high metrics support the idea that there is a cross-elasticity of demand linking only those two.[163]

To counter these claims, the Power Two would need to take the approach suggested in *Chicago Professional Sports Ltd. Partnership* and offer econometric data other than audience metrics and consumer price to argue that the football broadcasts of other conferences benefit television networks in a substitutable way.[164] The Power Two could try to find examples of win-loss competitive parity with the rest of the Power Five or selectively identify ticket prices of major non-Power Two college sports contests to suggest that other conferences could find substitutes, but a court is not likely to find those pieces of evidence to be as important from the perspective of a television network consumer that garners value from the advertising potential of its programming.[165] While it is not impossible for the Power Two to set forth a winning counterargument against the assertion that high major football broadcasts constitute a unique product market, they likely will experience significant challenges in doing so.

Once the relevant product market is established, the Power Two conferences would be situated in an analogous place to the NCAA in *Board of Regents*. Even though the conferences' leading position is with respect to a smaller group of institutions and lacks extensive governance power, the CFA case suggests that this difference does not create a

men's college basketball to such a degree that "glorified exhibition [bowl] games" command viewership at or beyond the level of premier college basketball).

[162] *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019); *Bd. of Regents*, 468 U.S. at 111 ("It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.").

[163] *See supra* note 45 and accompanying text; Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

[164] *See supra* note 66 and accompanying text; Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290 (2d Cir. 2008).

[165] For example, in the 2022 college football bowl season, which exclusively featured interconference matchups, the Big Ten finished with the sixth highest winning percentage after going 5–4. *See* NCAA, *Track Which Conferences are Winning the 2022-23 Bowl Season* (Jan. 11, 2023), https://www.ncaa.com/news/football/article/2023-01-09/2022-23-conference-bowl-records-scores-updates-through-college-football-playoff [https://perma.cc/8JFF-YUAB]. The Big Ten's winning percentage trailed behind all of the Mid-American Conference, independent affiliates, the SEC, the American Athletic Conference, and the ACC, respectively. *Id.*

sufficient legal distinction to avoid liability.[166] Therefore, assuming that the plaintiffs met their burden to show that the Timeslot Agreement has adverse competitive effects (i.e., a reduction in the available choices for each timeslot) in the relevant market, the Power Two may try to offer competitive exposure as a procompetitive justification. Their best argument would be that the Power Two could more equitably promote its teams if each conference could be sure that its less popular matchups would not be dwarfed by more popular matchups from the other.[167] This justification was rejected in the *Board of Regents* largely because "there [was] no single league or tournament in which all college football teams compete."[168] Thus, the 1981 Plan did not create a plausible pathway for the defendants in *Board of Regents* to achieve their procompetitive justification, because it could not serve to enhance the relative strength of all NCAA institutions.[169] The Timeslot Agreement better serves the procompetitive justification, because the alleged benefits are limited to specific competitors within individual conferences.[170] Even so, it is improbable that a court would accept this justification because of the difficulty in showing how equitable promotion benefits television networks as the consumers of high major college football programming.[171]

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[166] *See* Cooper, *supra* note 7; Gibbons, *supra* note 6; *see supra* note 90 and accompanying text.

[167] More specifically demonstrating this point, on October 21, 2023, a marquee Big Ten football matchup between Pennsylvania State University and The Ohio State University (garnering approximately 10 million viewers) was scheduled at Noon EST, directly in competition with Mississippi State University versus University of Arkansas (garnering approximately 1.2 million viewers), an ancillary SEC matchup. *See* Nielson Data # 2 (on file with author). However, at 3:30pm EST, a marquee SEC football matchup between University of Tennessee and University of Alabama (garnering approximately 8 million viewers), was scheduled directly in competition with Northwestern University versus University of Nebraska-Lincoln, an ancillary Big Ten matchup (garnering approximately 560,000 viewers). *Id.* In both cases, the viewership of the marquee matchup expectedly dominated the timeslot, limiting the potential viewership of the ancillary matchup. *See* Nielsen Impact Score College Data 2024 (on file with author).

[168] NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 118 (1984).

[169] *Id.* ("There is no evidence of any intent to equalize the strength of teams in Division I–A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.").

[170] *Id.* ("The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.").

[171] *Id.* at 117 ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the

The Power Two would need statistical evidence suggesting that the potential increases in exposure for less popular teams under the Timeslot Agreement would provide greater value to the television networks than repeatedly showcasing the biggest draws. This will be a difficult undertaking.[172] If the Power Two is able to articulate a sufficiently procompetitive justification, however, it is unlikely that the plaintiffs would be able to satisfy the Rule of Reason by offering an alternative course of action that is both less restrictive and equally effective.[173] The most predictable alternative would be that the Power Two could increase its number of broadcast timeslots, perhaps by staggering game start times or competing on days other than Saturday.[174] But television networks as plaintiffs are unlikely to propose such an alternative because of the difficulty of reconfiguring college football broadcasts into other timeslots within their broader programming strategies.[175]

In sum, an arrangement like the Timeslot Agreement would create serious Section 1 challenges for the Power Two conferences because a court will likely find that the Power Two maintains control over the relevant product market of high major college football broadcasts based

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conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.").

[172] Nielsen Impact Score College Data 2024 indicate that the marquee college football teams generate outsized values that unlikely to be replicated by marginal increases in value to other teams. *See* Nielsen Impact Score College Data (on file with author). For instance, for the 2022 season, only the football teams at University of Georgia, the University of Alabama, The Ohio State University, and the University of Michigan achieved broadcast value in excess of $600 million. *Id.* While five other teams achieved a broadcast value of $300 million to $500 million, every other remaining Power Five team achieved a broadcast value below $300 million, which is less than half the broadcast value of the four marquee teams initially mentioned. *Id.*

[173] *See supra* note 37 and accompanying text.

[174] In recent years, a limited number of less popular Power Five football competitions have been played on Thursday and Friday nights. *See* Colin Becht, *Stop Complaining About Friday Night College Football*, SPORTS ILLUSTRATED (Apr. 11, 2017), https://www.si.com/college/2017/04/11/friday-night-games-schedule-big-ten [https://perma.cc/3K7Z-Y5G6] ("Saturdays are packed as is. From noon until 2 a.m., when the last West Coast game wraps up (or later if Hawaii is hosting), you can already watch multiple games at a time. And even with a multi-screen setup, you're missing most games. So why not move some to a less-packed time a day earlier? It's understandable why Friday games are not ideal for fans trying to attend the games, but we're several decades past in-stadium attendance being the primary audience for college football. For the vast majority of fans watching on TV, more Friday games would be a huge boon.").

[175] It is also worth noting that the physical toll of college football requires recovery time for student-athletes. It is unlikely that a team could be physically prepared to play a game on Saturday, another game on Wednesday, and a third game on the following Monday, for instance.

on reliable consumer data and the Power Two will be unable to survive the remainder of the Rule of Reason analysis.

VIII. HYPOTHETICAL CHALLENGES: POWER TWO WAGE CAPS

In addition to broadcast incentives, the Power Two will likewise be concerned about managing the growing costs of student-athlete compensation. Though it seems likely that direct pay-for-play compensation will reach some subset of college athletics in the near future, it is not yet clear what form that compensation will take.[176] Because of the prevalence of intraconference competition and disparities in intraconference revenues, it is plausible that individual conferences will seek to set common compensation limits for their institutions.[177] This is theoretically consistent with the longtime approach of the NCAA: scholarship thresholds, travel restrictions, official visit parameters, and other limitations around student-athlete benefits are democratically set at levels where all of the competing institutions can afford to provide those benefits.[178] Dicta from the *Alston* majority opinion also may provide some level of comfort that individual conference restrictions on student-athlete compensation may survive antitrust scrutiny.[179]

Thus, the second hypothetical future scenario will predict that a two-step process occurs. First, the Power Two conferences, along with several other conferences, will separately agree for their institutions to directly pay a fixed wage for the athletic labor of football student-athletes who compete in their conferences. Second, the Big Ten and the SEC will enter into an agreement that neither conference will pay a higher wage than the other to its football student-athletes ("Wage Agreement"). To show their supremacy without overspending, Power Two conference wages will be only modestly higher than all the other FBS conferences which will also pay wages.

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[176] *See* McCann, *supra* note 16, and accompanying text.

[177] *See* Steve Berkowitz et al., *NCAA Finances: Revenue and Expenses by School*, USA TODAY (Mar 14, 2024, 9:05 AM), https://sports.usatoday.com/ncaa/finances [https://perma.cc/52P4-X4HJ] (noting a revenue gap of greater than $100 million between The Ohio State University and the University of Illinois Urbana-Champaign (both Big Ten institutions) as well as the University of Alabama and Mississippi State University (both SEC institutions)).

[178] *See* O'Bannon v. NCAA, 7 F. Supp. 3d. 955, 1003–04 (N.D. Cal. 2014) ("Here, the NCAA argues that its restrictions on student-athlete compensation increase the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increases the number of FBS football and Division I basketball games played. It claims that its rules increase this output in two ways: first, by attracting schools with a 'philosophical commitment to amateurism' to compete in Division I and, second, by enabling schools that otherwise could not afford to compete in Division I to do so.").

[179] *See supra* note 142.

The Wage Agreement is designed to fix the price that the Power Two conferences will pay to participating football student-athletes. The plaintiffs would be elite football student-athletes who feel they were paid less from the Wage Agreement than they would have earned for their services in an open market. The Wage Agreement itself would be the conspiracy challenged under Section 1.[180]

The Wage Agreement is likely to be examined under the Rule of Reason, despite its obvious insistence on horizontal price-fixing.[181] Aside from a default preference for the Rule of Reason in the sports context, courts have been especially willing to undertake the full Rule of Reason analysis with respect to limitations on student-athletes.[182] For instance, in each of the *Banks*, *Tanaka*, *O'Bannon* and *Alston* analyses, the courts chose the full Rule of Reason analysis in considering the legality of student-athlete restrictions.[183] The Supreme Court has twice acknowledged the unique difficulties of maintaining the broad competitive framework of college athletics in light of standard antitrust jurisprudence, which provides a justification for courts to forgo the per se or quick look approaches in this context as well.[184] Even though horizontal price-fixing is usually considered per se illegal, college football is a competitive industry which hinges on the viable participation of teams at over one hundred institutions, and so courts are likely to continue to give some deference in their review of restrictions that would arguably help maintain the competitive balance of that framework.[185]

The most critical concern for elite football student-athletes will be their ability to demonstrate that Power Two football provides "a bundle of goods and services" that is not substitutable with the rest of FBS, such that the Power Two constitutes a unique product market for them as

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[180] *See supra* note 41.

[181] *See supra* note 93.

[182] *See supra* note 155.

[183] *See supra* notes 102, 108, 124, and 132.

[184] NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100–01 (1984) ("In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."); NCAA v. Alston, 594 U.S. 69, 94 (2021) ("[T]he parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.").

[185] *See Bd. of Regents*, 468 U.S. at 100–01; *see also Alston*, 594 U.S. at 91.

consumers.[186] While this argument has some intuitive appeal, it will be especially difficult to find consistent evidentiary trends to support it. *Banks* and *Walk-On Football Players* showed that the relevant student-athlete talent market can theoretically be defined as a subset of the entire student-athlete market if there is clear evidence of a higher level of competition for the participating talent.[187] But it is not clear how the plaintiffs would empirically or objectively demonstrate that there is no substitute for the benefits provided to football student-athletes in the Power Two. A specific student-athlete may prefer the coaches or traditions of the University of Alabama or The Ohio State University over others, but *Tanaka* made clear that courts will not simply defer to individual preferences nor define product markets too narrowly when recruiting information suggests substitutability between competitors.[188] The analysis was much clearer in *O'Bannon* because the plaintiffs only had to show that the bundle of goods and services supplied to elite football and basketball recruits by FBS institutions was distinct from lower levels of the NCAA and other non-NCAA offerings.[189] Lower NCAA divisions openly agree to adopt a different set of rules than Division I as it relates to supplying student-athlete benefits, and the *Board of Regents* court altogether dismissed non-NCAA football as a substitute product.[190] Here, if a court follows *O'Bannon* and chooses to specifically consider tuition coverage, room and board, books, high-quality coaching, state-of-the-art athletic facilities, opportunities to compete at the highest level of college sports, and the presence of large crowds and television audiences, it will be much harder for the plaintiffs to show a clear distinction between the offerings of the Power Two versus the other conferences.[191] Even once direct wages are considered in the holistic bundle of goods, a modest distinction between the wages of the Power Two and the wages of the remainder of the entire FBS will likely not be sufficient by itself to sway

[186] *See supra* notes 126–29.

[187] *See supra* notes 110, 120.

[188] *See supra* note 117.

[189] O'Bannon v. NCAA, 802 F.3d 1049, 1057 (9th Cir. 2015). The Court specifically noted in *Alston* that abbreviated forms of antitrust review would have been likely to result in an adverse finding against the NCAA. *Alston*, 594 U.S. 69, 91 (2021) ("Our analysis today is fully consistent with [the Court's reasoning in *Board of Regents*]. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as per se unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.") (citing *Bd. of Regents*, 468 U.S. at 109).

[190] *See* NCAA 2023–24 DIVISION I MANUAL (2023), art. 13, 15, 16, *compared with* NCAA 2023–24 DIVISION II MANUAL (2023), art. 13, 15, 16; *see supra* note 132.

[191] *See supra* note 127.

the holistic analysis of the bundle of good and services uniquely offered by the Power Two.[192] As in the Timeslot Agreement, the plaintiffs could refer to the outsized viewership of the Power Two, but viewership does not clearly provide value to elite football student-athletes in the same way as to television networks.

Demonstrating a lack of reasonable substitutes for elite football student-athlete talent is particularly difficult with respect to the remainder of the Power Five. Consider an illustrative comparison: The University of Michigan, a Big Ten institution, has the largest football stadium capacity in the country and attendance costs are covered for its football student-athletes.[193] But Notre Dame University, where the football program does not compete in any conference, has the sixteenth largest football stadium capacity and its greater attendance costs are also covered for its football student-athletes.[194] The ease of predicting recruiting outcomes was a significant piece of evidence that convinced the court of the relevant product market in *O'Bannon*, but the situation is more complicated here.[195] Partly evidenced by their longstanding rivalry, there is a clear sense of parity between Michigan and Notre Dame that makes it nearly impossible to reliably anticipate which institution would be preferred by elite football

[192] The importance of a modest difference in the size of the wages between the Power Two and other conferences should be emphasized. For example, if Power Two wages were double or triple the relative size of the remainder of the FBS, a court's analysis of the holistic bundle of goods and services would likely change such that the plaintiffs may find it easier to argue that the Power Two offers a distinct package of benefits to elite football student-athletes.

[193] Anthony Chiusano, *The 25 Biggest College Football Stadiums in the Country*, NCAA (July 17, 2023), https://www.ncaa.com/news/football/article/2018-07-30/25-biggest-college-football-stadiums-country [https://perma.cc/PJA6-N889] (indicating that the capacity of Michigan Stadium is 107,601); University of Michigan Undergraduate Admissions indicates that Tuition and Fees totaled as high as $80,364 for the 2023-2024 academic year. *Costs*, UNIV. OF MICH., https://admissions.umich.edu/costs-aid/costs [https://perma.cc/8TSA-ESQX]; University of Michigan was ranked as the twenty-first best National University by the U.S. News and World Report (USNWR) for the 2023–2024 academic year. *Best National University Rankings*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-colleges/rankings/national-universities [https://perma.cc/K56W-X5BN] (last visited Apr. 7, 2024) [hereinafter *USNWR Best National University Rankings*].

[194] Chiusano, *supra* note 193 (indicating that the capacity of Notre Dame Stadium is 80,795); University of Notre Dame Undergraduate Admissions indicates that the Average Cost of Attendance was $83,271 for the 2023–2024 academic year. https://admissions.nd.edu/aid-affordability/tuition-fees/; University of Notre Dame was ranked as the twentieth best National University by the USNWR for the 2023–2024 academic year. *USNWR Best National University Rankings*, *supra* note 193.

[195] See O'Bannon v. NCAA, 802 F.3d 1049, 1065 (9th Cir. 2015).

student-athlete talent.[196] Those two programs are comparable giants in the college football world, but a similar stalemate exists when comparing the bundles of goods and services offered by the University of South Carolina (SEC) against Baylor University (Big 12), for instance.[197] Additionally, there are many football programs outside of the Power Two that are unequivocally stronger than several inside of the Power Two.[198]

The district court in *Alston* noted that no single conference dominates the entire student-athlete talent market, and it would be hard to show that combining the Power Two should change that analysis.[199] With respect to opportunities to pursue professional football, the Power Two stands out, but it does not stand alone. From 2000-2020, two programs outside of the Power Two were among the top five destinations producing the most NFL draft picks.[200] Moreover, NFL first round draft picks could fairly be considered the most elite of all football student-athletes, and only twenty-

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[196] *See* Chip Patterson, *College Football Recruiting Rankings: Teams with the Best Classes Over a Five-Year Average Entering 2021*, CBS SPORTS (Feb. 9, 2021, 2:18 PM), https://www.cbssports.com/college-football/news/college-football-recruiting-rankings-teams-with-the-best-classes-over-a-five-year-average-entering-2021/ [https://perma.cc/ZT73-DUZF] (evaluating the five-year average football recruiting class ranking of Michigan and Notre Dame to be 11.6 and 12.4, respectively).

[197] Baylor University was ranked as the ninety-third best National University by the USNWR for the 2023–2024 academic year (out-of-state tuition and fees totaled to $54,844) and its football stadium holds 45,150 people, whereas the University of South Carolina was ranked the 124th for the same year (tuition and fees totaled to $33,928) and its football stadium holds 77,559 people. *See USNWR Best National University Rankings*, *supra* note 193; Columbia Metropolitan Airport, *About Williams-Brice Stadium*, S.C. GAMECOCKS (2023), https://gamecocksonline.com/facilities/606ikipedi-brice-stadium/ [https://perma.cc/WA9T-QNR6]; McLane Stadium was ranked as the fifty-third best National University by the USNWR for the 2023–2024 academic year (out-of-state tuition and fees totaled to $36,402) and its football stadium holds 50,805 people, whereas the University of South Carolina was ranked the 124th for the same year (tuition and fees totaled to $33,928) and its football stadium holds 77,559 people. *McLane Stadium*, WIKIPEDIA (Nov. 11, 2023), https://en.wikipedia.org/wiki/McLane_Stadium [https://perma.cc/26RN-QA4B].

[198] For instance, compare University of Miami (ACC) (102–73 from 2010–2023) to Purdue University (Big Ten) (66–103 from 20102023) or Oklahoma State University (Big 12) (119–49 from 2010–2023) to Vanderbilt University (SEC) (62–108 from 2010–2023). *See e.g.*, *Sports Reference, Sports Stats, Fast, Easy and Up-To-Date*, https://www.sports-reference.com/ [https://perma.cc/RJZ7-BZTN] (last visited Apr. 7, 2024).

[199] *See* supra note 138.

[200] Daniel Wilco, *College Football Teams with the Most NFL Draft Picks Since 2000*, NCAA (Apr. 27, 2020), https://www.ncaa.com/news/football/article/2020-04-27/college-football-teams-most-nfl-draft-picks-2000 [https://perma.cc/ZYQ9-W5PM] (indicating that both Florida State University (ACC) and the University of Miami (ACC) have produced over 100 NFL draft picks since 2000).

three institutions (i.e., less than half the size of the Power Two) produced ten or more NFL first round draft picks from 2000-2020.[201] But about one-third of those institutions are outside of the Power Two.[202] Without sufficiently establishing that the bundle of goods and services offered to student-athletes by institutions outside of the Power Two is not reasonably substitutable with those inside of the Power Two, the plaintiffs will be unable to demonstrate the Power Two's power over the relevant product market.[203]

Assuming *arguendo* that the Power Two conferences provide a distinct product with respect to elite football student-athletes, the procompetitive justification that a wage limitation better maintains competitive parity for the benefit of the competitors will likely only be persuasive inside of the Power Two conferences. There is a tremendous revenue disparity between football programs within both the SEC and the Big Ten such that the wealthier programs could pay substantially higher wages than their immediate competitors.[204] Because each Power Two conference can easily point to the other to provide a "readily identifiable group of competitors," their procompetitive justification for limiting intraconference wages will probably be sufficient to defeat a Section 1 claim.[205] But, the Wage Agreement does not solely suppress wages *within* a single conference, it suppresses wages *between* the conferences, and courts may consider the illusory nature of Power Two competition to be an insufficient procompetitive justification, despite the loose perception of a Big Ten-SEC rivalry. In practice, an individual Big Ten team may not compete against any SEC team for several years on end, and it will be more difficult to offer a convincing procompetitive justification for the Wage Agreement if the Power Two conferences cannot show themselves to be direct competitors on the field of play.[206] Further, assuming

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[201] *Id.*

[202] *Id.* Two of the top four institutions (Florida State and Miami) are outside of the Power Two.

[203] *See* note 47.

[204] *See* note 177.

[205] *See* note 170.

[206] For example, Michigan State University has not played a football game against an SEC team since 2015, when it lost handily to the University of Alabama in the College Football Playoff (CFP). 2015 Football Schedule, MICH. STATE UNIV., https://msuspartans.com/sports/football/schedule/2015 [https://perma.cc/SCT7-Z5GT] (last visited Apr. 7, 2024). Michigan State University has not played a regular season football game against an SEC team since before 2000. *See generally Michigan State Football Records Directory*, MICH. STATE UNIV., https://msuspartans.com/sports/football/schedule [https://perma.cc/SAD4-Y9SV] (last visited Apr. 7, 2024). Across the 2022–2023 college football seasons, there was only one SEC-Big Ten regular season matchup, as opposed to seventy-eight matchups between SEC teams and others outside of the Power Five. *See 2023 SEC Football Schedule*, SOUTHEASTERN CONF. (Sept. 20, 2022),

arguendo that the court finds a procompetitive justification for the Wage Agreement to be sufficient, it is unlikely that the plaintiffs would be able to offer a less restrictive alternative that is equally effective.[207]

Overall, an arrangement like the Wage Agreement can probably withstand a Section 1 claim under the Rule of Reason because plaintiffs will find it particularly challenging to provide objective evidence that Power Two football offers a separate bundle of goods and services that is not reasonably substitutable with those offered to elite football student-athletes by other conferences. Without market power, the Rule of Reason analysis necessarily fails.[208]

IX. THE RESPONSIBLE PATH FORWARD

The economic and competitive dominance of the Big Ten and the SEC are likely to continue to intensify for the foreseeable future. But in considering the antitrust implications of their positions relative to remainder of the NCAA, the Power Two conferences simply do not dominate the talent market in the same way that they do the television market. Because the data more clearly demonstrate that the Power Two provides a product without any viable substitutes for television networks than for elite football student-athletes, antitrust risks to the Power Two would be lesser when limiting football student-athlete compensation than when limiting the flow of college football games.[209]

The distinction in consumer perspective is critical: Elite football student-athletes arguing against the substitutability of institutional benefits will face a greater practical challenge than television networks arguing against the substitutability of football broadcasts simply because of the level at which the respective products are being supplied. Institutions provide student-athlete benefits, but conferences own the rights to broadcast the football games, and there are many more institutions from

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https://a.espncdn.com/sec/football/2023/2023FootballScheduleGrid.pdf [https://perma.cc/3EGD-E3FZ]; *2022 SEC Football Schedule – Team by Team*, SOUTHEASTERN CONF. https://a.espncdn.com/sec/football/2021/2022%20FB%20Schedules.pdf [https://perma.cc/5SC5-SRSC] (last visited Apr. 7, 2024). Each of the Transperfect Music City Bowl, ReliaQuest Bowl, Cheez-It Citrus Bowl decidedly pits Big Ten teams against SEC competitors in 2023, but none of these is a part of the New Year's Six, a collection of bowl games that are considered the most prestigious. In addition, the expansion of the CFP from four teams to twelve starting in 2024 will result in fewer prominent bowl games being played outside of the CFP. The CFP does not provide automatic bids to the Power Two conferences, and in the event of any changes, such automatic bids are not likely to be matched in advance such that an SEC program will necessarily play a Big Ten program, as in the bowl structure.

[207] *See* Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

[208] *See* note 47.

[209] *See supra* notes 149, 186–92.

which to select a substitute than there are conferences. For instance, in the 2024 season, there will be nearly seventy Power Five institutions that elite football student-athletes may attend, but there will be only four Power conferences with whom television networks may contract to broadcast the biggest games.

Even so, modern public sentiment supporting student-athlete empowerment suggests that multiconference limitations on student-athlete compensation would meet staunch opposition.[210] Beyond the words of *O'Bannon* and *Alston*, the tone of both opinions represents a clear policy shift toward increasing student-athlete benefits, and the reputational damage of two superpower conferences using their newfound supremacy to reinstate limits on student-athlete compensation may sew public negativity about college athletics and ultimately cause greater long-term damage to the college athletics enterprise than the benefits produced by immediate costs savings.[211] Candidly, the public extends a level of sympathy for student-athletes that it does not similarly extend to media executives.[212] While it is facially appealing to cap student-athlete wage compensation, a better way to showcase the new direction of college athletics would be for each institution to independently set its own level of student-athlete compensation without any formal agreement or policy at

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[210] *See* NCAA v. Alston, 594 U.S. 69, 110 (2021) (Kavanaugh J., concurring) ("The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood. Price-fixing labor is price-fixing labor.").

[211] *See generally id.*; see also O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).

[212] *See* Kevin B. Blackistone, *It's Not Wrong to Say that College Sports is like Slavery. It's Wrong that No One's Trying to Fix That.*, WASHINGTON POST (May 8, 2018, 5:20 PM), https://www.washingtonpost.com/sports/colleges/its-not-wrong-to-say-college-sports-is-like-slavery-its-wrong-that-no-ones-trying-to-fix-that/2018/05/08/564b789c-52df-11e8-9c91-7dab596e8252_story.html [https://perma.cc/S9T2-33Y4]; *but see* Rupert Neate, *'Extra Level of Power': Billionaires Who Have Bought Up the Media*, THE GUARDIAN (May 3, 2022, 11:49 AM), https://www.theguardian.com/news/2022/may/03/billionaires-extra-power-media-ownership-elon-musk [https://perma.cc/Q2ZQ-NUXV] (vilifying the ultra-wealthy people who own several media companies and criticizing their motives for doing so).

the conference level.[213] To be clear, institutional autonomy to set student-athlete compensation should not be used as another means of offering frivolous benefits to impressionable recruits in hopes of eliminating competitors.[214] Blind spending to stockpile talent does not translate to championships.[215] Furthermore, there is evidence that the wealthiest football programs have otherwise already had the highest talent levels for the past several years, despite any fan dissatisfaction.[216] Instead, as with

[213] A similar phenomenon happened after the *Alston* decision. In 2021, several Power Five institutions separately decided to provide annual cash payments of $5,980 to their student-athletes as an education-related benefit following the Court's decision, without any clear mandate at the conference level or otherwise. *See* Andy Wittry, *The On3 Guide to Alston Awards—Education-Related Compensation*, ON3 (Sept. 20, 2022), https://www.on3.com/college/wisconsin-badgers/news/alston-awards-ncaa-v-alston-supreme-court-of-the-united-states-brett-kavanaugh/ [https://perma.cc/2Q2G-2ZYD] (listing 15 institutions which individually provided student-athletes with cash payments pursuant to *Alston* by early Fall 2022). *See Alston*, 594 U.S. at 85 ("The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually."); Other compensation markets can work like this as well. For instance, several of the largest law firms in America have individually chosen to compensate their associates at identical levels. While there is no formal agreement between the firms, it is often the case that a particularly prominent firm will publicly increase salary or bonus compensation, which shortly leads to matching compensation levels from the remaining firms that see themselves as competitors for legal talent.

[214] Lavish amenities have caused the costs of football facilities for the largest programs to approach and exceed $100 million, mostly serving as an ostentatious spectacle for recruits. *See* Mitch Sherman, *Nebraska Football's New Facilities Include Locker Room 3X Current Size, Player Recovery Focus*, THE ATHLETIC (Feb. 15, 2023), https://theathletic.com/4199515/2023/02/15/nebraska-football-facilities-matt-rhule/ [https://perma.cc/K8N9-Q3DF] ("In a dream scenario for [Coach] Rhule and his beefed-up staff, the Huskers are set to move into a $165 million complex—the most expensive undertaking in the history of Nebraska athletics—this summer."); Matt Baker, *With Florida's $85 Million Football Facility Open, Gators' Excuses are Over*, TAMPA BAY TIMES (Aug. 23, 2022), https://www.tampabay.com/sports/gators/2022/08/22/with-new-football-facility-open-florida-gators-excuses-are-over/ [https://perma.cc/6MVG-8KW2] ("The lobby showcases UF's three national championship trophies under a massive video board. The athlete lounge has a barbershop—the chairs' material is designed to look like alligator skin—and virtual reality room. The pool outside wouldn't look out of place at a nice resort. Every part of the complex delivers a powerful message to prospects and the sport as a whole.").

[215] *See* Chuck Culpepper & Cindy Boren, *Texas A&M Fires Jimbo Fisher, is Expected to Pay $76 Million Buyout*, THE WASHINGTON POST (Nov. 12, 2023, 1:39 PM), https://www.washingtonpost.com/sports/2023/11/12/jimbo-fisher-fired-texas-am/ [https://perma.cc/9X5X-W94Y] ("It became the latest, wildest chapter for a school and a football program whose record never seems to match its self-image.").

[216] *See* Patterson, *supra* note 196*; see also* Berkowitz et al., *supra* note 177 (together indicating that each of the top 10 highest-revenue athletic departments for

football coach salaries, institutions should respond pragmatically based on a realistic set of competitors and allow the compensation market to operate organically over time.[217]

The story of conference consolidation more broadly serves as a cautionary tale about competitive spending. Shortly after the University of Washington, a PAC 12 defector, was thrilled to compete in the 2024 College Football Playoff National Championship, its in-state rival, Washington State University, bitterly found itself without a conference at all.[218] Without sufficient revenues, the losers of conference reshufflings will be forced to restrict various student-athlete experiences, up to and including eliminating their sport programs.[219] Situated in metropolitan areas that may be historically agnostic to college sports, institutions like the University of Washington are nevertheless destined to thrive in an environment of conference consolidation because of the media rights revenue potential that their location provides.[220] At the same time, more

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the 2022–2023 academic year garnered a top 15 five-year average recruiting class ranking).

[217] McDonald Mirabile & Mark Witte, *Can Schools Buy Success in College Football? Coach Compensation, Expenditures and Performance*, MUNICH PERSONAL REPEC ARCHIVE (2012) (study concluding that football coach salaries are correlated to coaches' past success, and that salaries are determined by institutional characteristics such as the size of the fan base and the profitability of the football program).

[218] Michael McCann, *PAC-12 Turns PAC-2 as Court Grants Control to OSU, WSU*, SPORTICO (Nov. 15, 2023, 1:41 PM), https://www.sportico.com/leagues/college-sports/2023/pac-12-turns-pac-2-1234746775/ [https://perma.cc/9NML-DWNW] ("The departing schools' appeal argues, among other points, that the injunction unlawfully gives [Oregon State University] and [Washington State University] 'total control over the Conference' whereas an injunction is supposed to preserve the status quo—which the 10 exiting schools interpret as maintaining their rights as active conference members.").

[219] *See* Eric Fisher, *Financial Woes Could Force Arizona to Cut Sports Programs*, FRONT OFFICE SPORTS (Nov. 16, 2023, 2:02 PM), https://frontofficesports.com/financial-woes-could-force-arizona-to-cut-sports-programs/ [https://perma.cc/A6XM-L86C] ("The Big 12's riches can't arrive soon enough for the University of Arizona, and the financially struggling athletic program could cut some of its sports teams."); Connor Letourneau & Marisa Ingemi, *Will Cal, Stanford Face Sports Cuts After Making Big Sacrifices to* Join *ACC?*, SAN FRANCISCO CHRON. (Sept. 2, 2023, 2:45 PM), https://www.sfchronicle.com/sports/college/article/611tanford-cal-sports-acc-18343327.php [https://perma.cc/FK2Y-8FNQ] ("This only underscores some people's concerns that plummeting TV revenue could signal the end of at least several non-revenue teams.").

[220] Bob Hall, Former Yale University Athletic Director stated: "New York is a wonderful town. There's a great deal of competition for one's spare time. Only the really big games will draw here. A very large city cannot create college football atmosphere. New York colleges haven't been able to support their teams and have dropped them, one by one." Jimmy Jemail, *The Question: Why are Small Towns and*

remote institutions like Washington State University are left behind, along with the economies of those smaller markets that rely more heavily on local events.[221] This dichotomy is not limited to the Apple Cup.[222] Century-long rivalries and institutional partnerships across the country have recently been tossed aside in pursuit of greater media rights revenues and more exciting football victories.[223]

The next chapter of the college athletics story requires that institutional leaders prioritize fiscal and competitive responsibilities over

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Cities Usually Better Football Towns Than New York (Asked at a Meeting of the N.Y. Touchdown Club), SPORTS ILLUSTRATED (Nov. 7, 1955), https://vault.si.com/vault/1955/11/07/the-question-why-are-small-towns-and-cities-usually-better-football-towns-than-new-york-asked-at-a-meeting-of-the-ny-touchdown-club [https://perma.cc/4WQG-5LAJ].

[221] *See* Susan M. Shaw, *The Human Cost Of Conference Realignment*, FORBES (Oct. 3, 2023, 8:47 AM), https://www.forbes.com/sites/susanmshaw/2023/10/03/the-human-cost-of-conference-realignment/?sh=669ced9f1e09 [https://perma.cc/BK9G-Y72K] ("In a recent update to the OSU [Oregon State University] community, President Jayathi Murthy and Athletics Director Scott Barnes also pointed out, 'In addition to OSU's direct losses, there will be significant negative financial impact on businesses in Corvallis, Albany, and Lebanon, and Benton and Linn counties and surrounding areas, which have greatly benefited from fans and visitors drawn to Pac-12 play. In Corvallis alone, early estimates show millions of dollars in potential lost revenue to the local travel and hospitality industry—not to mention the lost tax revenue to the city and county.' These lost dollars mean direct impact on the people whose livelihoods and services depend on revenue generated through OSU Athletics.").

[222] The Apple Cup is the nickname given to the annual football game between the University of Washington and Washington State University. *See University of Washington and Washington State University Agree to Five-Year Continuation of the Apple Cup*, UNIV. OF WASH. ATHLETICS (Nov. 19, 2023), https://gohuskies.com/news/2023/11/19/football-university-of-washington-and-washington-state-university-agree-to-five-year-continuation-of-the-apple-cup.aspx [https://perma.cc/L663-66XU]. The two institutions have fortunately agreed in principle to continue their 115-year rivalry game after Washington's move to the Big Ten. *Id.* This result should be juxtaposed against the ostensible abandonment of the annual Bedlam rivalry, one of the premier college football games in which the University of Oklahoma, who will join the SEC in 2024, competed against Oklahoma State University for 118 years until 2023. Pat Forde, *Bye-Bye, Bedlam: Oklahoma, Oklahoma State Rivalry Faces Uncertain Future*, SPORTS ILLUSTRATED (Nov. 3, 2023), https://www.si.com/college/2023/11/03/bye-bye-bedlam-oklahoma-oklahoma-state-rivalry-faces-uncertain-future [https://perma.cc/H63L-A7Y8].

[223] *See* Stewart Mandel & Nicole Auerbach, *UC Board of Regents Approves UCLA's Move to Big Ten in 2024*, THE ATHLETIC (Dec. 14, 2022), https://theathletic.com/4003755/2022/12/14/uc-board-of-regents-ucla-big-ten/ [https://perma.cc/9B85-KH3P] ("I'd been told by people close to the situation at UCLA and within the Big Ten that the likeliest outcome—even all the way back in the summer—was tossing some money in the direction of Cal, since the Bruins were leaving their sister school high and dry in a league that was less financially secure than their new home.").

short-term gains. The consequences of unrestrained competitive spending are not just risky, they have now proven to be existential.[224] We must learn how to contextualize wins and losses without losing sight of the infinite game. Outspending one's competitors is an appealing strategy, but displacing peer institutions ultimately threatens to upend the broad college athletics framework that has provided growth opportunities to millions of student-athletes for over 100 years.[225] Conference media deals will almost certainly continue to surge, large institutions will garner more revenue as a result, and it is incumbent on those institutions not to simply spend new money with old habits.[226] Even though student-athlete wage compensation may fairly be considered as a social advancement, a new type of self-discipline should be exercised with respect to student-athlete wages. This approach may not guarantee that alumni will get to relish after demolishing their biggest rival every year, but it would provide much-needed longevity to the important college athletics framework that has struggled to withstand instability over the past several decades.

[224] Aside from the litany of legal challenges facing college athletics one of the largest threats to conference power is ironically based on the opportunity to pursue even further increased media revenues outside of a multiconference structure. Based on a professional league model, several national pundits have recently predicted that major college football may eventually be housed in a single, sport-specific entity including only a small number of the most prominent college football programs. *See* Steven Godfrey, *College Football is Barreling Toward a Super League, No Matter What Might Be Lost*, WASHINGTON POST (Aug. 15, 2023, 8:00 AM), https://www.washingtonpost.com/sports/2023/08/15/college-football-super-league/ [https://perma.cc/6LDC-8GUD]; Ubben, *supra* note 35. It is nearly certain that this "Super League" type of structure would hold sufficient market power for the purposes of Section 1 in many instances, and it may also create scrutiny under Section 2 as a monopolistic action. The Super League scenario is not explored herein. However, it is worth noting that revenue incentives are such that there is a legitimate possibility that there will be significantly fewer institutions sponsoring major college football in the future.

[225] *See* Letter from Charlie Baker to NCAA Membership Committee Members (Dec. 5, 2023) (noting that tens of millions of student-athletes have competed over time).

[226] *See supra* note 14 and accompanying text (discussing the uptick in the value of sports media generally, football in particular, and the additional revenue to be generated in the future).