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**THE NCAA, FAIR PAY TO PLAY, ANTITRUST SCRUTINY,  
AND THE NEED FOR INSTITUTIONAL REFORM**

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## I. AN OVERVIEW OF THE NCAA, FAIR PAY TO PLAY, AND COLLEGES THAT FAIL TO PRACTICE WHAT THEY PREACH

Let's begin with some numbers. The NCAA and its member colleges bring in thirteen billion (with a "b") dollars per year in revenue.<sup>1</sup> Thirty-eight different NCAA member colleges each independently bring in over 100 million dollars per year in revenue.<sup>2</sup> The University of Texas's athletic programs, which are driven primarily by football and then men's and women's basketball, bring in over 200 million dollars per year in revenue<sup>3</sup>—more than most individual National Hockey League teams.<sup>4</sup> The salaries for elite coaches in football and men's basketball now sometimes exceed eight million dollars per year.<sup>5</sup> Assistant coaches at elite football programs are now making upwards of two million dollars per year.<sup>6</sup> And at the University of Michigan, its quarterbacks coach is paid over one million dollars per year.<sup>7</sup>

Schools use college sports as a means to improve their brand equity, and to recruit tuition-paying students to their school, thus enhancing

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<sup>1</sup> See Eben Novy-Williams, *Quick Take: College Sports*, BLOOMBERG, (Sept. 27, 2017, 11:11 AM), <https://www.bloomberg.com/quicktake/college-sports-ncaa>.

<sup>2</sup> See Steve Berkowitz et al., *NCAA Finances 2017-18*, USA TODAY, <https://sports.usatoday.com/ncaa/finances/> (last visited Apr. 30, 2020).

<sup>3</sup> *Id.* (listing 2017-18 revenue at over \$219 million).

<sup>4</sup> See Mike Ozanian & Kurt Badenhausen, *The NHL's Most Valuable Teams*, FORBES (Dec. 5, 2018, 9:40 AM), <https://www.forbes.com/sites/mikeozanian/2018/12/05/the-nhls-most-valuable-teams/#745940e150e2> (showing that for the 2017-18 NHL season, only three NHL teams brought in more revenue than the University of Texas athletics program's \$219 million; these teams were the New York Rangers, Toronto Maple Leafs and Montreal Canadiens).

<sup>5</sup> See John Duffley, *25 Highest Paid College Football Coaches of 2019*, FANBUZZ (Jan. 2, 2020, 12:10 PM), <https://fanbuzz.com/college-football/highest-paid-college-football-coaches/> (listing University of Alabama head football coach Nick Saban's salary at \$8.3 million per year); Chris Bumbaca, *Top 10 Highest Paid College Basketball Coaches*, USA TODAY (Mar. 11, 2020, 3:36 PM), <https://www.usatoday.com/story/sports/ncaab/2020/03/11/ncaa-basketball-coaches-salaries-top-10-highest-izzo-krzyzewski-calipari/5021566002/> (listing University of Kentucky's men's basketball coach John Calipari's salary at \$8.2 million).

<sup>6</sup> See Tom Schad, *Overpaid or Worth the Cash? Here's How 10 Highest Paid Assistant Football Coaches Stack Up*, USA TODAY (Dec. 5, 2018, 12:39 PM), <https://www.usatoday.com/story/sports/ncaaf/2018/12/05/assistant-football-coaches-highest-paid-lsu-clemson/1989693002/> (referencing three assistant college football coaches who currently earn base salaries that exceed \$2 million per year).

<sup>7</sup> See Bill Sheaf, *Michigan Nears Top—In Million Dollar Assistant Coaches*, CRAIN'S DETROIT BUSINESS (Jan. 27, 2019, 12:03 AM), <https://www.craindetroit.com/sports/michigan-near-top-million-dollar-assistant-coaches> (noting that the University of Michigan currently pays three assistant football coaches upwards of \$1 million in annual salaries, including Pep Hamilton, assistant head coach/passing game coordinator/quarterbacks coach, who is earning \$1 million, plus possible \$250,000 bonus).

their revenues overall.<sup>8</sup> Certain schools, such as Gonzaga University and Boise State University, would probably not even be on the academic map if it were not for their big-time college sports.<sup>9</sup> In addition, studies have shown that offering big-time academics helps university revenues based on something known as the “Flutie Factor,” which is named after former Boston College quarterback Doug Flutie.<sup>10</sup> After his great game playing quarterback for Boston College against the University of Miami in November 1984, the following year Boston College received so many undergraduate applications for admission that the school was able to become more selective in choosing candidates, and the SAT scores of their next incoming class increased by upwards of 100 points.<sup>11</sup> Call it whatever we want, but college sports has become a marketing arm to the university system overall and “big business.”<sup>12</sup>

Nevertheless, at the same time that college sports have become “big business,” many of the athletes that compete in big-time college sports continue to live below the poverty line, and live under very strong control from the member-schools.<sup>13</sup> They practice over forty hours per week, oftentimes because the coaches require it.<sup>14</sup> They now get all the

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<sup>8</sup> See Carmen Nobel, *The Marketing Effect of College Sports*, FORBES (Feb. 5, 2013, 3:27 PM), <https://www.forbes.com/sites/hbsworkingknowledge/2013/02/05/the-marketing-effect-of-college-sports/#34a8fc225490> (discussing a research paper written by Harvard Business School Assistant Professor Doug J. Chung that looks at the financial benefits that schools derive from successful big-time athletic programs, including a purported 18.7 percent increase in school applications “[w]hen a school goes from being mediocre to great on the football field”); see also Doug J. Chung, *The Dynamic Advertising Effect of College Athletics*, MARKETING SCIENCE, Sept.–Oct. 2013, at 2, [https://dash.harvard.edu/bitstream/handle/1/10880582/chung\\_TheDynamicAdvertisingEffect\\_final.pdf?sequence=1&isAllowed=y](https://dash.harvard.edu/bitstream/handle/1/10880582/chung_TheDynamicAdvertisingEffect_final.pdf?sequence=1&isAllowed=y).

<sup>9</sup> *C.f.* Chung, *supra* note 8 (describing the “18 percent increase in applications followed Boise State University’s successful 2006–07 football season, which included a win over college football powerhouse [University of Miami]”).

<sup>10</sup> See Nobel, *supra* note 8.

<sup>11</sup> See MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 60–68* (Henry Holt & Co., 2000) (discussing the Flutie Factor).

<sup>12</sup> Brian Frederick, *Fans Must Understand that College Sports is Big Business*, U.S. NEWS (Apr. 1, 2013), <https://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/fans-must-understand-that-college-sports-is-big-business>.

<sup>13</sup> See Nw. Univ., No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f> (describing the extreme level of control exercised over college athletes by at least one university, in one sport); see also Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big-Time College Sports*, NAT’L COLL. PLAYERS ASS’N, 4, 19, <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> (last visited Apr. 30, 2020) (denoting that more than 85 percent of college athletes live below the poverty line).

<sup>14</sup> See Marc Edelman, *The Future of College Athlete Players Unions*, 38 CARDOZO L. REV. 1627, 1632–33 (2017) (explaining that “most colleges require their Division I men’s basketball and FBS football players to devote upwards of forty hours

food they need,<sup>15</sup> but oftentimes their families cannot even afford to come to the games.<sup>16</sup> They play in stadia and arenas that are filled with logos—endorsements of companies that pay the colleges.<sup>17</sup> They sometimes play on national television, where commercials for title sponsors air every few minutes.<sup>18</sup> But at the same time, they are not allowed to do so much as accept 100 dollars for doing a promotion with a local pizzeria.<sup>19</sup> Let us think about that.

California's Fair Pay to Play Act, which California state senator Nancy Skinner advocated for, did not attempt to recreate the entire power and monetary dynamic in college sports.<sup>20</sup> But it did attempt to tackle a very, very small part of one problem within one particular

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per week to their sport, notwithstanding academic and personal time commitments”).

<sup>15</sup> See Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014, 4:25 PM), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules> (discussing the NCAA's much belated decision to finally revise its own policy that had limited schools from providing unlimited food to their athletes).

<sup>16</sup> See Jeff Greer, *NCAA Tournament Travel a Budget Buster for Players' Families*, COURIER J. (Mar. 14, 2017, 8:44 AM), <https://www.courier-journal.com/story/sports/college/louisville/2017/03/14/ncaa-tournament-travel-can-budget-buster-players-families/98945408/> (discussing the financial strain on families of college athletes that wish to fly to attend their children's games).

<sup>17</sup> See Garrett Mosher, *Biggest Brands in College Football – How Brands are Effectively Activating their Sponsorships*, HOOKIT (Aug. 20, 2019), <https://www.hookit.com/insights/biggest-brands-in-college-football-how-brands-are-effectively-activating-their-sponsorships/> (discussing some of the ways colleges that offer big-time sports are signing endorsement deals to capitalize on interest in, and athletic work product, of their star athletes).

<sup>18</sup> See generally *NCAA Corporate Champions at Partners*, NCAA (Jan. 16, 2020), <https://www.ncaa.com/news/ncaa/article/2011-02-25/corporate-champions-and-partners> (describing the various categories of corporate sponsors whose names and logos are plastered throughout the live and televised versions of the NCAA men's basketball tournament).

<sup>19</sup> See Debbie Holmes, *Ohio State President Still Opposes Endorsement Deals for College Athletes*, WOSU (Sept. 24, 2019), <https://radio.wosu.org/post/ohio-state-president-still-opposes-endorsement-deals-college-athletes#stream/0> (quoting the president of Ohio State University, Michael Drake, quite incredulously purporting that despite all of the NCAA member colleges' mass commercialization of certain college sports that somehow allowing college athletes to sign endorsement deals is what would turn college sports “into professional sports”).

<sup>20</sup> See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206) (providing text of the new California law that will take effect in 2023).

state.<sup>21</sup> By most accounts, it was a modest and reasonable reform.<sup>22</sup> The proposed bill, which was signed into law by the state governor, will require NCAA member colleges in the State of California, beginning in the year 2023, to allow their athletes to control their right of publicity, which is bestowed to them under California law, and thus, to sign endorsement deals with third parties without university interference.<sup>23</sup> The Fair Pay to Play Act does not require, or even allow, California's colleges to directly pay the athletes.<sup>24</sup> And it does not go into effect immediately.<sup>25</sup> All it does is allow college athletes to market their own name and likeness.<sup>26</sup> To many, it seems like a reasonable and modest reform.<sup>27</sup>

And, what was the NCAA's reaction to California passing the Fair Pay to Play Act? The NCAA has now threatened to ban the California member schools if they comply with the state law.<sup>28</sup> The NCAA's decision was not only meant to deter California legislators from passing this law and deter California colleges from eventually following it, but

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<sup>21</sup> See *id.*; see also Roshaun Colvin & Joshua Jansa, *California's 'Fair Pay to Play' Law for College Athletes Has Other States Racing to Join Up. Here's Why*, WASH. POST (Nov. 18, 2019, 6:00 AM), <https://www.washingtonpost.com/politics/2019/11/18/californias-fair-pay-play-law-college-athletes-has-other-states-racing-join-up-heres-why/> (explaining that the California Fair Pay to Play Act “will allow college athletes to make money from endorsement deals for the first time”).

<sup>22</sup> See, e.g., Sean Gregory, *How California's Historic NCAA Fair Pay to Play Law Will Change College Sports for the Better*, TIME (Oct. 1, 2019), <https://time.com/5689548/california-ncaa-law/> (explaining that “schools could consider the California model a reasonable compromise, if not a victory, on player compensation, since the schools themselves won't be on the hook for payments — those other third-party companies are making the deals”); John Feinstein, *The NCAA is Still Whining About Fair Pay for Play. It's Too Late for That*, WASH. POST (Oct. 16 2019, 12:57 PM), [https://www.washingtonpost.com/sports/colleges/the-ncaa-is-still-whining-about-pay-to-play-its-too-late-for-that/2019/10/16/d128a2c8-f01e-11e9-8693-f487e46784aa\\_story.html](https://www.washingtonpost.com/sports/colleges/the-ncaa-is-still-whining-about-pay-to-play-its-too-late-for-that/2019/10/16/d128a2c8-f01e-11e9-8693-f487e46784aa_story.html) (opining that “[t]he NCAA campaign to attack the Fair Pay to Play Act is riddled with excuses that call the law wrong or, more laughably, unnecessary”).

<sup>23</sup> See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206).

<sup>24</sup> See *id.*; see also Gregory, *supra* note 22 (explaining that California's Fair Pay to Play Act does not allow colleges to pay their athletes directly, but rather only permits third-party payments).

<sup>25</sup> See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206).

<sup>26</sup> See *id.*

<sup>27</sup> Feinstein, *supra* note 22.

<sup>28</sup> See Greg Liggins, *NCAA Threatens to Ban California Teams in Light of Fair Pay to Play Bill*, CBS Sacramento, Jun. 24, 2019, <https://sacramento.cbslocal.com/2019/06/24/ncaa-threat-ban-california-pay-to-play/>.

it was also a very clear attempt to chill other states, including North Carolina, from passing their own bills to grant at least a somewhat greater degree of financial freedom to their states' college athletes.<sup>29</sup> At present, the NCAA, which is composed of nearly 1200 member colleges,<sup>30</sup> continues to hold true to its threat that if the colleges in California follow what is now California law, the NCAA will attempt to ban them for doing so.<sup>31</sup>

Before going any further, let us talk for two moments from an education perspective, as someone who, in addition to having degrees in law, sports management and business,<sup>32</sup> also holds a degree in higher education administration.<sup>33</sup> The irony of the NCAA's response here cannot be ignored. The world of higher education purports to advocate certain values. These values include the belief that workers should earn a fair wage and the belief that we should not exploit people from marginalized positions—whether it be based on family income, lack of formal education, or ethnicity. The higher education industry is so quick to criticize big business for exploiting labor. We have courses at almost every major college in the county that criticize worker exploitation and discuss concepts like a universal fair minimum wage. But the reality is that maybe it is not what you preach that matters; maybe it is what you *do* that matters. And the nearly 1200 member

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<sup>29</sup> See Colvin & Jansa, *supra* note 21 (explaining that “[t]o remain competitive for their share of athletic talent and sports revenue, states have quickly introduced their own versions of [bills to allow college athletes to endorse products]”); see also Justin H. Williams, *North Carolina Lawmakers Push NCAA Reform*, TECHNICIAN (Jan. 12, 2020), [http://www.technicianonline.com/sports/article\\_b8e83ff6-35a2-11ea-9e7b-8bd0b2d7f90d.html](http://www.technicianonline.com/sports/article_b8e83ff6-35a2-11ea-9e7b-8bd0b2d7f90d.html) (noting that “Rep. Mark Walker, a Republican congressman representing North Carolina’s sixth district, introduced the Student-Athlete Equity Act in Washington back in March. The proposed bill, whose supporters stem from both sides of the aisle, would strip the NCAA of its non-profit tax exemptions if it continued to prohibit student-athletes from profiting on their own name, image and likeness”).

<sup>30</sup> See Will Hobson & Ben Strauss, *March Madness is Worth Billions to the NCAA and Networks. Cancelling Will Cost Them*, WASH. POST (Mar. 13, 2020, 2:58 PM), <https://www.washingtonpost.com/sports/2020/03/13/march-madness-money-coronavirus/> (referencing the NCAA as including “1,200 member schools across the country”).

<sup>31</sup> See Steve Berkowitz, *NCAA Says California Schools Could be Banned from Champions if Bill Isn't Dropped*, USA TODAY (Jun. 24, 2019, 8:03 AM), <https://www.usatoday.com/story/sports/2019/06/24/ncaa-california-schools-could-banned-championships-over-bill/1542632001/> (discussing a letter sent from NCAA President Mark Emmert implying the prospect of banning California member colleges from, at a minimum, certain post-season tournaments).

<sup>32</sup> J.D., Michigan Law (2003); M.A. University of Michigan School of Kinesiology (Sports Management) (2003); B.S. Economics, Wharton School, University of Pennsylvania (1999).

<sup>33</sup> M.S. Ed. (High Ed. Admin), Marx School of Public and International Administration, Baruch College, City University of New York (2019).

colleges that are part of the NCAA are clearly not living their own purported values when, outside the bounds of their classrooms, they reach agreements seeking to curtail the free market for college athletes to sign endorsement deals and instead seek to keep all the money derived from college sports in the hands of very wealthy college coaches, athletic directors, and presidents of universities.<sup>34</sup>

But, from here we will set aside the moral issue. Perhaps I am not the best person to speak particularly on the moral exploitation of college athletes. Maybe that topic is best to leave to experts like Taylor Branch<sup>35</sup> and Dr. Harry Edwards.<sup>36</sup> They have done fabulous jobs addressing those issues before.<sup>37</sup> Thus, I am going to spend the rest of my talk today addressing a much more narrow point, which is a legal point and a point that is not meant to apply to liberal or conservative values, but rather to American, capitalist values. The point is that, at the end of the day, the NCAA's threat to ban California colleges (or any other colleges that allow athlete endorsement deals) from participating in NCAA events is not only morally wrong, but is also illegal under antitrust law because the NCAA's restraints trample upon basic, capitalist principles of free labor markets. And, as a seasoned antitrust lawyer who writes and teaches in that particular field, I feel uniquely well-positioned to explain exactly why this is so.

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<sup>34</sup> *Cf.* Lulu Garcia-Navarro, *Activist on California NCAA Law*, NPR (Oct. 6, 2019, 7:59 AM), <https://www.npr.org/2019/10/06/767636927/activist-on-california-ncaa-law> (quoting University of California professor and civil rights activist Dr. Harry Edwards as describing the current reality of big-time college sports as follows: "We have a set of circumstances where increasingly, in basketball, most certainly, and in football, it is the black athlete that is the backbone of the whole process of producing this tremendous wealth. You look at the NFL, you look at the quarterbacks in the top 25 collegiate programs, and increasingly, they are black. That means that what we're looking at here is not just a situation of financial exploitation but of racial domination where you have white - overwhelmingly white coaches, athletic departments, college presidents and chancellors profiting off of the uncompensated labor of black players in football and basketball.").

<sup>35</sup> Taylor Branch is a Pulitzer Prize-winning author and public speaker who has written extensively on the history of the civil rights era, as well as more recently the college athletes' rights movement. For a full biography of Taylor Branch, see <https://taylorbranch.com/about-taylor-branch/>.

<sup>36</sup> Dr. Harry Edwards is an emeritus professor at the University of California who has written extensively on the sociology of sport and race relations in organized sport, as well as more recently about the college athletes' rights movement. For a full biography of Dr. Edwards, see <https://sociology.berkeley.edu/professor-emeritus/harry-edwards>.

<sup>37</sup> See Taylor Branch, *The Shame of College Sports*, THE ATHLETIC, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (last visited Apr. 30, 2020; Garcia-Navarro, *supra* note 34).

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## II. WHY THE NCAA’S THREAT TO BAN COLLEGES THAT ALLOW “FAIR PAY TO PLAY” VIOLATES FEDERAL ANTITRUST LAW

Simply stated, when NCAA member colleges collectively threaten to ban those schools that seek to allow their athletes to sign third-party endorsement deals, NCAA members not only violate certain moral norms that one could perhaps debate, but NCAA members also collectively violate Section One of the Sherman Antitrust Act<sup>38</sup> – the longstanding federal statute that is sometimes referred to as the “Magna Carta of free enterprise.”<sup>39</sup> Thus, if the NCAA really were to ban California colleges in 2023 for allowing its athletes to sign endorsement deals, either the State of California or any California member college could reasonably sue the NCAA member schools under Section One of the Sherman Act.<sup>40</sup> And, I believe it is far more likely than not that the plaintiffs would win this lawsuit against the NCAA, just as plaintiff colleges prevailed in a famous antitrust lawsuit against the NCAA before the Supreme Court back in 1984.<sup>41</sup>

### A. An Overview of Antitrust Law and Policy

So, from here, let us get into the nuance of antitrust law. Section One of the Sherman Act, in pertinent part, states that “any contract combination or conspiracy in the restraint of trade shall be declared to be illegal.”<sup>42</sup> This statute was passed in the late 1800s based on concerns that big businesses were doing things collectively to the detriment of consumers, and to the detriment of the government overall.<sup>43</sup> Now, there are a whole host of behaviors that would be deemed to be potentially problematic under Section One of the Sherman Act.<sup>44</sup> The most classic ones are price fixing, wage fixing, and group

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<sup>38</sup> 15 U.S.C. § 1 (2004).

<sup>39</sup> U.S. v. Topco, 405 U.S. 596, 610 (1972).

<sup>40</sup> See 15 U.S.C. § 1 (2004) (providing the underlying text to Section One of the Sherman Act).

<sup>41</sup> See *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984) (finding NCAA’s restraints on the number of football games individual member schools may have broadcast on national television to violate Section One of the Sherman Act).

<sup>42</sup> 15 U.S.C. § 1 (2004).

<sup>43</sup> See PHILLIP AREEDA & LOUIS KAPLOW, *ANTITRUST ANALYSIS: PROBLEMS, TEXTS AND CASES* 4-5, 49 (1997) (explaining that “[t]he possible goals of antitrust beyond economic efficiency include consumer interests in lower prices (perhaps at the expense of productive efficiency), the political and social values of dispersed control over economic resources, multiple choices for producers and consumers free of the arbitrary dictates of monopolies or cartels, equal opportunity, and ‘fairness’ in economic dealings”).

<sup>44</sup> See Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding Professional Sports Leagues into Europe*, 29 NW. J. OF INT’L BUS. & L.

boycotts, which are sometimes known as concerted refusals to deal.<sup>45</sup> When the Sherman Act was passed in 1890, Congress, at the time, was concerned primarily with what was considered to be the biggest and most powerful lobbying companies at the time: businesses in areas such as steel, banks, and railroads.<sup>46</sup> Today, however, when we think of big business and big lobbying arms, perhaps there is no bigger business than the service business of higher education.<sup>47</sup>

Now, the exact contours of antitrust law have changed a little bit in subtle directions throughout time. But despite what we hear certain politicians saying today,<sup>48</sup> antitrust law is not a series of laws that are simply opposed to big business. Big businesses are not condemned under antitrust law. Making a lot of money is not condemned under antitrust law. But, engaging in practices that are harmful to the free market are. So, antitrust law, despite the false lens it is sometimes put under, is clearly not a socialist policy. It is a fundamentally capitalist policy – a policy that recognizes that, if we want to have free markets in this country and if we want to have competition for who could provide the best products and the best services, the only way that our free market capitalist system works is if we do not have interference in the free market to prevent competitors from competing against one another. And when companies collude to restrain trade, their doing so directly harms the free market.

Of course, the detailed nuances of antitrust law have subtly evolved in different directions. In the 1960s, which was a progressive and reform period, antitrust law was not seen as solely about protecting

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403, 412–13 (2009).

<sup>45</sup> See *id.* (explaining that Section 1 of the Sherman Act “specifically governs the behaviors of price fixing, wage fixing, tying arrangements, market allocations, and concerted refusals to deal (group boycotts)”).

<sup>46</sup> See Laura Sawyer, *US Antitrust Law and Policy in Historical Perspective*, 2–9 (Harv. Bus. Sch., Working Paper No. 19-110), [https://www.hbs.edu/faculty/Publication%20Files/19-110\\_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf](https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf). See also Alison Griswold, *Why is it Called Antitrust?*, QUARTZ (Nov. 11, 2019), <https://qz.com/1732014/why-is-it-called-antitrust/>.

<sup>47</sup> See Frederick Daso, *Higher Education is the New Big Business*, MEDIUM (Aug. 31, 2018), <https://medium.com/@fredsoda/higher-education-is-the-new-big-business-287bbad95afb>; Diane Rado, *In the Big Business World of Education, Top Lobbying Firms are Key Players*, FLA. PHOENIX (May 31, 2019), <https://www.floridaphoenix.com/2019/05/31/in-the-big-business-world-of-education-top-lobbying-firms-are-key-players/>.

<sup>48</sup> See, e.g., Lauren Hirsch & Lauren Feiner, *Attorney General Barr Defends Antitrust Law as Elizabeth Warren Looks to Reinvent it*, CNBC (Dec. 10, 2019, 7:46 PM), <https://www.cnbc.com/2019/12/10/barr-defends-antitrust-law-as-warren-looks-to-reinvent-it.html>; see also Lina Khan, *The Supreme Court Just Quietly Guttled Antitrust Law*, VOX (July 3, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/7/3/17530320/antitrust-american-express-amazon-uber-tech-monopoly-monopsony>.

customers, but rather as bringing together a broad range of social policy initiatives such as perhaps the populist interest in protecting small business.<sup>49</sup> By the late 1970s and early 1980s, a lot of that changed. The law and economics movement, led by Judge Robert Bork who published the book *Antitrust Paradox*,<sup>50</sup> shifted many of these populist principles out of the law and shifted prevailing interpretation of antitrust law to one primarily geared toward analyzing the economic restraint of particular conduct on consumers.<sup>51</sup> Nevertheless, even adopting the law and economics movement's more recent interpretation of antitrust law, the NCAA's restraints on permitting member colleges to allow athletes to profit from endorsing products still fall within the scope of a very likely antitrust violation.

Indeed, irrespective of one's political leanings or subtle differences in terms of how to most appropriately interpret nuances in antitrust law, under a proper antitrust analysis, one would analyze any purportedly anticompetitive conduct based on the same three identical steps.<sup>52</sup> The first step entails analyzing threshold issues.<sup>53</sup> These are technical legal requirements that are needed for an antitrust case to go forward.<sup>54</sup> If these threshold requirements are met, the case then moves to the second stage in analyzing the restraint's competitive effects. The question that

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<sup>49</sup> See Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 72–73 (2018) (explaining that “[t]he rhetoric of progressive antitrust policy-makers has generally not spoken of market failure [but rather has] articulated concerns and has stepped into such areas as the distribution of wealth or protection of specific interest groups [including] the threats posed by the concentration of wealth, big business, industrial concentration and excessive mergers, harmful vertical integration, high entry barriers, or abuses of [intellectual property] rights”).

<sup>50</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

<sup>51</sup> *C.f.* Maurice Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563 (2012) (“Although economists were ambivalent in 1890 toward the Sherman Act, and even though the Act's legislative history encompassed noneconomic concerns, in the past policy cycle, Judge Richard Posner, Judge Robert Bork, and other Chicago School scholars pursued a quest for a single unifying economic goal. According to these scholars, antitrust's whole task was “the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.”) (internal citations omitted).

<sup>52</sup> See Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts*, 58 CATH. U. L. REV. 631, 640–41 (2009) (applying a test that requires an analysis as to whether technical threshold issues are met, then shifts to competitive analysis of the underlying restraint, and concludes by assessing whether any affirmative defenses pertaining to either preemption or other policy matters would preempt the otherwise finding of an antitrust violation).

<sup>53</sup> See *id.* at 640.

<sup>54</sup> See generally *id.* (describing these threshold issues as questions related to “(1) whether there is an effect on trade or commerce among more than one state, and (2) whether there is a sufficient agreement among two or more parties to constitute a “contract, combination ... or conspiracy.”).

is assessed here is whether the underlying collective restraint does more to harm than to help competition in the specific market or markets of inquiry.<sup>55</sup> Finally, if the underlying restraint is found on the whole to harm competition, courts, before deeming the underlying conduct to be illegal, also have to consider whether any affirmative defenses apply.<sup>56</sup> With regard to assessing affirmative defenses, the courts need to consider whether there is a broader statute or court-recognized public policy matter that leads to the preemption of antitrust law.<sup>57</sup>

## **B. Applying § 1 of the Sherman Act to the NCAA's Bar on Fair Pay to Play**

I will now explain why the NCAA's rules that prevent member colleges from allowing endorsement deals (as well as the NCAA's threat to ban member colleges that allow their athletes to sign endorsement deals) meet the threshold issues for a violation of Section One of the Sherman Act, as well as are net anticompetitive and are not saved by any other statutory law or any common law principle.

### *1. Threshold Issues*

With respect to assessing the NCAA's restraint on allowing athlete endorsements, under the threshold stage of the inquiry, there are two specific matters to consider.<sup>58</sup> First, to meet the threshold requirements under Section One of the Sherman Act, there needs to be an agreement amongst two or more parties.<sup>59</sup> This is because Section One of the Sherman Act is only about governing contracts, combinations or conspiracies in restraint of trade,<sup>60</sup> and, indeed, there cannot be a contract, combination or conspiracy involving just one party.<sup>61</sup> There are other sections of antitrust law too, like Section Two of the Sherman Act, that govern the conduct of monopolies acting improperly.<sup>62</sup> But, if

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 654 (explaining that at this final step in the analysis, "a court finally turns to whether any exemption or affirmative defense would negate the finding of antitrust liability").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 640.

<sup>59</sup> *Id.*

<sup>60</sup> 15 U.S.C. § 1 (2004).

<sup>61</sup> *Copperweld v. Indep. Tube*, 467 U.S. 752, 768 (1984).

<sup>62</sup> 15 U.S.C. § 2 (2004) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony"); *Copperweld*, 467 U.S. at 767 ("The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual

we are under Section One, we have to show an agreement amongst two or more parties in order to be able to move forward with the analysis.<sup>63</sup>

The NCAA, as a private, bottom-up, trade association, is an association composed of its members.<sup>64</sup> Indeed, even though we sometimes talk about the NCAA in the singular sense, the NCAA is driven by 1200 different member colleges that agree on certain rules.<sup>65</sup> For example, Wake Forest is one of these nearly 1200 schools.<sup>66</sup> And the interests of these schools are not always naturally aligned with one another. In fact, in the past, there have been cases in which colleges have sued the NCAA, which help us to understand the degree of this nonalignment. For example, the Governor of the State of Pennsylvania, acting on behalf of Penn State University, sued the NCAA several years back over the attempt to sanction the school for failure to report allegations of child sexual abuse in the team's football locker room.<sup>67</sup> Likewise, back in 1984, the University of Oklahoma and University of Georgia sued the NCAA because NCAA member colleges passed a rule to limit the number of games that schools could have broadcast on television.<sup>68</sup> Based on these separate centers of decision-making at each of the NCAA member schools, when these schools come together to reach a collective decision on a topic—including the right of any individual member school to allow their athletes to sign endorsement deals—doing so would constitute an agreement amongst two or more parties, and thus, that prong of the Section One threshold issues is surely met.

Similarly, the second threshold issue that needs to be met before an antitrust challenge under Section One of the Sherman Act—interstate commerce—is also nearly undeniably met.<sup>69</sup> To understand the modern

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monopolization”) (internal citations omitted).

<sup>63</sup> Copperweld, 467 U.S. at 768 (“Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a contract, combination ... or conspiracy between *separate* entities. It does not reach conduct that is ‘wholly unilateral.’”) (internal citations and quotations omitted).

<sup>64</sup> See Marc Edelman, *The Future of Amateurism after Antitrust Scrutiny*, 92 OREGON L. REV. 1019, 1022 (2014) (explaining why the NCAA constitutes a “bottom-up” trade association); see also Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 Duke L.J. 727, 727 n.1 (2007) (noting that as recently as 2007 the NCAA described itself on its own website as a “bottom-up organization”).

<sup>65</sup> See Hobson & Strauss, *supra* note 30.

<sup>66</sup> *Directory*, NCAA, <https://web3.ncaa.org/directory/memberList?type=1> (last visited April 30, 2020).

<sup>67</sup> *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416 (M.D. Pa. 2013).

<sup>68</sup> *Bd. of Regents*, 468 U.S. at 85 (finding NCAA's restraints on the number of football games individual member schools may have broadcast on national television to violate Section One of the Sherman Act).

<sup>69</sup> See generally Edelman, *supra* note 52, at 640.

definition of interstate commerce, one needs to think back to the famous 1942 case of *Wickard v. Filburn* and its holding.<sup>70</sup> Since the Supreme Court decided *Wickard v. Filburn*, it has become very easy, in most circumstances, to show that the minimum requirements for interstate commerce, in almost any antitrust matter, have been met.<sup>71</sup> Indeed, I can give you even the smallest and silliest examples to prove interstate commerce in the context of the NCAA's restraint. For example, if we just accept the fact that the NCAA member colleges come across state lines and meet for an annual meeting in Indianapolis, or the fact that these games are on television or radio and are broadcast across state lines, that should satisfy the test. Thus, there really is no reasonable means to refute that a plaintiff seeking to challenge the NCAA's restraints on colleges allowing athletes to sign endorsement deals would proceed to the next stage of inquiry.

## 2. Competitive Effects Analysis

Moving to the competitive effects part of our analysis, the question next turns to whether the NCAA's ban or punishment of colleges that allow athletes to sign endorsement deals constitutes an illegal restraint of trade in the economic sense. The test for determining whether there exists economically anticompetitive conduct, however, is not as straightforward as it might at first seem. Even though Section One of the Sherman Act technically states that any contract, combination or conspiracy in the restraint of trade shall be deemed illegal—I kid you not—"any" does not actually mean "any."<sup>72</sup> Rather, to explain in a somewhat oversimplified manner how this statute has been interpreted, there are two general types of test that courts could apply to determine whether a particular restraint is indeed illegal.<sup>73</sup> Plaintiffs and their lawyers prefer a test known as the *per se* test, which holds that the mere

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<sup>70</sup> *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (holding that a federal statute intended to limit the amount of wheat that one may grow, even for personal use, implicates interstate commerce because "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions").

<sup>71</sup> See Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 73 (2013).

<sup>72</sup> See generally Mark Lemley & Christopher Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 ILL. L. REV. 1207, 1212 (2008) ("Read literally, the sweep of [Section 1 of the Sherman Act] outlaws contracting entirely, as every contract restrains trade in some way. . . . Naturally unwilling to interpret section 1 as broadly as written, the Supreme Court reasoned that section 1 condemns only unreasonable restraints of trade. The task for antitrust courts then became how to determine whether a particular agreement was, in fact, unreasonable.").

<sup>73</sup> See *id.*

fact that the behavior happened means that it is illegal under this prong of the antitrust analysis and no other analysis is needed.<sup>74</sup> This *per se* test is generally applied when an antitrust dispute involves conduct that happens in traditional industries with traditional competitors and the courts have looked at it before and we don't want to waste limited judicial resources.<sup>75</sup> But, there is another test that requires a deeper inquiry before reaching an economic conclusion about a restraint.<sup>76</sup> That second, more complex test, is known as Rule of Reason analysis.<sup>77</sup>

As much as I would like to say from a policy point of view that much of what the NCAA is doing here is *per se* illegal, here is one point where I agree with the NCAA and its counsel: what they are doing is probably not *per se* illegal.<sup>78</sup> It might be illegal; we'll get to it in a few minutes. I think it is illegal. But it's probably not *per se* illegal. Rather, the NCAA's conduct requires analysis under the Rule of Reason test. This is because of the fact that the NCAA structurally is a *bona fide* joint venture, where colleges who are members of the NCAA must cooperate, at least to a limited extent, to put on their product at all, even though they also compete, or should compete, in a lot of ways for players, sponsorships and even students.<sup>79</sup>

The joint venture structure of the NCAA complicates the analysis enough that a court cannot reasonably say an underlying agreement among NCAA member schools is illegal without at least conducting some economic analysis of the agreement's economic effects.<sup>80</sup> For

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<sup>74</sup> *See id.*

<sup>75</sup> *See Broadcast Music, Inc. v. Columbia Broadcasting*, 441 U.S. 1, 19, n. 33 (1979) (“[T]he *per se* rule is not employed until after considerable experience with the type of challenged restraint.”).

<sup>76</sup> *See Lemley & Leslie, supra* note 72, at 1212.

<sup>77</sup> *See Lemley & Leslie, supra* note 72, at 1212, 1215 (explaining that under the rule of reason, courts take into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect) (internal citations and quotations omitted).

<sup>78</sup> *See NCAA v. Board of Regents*, 468 U.S. 85, 100–01 (1984) (rejecting the application of antitrust law's *per se* test to the NCAA's restraint of televised game broadcasts, and instead applying a quick-look version of the Rule of Reason, because the case “involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all”).

<sup>79</sup> *See generally id.* (explaining the need for some cooperation among NCAA teams for a game to be played at all); *American Needle v. NFL*, 560 U.S. 183, 203 (2010) (“When restraints on competition are essential if the product is to be available at all,” *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.”) (internal citations and quotations omitted); *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (“The pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act.”).

<sup>80</sup> *See Bd. of Regents*, 468 U.S. at 100–01; *American Needle*, 560 U.S. at 203;

people that like citations to support these type of bold assertions, your citation to support this point comes from the 1984 Supreme Court case *Board of Regents of the University of Oklahoma v. NCAA*, where the high court rejected finding an NCAA restraint on the number of games member schools could play on television as *per se* illegal for that very reason.<sup>81</sup> Or, for people that like citations that are more modern, you can turn to *Texaco v. Dagher*, a case from about fifteen years ago which seems to imply that joint venture behavior will never be *per se* illegal.<sup>82</sup> So, we do not get to call the NCAA's threats to restrain Fair Pay to Play illegal so easily. Instead, the NCAA's conduct that threatens to restrain California member schools—or any schools that allow athletes to sign endorsement deals—has to really be looked at economically on its merits under a more complex test: the Rule of Reason.<sup>83</sup> Of course, however, needing to apply the full Rule of Reason to the NCAA's restraints simply means a more detailed inquiry, and not any *prima facie* support for the NCAA's restraints.<sup>84</sup>

As we turn our attention next to applying the Rule of Reason inquiry, let me get a little more in the weeds for a moment and acknowledge there are various different forms of the Rule of Reason test. Recognizing that half the people in this room have not taken an antitrust class at this point, I am not going to get into burdens of production, burdens of persuasion, or the subtleties of when plaintiffs would be allowed to escape the full scope of a Rule of Reason analysis and instead complete just a quick-look or truncated version of the Rule of Reason.<sup>85</sup> Instead, I am going to discuss whether the NCAA's attempts to ban colleges for allowing athletes to benefit from “Fair Pay to Play” violates a full Rule of Reason inquiry, which is the most

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Texaco, 547 U.S. at 8 (all rejecting the *per se* test in the context of a bona fide joint venture).

<sup>81</sup> Bd. of Regents, 468 U.S. at 100–01.

<sup>82</sup> Texaco, 547 U.S. at 8.

<sup>83</sup> See *O'Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015) (holding that the NCAA's rules restraining college athlete compensation need to be reviewed under the Rule of Reason).

<sup>84</sup> See, e.g., Bd. of Regents, 468 U.S. at 85; *O'Bannon*, 802 F.3d at 1049 (both finding particular NCAA conduct to be illegal under antitrust law's Rule of Reason).

<sup>85</sup> For an excellent, comprehensive analysis of the burden shifting that occurs under a full Rule of Reason analysis and subtle differences between treatise law and the way courts actually apply this test, see Michael Carrier, *The Rule of Reason: An Empirical Update for the 21<sup>st</sup> Century*, 16 GEO MASON L. REV. 827 (2009). For a discussion of the quick look Rule of Reason and how it is both intertwined with, and yet still in some ways separate from, the full Rule of Reason, see, e.g. *Cal Dental v. FTC*, 526 U.S. 756, 780 (1999) (recognizing that “[t]here is always something of a sliding scale in appraising reasonableness, but the sliding scale” and “the quality of proof required should vary with the circumstances”) (internal citations and quotations omitted).

favorable test to apply from the standpoint of the NCAA as a defendant. The reason why we are giving the NCAA every possible benefit of the doubt is because the argument I want to make is not what the NCAA is doing *might* be illegal, but rather what the NCAA is doing is certainly illegal. Thus, if I can economically make the point that the NCAA's efforts to prevent Fair Pay to Play violate antitrust law under a full Rule of Reason inquiry, a listener from the NCAA could not reasonably argue this conclusion is wrong because the applied test was not deferential enough. Indeed, the NCAA would not have any meaningful counterargument to pick away at my point.

So, when applying the full Rule of Reason inquiry to determining whether the NCAA's restraints on Fair Pay to Play anticompetitively restrain trade, one would have to then analyze, separately, three different factors.<sup>86</sup> First, one needs to consider whether the NCAA member colleges collectively maintain market power, which is the power to restrain trade under any relevant market.<sup>87</sup> The "market power" requirement is part of this analysis because, as a matter of economics, courts are not particularly concerned about restraints that encompass only a few of many market competitors.<sup>88</sup> Thus, if Wake Forest wanted to reach an agreement with Duke University to each prevent their athletes from signing endorsement deals, an agreement among just these two schools is not likely to substantially impair competition in any relevant the market. By contrast, if more than roughly one-third of any given marketplace sought to restrain trade, that could reasonably hamper the free market overall.<sup>89</sup>

Now, if we're dealing with a conference trying to disallow Fair Pay to Play within the entire universe of NCAA member schools, the presence or absence of market power poses an interesting question and

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<sup>86</sup> See Edelman, *supra* note 71, at 74 (referencing the elements of market power, net anticompetitive effects, and consumer harm).

<sup>87</sup> See Edelman, *supra* note 71, at 73 (explaining that "[u]nder a modern view, the actual amount of interstate activity, as compared to intrastate activity, is irrelevant so long as it is not insubstantial. Thus, almost every activity from which an actor anticipates economic gain" will be found to affect interstate commerce") (internal citations and quotations omitted).

<sup>88</sup> See generally A. Douglas Melamed, *Antitrust Law is Not That Complicated*, 130 HARV. L. REV. F. 163 (2017) (explaining that the conventional view under antitrust law is that low or no market power could mean that the defendant lacks the power to exclude rivals or injure competition and therefore explains the lack of antitrust concern under the Rule of Reason for that reason).

<sup>89</sup> See Marc Edelman, *The NCAA's 'Death Penalty' Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise*, 18 LEWIS & CLARK L. REV. 385, 407 (2014) (citing DANIEL A. CRANE, ANTITRUST (2014) (explaining that "[t]ypically, a market share of more than 33% represents the minimum threshold for market power [and] a relevant market share of greater than 50% presents an extremely strong presumption of market power")).

we can save that for another day. But, when the NCAA, on a national level, seeks to ban or otherwise sanction member schools for allowing endorsement deals, the presence of market power in the context of this analysis is nearly indisputable.<sup>90</sup> If we accept college athletics as being a market in itself, then the NCAA member colleges collectively have one hundred percent of the market. Alternatively, even if we were to expand the definition of this market and talk about other reasonable places that people of this age are able to go and compete in sports like Australia and New Zealand for basketball, there still seems to be little doubt the NCAA member colleges meet the threshold requirements of showing market power.<sup>91</sup>

The second thing we then need to do under a full Rule of Reason antitrust analysis is to look at the anticompetitive effects and assess whether the NCAA's restraints on allowing endorsement deals does more to help or to hurt free market competition.<sup>92</sup> The anticompetitive effects here are undeniably straightforward. We know that the NCAA member schools' concerted efforts to prohibit any other member from allowing athletes to endorse products is driving some athletes away from U.S. college sports altogether.<sup>93</sup> We have young athletes like RJ Hampton that are going to Australia and New Zealand to play basketball because there is such a concerted restraint in the United States that there has become no meaningful opportunity for them to play college

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<sup>90</sup> See, e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014) (holding that the NCAA member colleges have market power in both the market to offer collegiate educations and the market to recruit college athletes' services), *rev'd in part on other grounds*, 802 F.3d 1049 (9th Cir. 2015).

<sup>91</sup> See Edelman, *supra* note 89 (explaining the minimum threshold for market power is probably one third of a relevant market, and definitely less than half of that market); see also Ricky O'Donnell, *How Elite High Schoolers are Skipping College to Enter the NBA*, SB NATION (Aug. 8, 2019), <https://www.sbnation.com/college-basketball/2019/8/8/20753788/nba-draft-college-basketball-recruiting-lamelo-ball-rj-hampton> (discussing how two elite college basketball prospects escaped the NCAA to play for a team based in New Zealand in the Australian professional basketball league).

<sup>92</sup> See Edelman, *supra* note 71, at 72–73 (explaining that “[u]nder a modern view, the actual amount of interstate activity, as compared to intrastate activity, is irrelevant so long as it is not insubstantial. Thus, almost every activity from which an actor anticipates economic gain” will be found to affect interstate commerce) (internal citations and quotations omitted).

<sup>93</sup> See Dan Greene, *R.J. Hampton's Decision to Turn Pro Embodies the Modern Challenge Facing College Basketball*, SPORTS ILLUSTRATED (May 28, 2019), <https://www.si.com/college/2019/05/28/rj-hampton-nbl-new-zealand-ncaa-recruiting-nba-draft> (noting that “even just allowing players to profit from their likeness via endorsements and commercials would give college basketball, with its much higher visibility, a potential advantage over playing overseas or in the G-League”).

basketball while earning money.<sup>94</sup> The NCAA's restraints have also taken away the ability of certain colleges that want to bring in elite athletes to do so by offering them superior terms that grant them the right to license their own names and likenesses. In a truly free market, if a school like Wake Forest University were to want to compete more successfully to enroll new students against a school such as Duke University, there are a number of things that Wake Forest University would be able to do. They could lower their tuition for certain students. They could bring in better faculty. They could bring in more prominent faculty. They could improve the appearance of their grounds. They could give students stipends or payments to come to their school. And they could induce new students through better athletic programs which non-athletes could support. But, under the NCAA's concerted rules, a school such as Wake Forest University is prevented from attempting to market itself to prospective students by offering better financial terms to recruit top athletes and thus, offering students superior sports teams to support. By taking away the option for a school such as Wake Forest University to attempt to compete against rival schools on this one particular dimension, the NCAA member schools are concertedly restraining free trade in various markets, including the market to recruit student-athlete labor and the market to sell their educational services to a prospective student body at large.<sup>95</sup>

When comparing these anticompetitive effects against any alleged procompetitive benefits of the NCAA's rules that disallow colleges from allowing athletes to endorse products, the balance still tips hugely toward finding the NCAA's restraints on Fair Pay to Play to be anticompetitive. The NCAA and its lawyers have come up with all types of seemingly disingenuous ways of defending their rules, but it is still important to give them the benefit of the doubt for the same reason we did before in ensuring that we complete an earnest, comprehensive and complete analysis. Thus, I will go through the NCAA's likely counterarguments here, or at least what we can reasonably predict they would be by the public statements of NCAA leaders and their arguments made in attempting to defend themselves in other recent antitrust cases challenging NCAA restraints on athlete compensation.

First, the NCAA, in its pleadings from other recent antitrust challenges, has previously argued that either paying the athletes or allowing the athletes to sign endorsement deals might create a wedge between athletes and other students because the athletes may find

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<sup>94</sup> See Edelman, *supra* note 89, at 407; see also O'Donnell, *supra* note 91.

<sup>95</sup> *C.f.* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (finding that an agreement to prevent would-be competitors from competing against one another based on price would violate antitrust laws).

themselves with greater economic means.<sup>96</sup> Whether allowing Fair Pay to Play would make athletes better off financially than other students, in itself, is debatable, and indeed that argument has been rejected by one appellate court.<sup>97</sup> In addition, NCAA leaders seem to be implying that if the athletes are allowed to sign endorsement deals, this would be bad because the female athletes would not have these same opportunities and thus it would create a wedge also between male and female athletes.<sup>98</sup> The factual presumptions that the NCAA is relying upon here, similarly seem, dubious as women gymnasts are very much in demand for sponsorship deals.<sup>99</sup> In addition, one of the supporters of Fair Pay to Play who testified before the California state legislature, Haley Hodson, who was a women's volleyball player at Stanford University and now a 1L at UCLA Law School,<sup>100</sup> testified that she would have been able to sign endorsement deals if not for the NCAA member schools' concerted rules, and she wishes the NCAA would not have taken that opportunity away from her.<sup>101</sup>

But leaving aside the factually dubious nature of these arguments, and even if these arguments were factually accurate, still none of that would legally justify the NCAA's banning or sanctioning of schools that allow athletes to sign endorsement deals, because these purported benefits of the NCAA disallowing Fair Pay to Play are not actually

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<sup>96</sup> See *In re National Collegiate Athletic Association Grant-in-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d 1058, 1086 (2019) (fully rejecting the NCAA's argument in defense of concerted limits on financial benefits for college athletes based on the NCAA's purported claim that these limits "are procompetitive due to an effect on promoting integration, by preventing a wedge or otherwise," between college athletes and other students).

<sup>97</sup> Indeed, the U.S. District Court for the Northern District of California fully rejected this argument. See *id.*

<sup>98</sup> See Sara Valenzuela, *California Passes Fair Pay to Play Act, but the NCAA Won't Go Down Without a Fight*, N.Y. DAILY NEWS (Sept. 30, 2019, 2:42 PM), <https://www.nydailynews.com/sports/college/ny-ncaa-california-governor-gavin-newsom-college-athletes-20190930-p6dni2zreffujnegfrsjwxa4m4-story.html> (discussing the phone calls that California Governor Gavin Newsom received from several NCAA member college presidents accusing the Fair Pay to Play Act of somehow destroying Title IX).

<sup>99</sup> Gregory, *supra* note 22 (discussing the Fair Pay to Play Act, which was first proposed by female state senator Nancy Skinner, and which Skinner describes as potentially benefiting female athletes as well, including female gymnasts).

<sup>100</sup> See *About*, HAYLEY HODSON, <http://www.hayleyhodson.com/about.html> (last visited Apr. 30, 2020).

<sup>101</sup> See Felicia Mello, *Should College Athletes Profit From Their Prowess: NCAA Says No, But California May Say Yes*, CAL MATTERS (July 3, 2019), <https://calmatters.org/education/2019/07/college-athletes-profit-ncaa-california-skinner-fair-pay/> (mentioning that, in order to avoid violating NCAA rules, Hayley Hodson was required to turn down "an endorsement deal with a sunglasses brand and the stipend offered to her teammates").

considered procompetitive benefits under a proper Rule of Reason analysis.<sup>102</sup> Indeed, the 1978 Supreme Court case *National Society of Professional Engineers v. United States* made very clear that antitrust law is not to be about balancing the anticompetitive economic effects against why some people might think this is good for society.<sup>103</sup> Such policy reasons are supposed to come from Congress.<sup>104</sup> All we are allowed to balance is what is anticompetitive against what is procompetitive in an economic sense from the exact same market.<sup>105</sup> And even if the NCAA's restraint really were to help equalize student incomes and equalize opportunities for male and female athletes—both highly dubious factual arguments in themselves—it still would not affect this prong of the antitrust analysis.

So, given that one could reasonably assume that a plaintiff seeking to challenge the NCAA's restraints on Fair Pay to Play would be able to show not only market power but also anticompetitive effects, we can now move to the final stage of the competitive effects analysis—showing consumer harm in some relevant market.<sup>106</sup> Now, quite interestingly, whereas the law and economics movement may have facilitated the plaintiffs' antitrust case under the second prong by disallowing the NCAA from reasonably even attempting to introduce non-economic arguments in favor of its restraints, this third stage of the analysis, related to showing the need for consumer harm, becomes somewhat more arduous under Chicago School standards.<sup>107</sup> Nevertheless, I still think there are a number of ways a plaintiff could easily show that the NCAA's attempt to punish colleges that allow their

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<sup>102</sup> See Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Age/Education Policy from a Legal, Cultural, and Ethical Perspective*, 3 NW. U.J. OF L. & SOC. POL'Y 1, 72 (2008) (noting that "antitrust law seeks to address economic issues and not social policy"); see also *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The heart of our national economic policy long has been faith in the value of competition. . . . Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.") (internal citations and quotations omitted).

<sup>103</sup> See *Nat'l Soc'y*, 435 U.S. at 695 (explaining that "[e]xceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute").

<sup>104</sup> See *Nat'l Soc'y*, 435 U.S. at 689–90 (explaining that Congress, and not courts, are supposed to create public policy exceptions to the Sherman Act).

<sup>105</sup> See *Smith v. Pro Football Inc.*, 593 F. 2d 1173, 1183 (1978) (explaining that the anticompetitive effects in a market for athletic labor can only be balanced against procompetitive economic benefits in that same labor market).

<sup>106</sup> See Edelman, *supra* note 71.

<sup>107</sup> See Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 563 (2012) (discussing the emerging unified view that antitrust law is only intended to assess economic effects, as supported by leading minds of the law and economics movement such as Judge Richard Posner).

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athletes to endorse products in conformance with state law produces the requisite level of consumer harm to meet this requirement, even when applying the most exacting standards. For example, coming back to the discussion from earlier about how colleges compete against each other both to recruit students and for athletic labor to help recruit students, a plaintiff could address the fact that the NCAA does not allow any college—not even the California colleges—to compete in the free market to recruit athletic labor. Furthermore, when thinking about the same issue from the perspective of fans of college sports and consumers themselves, in a free market fans would have the opportunity to signal their preference for having certain athletes come to their favorite school. One of the ways that schools might be more likely to get these athletes would be to allow them to enjoy the commercial rights to endorse products. However, as long as the NCAA rule is in place, fans of individual member schools cannot reasonably signal to these colleges their preference for the colleges to allow these athletes to endorse products as a means of encouraging them to choose their school over another. Indeed, doing so would be futile for any school that reasonably believed the NCAA’s response would be to ban them from the entirety of competition.

### *3. Purported Antitrust Defenses*

I am now almost finished demonstrating why antitrust law prevents the NCAA from banning member colleges that comply with state law mandating they allow athletes to endorse products. First, I showed that the threshold issues are met to challenge this type of restraint under the Rule of Reason. Then, I showed that it would be net anticompetitive from an economic perspective and it would harm consumers if the NCAA were to actually ban California member colleges—or other member colleges from any other state that were to allow athletes to sign endorsement deals. Finally, the last question that is left is to consider whether there is any federal statute or common law policy that would preempt the application of antitrust law and thus otherwise save the NCAA’s restraints.

As far as federal statutes go, I do not believe there is any good faith defense that the NCAA could argue here. The NCAA likes to publicly claim that Title IX of the Education Amendments of 1972 prevents it from allowing a free market for college athletes to endorse products—a point I subtly referenced earlier in the net economic effects stage of this analysis.<sup>108</sup> However, the NCAA’s Title IX argument is completely

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<sup>108</sup> See Valenzuela, *supra* note 98; see also Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018) (“No person in the United States

disingenuous in the context of the Fair Pay to Play Act, which allows for athletes to seek pay from third parties and not from member colleges themselves.<sup>109</sup> Title IX only governs the conduct of educational institutions, and not unrelated third parties.<sup>110</sup>

To be fair, if we were talking about NCAA member colleges directly paying different sums of money to male athletes and female athletes, the NCAA might have a point, at least in a theoretical sense, that some form of a balancing analysis between antitrust principles and Title IX principles might be appropriate.<sup>111</sup> But, the underlying conversation about California's Fair Pay to Play Act is not about member colleges directly paying athletes.<sup>112</sup> Rather, it is about allowing athletes to sign licensing deals with third parties.<sup>113</sup> Even if third-party endorsers were to pay more money to male athletes than female athletes, doing so would not produce liability under Title IX of the Education Amendments against the athletes' member college or the NCAA.<sup>114</sup> Indeed, this argument is entirely fictitious and devised by highly-paid NCAA administrators, athletic directors and coaches to shield their true reason for opposition: they do not want certain third parties to sign endorsement deals with college athletes instead of the colleges or even them personally.

To further illustrate this point, we know that we live in a society where overall women are paid \$0.80 on the dollar to men for the same work.<sup>115</sup> This is clearly a societal wrong. But when employers hire

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shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”).

<sup>109</sup> See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206) (providing text of the new California law that will take effect in 2023).

<sup>110</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018).

<sup>111</sup> See *id.*; Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 883 (2002) (recognizing that if colleges were to provide direct stipends to their athletes rather than allowing third-party endorsements, there would exist a *bona fide* legal concern under Title IX).

<sup>112</sup> See S.B. 206, 2019 Leg., Reg. Sess. (Cal. 2019), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB206](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206) (providing text of the new California law that will take effect in 2023).

<sup>113</sup> See *id.*

<sup>114</sup> See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018); see also Edelman, *supra* note 111 (explaining that “deregulation,” meaning allowing athletes to endorse products for third parties, complies with Title IX because it “does not involve any payment from educational institutions to student-athletes, and therefore is free from the regulation's scope” and moreover it “is not a circumvention of equal rights law, but rather a proper understanding of its spirit”).

<sup>115</sup> See Sonem Sheth et. al., *7 Charts that Shows the Glaring Gap Between Men's and Women's Salaries in US*, BUS. INSIDER (Mar. 31, 2020), <https://www.businessinsider.com/gender-wage-pay-gap-charts-2017-3> (stating that

female graduates at lower salaries than male graduates, Title IX liability does not attach to these colleges for allowing their male and female students to take jobs at unequal pay.<sup>116</sup> Indeed, we do not say that colleges are in violation of Title IX when they allow big investment banks to interview on campus if these banks pay somewhat more money to male recruits than their female recruits. As abhorrent as the practice may be, we blame the banks and the free market, but not the colleges. Similarly, when we are dealing with third party pay of college athletes through endorsement markets, the scenario should be seen as no different. And that is leaving aside the fact that I really sincerely do believe that gymnasts and women's basketball players at certain schools will have the real opportunity to sign lucrative endorsement deals, and perhaps will even sign endorsement deals as lucrative as those signed by male athletes, under a free market.<sup>117</sup>

In addition, the NCAA and its lawyers have repeatedly made the dubious claim that the 1984 Supreme Court decision *Board of Regents vs. NCAA* – a case I mentioned earlier that was decided against the NCAA – somehow provides them with a legal prophylactic to their restraints on athlete endorsements.<sup>118</sup> Just to be clear, *Board of Regents* was not a case that the NCAA won.<sup>119</sup> Rather, *Board of Regents* was a case in which the NCAA was found in violation of federal antitrust law.<sup>120</sup> *Board of Regents* was the very case that forced the NCAA to overturn certain policies that it put in place about the games on

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“[i]n 2018, a woman working full time earns 81.6 cents for every dollar a man working full time earns on average” and that “women’s median annual earnings are \$9,766 less than men’s, according to the most recent available data from the US Census Bureau”).

<sup>116</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2018).

<sup>117</sup> See generally Gregory, *supra* note 22 (discussing how female athletes, and particularly female gymnasts are ripe to sign endorsement deals under the Fair Pay to Play Act); see also Edelman, *supra* note 111 (explaining how a court-ordered liberalization of the NCAA’s rules that prevent athletes from signing endorsement deals would benefit male and female athletes alike).

<sup>118</sup> See Jon Solomon, *O’Bannon v. NCAA: A Cheat Sheet for NCAA’s Appeal of Paying Players*, CBS SPORTS (Mar. 13, 2015), <https://www.cbssports.com/college-football/news/obannon-vs-ncaa-a-cheat-sheet-for-ncaas-appeal-of-paying-players/> (discussing the NCAA’s dubious claim that the Supreme Court’s decision in *Board of Regents* protects it from antitrust scrutiny of rules they purport relate to amateurism). Of course, some courts have given deference to this unusual view of a special defense for NCAA rules pertaining to amateurism. See, e.g., *Deppe v. Nat’l Collegiate Athletic Ass’n*, 893 F.3d 498 (7th Cir. 2018) (seeming to recognize deference to the NCAA’s amateurism rules).

<sup>119</sup> See *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (upholding the finding that the NCAA member colleges’ collective restraints on the number of games in which individual member colleges should appear on television violated Section One of the Sherman Act).

<sup>120</sup> See *id.* at 88.

television.<sup>121</sup> And the University of Oklahoma and the University of Georgia, the schools that sued them, won—not the NCAA.<sup>122</sup> Nevertheless, in that long case, there is some very loose dicta about amateurism and it shows up in two places. One place where this dicta shows up is where the court references the value of amateurism and its purported value in determining whether the NCAA’s conduct should be reviewed under the *per se* test for illegality or the Rule of Reason.<sup>123</sup> The court concluded that the Rule of Reason, rather than the *per se* test, should apply because the NCAA needs ample latitude in imposing amateurism.<sup>124</sup> But, that does not create an amateurism exception under antitrust law. All it says is that we have to look at alleged NCAA restraints under the Rule of Reason, not under the *per se* test.<sup>125</sup>

Meanwhile, the second place in *Board of Regents* where this loose dicta about amateurism shows up is at the very end of the court’s opinion.<sup>126</sup> In this context, the dicta is very interesting for those who follow closely the way particular Supreme Court judges tend to write their opinions. The *Board of Regents* opinion was written by Justice Stevens, who was nominated to the Supreme Court by President Ford and who wrote many of the court’s antitrust opinions while on the bench.<sup>127</sup> One thing that is noticeable in many, if not most, of Justice Stevens’s antitrust opinions over his long and illustrious Supreme Court career is his unique final paragraph. At the very end of Justice Stevens’s antitrust opinions, Justice Stevens often includes a conciliatory paragraph which, in essence, tries to limit the holding of his decision to just the specific facts before him.<sup>128</sup> Judge Stevens did that in *Board of*

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<sup>121</sup> See *id.* at 89–91.

<sup>122</sup> See *id.* at 88.

<sup>123</sup> See *id.* at 101–02 (analyzing the unique nature of college football and how certain amateurism rules might arguably be proven procompetitive as part of why courts need to analyze the economic effects of these rules in full rather than just deeming them *per se* illegal).

<sup>124</sup> See *id.* at 102 (explaining, in this context, that “the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable” and that based upon this, certain NCAA rules “can be viewed as procompetitive”).

<sup>125</sup> See *id.* at 101–03.

<sup>126</sup> See *id.* at 120 (limiting the scope of the Supreme Court’s holding that the NCAA had violated antitrust to the particular facts by conceding in dicta, that, at least in a theoretical sense, “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act”).

<sup>127</sup> See Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (Jul. 16, 2019), <https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html> (providing a biography of Justice Stevens and mentioning in caption, below a picture, that Justice Stevens was nominated to the Supreme Court by President Gerald Ford).

<sup>128</sup> For two examples of this conciliatory or limiting paragraph at the end of a

*Regents* by noting that the economic analysis in that case was not about the NCAA's amateurism rules, and he left open the possibility that an economic analysis regarding at least some of the NCAA's amateurism rules might, as a matter of fact, lead to the factual conclusion that these rules are procompetitive.<sup>129</sup> Nevertheless, this language at the end of *Board of Regents* does not actually state that all NCAA amateurism rules are *per se* legal or even that amateurism rules are exempt from antitrust scrutiny.<sup>130</sup> Such a claim when raised by the NCAA is complete fiction.

Indeed, when considering the truth of Justice Stevens's words in *Board of Regents*, it would instruct a court to conduct a proper antitrust analysis of a rule such as the NCAA's ban on Fair Pay to Play based on its full economic effects before drawing any conclusion about legality or illegality.<sup>131</sup> In today's speech, we have conducted this full economic analysis of Fair Pay to Play. Based on all the evidence available, we can now comfortably make the reasonable conclusion that the NCAA's restraints on Fair Pay to Play yield strong anticompetitive effects and harm at least certain groups of consumers. Thus, a reasonable reading of Justice Stevens's dicta would allow us to conclude that a reviewing court could very likely find the NCAA's restraints that seek to punish colleges for conforming to state Fair Pay to Play laws would violate Section One of the Sherman Antitrust Act.

### III. CONCLUDING THOUGHTS ON COLLEGES, THEIR VALUES, HYPOCRISY, AND THE IMPORTANCE OF NCAA REFORM

In closing, I would like to acknowledge that I spent most of today's talk trying to show that the NCAA's threat to ban member colleges that allow their athletes to sign endorsement deals is a phony threat, which would not likely hold up in court under antitrust scrutiny. I think it is

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Justice Stevens' antitrust decisions aside from the conclusion to the *Board of Regents* decision, *see, e.g.*, *American Needle v. NFL*, 560 U.S. 183, 202–04 (2010) (conceding that while the NFL teams' joint licensing of trademark rights is not exempt from antitrust scrutiny and might very well violate antitrust law, various other matters that were not a subject of the litigation such as "scheduling of games" might very well be permissible under antitrust scrutiny); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 699 (1978) (recognizing that if the National Society of Professional Engineers seeks to impose rules or restraints somewhat different from those reviewed in this particular matter, it may move the court for modification of the issued decree that the Supreme Court upheld—thus, implicitly recognizing the possibility that different potential restraints by the same trade association might be legally permissible).

<sup>129</sup> *See* *NCAA v. Board of Regents*, 468 U.S. 85, 101-02 (1984).

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* at 120.

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very important for us, as citizens who might be pushing state legislators to pass bills to mandate Fair Pay to Play in other states, to realize that the NCAA's threat is just a threat, and many of the things that NCAA members threaten to do they could not do thanks to the realities of antitrust law. Indeed, what the NCAA is doing by merely threatening to ban member colleges that allow athletes to sign endorsement deals is exactly the type of conduct that antitrust law was implemented to prevent—using its incredible market power as a large trade association to try to scare citizens away from making legal change.

As we approach the end of this talk, I am now going to step back for a moment from the black letter legal analysis of the NCAA's restraints on allowing colleges to permit their athletes to endorse products and return to a broader ethical analysis. Let us remember what the NCAA really is. The NCAA is not a mythical, all-powerful entity that exists in a vacuum with a divine right to govern college sports in any way it sees fit. Rather, the NCAA is actually 1200 member schools—the very schools that many of us attended or attend, and regularly ask us to donate money. These schools purported to teach us not only law, but also ethics. The NCAA is composed of those schools that regularly tell us that we should not be exploiting our labor, and that we ought to treat people of all ethnicities, of all backgrounds, and of all financial status with respect.

It is horrifying to me that these 1200 member schools, which overall, I think, teach us such great values out of a textbook, are not living up to their own values when they come together and act within their own cartel of the NCAA. And if there is any comfort to me in all of this, the comfort should perhaps be that the courts, and thank goodness the State of California, will attempt to reign in these NCAA member colleges using antitrust law in a way we should have only wished the colleges and NCAA leaders would have reigned in themselves. If only the NCAA and its member colleges adhered to both the legal principles and the moral values that they espouse to others in their classrooms, we would not be here confronting these legal issues today. Now is the perfect opportunity for us as a society to re-teach the NCAA and its member colleges those same valuable lessons that years ago they had taught to so many of us. We need to make sure that NCAA member schools do not attempt to punish individual member colleges for complying with state law and granting fair market and free market opportunities to their college athletes. If the NCAA moves forward with these naked threats against California member colleges and their athletes that seek to endorse products, an antitrust challenge against the NCAA is more than warranted.