BREAKING THE MONOPSONY MIRROR: EVALUATING THE COLLATERAL MARKET PROCOMPETITIVE JUSTIFICATION IN THE CONTEXT OF *NCAA V. ALSTON*

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For over a century, the American universities that comprise the National Collegiate Athletic Association ("NCAA") have agreed to regulate and restrict athlete compensation. Meanwhile, these universities, along with the coaches and administrators they employ, have secured enormous profits generated by the athletes' labor. Over the last decade, current and former athletes have brought various lawsuits challenging the NCAA's compensation restrictions under § 1 of the Sherman Act. The athletes have had moderate success in striking down certain restrictions, which recently led to the NCAA reversing a long-standing prohibition that had prevented athletes from profiting off their name, image, and likeness ("NIL"). Nevertheless, one compensation restriction still prevents the athletes from realizing their fair market value—the NCAA's restrictions on compensation unrelated to education. This Note asserts that the contextual differences between restrictions employed by monopolies and monopsonies require courts to employ a different legal framework for evaluating a challenged restriction's procompetitive effects. Accordingly, this Note proposes that courts should adopt a new two-part test to determine whether certain consumer benefits are sufficient to justify a monopsonist's restrictions in a labor market. The proposed test is then applied to the NCAA's remaining restrictions on compensation unrelated to education. Under the new test, courts would likely find that the NCAA's restrictions on compensation unrelated to education violate § 1 of the Sherman Act.

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INTRODUCTION

One definition of the term "to commercialize" is to "manage on a business basis for profit."[1] Based on this definition, it is hard to argue that the National College Athletic Association ("NCAA") is anything but a commercial enterprise. Despite its nonprofit status,[2] the business of intercollegiate sports is managed to ensure that the directors at the NCAA and its member institutions (i.e., numerous American universities) reap economic benefits. For example, the NCAA's

1. *Commercialize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/commercialize [https://perma.cc/4GP5-D8E6] (last visited Oct. 25, 2021).

2. *Finances*, NCAA, https://www.ncaa.org/sports/2021/5/4/finances.aspx [https://perma.cc/WD2C-Q5AT] (last visited June 14, 2022).

President, Mark Emmert, earned $2.9 million in total compensation during the 2019–2020 fiscal year.[3] Furthermore, the highest-paid NCAA football[4] and basketball[5] coaches are earning salaries that are commensurate with top coaches in the National Football League[6] ("NFL") and National Basketball Association[7] ("NBA"). In some cases, college coaches are the highest-paid public employees in their respective states.[8] Administrators at member institutions profit too; athletic directors at top universities routinely take in over half a million dollars a year in total compensation.[9] According to the NCAA, administrative compensation and severance pay, combined with coaching compensation, accounted for 35.1% of Division I member institutions' total expenses in 2019.[10]

The NCAA's member institutions also profit indirectly from the business of intercollegiate sports.[11] Universities have used profits generated by intercollegiate

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3. Michael Shapiro, *Report: NCAA Paid Mark Emmert $2.9 Million in 2019-20 Despite COVID-19 Revenue Drop*, SPORTS ILLUSTRATED (July 19, 2021), https://www.si.com/college/2021/07/19/mark-emmert-ncaa-salary-covid-19-revenue-drop [https://perma.cc/TA2S-NTHC].

4. *College Football Head Coaches Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/football/coach [https://perma.cc/ZKE4-S2N8] (last visited Oct. 14, 2021, 7:09 AM) (indicating highest-paid college football coach makes nearly $10 million a year).

5. *Men's Basketball Head Coach Salaries*, USA TODAY, https://sports.usatoday.com/ncaa/salaries/mens-basketball/coach [https://perma.cc/U96K-4582] (last visited Mar. 9, 2021, 2:21 PM) (noting the highest-paid college basketball coach earns just over $8 million a year).

6. *See* Tadd Haislop, *Bill Belichick, Jon Gruden & More Salaries for the NFL's Highest-Paid Coaches in 2020*, SPORTINGNEWS (Oct. 4, 2020), https://www.sportingnews.com/us/nfl/news/nfl-highest-paid-coaches-2020-salary/1rvqdfp8aswj016sqey1b06r2e [https://perma.cc/U96K-4582] (noting that only three NFL coaches were in line to make more than $10 million in 2020).

7. *See* Renz Soliman, *Highest Paid NBA Coaches 2021: Bucks' Budenholzer, Suns' Williams Don't Make List*, INT'L BUS. TIMES (July 15, 2021, 8:12 AM), https://www.ibtimes.com/highest-paid-nba-coaches-2021-bucks-budenholzer-suns-williams-dont-make-list-3252238 [https://perma.cc/GQ3K-H5YU] (placing the top bracket of NBA head coach earnings at $7–11 million annually).

8. Charlotte Gibson, *Who's Highest Paid in Your State?*, ESPN, https://www.espn.com/espn/feature/story/_/id/28261213/dabo-swinney-ed-orgeron-highest-paid-state-employees [https://perma.cc/A3H7-LAZM] (last visited Nov. 1, 2021).

9. *The 20 Highest-Paid Athletic Directors in College Sports*, BUS. INSIDER (July 26, 2021, 12:46 PM), https://www.businessinsider.in/sports/the-20-highest-paid-athletic-directors-in-college-sports/slidelist/21279839.cms [https://perma.cc/3XPQ-GHCG].

10. *Finances of Intercollegiate Athletics Database*, NCAA (Sept. 2020), https://www.ncaa.org/about/resources/research/finances-intercollegiate-athletics-database [https://perma.cc/JC7T-DH8W].

11. *See, e.g.*, David A. Grenardo, *An Intersection of Gender, Race, and Sports: Guidelines for Universities Determining Whether Athletes Accused of Title IX Violations Should Be Removed from Their Teams*, 9 BERKELEY J. ENT. & SPORTS L. 41, 70–71 (2020); Jared Fattore, *Collegiate Athletes as Employees: An Analysis of the Northwestern Football Challenge and Its Relation to the Columbia NLRB Ruling*, 13 DEPAUL J. SPORTS L. 61, 67 (2017); Christian Bray, *Leaving Your Mark: An Analysis of Collegiate Student-Athlete Trademark Rights*, 23 SPORTS L.J. 87, 102–03 (2016).

sports to construct "lavish athletic facilities" in an effort to entice top-tier high school athletes to commit to the institution.[12] Commitments from top-tier athletes often lead to increased success in athletics.[13] Athletic success tends to correspond with an increase in national media exposure, which in turn serves as free advertising to potential applicants to the university.[14] The increased application volume allows universities to be more selective in the admissions process.[15] The decrease in acceptance rates and admittance of higher quality applicants can improve graduation and retention rates,[16] which can improve a university's position in the *U.S. News and World Report* University Rankings.[17] Ultimately, increased success on the playing field can lead to increased success in a university's classroom.

The NCAA espouses a Principle of Amateurism (the "Principle"), which was ostensibly adopted to protect athletes from exploitation by commercial enterprises.[18] Historically, under the Principle, collegiate athletes who accepted compensation from commercial enterprises were considered permanently ineligible by the NCAA.[19] Nevertheless, the NCAA is an increasingly commercial enterprise that uses profits derived from intercollegiate athletics to line the pockets of its employees, its member institutions' employees, and the member institutions themselves.[20]

In recent years, courts have been called upon to protect current and former athletes from exploitation by the very commercial enterprise that claims to protect

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12. Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIBUNE (Dec. 23, 2015, 6:40 AM), https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html [https://perma.cc/59SH-E2ZP] (noting that universities have spent millions of dollars on athletic facilities that contain excessive leisure amenities, including mini-golf courses, sand volleyball courts, laser tag facilities, movie theaters, and barber shops).

13. Andy Wittry, *Analyzing College Football's Relationship Between Recruiting Class Rankings and Wins*, WATCH STADIUM (July 2, 2019), https://watchstadium.com/analyzing-college-footballs-relationship-between-recruiting-class-rankings-and-wins-07-01-2019/ [https://perma.cc/B2ZW-YKWA].

14. HBS Working Knowledge, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), https://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications/?sh=17263ed56e96 [https://perma.cc/K6HY-GUYQ].

15. *Id.*

16. Jamie Tkach, Competitive Colleges and Graduation Rates in American Universities 8–10 (2013) (B.S. Honors Capstone, American University) (available at https://auislandora-stage.wrlc.org/islandora/object/1213capstones%3A30/datastream/PDF/download).

17. Robert Morse & Eric Brooks, *How U.S. News Calculated the 2022 Best Colleges Rankings*, U.S. NEWS (Sept. 12, 2021, 9:00 PM), https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings.

18. NCAA, 2021–2022 DIVISION I MANUAL § 2.9 (2021), https://web3.ncaa.org/lsdbi/reports/getReport/90008 [https://perma.cc/4PUV-WECW].

19. *Id.* § 12.1.2(a).

20. *See supra* notes 3–17 and accompanying text.

them: the NCAA.[21] Current and former athletes have brought a series of antitrust lawsuits alleging that the NCAA's compensation restrictions violate § 1 of the Sherman Act.[22] In the first case to strike down some of the NCAA's compensation restrictions, the court in *O'Bannon v. NCAA* determined—as part of its market definition analysis[23]—that the NCAA and its member institutions can "be characterized as buyers in a market for recruits' athletic services."[24] The district court elaborated that this means the claim arose "under a theory of monopsony, rather than monopoly."[25] A monopsony may be present in a labor market when there is a single, dominant buyer who has the ability to artificially fix wages.[26] Consequently, in the recent *NCAA v. Alston* litigation, current and former athletes asserted that the NCAA is a monopsonist.[27] Additionally, the athletes claim that the NCAA's remaining compensation restrictions violate the Sherman Act.[28] In this recent litigation challenging the NCAA's compensation restrictions, the parties stipulated to the *O'Bannon* market definition.[29] Such a stipulation means that courts must keep in mind the differences between monopsonies and monopolies when evaluating § 1 claims.

Although the U.S. Supreme Court and the Ninth Circuit Court of Appeals have been receptive to finding that some of the NCAA's restrictions have

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21. *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021) (consolidated suit involving numerous current and former college athletes challenging the NCAA's restrictions on compensation related to education); *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061–62 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021) (current and former athletes challenging various NCAA compensation limits); O'Bannon v. NCAA, 802 F.3d 1049, 1052–55 (9th Cir. 2015) (former UCLA All-American basketball player challenging the NCAA's NIL restrictions as it applies to former college athlete).

22. *See, e.g.*, *Alston*, 141 S. Ct. at 2147 (consolidated suit involving numerous current and former college athletes challenging the NCAA's restrictions on compensation related to education); *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1061–62 (current and former athletes challenging various NCAA compensation limits); *O'Bannon*, 802 F.3d at 1052–55 (former UCLA All-American basketball player challenging the NCAA's NIL restrictions as it applies to former college athlete).

23. Market definition is the first step in the Rule of Reason, which is often used to evaluate claims brought under § 1 of the Sherman Act. The market definition ultimately informs the rest of the legal analysis. For an explanation of market definition and the legal framework of the Rule of Reason see *infra* Part I(C)(1)-(4).

24. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

25. *Id.*

26. Julie Young, Monopsony, INVESTOPEDIA (Nov. 21, 2020), https://www.investopedia.com/terms/m/monopsony.asp [https://perma.cc/JTD7-T4EN].

27. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1066–67. For an explanation of how monopsonies operate, see *infra* notes 44–46 and accompanying text.

28. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1061–62, 1067 1091–92; *O'Bannon*, 7 F. Supp. 3d at 965–66, 991.

29. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1066–67.

anticompetitive effects,[30] the NCAA has successfully defended its restrictions on compensation unrelated to education.[31] It argues that these restrictions maintain a product distinction between college and professional sports and thereby increase consumer demand.[32] As recently as 2020, courts have accepted the NCAA's consumer demand argument as a valid procompetitive justification for an otherwise anticompetitive restriction.[33]

This Note will assert that the NCAA's restrictions on unlimited compensation unrelated to education violate § 1 of the Sherman Act.[34] The main purpose of the Sherman Act—protecting competition—is not achieved if monopsonists can reach agreements that eliminate competition and still escape § 1 scrutiny by asserting that the agreement provides some small benefit to consumers. Accordingly, maintaining a product distinction between college and professional sports should not be a valid procompetitive justification in the monopsony context unless its procompetitive effects in the consumer or output market outweigh the anticompetitive effects in the relevant labor market. In other words, the NCAA's remaining restrictions on compensation should be lawful only if the benefit of offering a "new product" to consumers outweighs the harm that is inflicted on the athletes by limiting their earning potential.

Part I of this Note provides background information on economic principles and the development of antitrust law relevant to evaluating whether the NCAA's restrictions on compensation unrelated to education violate § 1 of the Sherman Act.[35] Part II provides background information on the NCAA's commitment to the Principle and recent litigation challenging the NCAA's athlete compensation restrictions.[36] Part III reviews the district court's procompetitive justification finding in *Alston* and counters it by advocating for a new test to analyze procompetitive justifications in the monopsony context.[37] Part IV specifically recommends that courts should adopt a two-part test to evaluate procompetitive justifications in the monopsony context.[38] Part V applies the proposed test to the NCAA's alleged procompetitive justification for the restrictions that survived the recent litigation between the NCAA and former and current athletes: the restrictions

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30. *See, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2147, 2166 (2021) (affirming district court ruling that the NCAA's restrictions on education-related benefits have anticompetitive effects and violate the Sherman Act); O'Bannon v. NCAA, 802 F.3d 1049, 1070–72 (9th Cir. 2015) (finding that NCAA's NIL restrictions have anticompetitive effects).

31. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1259–60 (9th Cir.), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021); *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1109.

32. *See Alston*, 141 S. Ct. at 2152–53.

33. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1243, 1256–57, 1259–60, 1264; *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1070.

34. 15 U.S.C.A. § 1 (West, Westlaw Edge through PL 117-39).

35. *See infra* Part I.

36. *See infra* Part II.

37. *See infra* Part III.

38. *See infra* Part IV.

on unlimited compensation unrelated to education.[39] Finally, the Note concludes with a summary of each Part and asserts that under the newly proposed test, the NCAA's restrictions on compensation unrelated to education violate § 1 of the Sherman Act.[40]

I. ECONOMIC PRINCIPLES AND ANTITRUST BACKGROUND

To comprehend why the district court in *Alston* may have erred in its procompetitive justification finding, it is imperative to understand the underlying economic principles, as well as the context and history of antitrust law in the United States.

A. Monopolies and Monopsonies

A distinction between monopolies and monopsonies must be made to understand the *Alston* cases. A monopoly occurs when there is a dominant seller in a product or output market.[41] In this context, there are no other viable suppliers in the market, so the monopolist can set prices above what its product would sell for in a competitive market.[42] Because the consumers cannot turn to another supplier in the market to fulfill their product needs, the consumer must either pay the prices set by the monopolist or forgo the product entirely. Here, a power imbalance between the consumers and the dominant seller allows the dominant seller to take advantage of the consumers.[43]

By contrast, a monopsony occurs when a market is dominated by a single buyer.[44] In this situation, because there are no other viable buyers for individuals attempting to sell their labor or products, the monopsonist can depress wages or prices below what a competitive market would yield.[45] Because sellers have no viable competitor to whom they can sell their products or labor, they must either accept the depressed prices or wages or exit the market. Here, the power imbalance between the sellers and the dominant buyer allows the dominant buyer to take advantage of the sellers.[46]

39. *See infra* Part V.
40. *See infra* Conclusion.
41. Adam Hayes, *Monopoly*, INVESTOPEDIA (Sept. 1, 2021), https://www.investopedia.com/terms/m/monopoly.asp [https://perma.cc/6Z9J-SMA3]. An output market is a market where consumers purchase goods or services from sellers or suppliers. *Factor Market*, INVESTOPEDIA (July 24, 2021), https://www.investopedia.com/terms/f/factor-market.asp [https://perma.cc/NQG2-NWFL]. By contrast, an input market is a market where businesses purchase the resources needed to create the goods and services sold in the output market. These resources include raw materials and labor. *Id.*
42. *See id.*
43. *See id.*
44. Young, *supra* note 26.
45. *Id.*
46. *See id.*

As we will see below,[47] the distinctions between these two concepts should lead courts to develop and employ different legal tests when restraints on trade in one market are justified by procompetitive effects in a collateral market.

B. History and Context of the Sherman Act

The Sherman Act was the first antitrust law in American history.[48] In 1890, Congress passed the Act to promote "free and unfettered competition."[49] Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[50]

Nevertheless, the statute and legislative history fail to articulate definitions or frameworks to guide courts as they interpret the Act. In fact, this may have been by design according to Senator John Sherman's comments in a legislative debate:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law.[51]

This lack of clarity has led to disagreements among courts and commentators about the Act's general principles and purposes.[52] Courts have been afforded wide latitude to interpret the general principles of the Sherman Act,[53] but the goals that courts have sought to promote have shifted over time. In early antitrust cases, courts appeared to endorse the position that in passing the Sherman Act, Congress intended to promote social goals, such as protecting small businesses from anticompetitive practices, in addition to preventing monopolies from extracting excess profits from consumers.[54] More recently, courts have accepted the position of commentators that the only purpose of antitrust law is to prevent competitors from fixing prices or restricting the output of goods.[55] The U.S. Supreme Court has even gone so far as to call the Sherman Act a "consumer welfare prescription."[56] Based

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47. *See infra* Part III(B).

48. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/Y4YE-BCCG] (last visited Nov. 30, 2021).

49. *Id.*

50. 15 U.S.C.A. § 1 (West, Westlaw Edge through PL 117-39).

51. 21 Cong. Rec. 2460 (1889).

52. David F. Shores, *Antitrust Decisions and Legislative Intent*, 66 MO. L. REV. 725, 746–50 (2001).

53. *Id.* at 740–41.

54. *Id.* at 746–50.

55. *Id.* at 765–66.

56. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). Consumer welfare has a complex history that is beyond the scope of this Note. The term gained relevance in antitrust law after Judge Richard Bork published *The Antitrust Paradox*. Bork used the term to promote the idea that antitrust law should look favorably upon restrictions that promote efficiency and increase the nation's total wealth while striking down agreements that restrict output or competition. Ultimately, it appears that Bork was agnostic as to how these efficiency gains

on this language, it would be fair to assume that so long as consumers are not injured, any restraint on competition would not violate the antitrust laws.

Nevertheless, the legislative history supports the position that protecting consumers or increasing consumer welfare could not have been the Act's *only* purpose. Statements from the congressional record show that the legislature was also concerned with protecting sellers from unreasonable trade restraints. To garner support for the Act, Senator Sherman made clear that dominant corporations "*depress the price of what they buy* and increase the price of what they sell."[57] Additionally, Senator James George, a co-drafter of the Sherman Act, stated that these corporations "increase beyond reason the cost of the necessaries of life and business, *and they decrease the cost of raw material*."[58] These statements support the position that the Sherman Act was intended to protect *both* sellers and consumers from undue restraints imposed by monopolies and monopsonies.

The plain language of § 1 and Supreme Court precedent also support the position that the Sherman Act was intended to protect sellers from monopsonies in an input market. For instance, the plain language of the statute draws no distinction between agreements that restrain trade in input or output markets. Instead, it simply declares "every contract . . . or conspiracy, in restraint of trade or commerce . . . to be illegal."[59] Additionally, the Supreme Court has consistently stated that antitrust laws are designed to "protect competition."[60] But suppose you are a seller of widgets in a market that only has two buyers. Under a consumer welfare standard, as it tends to be interpreted by courts, the two buyers could agree with each other to only purchase widgets for one cent and legally justify the agreement because it creates cost savings that are passed along to consumers in the output market.[61] Although

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were distributed between sellers and consumers. The Supreme Court has never clearly defined this term and has often used it broadly to strike down restrictions that have a perceived detrimental effect on consumers. The point of using this term is to show how courts often use the phrase as a substitute for employing new legal tests or empirical analysis to determine the legality of a restraint under the antitrust laws. This ambiguity can be seen in *Alston*, where the district court simply accepts increased consumer choice as a valid procompetitive justification without inquiring into the actual economic efficiency of the challenged restraint or weighing the anticompetitive effects in the labor market against the procompetitive effects in the consumer market. For a further discussion regarding the confusion around the definition of "consumer welfare," see Barak Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133 (2011).

57. 21 Cong. Rec. 2461 (1890) (emphasis added).

58. 21 Cong. Rec. 1768 (1890) (emphasis added).

59. 15 U.S.C.A. § 1 (West, Westlaw Edge through PL 117-39).

60. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

61. It is questionable whether these cost savings are passed along to the consumer. Generally, economics literature shows that, in the case of a monopsony, cost savings from lower input prices do not get passed along to consumers. *See* Alan Devlin, *Questioning the Per Se Standard in Cases of Concerted Monopsony*, 3 HASTINGS BUS. L.J. 223, 224 (2007) (noting that "economics can show that . . . cost-reductions will rarely be passed onto consumers."); Roger Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589, 610–12 (2005) (concluding that under a standard monopoly model the monopsonist will not pass on lower costs to consumers). In fact, some literature suggests that monopsonists have

such an agreement may ultimately benefit consumers, its main intended purpose is to *eliminate competition* for widgets in a way that allows buyers to extract monopsony prices. Such an outcome would contradict the plain language of the statute and the Supreme Court's repeated declaration that antitrust laws mainly focus on protecting competition.

C. Development of the Rule of Reason

Understanding the underlying purposes of the Act is essential to correctly applying the Supreme Court's Rule of Reason jurisprudence and assessing the NCAA's procompetitive justification. Eight years after the passage of the Sherman Act, William Howard Taft laid the foundation for what would become known as the Rule of Reason in his opinion for the Sixth Circuit in *United States v. Addyston Pipe & Steel Co.*.[62] In *Addyston Pipe & Steel Co.*, the U.S. Attorney General brought suit against six cast-iron pipe manufacturers, alleging that the corporations had entered into an agreement to fix prices in violation of the Sherman Act.[63] Evidence in the case showed that the six corporations agreed to limit competition by assigning exclusive territories and predetermining winning bids for projects.[64] After the corporations selected a winner for the bid together, that corporation would enter its bid, and the others would place "competing" bids at higher prices.[65] The corporations argued that the agreement was a reasonable restraint and valid under common law[66] because it prevented ruinous competition among themselves, and the fixed prices were reasonable.[67] Taft, writing for the court, ultimately reasoned that regardless of whether the prices were reasonable, the agreement violated the Sherman Act because it "[gave] the defendants the power to charge unreasonable prices."[68]

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an incentive to set wages low and employ fewer workers, which in turn leads to lower output and higher prices in the output market. *See* COUNCIL OF ECON. ADVISERS, LABOR MARKET MONOPSONY: TRENDS, CONSEQUENCES AND POLICY RESPONSES 2 (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf [https://perma.cc/MFK5-PTMH]; Randy M. Stutz, *The Evolving Antitrust Treatment of Labor-Market Restraints: From Theory to Practice*, AM. ANTITRUST INST. 2, n.5 (July 31, 2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/AAI-Labor-Antitrust-White-Paper_0.pdf [https://perma.cc/P6QC-M3WM]. These findings support the first part of the two-part test proposed *infra* Part IV(A) (i.e., the defendant's burden to show that benefits accrue to consumer in the output market).

62. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 282–88 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

63. *Id.* at 272.

64. *See id.* at 273–75.

65. *Id.*

66. *Id.* at 279.

67. *See id.* at 279–80. Due to the narrow scope of the Commerce Clause at the time the Sherman Act was passed, Congress justified the Act by stating that it was merely a codification of the common law. This context may also help explain why Congress failed to articulate clear definitions or frameworks that guide courts on interpreting the Act or pursuing its goals. Essentially, the corporations argued that because the Sherman Act was a codification of the common law and the agreement would be valid under the common law, the agreement was valid under the Sherman Act.

68. *Id.* at 293.

In evaluating the claim, the Sixth Circuit clarified that the test employed to determine the legality of a restraint depends on the restraint's intended purpose.[69] Agreements that are specifically designed to reduce competition among competitors or create a monopoly are per se illegal regardless of the restraint's reasonableness.[70] These agreements are commonly referred to as "direct" restraints.[71] Conversely, agreements between competitors that are primarily intended to serve legitimate business purposes are subject to a Rule of Reason analysis.[72] These restraints are commonly referred to as "ancillary restraints" and are lawful so long as the restraint is found to be reasonable.[73] Partnerships are common ancillary restraints.[74] For example, an agreement between two competitors to enter into a partnership with the intended purpose of combining their capital to serve consumers better may be reasonable—and, therefore, lawful—even though the agreement reduces competition and restrains trade.[75]

In 1911, the Supreme Court adopted Taft's view and endorsed the Rule of Reason as the analytical framework for evaluating antitrust claims under the Sherman Act.[76] *Standard Oil* was a seminal antitrust case in which the United States brought an action against John D. Rockefeller alleging violations of §§ 1 and 2 of the Sherman Act.[77] The government asserted that Rockefeller, through agreements among various corporations, engaged in anticompetitive behavior, including fixing the price of oil, securing preferential rebates from railroad companies, and controlling up to 90% of the petroleum market, among other unlawful acts.[78] The government relied on precedent to establish that the Act prohibits any contract or combination in restraint of trade regardless of its reasonableness.[79] After extensively reviewing the language of the Act and the common law from which it was derived, the *Standard Oil* Court stated that the broad scope of the Act and the wrongs it was intended to prevent[80] indicated the need for a standard or framework for analyzing

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69. *Id.* at 280–81, 293.
70. *Id.* at 293.
71. *Id.* at 299.
72. *Id.* at 280–81.
73. *Id.*
74. *Id.*
75. *Id.*
76. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60–62 (1911).
77. *Id.* at 31.
78. *Id.* at 32–33.
79. *See id.* at 64–70. The cases relied upon were *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897), and *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898). In both cases, the Supreme Court declared the alleged restraints to violate the Sherman Act. In *Trans-Mo.* and *Joint Traffic*, the Court used language that seemed to indicate that § 1 did not permit judges to engage in a reasonableness analysis. The *Standard Oil* Court differentiated those cases by invoking Taft's line of reasoning regarding direct restraints. *See supra* notes 69–73 and accompanying text. The *Standard Oil* Court stated that the only principle to be derived from these earlier cases is that restraints that are so evidently restraints of trade cannot be justified by arguing that the restraint is reasonable.
80. *See Standard Oil*, 221 U.S. at 50–52, 56–58. The *Standard Oil* Court identified several harms that it believed the common law aimed to address. Specific harms that the Court

whether a restraint falls within the scope of the Act.[81] The Court held that "the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the *rule of reason* guided by the established law . . . and the public policy which its restrictions were obviously enacted to subserve."[82] The Court clarified that the Rule of Reason only applied to ancillary restraints and not direct restraints.[83]

In deciding the merits of the case, the *Standard Oil* Court upheld the lower court's ruling that the company had violated both sections of the Sherman Act.[84] The Court reasoned that the company's total dominance of the market, its attempts to drive out competitors, and its market-allocation agreements, among other competitive harms, all supported the finding that the company had employed direct restraints that were per se illegal.[85]

It appears clear from *Addyston* and *Standard Oil* that agreements between competitors to fix prices (in either input or output markets) serve no legitimate business purpose other than to reduce competition among firms. Accordingly, such restraints are per se illegal.

Turning to the NCAA, it would be fair to conclude that the member institutions' agreement to restrict compensation unrelated to education would be classified as a direct restraint that is per se illegal because it is a price-fixing agreement in a labor market. Nevertheless, the Supreme Court has ruled that restrictions employed by the NCAA are subject to the Rule of Reason.[86]

In 1981, the NCAA entered into two separate agreements with American Broadcasting Company ("ABC") and Columbia Broadcasting System ("CBS") to televise collegiate football games for the 1982–1985 seasons.[87] As part of these agreements, the NCAA restricted the number of times an individual school could appear on television and prohibited its member institutions from selling the rights to

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discussed included price fixing, restricting output, and the degradation of product quality. *Id.* at 52. Nonetheless, the Court also stated that some early English commentators claimed that a monopoly occurs whenever individuals are restrained from trading in a way that they had before. *Id.* at 51. This shows that the English common law, upon which the Sherman Act was based, may have been equally concerned with protecting sellers and consumers from monopolistic practices. This lends additional support to this Note's argument *infra* Part IV that courts should not accept procompetitive effects that accrue in a collateral consumer market as a valid justification for price-fixing agreements in a labor market in the absence of some standard or test that weighs the procompetitive and anticompetitive effects.

81. *Id.* at 49–60.

82. *Id.* at 62 (emphasis added).

83. *Id.* at 63–65; *see supra* notes 69–73 and accompanying text.

84. *Standard Oil*, 221 U.S. at 70–75.

85. *Id.* at 70–77.

86. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100, 103 (1984). Courts have found that in some situations, associations can have "redeeming competitive virtues" and should be subject to the rule of reason rather than per se rules of illegality. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 13 (1979); *see also* Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010); *infra* text accompanying notes 92–94.

87. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. at 91–94.

broadcast any games.[88] Two NCAA member institutions, the University of Oklahoma and the University of Georgia, brought an antitrust action against the NCAA alleging that the NCAA adopted an agreement that "unreasonably restrained trade in the televising of college football games."[89] In *NCAA v. Board of Regents of the University of Oklahoma* (*Board of Regents*), the Court found that the agreement constituted a horizontal restraint[90] that had the effect of fixing prices and limiting the output of televised college football games.[91] Although horizontal price-fixing and output restrictions are practices that are generally per se unlawful,[92] the Court evaluated the NCAA's restrictions under the Rule of Reason.[93] It reasoned that the per se rule of illegality does not apply in "industr[ies] in which horizontal restraints on competition are essential if the product is to be available at all."[94] In other words, intercollegiate athletic competitions require competitors (the member institutions) to agree on various restrictions (playing rules, the amount of scholarships universities can allow, etc.). If those restrictions were held to be per se unlawful, then the competitions would cease to exist.[95] Accordingly, all of the NCAA's restrictions would be judged under the Rule of Reason.[96] The Supreme Court subsequently affirmed the Rule of Reason's applicability to NCAA-imposed restraints in *Alston*.[97]

The district court's opinion in *Alston* shows how courts analyze NCAA-imposed restraints under the Rule of Reason. In a Rule of Reason analysis, courts begin by defining the relevant market in which the restraint operates.[98] After defining the relevant market, courts employ a "three-step burden-shifting framework"[99] to determine whether a given restraint is reasonable.[100] First, the plaintiff has the burden of establishing that the challenged restraint has anticompetitive effects in the relevant marketplace.[101] If the plaintiff succeeds, the burden shifts to the defendant to show that the challenged restraint produces procompetitive effects that justify the restraint's existence.[102] If the defendant can prove that there is a valid procompetitive justification, the plaintiff must then show

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88. *Id.* at 94.
89. *Id.* at 88.
90. *Id.* at 99–100.
91. *Id.*
92. *See supra* text accompanying note 70.
93. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. at 100, 103.
94. *Id.* at 101.
95. *See id.* at 101–02.
96. *See id.* at 100–03.
97. *See* NCAA v. Alston, 141 S. Ct. 2141, 2155–57 (2021).
98. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1066–67 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).
99. *Alston*, 141 S. Ct. at 2160 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).
100. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1067–91.
101. *Id.* at 1067–70.
102. *Id.* at 1070–86.

that the defendant can achieve the same procompetitive effects through a less restrictive alternative.[103] If the plaintiff can prove that there is a less restrictive alternative to achieve the restraint's asserted ends (that is not substantially more costly to implement), then the restraint violates the Sherman Act.[104] If the plaintiff or the defendant fails to meet their burden at any step in the three-part test, judgment is entered against that party.[105]

1. Defining the Market

As noted in the district court's opinion in *Board of Regents*, market definition is usually the most difficult factual inquiry in a Rule of Reason analysis.[106] The difficulty can arise because the parties often assert vastly different market definitions, and one party may even assert multiple market definitions.[107] For instance, the district court in *O'Bannon* considered two market definitions asserted by intercollegiate athletes: the "College Education Market" and the "Group Licensing Market."[108] The court ultimately accepted either market as appropriate for a Rule of Reason analysis and divided the "Group Licensing Market" into three separate sub-markets.[109] Despite the district court's extensive factual findings related to the aforementioned markets, the relevant market in the *O'Bannon* opinion that would impact the *Alston* litigation was a *redefined* "College Education Market."[110] The district court in *O'Bannon* explained that instead of viewing the "College Education Market" as a marketplace where "NCAA Division I schools compete to sell unique bundles of goods and services to elite football and basketball recruits,"[111] that market could also be viewed as one where the schools are buyers of the athlete's services.[112] In *Alston*, the parties stipulated to this alternate definition of the "College Education Market."[113] The parties' stipulation to this market

103. *Id.* at 1087–91.

104. *Id.* at 1109.

105. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 113–20 (1984) (affirming the district court's finding that the NCAA's restriction violated § 1 of the Sherman Act because the NCAA failed to carry its burden to establish a valid procompetitive justification).

106. Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1296 (W.D. Okla. 1982), *aff'd in part, remanded in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

107. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 965–71 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

108. *Id.* at 965.

109. *Id.* at 965–71.

110. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1066–67 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021); *O'Bannon*, 7 F. Supp. 3d at 991.

111. *O'Bannon*, 7 F. Supp. 3d at 986.

112. *Id.* at 991.

113. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1066–67.

definition requires analyzing the Rule of Reason in the monopsony context rather than the monopoly context.[114]

2. Plaintiff's Burden to Establish the Challenged Restraint's Anticompetitive Effects

Once the district court in *Alston* accepted the market definition of the NCAA member schools as a monopsony and the intercollegiate athletes as sellers of labor, it proceeded to analyze the anticompetitive effects in that market. After providing extensive economic evidence that the NCAA's agreements to limit athlete compensation "have the effect of artificially capping [the athletes'] compensation and reducing competition," the plaintiffs moved for summary judgment using Rule of Reason analysis.[115] The plaintiffs' evidence proved that the NCAA possessed monopsony power that allowed the schools to artificially cap compensation because there were no other viable leagues to which the athletes could sell their labor.[116] Ultimately, the district court agreed that the NCAA's challenged restraints had significant anticompetitive effects because the NCAA used those restraints to exercise its monopsony power and artificially suppress the price of athletes' compensation in the relevant labor market.[117] That is, the court acknowledged that in the absence of the compensation restrictions, schools would meaningfully compete to provide compensation packages that reflect each athlete's true market value.[118] The NCAA did not meaningfully contest the plaintiffs' evidence, and the district court granted summary judgment on this issue.[119]

3. Defendant's Burden to Produce Procompetitive Justifications

Because the athletes showed that the challenged restraint had anticompetitive effects in the relevant market, the burden shifted to the NCAA to show that its restrictions produced procompetitive effects that outweighed its anticompetitive features. The NCAA asserted two main procompetitive justifications for its restrictions: "the challenged [restraints] are procompetitive because 'amateurism is a key part of demand for college sports,'" and the restraints keep athletes on a level playing field with other students that allow them to effectively integrate into their campus communities.[120] Although the *Alston* district court summarily rejected the integration argument,[121] it analyzed the consumer demand argument extensively.[122] Both parties submitted competing economic analyses that spoke to the benefits of amateurism, but ultimately, the court found the plaintiffs' expert more convincing.[123] Furthermore, the plaintiffs' expert, Dr. Daniel Rascher, provided two economic experiments that showed that "increased student-athlete compensation does not negatively affect consumer demand for Division I

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114. *Id.*
115. *Id.* at 1068.
116. *Id.*
117. *Id.* at 1067–70.
118. *Id.* at 1068.
119. *Id.* at 1097–98.
120. *Id.* at 1070, 1083.
121. *See id.* at 1083–86.
122. *See id.* at 1070–83.
123. *Id.* at 1070–80.

basketball and . . . football."[124] The first experiment compared consumer demand before and after the NCAA raised the amount of compensation that students could receive to the full cost of attendance.[125] This experiment found that, despite the increase in compensation, "NCAA, conference, and school revenues from Division I basketball . . . and football have increased since 2015."[126] The second experiment evaluated a program implemented by the University of Nebraska that allowed students that had exhausted their eligibility to receive up to $7,500 for education-related expenses.[127] Dr. Rascher found no evidence that the increased compensation from the University of Nebraska led to a decrease in consumer demand.[128]

Despite striking down the NCAA's economic analysis and finding that increased compensation would not negatively impact consumer demand, the court held sua sponte that the NCAA's consumer demand relies on "maintaining a distinction between college sports and professional sports," which constitutes a valid procompetitive justification.[129] The court likely erred in this finding for three reasons: (1) maintaining a product distinction with professional sports was not asserted by the NCAA as a procompetitive justification;[130] (2) the finding was based on lay witness opinion that was not empirically supported;[131] and (3) the court allowed benefits accruing in a collateral market (the consumer market for collegiate athletics) to justify anticompetitive behavior in the relevant, primary market (the labor market for athletes' services).[132]

4. Plaintiff's Burden to Identify Less Restrictive Alternatives

The district court's acceptance of the procompetitive justification meant that the challenged restraints would still violate the Sherman Act if the athletes could identify a less restrictive alternative. To succeed on this step, the athletes would have to offer an alternative that was virtually as effective at achieving the same procompetitive effects and was not substantially more costly than the challenged restrictions.[133] The athletes identified three alternatives: (1) eliminate all NCAA limits on compensation; (2) remove caps on awards or incentives to athletes; or (3) prohibit limits on compensation related to education.[134] The *Alston* district court struck down the first two alternatives, stating that both proposals could lead to unlimited payments, which would effectively turn collegiate athletes into professionals and eliminate the product differentiation between college and

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124. *Id.* at 1076.
125. *Id.*
126. *Id.* at 1076–77.
127. *Id.* at 1077.
128. *Id.* at 1078.
129. *See id.* at 1082.
130. *See id.* at 1082–83. The NCAA challenged the district court's characterization of the procompetitive justification in *Alston*, which indicates that no party asserted that maintaining a distinction between college and professional sports was a valid procompetitive justification. *See* NCAA v. Alston, 141 S. Ct. 2141, 2160–61 (2021).
131. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d at 1082–83.
132. *See id.*
133. *Id.* at 1104.
134. *Id.* at 1086.

professional sports.[135] Accordingly, these alternatives would not be as effective at maintaining a distinction between collegiate and professional athletes, which could reduce consumer demand.[136] The court accepted the third, less-restrictive alternative reasoning that compensation related to education indicates that the athletes are students and maintains the distinction between college and professional sports.[137] Therefore, the court held that the restrictions on education-related compensation violated § 1 of the Sherman Act.[138]

II. NCAA BACKGROUND

One of the NCAA's core principles is the Principle of Amateurism.[139] The Principle states that "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[140] Nevertheless, the NCAA has increasingly commercialized intercollegiate athletics through enormous television contracts,[141] profits from ticket sales,[142] and licensing agreements for video games.[143] Despite the NCAA's alleged commitment to protecting athletes from commercial exploitation, as late as 2014, the NCAA required athletes to sign away their rights to the use of their name or picture in the promotion of NCAA events to help secure the sources of revenue mentioned above.[144]

Additionally, the NCAA's disciplinary measures for compensation infractions cast doubt on its self-proclaimed role of a protector of athletes. The NCAA's discipline for improper compensation to athletes has included limiting the number of scholarships the institution can offer,[145] implementing postseason bans,[146]

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135. *Id.* at 1087.

136. *Id.*

137. *See id.* at 1087–91.

138. *Id.* at 1109.

139. *See* NCAA, *supra* note 18, § 2.9.

140. *Id.*

141. *Where Does the Money Go?*, NCAA, https://www.ncaa.org/about/where-does-money-go [https://perma.cc/P8V4-NF8X] (last visited Oct. 22, 2021).

142. *Id.*

143. *Electronic Arts & CLC to Bring Back College Football Video Games*, EA (Feb. 2, 2021), https://news.ea.com/press-releases/press-releases-details/2021/Electronic-Arts--CLC-to-Bring-Back-College-Football-Video-Games/default.aspx [https://perma.cc/SQF7-2MDR].

144. *See Form 13-3a: Student-Athlete Statement – NCAA Division I*, YUMPU 4–5 (2014), https://www.yumpu.com/en/document/read/30275896/form-13-3a-academic-year-2013-14-student-athlete-statement- [https://perma.cc/FC7U-K6LZ].

145. *See, e.g.*, Zac Ellis, *Miami Football to Lose Nine Scholarships over Three Years; No Bowl Ban From NCAA*, SPORTS ILLUSTRATED (Oct. 22, 2013, 9:29 AM), https://www.si.com/campus-union/2013/10/22/miami-hurricanes-ncaa-sanctions [https://perma.cc/GXX5-SPWK].

146. *See, e.g.*, *Michigan Hit with One-year Postseason Ban*, ESPN, https://www.espn.com/ncb/news/2003/0508/1550881.html [https://perma.cc/3FS7-BPTS] (last updated May 9, 2003, 12:03 PM).

and stripping players of individual performance awards.[147] In one instance, the NCAA eliminated Southern Methodist University's football program due to impermissible payments facilitated by the coaching staff and boosters.[148] In many cases, the coaches who implemented or facilitated the improper payments left the school before or shortly after the NCAA enforced its sanctions.[149] Ultimately, the brunt of the NCAA's discipline was directed at the athletes in the form of reduced opportunities for scholarships and loss of in-season, postseason, and individual performance awards, not at the commercial enterprises—coaching staffs and boosters—that sought to exploit them.[150]

The NCAA employs a number of restrictions to protect the Principle.[151] Some notable restrictions imposed by the NCAA on athletes include the prohibition on agent representation,[152] the prohibition on compensation unrelated to education,[153] and until recently, the prohibition on compensation related to the use of an athlete's name, image, and likeness ("NIL").[154] The restrictions on compensation related to the use of an athlete's NIL came under fire in 2009 when former University of California, Los Angeles basketball player Ed O'Bannon brought suit alleging that the NCAA's NIL restrictions unreasonably restrained trade in violation of the Sherman Act.[155] In *O'Bannon*, the Ninth Circuit Court of Appeals ultimately held that the district court erred in allowing athletes to be paid up to $5,000 for use of their NIL because increasing consumer demand in college sports

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147. *See* Nicholas Reimann, *Reggie Bush Won't Get Heisman Back After NCAA Ruling*, FORBES (July 28, 2021, 3:44 PM), https://www.forbes.com/sites/nicholasreimann/2021/07/28/reggie-bush-wont-get-heisman-back-after-ncaa-ruling/?sh=d9453b7cbb56 [https://perma.cc/U5GJ-RYXK]; *Reggie Bush to Forfeit Heisman*, ESPN (Sept. 14, 2010), https://www.espn.com/los-angeles/ncf/news/story?id=5572827 [https://perma.cc/9Y4F-DYL6].

148. Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME (Feb. 25, 2015, 6:00 AM), https://time.com/3720498/ncaa-smu-death-penalty/ [https://perma.cc/N8CN-FD6P].

149. *See, e.g.*, *2011 University of Miami Athletics Scandal*, WIKIPEDIA, https://en.wikipedia.org/wiki/2011_University_of_Miami_athletics_scandal [https://perma.cc/MMM2-UZSV] (last visited Mar. 5, 2022) (noting head basketball coach Frank Haith left to be head coach at the University of Missouri); *Steve Fisher*, WIKIPEDIA, https://en.wikipedia.org/wiki/Steve_Fisher [https://perma.cc/8WNH-2UP6] (last visited Mar. 5, 2022) (showing Steve Fisher left Michigan for an assistant job in the NBA before serving as the San Diego State head coach for 18 years); *Pete Carroll*, WIKIPEDIA, https://en.wikipedia.org/wiki/Pete_Carroll [https://perma.cc/P682-SEJE] (last visited Mar. 5, 2022) (noting that Pete Carroll left USC in 2009 amid a cloud of recruiting infraction allegations to become the head coach of the Seattle Seahawks).

150. *See, e.g.*, ESPN, *supra* note 146 (showing that the 2002–2003 Michigan men's basketball team was barred from postseason play despite no current players being involved in the scandal).

151. *See* NCAA, *supra* note 18, §§ 12.01–12 (establishing various rules that could cause athletes to lose their eligibility if violated).

152. *Id.* §§ 12.1.2(g), 12.3.1.

153. *Id.* § 12.1.2(a).

154. *See id.*

155. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).

based on the players' amateur status was a valid procompetitive justification.[156] Moreover, paying the athletes even a small amount would negatively impact consumer demand by frustrating the purpose of the amateurism principle.[157] Although the Supreme Court denied certiorari (as requested by both parties),[158] the *O'Bannon* litigation established key principles that would influence future challenges to the NCAA's amateurism restrictions: the NCAA's amateurism rules are subject to a Rule of Reason analysis,[159] and athletes may define the NCAA as "a monopsony—a market in which there is only one buyer (the NCAA schools, acting collectively) for a particular good or service (the labor and NIL rights of student-athletes)" in the relevant market.[160]

These principles were revisited in recent litigation between athletes and the NCAA that reached the Supreme Court and ultimately led to the abolishment of the NCAA's rules restricting NIL compensation.[161] In 2019, a group of former and current NCAA athletes brought an antitrust action in the District of Northern California challenging several NCAA-imposed restrictions on compensation, including the restraints on education-related benefits and compensation unrelated to education[162] As discussed above, the district court in *Alston* found the challenged restrictions to be anticompetitive but declared that "maintaining a distinction between college and professional sports" may drive consumer demand and is a valid procompetitive justification for restraints on compensation unrelated to education.[163]

The parties cross-appealed to the Ninth Circuit with the athletes seeking to undo the restrictions on compensation unrelated to education and the NCAA seeking to reinstate restrictions on education-related benefits.[164] The Ninth Circuit ultimately affirmed the scope of the district court's injunction and stated that the district court "struck the right balance" between preventing anticompetitive restraints to athletes and promoting the procompetitive justification "of preserving the popularity of college sports."[165] Nevertheless, a concurring opinion from Judge Milan Smith presented a cogent argument that the district court may have erred in its

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156. *Id.* at 1073.

157. *Id.* at 1076–77.

158. *O'Bannon*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

159. *Id.* at 1064; *see supra* Part I(C).

160. *See O'Bannon*, 802 F.3d at 1058.

161. *See* NCAA v. Alston, 141 S. Ct. 2141, 2154–57 (2021); Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/8DSS-YNEZ].

162. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

163. *Supra* notes 117–29 and accompanying text.

164. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1243 (9th Cir.), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

165. *Id.* at 1263.

procompetitive justification analysis.[166] Judge Smith pointed out that courts have inconsistently analyzed procompetitive justifications because some courts have been willing to accept procompetitive effects in a *collateral* market (e.g., in *Board of Regents*, the Supreme Court considered whether increased attendance in the live football market could justify anticompetitive agreements affecting the television football market),[167] while other courts have held that the procompetitive effects must accrue in the *actual* market defined by the plaintiffs.[168] Judge Smith reasoned that jurists are ill-suited to make value judgments regarding the net effects of a justification unless the review is "confined to [a] single market."[169] Judge Smith concluded that in the absence of "a purely economic, mathematically-defensible method for cross-market analysis that does not depend on policy judgments," courts should not accept procompetitive justifications offered in collateral markets.[170]

This time, the U.S. Supreme Court was poised to weigh in on whether the NCAA's restrictions violated the Sherman Act and granted certiorari.[171] The NCAA once again sought a ruling that none of the challenged restrictions violated the Sherman Act.[172] On appeal, however, the athletes only sought to uphold the district court's ruling regarding education-related benefits.[173] The NCAA conceded that it was a monopsony and was engaged in horizontal price fixing of the athletes' compensation by way of the restrictions.[174] The organization argued, however, that: (1) it should not be subjected to a Rule of Reason analysis;[175] (2) its procompetitive justification should apply to all of its restrictions;[176] and (3) the district court "impermissibly redefined" the NCAA's procompetitive justification by replacing the concept of amateurism with consumer demand.[177] In a unanimous opinion written by Justice Gorsuch, the Court held that the NCAA's compensation

166. *See id.* at 1266–71 (Smith, J., concurring).

167. *Id.* at 1268 (Smith, J., concurring).

168. *Id.* at 1269 (Smith, J., concurring).

169. *Id.* at 1269–70 (Smith, J., concurring). As we saw *supra* Part II(C)(3), jurists are often called upon to make value judgments when performing a Rule of Reason analysis. Jurists can effectively make these value judgments because of the analytical framework provided by a Rule of Reason analysis. This Note will assert *infra* Part IV that courts should adopt a two-part test for evaluating procompetitive justifications in a collateral market.

170. *Id.* at 1271 (Smith, J., concurring). This hypothetical "purely economic, mathematically-defensible method" is a standard that courts should aspire to. Courts, economists, and litigants should continue to pursue an empirically supported economic method to determine whether procompetitive effects in a collateral market outweigh the anticompetitive effects in the defined market. Such a method is beyond the scope of this Note. The two-part test laid out *infra* Part IV is intended to provide courts with an easy-to-apply test to help jurists weigh the anticompetitive effects in one market against the procompetitive effects in a collateral market.

171. *See* NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021).

172. *Id.* at 2154.

173. *See id.*

174. *Id.*

175. *Id.* at 2155. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," or a "quick look," before approving them.

176. *Id.* at 2161.

177. *Id.* at 2162–63.

restrictions are subject to a Rule of Reason analysis,[178] the procompetitive justification of increased consumer demand is inapplicable to the restrictions on education-related benefits,[179] and that the NCAA cannot classify the "restraint as a product feature and declare it" a procompetitive justification.[180]

In the aftermath of the Supreme Court's ruling in *Alston*, the NCAA altered its position and adopted an interim policy regarding athletes' NIL, which went into effect on July 1, 2021.[181] The interim policy allows students to receive compensation in exchange for the use of their NIL.[182] However, the policy continues to prevent athletes from receiving other unlimited compensation unrelated to education.[183] Since the adoption of the NCAA's interim policy, the financial landscape for athletes has changed drastically. Within days, many schools scrambled to put together NIL programming, initiatives, and classes dedicated to helping their athletes gain a competitive edge in the NIL market.[184] Additionally, two months after the adoption of the interim policy, the University of Alabama's starting quarterback, Bryce Young, became the first college athlete to surpass $1 million in NIL deals despite never having played a snap of college football.[185] An even more extreme case involves high school phenom Quinn Ewers, who decided to forgo his senior season of football, enroll early at Ohio State University, and cash in on NIL deals.[186] College football has not been the only sport transformed overnight: basketball

178. *Id.* at 2155–57.
179. *See id.* at 2162.
180. *Id.* at 2163.
181. Hosick, *supra* note 161.
182. *Id.*
183. *Id.*
184. Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa [https://perma.cc/E6Z5-HZY5].
185. Matt Reed, *Alabama's Bryce Young Secures $1M in NIL Deals*, THE SHADOW LEAGUE (Aug. 5, 2021), https://theshadowleague.com/alabamas-bryce-young-already-earns-over-1m-in-nil-deals-he-hasnt-started-a-game-yet-for-the-crimson-tide/ [https://perma.cc/FZ2J-7KRQ].
186. Andrew Lind, *Ohio State QB Commit Quinn Ewers Reclassifying, Will Play For Buckeyes This Season*, FANNATION (Aug. 2, 2021), https://www.si.com/college/ohiostate/recruiting/ohio-state-football-2022-quarterback-commit-quinn-ewers-reclassifying-will-play-for-buckeyes-this-fall [https://perma.cc/PV2A-65CS].

players,[187] soccer players,[188] field hockey players,[189] wrestlers,[190] gymnasts,[191] and swimmers[192] have all taken advantage of lucrative NIL deals.

Allowing athletes to profit from the sale of their NIL rights has alleviated some of the artificial limitations placed on athletes' earning power, but the NCAA continues to employ anticompetitive restraints preventing athletes from acquiring a fair market value for their services.[193] Justice Gorsuch's opinion for the Court in *Alston* casts serious doubt on whether increasing consumer demand through product differentiation can *ever* be a valid procompetitive justification when the monopsonist purchases labor.[194] Justice Gorsuch took notice of multiple amicus briefs arguing that a monopsonist may not justify anticompetitive restraints in a labor market it controls for the benefit of end-use consumers.[195] Accordingly, the amici argued, the NCAA's procompetitive justification may be valid only if it has procompetitive effects in the labor market under analysis, not in the downstream consumer market.[196] In other words, the relevant market remains the market for athletes' services, and the NCAA may not be able to use benefits in the market for live or televised athletic events, team paraphernalia, or college athletic video game market to justify its restraints in the market for athletes' services. Furthermore, Justice Gorsuch's statement that "a party [cannot] relabel a restraint as a product feature" suggests that the NCAA cannot justify its restrictions on unlimited compensation unrelated to education by claiming those restrictions are what differentiates collegiate sports from professional sports.[197]

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187. Myron Medcalf, *Paige Bueckers, Chet Holmgren and 25 More of College Basketball's Most Marketable Players*, ESPN (Aug. 19, 2021), https://www.espn.com/mens-college-basketball/story/_/id/32044653/paige-bueckers-chet-holmgren-25-more-college-basketball-most-marketable-players [https://perma.cc/ACR9-4H5F].

188. Adam Fine, *Enterprising St. Joseph's Athletes Bring NIL to Hawk Hill*, THE PHILA. ENQUIRER (Oct. 4, 2021), https://www.inquirer.com/college-sports/st-joes/nil-ncaa-st-josephs-philadelphia-20211004.html [https://perma.cc/7NGA-4GZG].

189. *Id.*

190. Mike Willis, *Which College Wrestlers Are Already Taking Advantage of NIL*, USA WRESTLING (July 2, 2021, 2:52 PM), https://www.teamusa.org/USA-Wrestling/Features/2021/July/02/Which-college-athletes-are-already-taking-advantage-of-NLI [https://perma.cc/WP3K-AMT2].

191. Kristi Dosh, *LSU Gymnast Olivia Dunne Announces First NIL Brand Deal Is with Activewear Brand Vuori*, FORBES (Sept. 14, 2021, 9:00 AM), https://www.forbes.com/sites/kristidosh/2021/09/14/lsu-gymnast-olivia-dunne-announces-first-nil-brand-deal-is-with-activewear-brand-vuori/?sh=267aa3562c78 [https://perma.cc/NW74-3WM7].

192. Matthew De George, *Texas Swimmer Carson Foster Signs NIL Deal with Mizuno Swim*, SWIMMINGWORLD (Sept. 9, 2021, 10:02 AM), https://www.swimmingworldmagazine.com/news/texas-swimmer-carson-foster-signs-nil-deal-with-mizuno-swim/ [https://perma.cc/EM2F-FGY4].

193. *See* NCAA v. Alston, 141 S. Ct. 2141, 2153, 2156 (2021) (noting that although the NCAA does not contest that it is a monopsony, it may continue to employ restrictions on compensation unrelated to education); NCAA, *supra* note 18, § 12.1.2(a).

194. *Alston*, 141 S. Ct. at 2155.

195. *Id.*

196. *Id.*

197. *Id.* at 2163, 2166.

Justice Kavanaugh's concurrence went even further in casting doubt on the legality of the NCAA's remaining restrictions.[198] First, Justice Kavanaugh reiterated that, under the Court's decision, any future challenges to the NCAA's compensation restraints must be subject to a Rule of Reason analysis.[199] Next, Justice Kavanaugh indicated that product differentiation resulting in increased consumer demand might not be a legitimate procompetitive justification, calling the NCAA's argument "circular and unpersuasive" and noting the restriction's illegality in other employment contexts.[200] Finally, Justice Kavanaugh observed that "a monopsony cannot launder its price-fixing by calling it product definition" and pointed out that "[c]ollege presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the [athletes] who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing."[201] Accordingly, the NCAA's lone procompetitive justification may be vulnerable to future antitrust challenges,[202] and college athletes may soon be free to realize their true earning potential.[203]

III. *ALSTON*'S APPLICATION OF THE RULE OF REASON

A. Assumptions

For the purposes of this Note, we will accept the *Alston* district court's application of the Rule of Reason, its market definition, and its finding that the challenged restraint had anticompetitive effects in the relevant market. The focus of the rest of this Note will be limited to a review of *Alston's* procompetitive justification analysis, an argument that courts should adopt a new two-part test for evaluating procompetitive justifications that accrue in a collateral product market, and an application of the test to the NCAA's restrictions on compensation unrelated to education.

B. Reviewing Alston's Procompetitive Justification Analysis

Although the NCAA's interim NIL policy allows athletes to receive compensation that more closely approximates what they would receive in an open

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198. *See id.* at 2166–69 (Kavanaugh, J., concurring).

199. *Id.* at 2167 (Kavanaugh, J., concurring).

200. *Id.* (Kavanaugh, J., concurring).

201. *Id.* at 2168 (Kavanaugh, J., concurring).

202. The NCAA has commonly argued that previous lawsuits challenging its compensation restrictions invoke the principles of res judicata and stare decisis. Accordingly, courts should decline to hear antitrust actions involving restrictions that courts have already ruled on. *See id.* at 2157. In *Alston*, the Supreme Court suggested, in dicta, that the fact-specific nature of a Rule of Reason inquiry requires de novo review if market conditions change. *See id.* at 2157–58. Because the NCAA has adopted an interim NIL policy, the market conditions have significantly changed as athletes have signed NIL deals in amounts far above previously permitted scholarship amounts. Accordingly, the decisions in *Alston* and *O'Bannon* should not insulate the NCAA from future challenges to its restrictions on compensation unrelated to education.

203. *See id.* at 2166–69 (Kavanaugh, J., concurring).

market, the NCAA seems to concede that it functions as a monopsonist.[204] Additionally, the NCAA continues to employ restraints on compensation that have anticompetitive effects in the labor market for college athlete services.[205] These restraints remain in place because the *Alston* district court found that maintaining a product distinction between intercollegiate and professional sports increases consumer choice and may boost consumer demand for college sports, which would be a valid procompetitive justification.[206]

Nevertheless, the court's procompetitive justification finding was devoid of any empirical economic support and appears to be rooted in a broad application of the ambiguous consumer welfare principle (i.e., prohibitions that increase consumer choice or consumer demand are in the consumer's best interest and, therefore, are procompetitive).[207] First, the district court acknowledged that "[t]he only economic analysis in the record that specifically speaks to the effects of compensation amounts on consumer demand is that by the athletes' expert, Dr. Rascher."[208] Dr. Rascher's economic analysis consisted of two separate experiments that tended to show that increases in athlete compensation had a positive correlation with consumer demand—i.e., as athlete compensation rose, so did consumer demand.[209] Furthermore, the court admitted that "Dr. Rascher's analysis . . . support[s] a finding that, because the described increases to student-athlete compensation did not lead to a decrease in consumer demand, similar future increases in compensation would not reduce demand."[210] However, the court gave greater weight to lay opinion testimony by defense witnesses that claimed that "the value of media rights contracts has a relationship to the popularity of college sports as being distinguishable from professional sports"[211] and held that maintaining a distinction with professional sports increases consumer choice and is procompetitive.[212] Early results seem to question the validity of the NCAA's opinion testimony—college football television ratings appear to be higher in the first post-NIL season than in the 2020–2021 season.[213]

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204. *See id.* at 2154, 2156 (noting that the NCAA accepts that it has monopsony control in the relevant labor market).

205. Hosick, *supra* note 161.

206. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1082–83 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

207. *See id.* at 1076–83.

208. *Id.* at 1076.

209. *See id.* at 1076–78.

210. *Id.* at 1078.

211. *Id.* at 1082.

212. *Id.* at 1082–83.

213. *See, e.g.*, Amanda Brooks, *ESPN Networks Deliver Multi-Year College Football Viewership Growth in 2021—and the Most-Streamed CFB Season Ever*, ESPN PRESS ROOM (Dec. 13, 2021), https://espnpressroom.com/us/press-releases/2021/12/espn-networks-deliver-multi-year-college-football-viewership-growth-in-2021-and-the-most-streamed-cfb-season-ever/ [https://perma.cc/UKR6-ZK9F] (showing that even college football pregame shows, experienced growth in television ratings); John Rigby, *"Whoa,*

Developments in other areas of antitrust law show how the district court in *Alston* may have reached such a result. Courts commonly refer to monopsonies as "the mirror image of monopol[ies]."[214] Accordingly, the U.S. Supreme Court has generally applied the same legal frameworks when evaluating monopoly and monopsony claims.[215] For instance, in *Weyerhaeuser*, an antitrust action brought under § 2 of the Sherman Act, the Supreme Court applied a two-prong test used to establish predatory pricing by *monopolists* to evaluate whether a *monopsonist* was engaged in predatory bidding.[216] The Court reasoned that the same analytical and legal frameworks should apply to monopolies and monopsonies because there is a "close theoretical connection between" the two concepts.[217]

The *Alston* district court seemingly endorsed the *Weyerhaeuser* Court's line of reasoning when the district court found that maintaining a product distinction that leads to increased consumer choice is a valid procompetitive justification for monopsonies.[218] Traditionally, increasing consumer choice has been accepted as a valid procompetitive justification for anticompetitive restraints in the monopoly context,[219] where the Sherman Act is intended to protect consumers.[220] Therefore, restraints on trade that have the net effect of increasing consumer choice are valid procompetitive justifications because the benefit accrues to consumers, the class of individuals the Act is designed to protect.[221] Following the *Weyerhaeuser* line of reasoning, the "close theoretical connection between monopol[ies] and monopson[ies]" would support a finding that increasing consumer choice is a valid procompetitive justification in the monopsony context.[222]

Nonetheless, the *Weyerhaeuser* line of reasoning should not be extended to the Rule of Reason's procompetitive justification analysis for monopsonies.

Tellie!": Analyzing College Football's Big 2021 TV Ratings, CONDUCT DETRIMENTAL (Oct. 15, 2021) https://www.conductdetrimental.com/post/whoa-tellie-analyzing-college-football-s-big-2021-tv-ratings [https://perma.cc/65U4-7AD5] (describing college football's "roaring" ratings through the first six weeks of the season).

214. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 321–22 (2007); Maurice E. Stucke, *Looking at the Monopsony in the Mirror*, 62 EMORY L.J. 1509, 1516 (2013).

215. *Weyerhaeuser*, 549 U.S. at 321–22; *see* NCAA v. Alston, 141 S. Ct. 2141, 2154–55 (2021) (implying the court will apply the standard Rule of Reason analysis because neither party asserted that a cross-market analysis in the monopsony context is improper).

216. *Weyerhaeuser*, 549 U.S. at 325–26.

217. *Id.* at 321.

218. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1082–83 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

219. Law v. NCAA, 134 F.3d 1010, 1023 (10th Cir. 1998).

220. *See supra* text accompanying notes 55–56.

221. *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1038 (N.D. Cal. 2021). Increased consumer choice occurs when a restraint creates a product differentiation in the market and serves as a substitute for other products. This allows consumers to choose between two competing products. Because increased consumer choice protects interbrand competition and the benefit accrues to the consumer, it is a valid procompetitive justification.

222. *Weyerhaeuser*, 549 U.S. at 321.

Although the reasoning may be valid in other antitrust contexts,[223] it fails to provide adequate support to the district court's finding that increased consumer choice is a valid procompetitive justification in the monopsony context. As applied to monopsonies, the Sherman Act is designed to protect sellers from a dominant buyer's anticompetitive behavior.[224] It can hardly be said that the Act achieves its design if monopsonists can escape § 1 scrutiny by simply passing along some of its ill-gotten gains to consumers.

This is not to say that all agreements that result in restraints of trade in labor markets cannot be justified by procompetitive benefits that accrue to consumers. For example, two companies engaging in a merger may agree to eliminate or consolidate certain job roles. By consolidating these employment opportunities, the companies reduce the number of available jobs and eliminate competition in the labor market for those roles. Nevertheless, the merger and subsequent layoffs can create cost savings for the firm that are passed along to the consumer in the form of lower prices.[225] Accordingly, courts should adopt a test to evaluate whether procompetitive effects in a collateral product market can justify anticompetitive effects in the relevant labor market.

IV. PROPOSED TWO-PART TEST FOR COLLATERAL MARKET PROCOMPETITIVE JUSTIFICATIONS

Because there is evidence that the Sherman Act was intended to protect both sellers and consumers,[226] courts should refrain from subordinating the rights of primary sellers to the rights of collateral consumers in the absence of an established analytical framework. Courts should employ a two-part test to evaluate whether a procompetitive effect in a collateral consumer market can justify a restraint in the relevant labor market. First, courts should require the defendant to prove that a legitimate benefit (i.e., reduced prices, increased output, or increased consumer choice) actually accrues to consumers in a collateral market. If the defendant makes such a showing, the burden should shift to the plaintiff to demonstrate that the detriments in the relevant labor market outweigh the benefits in the collateral consumer market.

A. Part One: Defendant's Burden to Show that Legitimate Benefits Accrue in the Collateral Market

As noted above, economic theory casts doubt on whether benefits created from a monopsonist's restrictions in a labor market will be passed on to consumers

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223. The *Weyerhaeuser* Court stated that "[p]redatory-pricing and predatory-bidding claims are analytically similar." *Id.* at 321. Whether monopolies and monopsonies are analytically similar in regards to actions brought under § 2 of the Sherman Act is beyond the scope of this Note. For a further discussion about the potential complexities of applying the same analytical framework to monopsonies and monopolies in § 2 claims, see Stucke, *supra* note 214.

224. *See supra* text accompanying notes 57–61.

225. *See* Will Kenton, *Cost Synergy*, INVESTOPEDIA (June 29, 2021), https://www.investopedia.com/terms/c/costsynergy.asp [https://perma.cc/XE5Y-ZV68].

226. *See supra* Part I(B).

in a collateral output market.[227] Generally, valid procompetitive justifications fall into three main categories: reduced prices, increased output, and increased consumer choice.[228] This allows monopsonies to make three main arguments concerning wage restrictions in a labor market: (1) decreasing wage spending leads to cost savings that are passed along to consumers in the form of lower prices; (2) decreasing wage costs allows the monopsonist to employ more labor, which can lead to higher product output; and (3) wage restrictions create a product differentiation that leads to increased consumer choice.[229] Accordingly, courts should analyze each proffered restriction on a case-by-case basis to determine whether the procompetitive benefits asserted by a defendant are valid and whether they accrue to consumers in the collateral market. The party that imposes the restriction will presumably be in the best position to show the restriction's effects and should therefore carry the burden of proof.

Admittedly, labor market restrictions can create cost savings, increased output, or increased consumer choice that benefit consumers in a collateral market. In addition to the merger example provided above,[230] horizontal competitors in a technology start-up market might engage in no-poach agreements.[231] Accordingly, the competitors may agree not to lure the other employees away by competing on starting salaries or benefits. Due to a lack of funding, these start-ups may need to keep wage expenses low to bring a differentiated product to market, increasing consumer choice. Additionally, decreasing wage costs may allow a start-up to hire more employees or compete with economies of scale, such as Amazon, on price. Therefore, the restrictions, which reduce competition in the labor market, can increase competition in the collateral consumer market if the start-ups hire more employees to penetrate the market with a new product and to compete on price with established technology companies.

Nevertheless, economic theory suggests that benefits created from restrictions in the labor market do not truly accrue to consumers. As noted above, most wage restrictions tend to decrease output and increase prices.[232] Moreover, there may be limited situations in which restrictions in a labor market can increase consumer choice through product differentiation. Restrictions that allow a corporation to create a new product by keeping labor costs low may increase consumer choice, but as noted in Justice Gorsuch's *Alston* opinion, a buyer in the

227. *See supra* note 61 and accompanying text.

228. *See supra* text accompanying note 55.

229. *See supra* text accompanying note 55.

230. *See supra* note 225 and accompanying text.

231. No poach agreements are agreements between employers to refrain from recruiting or hiring the other's employees. To be clear, no-poach agreements are per se illegal under the Sherman Act. *See* FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), https://www.justice.gov/atr/file/903511/download [https://perma.cc/F273-Z3NN]. Nevertheless, the example is helpful to show how restrictions that eliminate competition in the labor market could increase competition in a collateral consumer market.

232. *See supra* note 61 and accompanying text.

wage market cannot simply classify the "restraint as a product feature and declare it" a procompetitive justification.[233]

At this step in the test, courts should evaluate whether the defendant's asserted procompetitive justification is valid under current antitrust jurisprudence and whether the restriction benefits consumers in the labor market. In terms of price or output, the defendant must make some showing that the restraint is directly tied to cost savings that are passed on to the consumer in the form of lower prices or increased employment that leads to greater production output. If the defendant attempts to show that the restrictions in the labor market increase consumer choice, the showing cannot merely be a claim that consumers have access to a new product because the "restraint [is] a product feature."[234] If the defendant fails to carry this burden, the inquiry ends, and the restraint should be declared illegal under § 1 of the Sherman Act.

B. Part Two: Plaintiff's Burden to Show that Detriments in the Relevant Market Substantially Outweigh Benefits in the Collateral Market

Suppose the defendant can succeed at the first step. The plaintiff should still be offered the opportunity to show that the detriments in the relevant market substantially outweigh the benefits in the collateral market. This prong of the test aims to prevent reallocations of wealth, where the buyer extracts monopsony prices in the labor market, internalizes the majority of the profits, and only passes on small amounts of the cost savings to consumers. Because the defendant is required to prove that its restraint has quantifiable procompetitive benefits in the collateral market, the plaintiff should be better positioned to show that the anticompetitive effects in the relevant market substantially outweigh the benefits. Thus, the plaintiff should carry the burden in this part of the test.

This proposed part of the test is consistent with the purposes of the Sherman Act.[235] Even if one concedes that the Sherman Act is primarily intended to protect consumers, the legislative history shows that Congress was also concerned with protecting sellers from anticompetitive behavior of dominant corporations.[236] Accordingly, dominant corporations that enter agreements to restrain trade and extract monopsony profits should not be able to legally justify the agreements by passing on small portions of those profits to consumers. Such agreements, in substance, constitute large reallocations of wealth from sellers to the dominant corporations, with only small benefits being passed along to the consumer.

Indeed, such a standard would require courts to make value judgments regarding the net effects of a justification across markets.[237] Although Judge Smith asserted that "jurists are ill-suited to make" those judgments, the first part of the

233. NCAA v. Alston, 141 S. Ct. 2141, 2163 (2021).

234. *See id.*

235. *See* discussion *supra* Part I(B), Part III(B).

236. *See* discussion *supra* Part I(B).

237. *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1269–70 (9th Cir. 2020) (Smith, J., concurring)., *cert. granted sub nom.* NCAA v. *Alston*, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

proposed test puts courts in a better position to make these judgments.[238] To succeed on the first part of the test, the defendant must provide evidence that some quantifiable benefit accrues in the collateral consumer market.[239] This evidence would provide the court with a baseline against which it can evaluate the anticompetitive effects in the relevant labor market. If the plaintiffs can show that the anticompetitive effects in the relevant labor market substantially outweigh the quantifiable benefit that accrues to consumers in the collateral market, the court should hold that the restraint violates § 1 of the Sherman Act.

V. APPLYING THE PROPOSED TEST TO THE NCAA'S LONE REMAINING PROCOMPETITIVE JUSTIFICATION

After recommending the two-part test for evaluating collateral market procompetitive justifications for restraints in the relevant market, it is instructive to apply the test to the restriction that survived the *Alston* litigation to see how the test may work in practice. Under the first part of the test, the NCAA is unlikely to succeed because the available data and anecdotal evidence suggest that its restrictions on compensation unrelated to education do not result in lower ticket prices,[240] increased output, or legitimate product differentiation. Even if the NCAA were to succeed on the first part of the test, the athletes would likely be able to show that the detriments in the labor market substantially outweigh the benefits that accrue to consumers in the collateral product market.

A. Part One: NCAA Would Likely Fail to Show That Legitimate Benefits Accrue in the Collateral Market

It is unlikely that the NCAA could show that its restrictions on compensation unrelated to education create legitimate benefits that accrue to consumers in the collateral market. First, comparing NCAA live athletic events with similar markets in professional sports does not show that identifiable cost savings are passed along to consumers, and empirical evidence indicates that the universities retain these profits.[241] Second, there is no evidence that the NCAA's restrictions increase the output of intercollegiate athletic events.[242] Additionally, anecdotal evidence following the NIL changes suggests that by eliminating competition for athletes' services among Division 1 schools, the NCAA restricts the number of teams that can compete in the NCAA's premier football division, the Football Bowl Subdivision ("FBS").[243] This lack of competition ultimately reduces the output of FBS games. Finally, the Supreme Court's *Alston* opinion implies that the NCAA

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238. *Id.* at 1270; *see also* Discussion *supra* Part IV(A).

239. *See* Discussion *supra* Part IV(A).

240. Admittedly, only secondary market ticket price data is available for NCAA athletic events. Using secondary market ticket price data is an imperfect measure of potential cost savings because it is a sale from one consumer to another and does not reflect the price that a university originally charged for the ticket. The NCAA is likely to have better data regarding face value ticket prices, which may ultimately show that the restrictions result in cost savings that are passed along to consumers.

241. *See infra* notes 244–49 and accompanying text.

242. *See infra* notes 250–52 and accompanying text.

243. *See infra* notes 253–61 and accompanying text.

will not be able to justify its restrictions by stating that the restraint is a product feature that increases consumer choice.

As to the first point, a brief market analysis of live athletic events shows no quantifiable cost savings passed on to consumers. According to USA Today, the average NFL ticket on the secondary market in 2021 cost consumers $252.91, with the Las Vegas Raiders leading the way at an average of $673 per ticket.[244] By contrast, the mean ticket price on the secondary market for the top 25 college football teams in 2021 sat at $315.88, with the University of Georgia charging an average of $665 per ticket.[245] Although this trend did not hold for college and professional basketball tickets, it appears that this was due to a drastic increase in the average NBA ticket price in 2021.[246] The average ticket price for the top 25 college basketball teams for 2021 was $153.52,[247] which was roughly approximate to the average NBA ticket price from 2011–2020.[248] Empirical evidence suggests that these cost savings create profits for member institutions that are used to pay the salaries of coaches and administrators, construct lavish athletic facilities, and fund non-revenue generating sports that attract wealthier families to the university.[249]

Second, the NCAA is unlikely to be able to show that its restrictions on compensation unrelated to education increase the output of intercollegiate sports. As an initial matter, the NCAA imposes caps on the number of scholarships that can be offered for each sport.[250] Despite increases in the average athletic scholarship per athlete in both men's and women's sports between 2017 and 2020, the NCAA caps on the number of scholarships available for each sport have remained the same.[251]

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244. Kevin Kaduck, *Which NFL Team Has the Most Expensive Tickets on the Secondary Market?*, USA TODAY SPORTS: LISTWIRE (Nov. 10, 2021, 8:00 AM), https://thelistwire.usatoday.com/lists/which-nfl-team-has-the-most-expensive-tickets-on-the-secondary-market/ [https://perma.cc/9LM7-V2M8].

245. *See How to Find the Cheapest 2022 College Football Tickets*, TICKETIQ (Aug. 22, 2021), https://blog.ticketiq.com/blog/ncaa-college-football-tickets-face-value [https://perma.cc/B3NX-GTDE].

246. *See How to Find the Cheapest NBA Tickets for the 2021-22 Schedule*, TICKETIQ (Sept. 29, 2021), https://blog.ticketiq.com/blog/nba-tickets-prices-trends [https://perma.cc/T8L6-7DDT] (noting that tickets for the 2021 season increased by 37%).

247. *See Where to Find the Cheapest College Basketball Tickets in 2021-22*, TICKETIQ (Nov. 8, 2021), https://blog.ticketiq.com/blog/where-to-find-cheapest-college-basketball-tickets [https://perma.cc/Z4QU-47TF].

248. *See How to Find the Cheapest NBA Tickets for the 2021-22 Schedule*, *supra* note 246, (showing that average ticket prices remained in between $115 and $171 dollars over the past decade prior to the 2021 increase).

249. Craig Garthwaite, et al., *Who Profits from Amateurism? Rent-Sharing in Modern College Sports*, NAT'L BUREAU ECON. RES., 12–13 (Oct. 2020), available at https://www.nber.org/system/files/working_papers/w27734/w27734.pdf [https://perma.cc/33S9-2ZHU].

250. *NCAA Athletic Scholarships: Number of NCAA Athletic Scholarships By Sport*, VARSITYEDGE.COM, https://www.varsityedge.com/athletic-scholarships-by-sports/#.YiVPuHrMJyw [https://perma.cc/H4J2-LT8W] (last visited Mar. 6, 2022).

251. *See College Scholarship Limits 2020-21*, SCHOLARSHIPSTATS.COM, https://scholarshipstats.com/ncaalimits [https://perma.cc/N5U2-7P52] (last visited Apr. 20,

This suggests that future compensation increases will not limit the number of scholarships available to athletes. Furthermore, individuals in all sports "walk on" to teams without scholarships to fill the remaining spots.[252] Accordingly, no publicly available evidence suggests that the compensation restrictions increase the number of scholarships, athletic opportunities, or intercollegiate athletic events.

Furthermore, early anecdotal evidence from college football following the NCAA's NIL revisions suggests that the NCAA's compensation restrictions unrelated to education may reduce the output of college athletic events. There are 131 teams in the FBS.[253] Entities that track recruits, such as ESPN, assign "stars" to the prospects to denote the athletes' ability.[254] A "five-star prospect" is the highest ranking a future collegiate player can achieve.[255] 2021 marked the first time in the history of ESPN's rankings, which started in 2006, that a "five-star prospect" committed to the lower Division 1 subdivision, the Football Championship Subdivision ("FCS").[256] That prospect, Travis Hunter, committed to Jackson State University and its head coach, NFL Hall of Fame football player Deion Sanders.[257] The commitment created national media attention and speculation that Hunter's future NIL earnings played a role in the decision.[258] According to On3's NIL Valuation index, Travis Hunter has the second-highest NIL earning potential of all current high school and collegiate athletes.[259]

This anecdotal evidence suggests that if the NCAA's compensation restrictions are lifted, universities in the FBS and FCS will begin to compete fiercely to offer recruits the best compensation packages. Monetary restraints are likely to prevent individual schools from stockpiling the best players because major institutions will be unable to pay their lower priority recruits what smaller

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2022); *College Athletic Scholarship Limits 2017-18*, SCHOLARSHIPSTATS.COM, https://www.reachhighscholars.org/Articles/College%20Athletic%20Scholarship%20Limits.pdf [https://perma.cc/C5N9-B3TJ] (last visited Apr. 20, 2022).

252. *See* Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College Walk-on*, USA TODAY: HIGH SCHOOL SPORTS (Apr. 13, 2017, 10:01 AM), https://usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on [https://perma.cc/DRH4-4C5X].

253. *List of NCAA Division I FBS Football Programs*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_NCAA_Division_I_FBS_football_programs [https://perma.cc/WL4P-4EY3] (last visited Mar. 6, 2022).

254. *See Recruiting Database: 2022 ESPN 300*, ESPN, http://www.espn.com/college-sports/football/recruiting/playerrankings/_/view/rn300 [https://perma.cc/AD3Q-KYMK] (last visited Mar. 6, 2022).

255. *See id.*

256. Tom VanHaaren, *Deion Sanders Flips No. 2 Overall College Football Recruit Travis Hunter from Florida State to Jackson State on National Signing Day*, ESPN (Dec. 15, 2021), https://www.espn.com/college-sports/recruiting/football/story/_/id/32875645/deion-sanders-flips-no-2-overall-college-football-recruit-travis-hunter-florida-state-jackson-state-national-signing-day [https://perma.cc/USY4-5LVR].

257. *Id.*

258. *See, e.g.*, Keegan Pope, *Travis Hunter Projects to Have Huge NIL Valuation from On3*, ON3 (Jan. 7, 2022), https://www.on3.com/news/travis-hunter-projects-to-have-huge-nil-valuation-from-on3/ [https://perma.cc/YZD2-2A5U].

259. *Id.*

institutions can offer their top recruits.[260] As smaller institutions begin recruiting better talent away from dominant schools by using superior compensation packages, competitive balance among the teams is likely to increase, and some FCS schools may compete with their FBS counterparts. This increased competitive balance could ultimately lead to a larger number of institutions that will be competitive at the Division I level, thereby increasing the total output of FBS football games. Similar trends have been observed in other labor contexts.[261]

Finally, it appears the NCAA will not be able to successfully rely on the procompetitive justification that its restrictions increase consumer choice by maintaining product differentiation with professional sports. Justice Gorsuch's opinion and Justice Kavanaugh's concurrence in *Alston* imply that had the athletes challenged the district court's procompetitive justification finding, the Supreme Court may have held that the restrictions violate § 1 of the Sherman Act.[262] Both Justices questioned the legitimacy of a procompetitive justification that defines the restriction as a product feature.[263] Furthermore, Justice Kavanaugh pointed out that the NCAA's procompetitive justifications would not be accepted in other industries; for example, "[l]aw firms cannot cabin lawyers' salaries in the name of providing legal services out of a 'love of the law.'"[264]

Because available data and anecdotal evidence show that the NCAA is unlikely to prove that its restrictions on compensation unrelated to education result in lower prices,[265] increased output,[266] or expanded consumer choice,[267] courts should find that the restrictions violate § 1 of the Sherman Act under the proposed test. Nevertheless, this Note will evaluate part two of the proposed test to see whether plaintiffs could prevail on that part.

B. Part Two: Athletes Would Likely Be Able to Show that the Anticompetitive Effects of NCAA's Restrictions in the Relevant Labor Market Substantially Outweigh Their Benefits in the Collateral Consumer Market

Certainly, better access to available and proprietary data may help the NCAA show that the cost savings acquired from its restrictions unrelated to compensation are passed on to consumers in the collateral market. Moreover, lower courts may be willing to ignore the dicta from the Supreme Court's *Alston* decision and allow the NCAA to assert that maintaining a distinction between college and professional sports increases consumer demand and is a procompetitive benefit that

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260. *See* David M. Hale, *How Campbell, a Small FCS school in North Carolina, is Competing with Deion Sanders and FBS Teams*, ESPN (Feb. 23, 2022), https://www.espn.com/college-football/story/_/id/33323417/how-campbell-small-fcs-school-north-carolina-competing-deion-sanders-fbs-teams [https://perma.cc/KAC2-896T] (suggesting Deion Sanders is luring prospective athletes away from FBS schools by promising increased NIL earning potential).

261. *See supra* note 61 and accompanying text.

262. *See* NCAA v. Alston, 141 S. Ct. 2141, 2163, 2166 (2021); *id.* at 2167 (Kavanaugh, J., concurring).

263. *See id.*

264. *Id.* at 2167 (Kavanaugh, J., concurring).

265. *See supra* notes 244–49 and accompanying text.

266. *See supra* notes 250–61 and accompanying text.

267. *See supra* notes 262–64 and accompanying text.

accrues in the collateral market. Nevertheless, under the proposed test, courts would still likely find that the NCAA's restrictions on compensation unrelated to education violate § 1 of the Sherman Act because the anticompetitive effects in the relevant wage market are significant and will substantially outweigh the benefits in the collateral market.

In *Alston*, the district court acknowledged that the NCAA's restriction had substantial anticompetitive effects in the market for athletes' services but did not try to quantify these anticompetitive effects.[268] A recent empirical study reveals that these anticompetitive effects reach the six figures for NCAA basketball and football players.[269] In other words, if the NCAA employed a revenue-sharing model similar to professional sports, each scholarship football and basketball player in the Power 5 conferences[270] would receive more than $360,000 and $500,000 in payments, respectively.[271] This finding aligns with a seminal economic study from 1993 that estimated that premier football players (i.e., players drafted in the first round of the NFL draft) are worth roughly $500,000 to their institutions.[272] In 2010, this study was replicated using more current data, and the findings suggest that a premier football player was worth over $1 million.[273] These amounts likely understate the true detrimental effects of the NCAA's restrictions in the labor market because the studies estimate the players' value based on revenue generated by the football and basketball teams without accounting for external booster payments that could entice an athlete to attend an institution.

Using the more conservative estimates and assumptions from the most recent study, we can extrapolate the potentially detrimental effects in the relevant labor market. Back-of-the-envelope calculations, using the figures listed in Table 9 of the study, show that 61 schools from the Power 5 conferences alone would be responsible for over $2.4 billion in revenue-sharing payments to athletes under a professional-style revenue-sharing agreement each year.[274] Again, this amount fails to account for all of the NCAA's member institutions or external booster payments that could be provided to the athletes. In the absence of a showing that the NCAA's restrictions on compensation unrelated to education create billions of dollars in benefits to consumers in the output market in the form of lower prices, increased output, or increased consumer demand through product differentiation, a court would likely find that the anticompetitive effects in the relevant labor market

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268. *See In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1067–70 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.* NCAA v. Alston, 141 S. Ct. 1231 (2020), and *cert. granted sub nom.* Am. Athletic Conf. v. Alston, 141 S. Ct. 972 (2020), and *aff'd sub nom.* NCAA v. Alston, 141 S. Ct. 2141 (2021).

269. Garthwaite, *supra* note 249 at 30, 60.

270. The Power 5 conferences consist of the Atlantic Coastal Conference, Big 10 Conference, Big 12 Conference, Pac-12 Conference, and the Southeastern Conference.

271. *Id.* at 30.

272. Robert W. Brown, *An Estimate of the Rent Generated by a Premium College Football Player*, 31 ECON. INQUIRY 671 (1993).

273. *See* Robert Brown, *Research Note: Estimates of College Football Player Rents*, 12 J. SPORTS ECON. 200 (2011).

274. Garthwaite, *supra* note 249, at 50.

substantially outweigh the procompetitive benefits in the collateral consumer market.

CONCLUSION

This Note has proposed that courts should adopt and apply a new two-part test when an antitrust defendant attempts to justify restrictions in a relevant labor market with procompetitive effects in a collateral consumer market. This two-part test is intended to provide courts with an easy-to-apply analytical framework to help jurists make value judgments on whether the asserted procompetitive effects truly justify the challenged restraint. Part I distinguished monopolies and monopsonies, explored the history and the context of the Sherman Act, and introduced the Supreme Court's Rule of Reason jurisprudence.

Part II discussed the NCAA's dedication to its Principle of Amateurism, its growth into an increasingly commercial enterprise, and seminal cases that have challenged its various compensation restrictions under § 1 of the Sherman Act. In *Alston*—the most recent case challenging the NCAA's compensation restrictions—opinions from Justices Gorsuch and Kavanaugh cast serious doubt on whether the NCAA could legitimately justify its restrictions on compensation unrelated to education in the relevant labor market by pointing to procompetitive effects in a collateral consumer market. Accordingly, Part III examined the *Alston* district court's procompetitive justification analysis under the Rule of Reason and asserted that the factual differences between monopolies and monopsonies require courts to "break the mirror" and employ a new test for evaluating procompetitive justifications in the monopsony context.

Part IV proposed a new two-part burden-shifting framework intended to help courts perform a procompetitive justification analysis in the monopsony context. The first part of the test requires the defendant to show that its restrictions create legitimate benefits that accrue to consumers in the collateral market. If successful, plaintiffs would then have an opportunity to show that the detriments in the relevant labor market substantially outweigh any benefits to consumers. If the plaintiffs can make this showing, courts should refrain from subordinating sellers' rights to consumers' rights and should find the restraint illegal under § 1 of the Sherman Act.

Part V applied the proposed test to the facts of Alston to show how the test would work in practice. The publicly available data suggests that the NCAA would have difficulty showing that its restrictions on compensation unrelated to education produce legitimate benefits that accrue to consumers in the collateral market. Nevertheless, the NCAA may have access to proprietary data that could show that the restrictions benefit consumers. Even if the NCAA were able to make such a showing, empirical evidence demonstrates that the detriments in the labor market are stark. In the absence of proof that the NCAA's restrictions on compensation unrelated to education create billions of dollars in cost savings for consumers, a court would likely find that the detriments in the relevant labor market substantially outweigh the benefits to consumers. Accordingly, under the newly proposed test, courts would likely find that the NCAA's restrictions on compensation unrelated to education violate § 1 of the Sherman Act.