NCAA at the Crossroads: How O'Bannon v. NCAA Could Change College Sports

Evan Brewster

University of Mississippi. Sally McDonnell Barksdale Honors College

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NCAA AT THE CROSSROADS: HOW O’BANNON v. NCAA COULD CHANGE COLLEGE SPORTS

by
William Evan Brewster

A thesis submitted to the faculty of The University of Mississippi in partial fulfillment of the requirements of the Sally McDonnell Barksdale Honors College.

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May 2014

Approved by:

__________________________
Advisor: Dr. Marvin King

__________________________
Reader: Dr. William Berry

__________________________
Reader: Dr. Douglass Sullivan-Gonzalez
ABSTRACT
WILLIAM EVAN BREWSTER: NCAA at the Crossroads: How College Sports are on the Precipice of Change
(Under the direction of Dr. Marvin King)

This thesis investigates the current model of American college athletics and how football and basketball, specifically, have become extremely commercialized. This piece begins with an analysis of the current state of amateur college athletics and the changes that have taken place recently. *O’Bannon v. NCAA* signifies the one of the most recent challenges to NCAA power, attempting to change the unjust system that requires student-athletes to remain amateur while universities profit off the athletic contests. An evaluation of previous legal challenges to the NCAA help frame an assessment of the case itself thus far. To conclude, cases like *O’Bannon* and the potential for college athletes to unionize will be evaluated. Their potential impact on American college athletics will be discussed.
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1. INTRODUCTION

1.1 The Role of College Sports in Society

Walking around Oxford, Mississippi on a fall Saturday afternoon, it is easy to tell what the university, its students, and the community value—college football. The sleepy college town that houses the University of Mississippi, or Ole Miss, wakes up on Friday evening only to be back in its normal quiet state by Monday morning, just in time for the university to continue matriculating students. Oxford is no different from many college towns, or at least the ones with big time athletics.

For many universities in this country, college sports play a pivotal role in the success of the university as a whole. Ole Miss’ Athletic Director, Ross Bjork, and Chancellor, Dan Jones, “refer to athletics as the front door of the university.” Further, Bjork believes athletics are similar to other extracurricular activities, essential to student life. If done correctly, he believes athletics can be beneficial to colleges and universities as a whole. Schools hope better football and basketball seasons will lead to more interest and higher enrollment. More importantly, however, successful athletic programs will hopefully bring in significant amounts of money. While college sports are for amateur athletes only, it is hard to deny they have become more commercialized as their place in not only universities, but in society, has become more prominent.

America is the only country to offer athletics at its institutions of higher education. These athletic teams are important to their fan bases, specifically the football and basketball teams. This leads to significant interest in certain collegiate sporting events. For example, “the March Madness basketball tournament each spring has become a major national event, with upwards of eighty million watching it on television and talking about the games around the office water cooler. ESPN has spawned ESPNU, a channel dedicated to college sports, and Fox Sports and other cable outlets are developing channels exclusively to cover sports from specific regions or divisions.”

The 2014 college football national championship had over twenty-six million viewers. Because of increasing television coverage and viewership, lucrative contracts have driven universities in the major conferences to make large amounts of money.

Some of the most successful universities make between forty to eighty million dollars per academic year on football alone. Combine football with men’s and women’s basketball and Olympic sports, the most successful universities generate well over $100 million dollars primarily through television contracts for their sports teams. This is an anomaly as many universities do not have this sort of success with athletics and do not make profit off their athletics programs. Only football offers the hope of bringing in a significant income, but colleges and universities still hope for success. This results in these schools relying on “what the NCAA calls ‘allocated revenue.’” This includes direct and indirect support from general funds, student fees, and government appropriations. In other words, most colleges subsidize

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their athletics programs." More universities will lose money on sports programs than make money, but there is the chance they can hopefully cash in at some point. It could be argued that this results in universities attempting to participate at the highest level by having football programs and building facilities in a sort of “arms race” to become the most successful program.

Table 1-1: Highest College Sports Incomes for the 2011-2012 Academic Year

<table>
<thead>
<tr>
<th>University</th>
<th>Millions of dollars</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tennessee</td>
<td>160</td>
</tr>
<tr>
<td>Auburn</td>
<td>130</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>120</td>
</tr>
<tr>
<td>Penn State</td>
<td>110</td>
</tr>
<tr>
<td>LSU</td>
<td>100</td>
</tr>
<tr>
<td>Florida</td>
<td>95</td>
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<tr>
<td>Alabama</td>
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<tr>
<td>Michigan</td>
<td>85</td>
</tr>
<tr>
<td>Ohio State</td>
<td>80</td>
</tr>
<tr>
<td>Texas</td>
<td>75</td>
</tr>
</tbody>
</table>


Table 1-1 shows success in sports can lead to a large amount of money for athletic programs. All of these programs made over $100 million in the 2011-2012 academic year. Further, all of the programs in the top ten of highest college sports incomes are perennial football powers, or at least expect to compete at the highest level every season. While basketball can bring programs money, football success is prized and offers the highest payday and drives

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decision making for schools. This decision making often centers on television rights to broadcast events. While “money comes from a combination of ticket sales, concession sales, merchandise, licensing fees, and other sources, the great bulk of it comes from television contracts.” As it stands, college sports are more popular than ever, meaning commercialization and money are higher than ever too.

1.2 The Power of ESPN in College Football

One of the major reasons for the significant money tied to college football is ESPN. During the 1980s, ESPN, a young sports television network, saw college football as a cheap way to provide programming. Today, however, ESPN has spent more than ten billion dollars to provide thousands of hours of college football programming. This business partnership, as both sides see it, has its significant benefits: “For the colleges, beyond money for athletic departments, the partnership provides exposure that college officials say increases recruiting prowess, alumni donations, and even the quality of applicants. For ESPN, college football feeds a voracious need for the kind of programming that makes the network indispensible to sports fans.” This leads to ESPN playing matchmaker and setting up major non-conference games, in addition to scheduling games on weeknights, leading student-athletes to miss classes and universities finding ways to facilitate these events. For instance, Ole Miss, specifically, was scheduled to play on two Thursday night games during the 2013 season, including Thanksgiving night, where they were given a select primetime television slot. Schools agree to these matchups with the promise it will provide them with national exposure and an increase in revenues. ESPN can even change the time of a kick-off for a game as

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6 Branch, “The Shame of College Sports.”
close as six days in advance, leading the universities to scramble to be prepared for game
day. Major schools and universities will do seemingly anything to please ESPN, but it has
been a long journey to get to where things stand today.

1.3 The Rise of the NCAA

Over the past century, college sports have become tied to the National Collegiate
Athletic Association (NCAA), which has become arguably one of, if not the most, powerful
independent governing bodies in all of America. From the late nineteenth century, college
sports were used for leisure and pleasure. While they were important to the students,
athletics played a significantly minor role in higher education. The early game of football
was deadly because of inconsistent rules across the country. This led to the formation of the
NCAA in 1910 to prepare uniform playing rules for intercollegiate athletics and protect
amateur athletes. From this point forward, college sports changed dramatically as an
increased public interest led to an emphasis on winning. This would quickly lead to the rise
of the recruitment process in college athletics. All the while, amateurism continued to be
championed by the NCAA and its member institutions as the game was becoming a major
business.8

Following World War II, as a result of the G.I. Bill, millions more Americans
attended colleges and universities. Because of the influx of students and the power of
technology such as the radio, college sports grew exponentially. During the 1950s, the
NCAA, under the leadership of Walter Byers, began to strengthen its enforcement
department and expanded its authority.9 In response to a point shaving scandal involving the
University of Kentucky basketball team, Byers and the infractions board suspended the

8 Mitten, Matthew J., Timothy Davis, Rodney Smith, and Robert Berry. Sports law and regulation: cases,
9 Ibid, 102.
Wildcats for an entire season. Byers then “lobbied a University of Kentucky dean—A. D. Kirwan, a former football coach and future university president—not to contest the NCAA’s dubious legal position (the association had no actual authority to penalize the university), pleading that college sports must do something to restore public support.”

As television became a staple in the American home, the NCAA negotiated television contracts for college football, opening the door for the large contracts today. Byers ultimately negotiated a deal for college football to make more revenues from television contracts than professional football at the time, increasing the amount of money tied to college football programming. The NCAA, at the same time, attempted to combat the commercialization and increased interest in their events. Criticism of the NCAA began as they were increasingly punishing schools directly and punishing coaches, student-athletes, and administrators indirectly. Many university leaders were becoming frustrated by the NCAA’s perceived lack of response to the increased commercialization of athletics. They further believed that the NCAA’s regulatory power was growing too quickly while not alleviating the problems it created.

It was not until the 1980s university leaders became involved in the NCAA and its rulemaking process. Because of a landmark decision in the Supreme Court case, Board of Regents v. Oklahoma in 1984, the current model of college athletics began to take shape. This case and its greater significance will be explored further in the third chapter. Because of Board of Regents, universities and conferences were free to make their own business decisions, in this case, designing their own television contracts. This significantly changed the amount of money tied to college sports as the NCAA lost the ability to control the

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10 Branch, “The Shame of College Sports.”
11 Ibid.
12 Mitten, Davis, Smith, and Berry, Sports law and regulation: cases, materials, and problems, 102-103.
amount of money schools could make off television contracts as they had done prior. University leaders ultimately took control of the organization as Byers lost power and retired. Through this new leadership, rules were made by university leaders to regulate practice hours, sizes of coaching staffs, and graduation rates, along with eligibility throughout the 1980s and 1990s. In 1997, the NCAA was restructured, making university leaders the participants in the legislative process, giving them control over the rules and the budget. One of the cornerstones of their leadership was an increased attention to academic reform, which was supposed to work to the betterment of the student-athlete. On the other hand, the NCAA signed major television contracts worth billions of dollars, leading to the enormous commercialization found in college sports today. Since 2000, as college sports have become more commercialized, an emphasis has been placed on increasing graduation rates and academic achievement as the student-athletes are expected to be amateurs also focused on school. This creates an interesting tension as universities have begun to spend more on their programs. The arms race “has led institutions to build bigger and more elaborate facilities and programs in revenue-producing sports in order to maintain their competitive and commercial edge. [This] has cemented the commercialization of intercollegiate athletics.”

1.4 The Function of the Student-Athlete

Star student-athletes are normally the most recognizable students on their respective campuses. They become celebrities, along with their teams, and some universities begin to prosper:

13 Branch, “The Shame of College Sports.”
15 Ibid, 106.
Licensed collegiate merchandise is a multi-billion dollar industry that provides a significant revenue stream for the National Collegiate Athletic Association (NCAA) and its member universities. Consumer demand for a university’s merchandise is heavily influenced by the success of its athletic programs. For example, Louisiana State University’s merchandise royalties nearly tripled after it won its first Bowl Championship Series title in 2003. Although student-athletes play a large role in the success of collegiate athletic programs, the universities—not the student athletes—cash in on the profits. Universities also capitalize on the popularity of individual players, some of whom gain national recognition and celebrity status. Despite the revenues and profits universities derive from the acclaim of star players, the NCAA prohibits student-athletes from receiving any of the financial benefits derived from their fame of the use of their likenesses.16

For example, Tim Tebow brought the University of Florida Gators money not only from jerseys sold with his number, but money from the national championships he helped the university win. However, Tebow received no money for what he did for that program. While this looks like an unfair practice, it is completely normal for every college athlete, regardless of sport, as they receive no part of the money they help universities receive for the events in which they compete.

Student-athletes are limited by the rules the NCAA places on them, despite this being, for some, the only opportunity for them to receive a college education. Being eligible to play a college sport in the first place is a hurdle that can be difficult for some people. There are countless pages in the NCAA manual on academics, medical clearance, and more focused on student-athlete eligibility, but this investigation will focus on amateurism eligibility. The NCAA strictly enforces guidelines on financial assistance to continue the tradition of amateurism. Schools may give a certain number of student-athletes scholarships that cover the cost of attending the university. However, anything in excess will lead to a loss of eligibility for student-athletes: “The NCAA’s rule of thumb on expenses provides that a

student-athlete may not receive money that exceeds the actual and necessary expenses involved in any authorized activity.\textsuperscript{17}

The NCAA’s rules show their intention is for student-athletes to play the game in its purest form, for enjoyment instead of employment as they are amateur athletes. Because of this, the NCAA has instituted a policy that student-athletes should receive no outside compensation for their participation in college athletics. Bylaw 12.1.2 outlines that a student athlete would lose their eligibility if:

- a) uses his or her athletic skill (directly or indirectly) for pay in any form in that sport
- b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation
- c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received
- d) receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations
- e) competes on any professional athletics team, even if no pay or remuneration for expenses was received
- f) after initial full-time collegiate enrollment, enters into a professional draft
- g) enters into an agreement with an agent\textsuperscript{18}

The NCAA does not want college athletics to have the perception of being like professional sports despite the billions in television contracts. While athletes make the schools much money, they are limited in the opportunities they have to make money while enrolled in college. It is an uphill battle for any college athlete to challenge NCAA regulations as courts have deferred to the independent governing body. This means for many student-athletes, particularly those playing football and basketball, it is best to follow the rules and hope a huge payday will be waiting for them after school in professional sports. For some, however,

\textsuperscript{17} Wong, Glenn M. \textit{Essentials of sports law}. 4. ed. Santa Barbara, Calif.: Preager, 2010, 253-254.
that does not happen. All the while, the NCAA will continue to use the notion of amateurism to defend the current model of college athletics.

1.5 Can College Athletics Change?

Over the rest of this thesis, the state of major college athletics today will be explored in greater detail. The tension between amateurism and commercialism will be explored as athletic programs are moving into new conferences to sign major television contracts. Next, the legal landscape surrounding college athletics will be evaluated, specifically showing what precedents have been made to continue the system of amateurism. The rest of this piece will look at the possibility of a landmark decision in *O’Bannon v. NCAA*, a trial challenging the amateur status of college athletes that has gained more steam than any similar case before. Additionally, the importance of the possibility of student-athletes to be able to unionize will be discussed in the context of *O’Bannon*. Each major decision and argument thus far will be assessed, along with the different possible outcomes of the case, showing that college sports are on the brink of great change as a system that has become unjust could be eradicated.

The tide against the NCAA and their policies limiting student-athletes has grown during the course of this case. A growing argument has become that student-athletes should be able to benefit from their fame, which is a result of the increasing popularity and commercialization of the sporting events.
2: COLLEGE ATHLETICS TODAY

2.1 The Myth of Amateurism

Without a doubt, there is a tension between the amateurism and commercialism in college sports. In its “Principle of Amateurism” the NCAA defines the concept by stating, “student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”

Colleges and universities can make millions of dollars on athletic events while the student-athletes who participate in these events receive at most a full-ride scholarship to these institutions. Many athletes come from a poor background and look at college sports as an opportunity to take them out of the lower class. For some, this is an opportunity to become the first in their family to receive a college education.

Following his retirement as president of the NCAA, Walter Byers claimed that the powerful conferences and universities were ruining college sports. Further, he renounced the

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NCAA’s claim of amateurism. Byers also wrote that the term “student-athlete” was created in the 1950s by the NCAA to be vague and support the notion of amateurism.

College players were not students at play (which might understate their athletic obligations), nor were they just athletes in college (which might imply they were professionals). That they were high-performance athletes meant they could be forgiven for not meeting the academic standards of their peers; that they were students meant they did not have to be compensated, ever, for anything more than the cost of their studies. Student-athlete became the NCAA’s signature term, repeated constantly in and out of courtrooms. Using the “student-athlete” defense, colleges have compiled a string of victories in liability cases.

Byers became fearful of the increasing commercialization of amateur college sports. As previously mentioned, following the Supreme Court decision in the Board of Regents case, Byers and the NCAA lost its control on the business decisions of college and universities. Money, especially television contracts, began to drive everything as it does today. Are the games just for recreational fun? Universities can claim that, but there are plenty of current and former student-athletes who beg to differ.

2.2.1 The Tide Has Turned: How Conference Realignment Has Changed College Sports

The first major change in college athletics today is conference realignment. For decades, conferences seemed to remain the same filled with teams from the same regions, developing rivalries and creating events out of these matchups. Commissioners often hold power over the universities in their conference, paling in comparison, though, to the power of the NCAA. However, as the money increased in college football, universities scrambled to be in the conferences with the most television revenue. The Southeastern Conference (SEC) most recently signed a deal with ESPN for $2.2 billion, while the Atlantic Coast Conference (ACC) signed with ESPN for $3.6 billion dollars to be shown during prime television slots.

These two conferences selected teams from other major conferences between 2011 and 2013

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20 Branch, “The Shame of College Sports.”

21 Ibid.
“as colleges forsake geographic loyalties in pursuit of more lucrative deals.”²² The SEC added teams from Texas and Missouri, while the ACC added teams from Indiana, Kentucky, New York, and Pennsylvania. Combine ESPN’s power with these major conference schools becoming richer, minor conferences and their universities are doing anything they can to stay relevant. For example, Texas Christian University (TCU) agreed to play games on Mondays, Tuesdays, and Wednesdays in order to receive exposure for years, which ultimately paid off as they became a member of a major conference, the Big 12.

The best example of this system is ESPN’s ability in the rise of the Boise State University football program. The university had an attractive offensive system in addition to a unique blue turf football field. Combine this with their willingness to play anyone on any night at any time, the school began to attract better players and began to be ranked annually. The school made it to some of the best postseason bowl games, hosted attractive non-conference matchups made for television, and has received more attention than many minor college football teams. Their rise was great for the small Western Athletic Conference (WAC), but once Boise State became more popular, they left the WAC for more money in the Mountain West Conference.²³ This system of the have and have-nots is being looked at closely and could be the impetus of major change in the future. As more money is given to successful teams and conferences, most of it is coming from ESPN.

2.2.2 The Tide Has Turned: How “Johnny Football” Has Changed College Sports

One of the best case studies into the changing culture around college sports involves Johnny Manziel, a former football player for Texas A&M University Aggies. Prior to his arrival, Texas A&M was a mediocre football program in the Big 12 Conference.

²² Miller, Eder, and Sandomir. "College Football’s Most Dominant Player? It’s ESPN."
²³ Ibid.
Contextually, it is important to point out that prior to his arrival, players such as Terrell Pryor, Reggie Bush, and more that violated NCAA rules, were vilified and significantly punished for their actions. As each scandal took place, there was “much wringing of hands. Critics scold[ed] schools for breaking faith with their educational mission, and for failing to enforce the sanctity of ‘amateurism.’” However, in 2012, things changed as a new coach was brought in along with the move of Texas A&M to the SEC. The Aggies started Manziel, a redshirt freshman, at quarterback in their first game of the season, which was selected to host ESPN’s popular “College GameDay” television show, which takes place on a college campus every week. The A&M athletic department claimed that this exposure was worth around $6.5 million. Manziel went on to become the winner of college football’s most valuable player award, the Heisman Trophy, and ESPN followed the newfound star, tracking seemingly everything he did.

During the summer of 2013, Manziel’s eligibility came into question. Reports said “Manziel was paid for signing hundreds of autographs for memorabilia brokers during the off-season.” If this was true, Manziel violated NCAA rules and he, along with Texas A&M would face possible punishment from the governing organization. Public perception quickly turned in Manziel’s favor against the NCAA as many believed this rule was unreasonable. For the first time, seemingly, the student-athlete was not vilified for a perceived NCAA rules violation. People believed a student-athlete should be able to profit off of their name and talent.

24 Branch, “The Shame of College Sports.”
25 Ibid.
This case showed many problems throughout the college athletics system. First, the NCAA did not ultimately have the power to force autograph dealers to talk to them about Manziel. Moreover, the NCAA struggled to find sufficient evidence to incriminate Manziel in this situation. In a climate that was not friendly to the NCAA, it looked as if they could not make a right decision.\footnote{Schroeder, George. "Analysis: The Johnny Manziel autograph case." USA Today. http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/15/johnny-manziel-texas-am-ncaa-investigation-autographs-for-money/2662257/ (accessed February 10, 2014).} As the 2013 season was approaching, the country wanted to know if they would get to watch the reigning Heisman Trophy winner play. Manziel was ultimately suspended for the first half of the opening game of the 2013 season against Rice. The NCAA and Texas A&M issued a statement saying “Manziel did not ‘accept any numeration for’ his autograph, according to the NCAA and Texas A&M. So, he’s being punished for ‘permitting’ someone else to sell his name.”\footnote{Gregory, Sean. “Johnny Manziel Suspension Is The World’s Most Confusing Punishment Comments.” Time Sports. http://keepingscoreblogs.time.com/2013/08/29/johnny-manziel-suspension-the-worlds-most-confusing-punishment/ (accessed February 11, 2014).} This ruling confused many and increased the narrative that the NCAA was hypocritical in its rulings. The punishment was significantly less than they had given in similar cases, such as Bush and Pryor. The NCAA, in comparison to those situations, did not look as powerful and strong in the fall of 2013. It could be argued that race played a factor in public criticism of these issues as Manziel was white and the others were African-American. However, it could be also be argued that the criticism had just changed over the few years as the narrative against the NCAA has changed.

2.3 The University of Mississippi and the NCAA

The University of Mississippi, like any major college sports power, is impacted by the climate of college athletics today. As a member of the Southeastern Conference, the university is the perfect example of a big-time college athletic program. First, the athletic
department’s budget involves a substantial amount of money. In order to be competitive on college sport’s biggest stage, programs need money to be competitive. The budget for the Ole Miss athletic department during the 2013-2014 academic year is about $70 million.\(^{30}\) The Ole Miss Athletics Foundation, a private organization funds over $10 million in operations. Moreover, the university receives more than $400,000 in student fees. While it takes millions of dollars to fund Ole Miss’ fourteen official athletic teams, millions come in revenue from the school’s major sports. “Football continues to be the breadwinner in Oxford. The Rebels project revenue of $31.7 million from Hugh Freeze’s team, compared with expenses of slightly over $13 million, for a projected profit of $18.7 million. Men’s basketball is projected to make about $2.8 million, even after a 21-percent increase in funding for the program.”\(^{31}\)

Second, the University of Mississippi has a major fundraising organization for their athletics department, the aforementioned Ole Miss Athletics Foundation. These types of organizations provide athletic departments money to help them be competitive and can be found at seemingly every big-time university. According to its website, “alumni and friends of the Ole Miss Athletics Department can contribute to the department to aid in financing the high costs of educating student-athletes and improving facilities. Membership is open to all interested persons, and all donations are tax deductible.”\(^{32}\) Because of organizations like the Ole Miss Athletics Foundation, the university has, or is in the process, of building attractive facilities in the hope the nation’s best athletes will be attracted to play for them. As of fall


2013, a new basketball arena is in the early stages of development. Further, major improvements to the football stadium are being designed. To fund this arena, the Ole Miss Athletics Foundation is holding a fundraising campaign to bring in $150 million. The university plans to use $70 million towards a new basketball arena with the other money going to not only improve the football stadium, but other athletic facilities.  

Most major universities are growing their athletic programs. There are some problems that come along with this growth and the increasing popularity of their events. According to Dan Jones, Ole Miss’ Chancellor, the role of athletics in the life of the university:

has evolved rapidly over the last few years. [Our athletic director] refers to athletics as a mechanism for keeping alumni engaged with the university. The growth of revenue and the constraints imposed by the law on regulating salaries and other athletic spending has led to an unhealthy aspect of college sports. Managing the ethics and legal issues associated with high budgets in athletics is a strain on the university…I’d love to see the ability to regulate salaries and other spending on athletics. In an unregulated market, the facility wars and competition for the best coaches through high compensation will continue. No single university can solve this problem and maintain excellence in athletics.

While Chancellor Jones admits athletics does serve a positive purpose for the university, he also admits the system is growing to become something that will be difficult to regulate. Ross Bjork, athletic director for the University of Mississippi, believes that governance and confidence in the NCAA are the biggest glaring problems for college athletics. He believes not only is the enforcement process broken, but public opinion of the NCAA and the term amateurism has led to the perception of a weak organization. When discussing money’s role in his athletic department, Bjork argues money makes Ole Miss competitive on and off

the field. He believes that to build a program to last, a university must be resourceful with its money. Ole Miss has one of the smallest budgets and programs in the Southeastern Conference.

2.4 Public Perception of the NCAA

Currently, because of cases like Johnny Manziel’s, the NCAA has become less than favorable in the public eye. People have lost faith in the organization and are waiting for its demise. Many believe the NCAA picks and chooses who it punishes, penalizing A.J. Green and Dez Bryant significantly and not penalizing Cam Newton. Further, they absolutely bungled an investigation into the Miami football program, using tainted evidence to punish the Hurricanes. Finally, citizens saw the plight of the student-athlete in a privileged football player from Texas A&M.

It can certainly be said that “atmospheric conditions have never been so predisposed toward an athlete and against the NCAA.” This has resulted in a perception that the NCAA is becoming inept while giving hypocritical rulings:

It is hard to know what is worse: the cases in which the NCAA investigates and imposes penalties, or the cases in which it does nothing. Its patchwork effort does little to inspire respect or deterrence. Of course, this inconsistency is just one of many, larger hypocrisies besetting the NCAA these days. On several fronts, the NCAA finds itself in a credibility quicksand, and every action it takes lately seems to sink it deeper in the muck.

At this moment, the hottest debate between sportswriters, fans, coaches, and players is whether or not student-athletes should receive compensation for what they do for their

36 Ibid.
37 Travis, Clay. "NCAA Wobbles As Johnny Manziel Investigation Continues
38 Branch, “The Shame of College Sports.”
schools. Much of this debate is centered on the power of the NCAA and questions the current model of college athletics.
3: THE LEGAL LANDSCAPE SURROUNDING COLLEGE SPORTS

3.1 Legal Principles of College Athletics

There are three legal principles important to the way courts look at the NCAA: limited judicial review, standing, and injunctive relief. These principles impact the way a court considers how to intervene in litigation involving the NCAA, from deferring to the organization or completely changing the organization’s policy.

3.1.1 Judicial Deference

One legal principle of college athletics is judicial deference. This principle believes a court should not intervene in litigation involving a voluntary organization’s own rules and membership. Using this principle, a court will only step in if rights guaranteed by the Constitution, by law, or by the association itself are violated. Many NCAA eligibility rules have been brought to court. When their rules are challenged and successfully overruled, one of the following conditions should be present: “(1) the rules violate public policy because they are fraudulent or unreasonable, (2) the rules exceed the scope of the association’s authority, (3) the organization violates one of its own rules, (4) the rules are applied unreasonably or arbitrarily, (5) the rules violate a law, or (6) the rules violate an individual’s constitutional rights.”41 If one were to embrace this principle they would argue that colleges, universities, coaches, and student athletes all voluntarily participate in college sports, so courts should defer to the NCAA unless one’s rights is being violated.

41 Wong. Essentials of sports law, 179.
3.1.2 Standing

Another legal principle important to college athletics is standing, which is when one demonstrates their right to be in court. To establish standing, the person challenging must satisfy three criteria. First, one must show they are negatively affected by the organization’s actions or rules. Second, one must show their interest is protected by the Constitution, laws, legal principles, or the association’s rules. Finally, the plaintiff specifically must be the one negatively affected by the organization’s actions. This situation can arise “in the case of an amateur association and one of its member institutions. An individual student-athlete is not directly involved in the controversy because the individual is not a member of the [NCAA], but the school itself is. Consequently, a student-athlete who brings suit must show actual harm has occurred to him or her.”

3.1.3 Injunctive Relief

Finally, another legal principle important to college athletics is injunctive relief. Instead of monetary damages, this type of relief provides “a fair, nondiscriminatory form of judgment to redress a wrong or an injury. Injunctive relief consists of a court order to one party either to do or refrain from doing a specific action. This type of relief is particularly important in sports in cases of eligibility and participation…Injunctive relief may be critical to the student-athlete since it allows him or her to continue competing.” Injunctive relief should force organizations like the NCAA to stop their current action and keep them from doing it in the future. Once a person is granted standing in a court of law, “a judge generally considers three factors before granting or denying any form of judicial relief: the nature of the controversy, the objective of the injunction, and the comparative hardship or

42 Ibid, 182.
43 Ibid, 178.
inconvenience to both parties. The judge then weighs these factors...before making a determination.”

These legal principles are important to understand before one looks at the different legal battles the NCAA is involved in. Each plaintiff should be well versed in these principles in order to craft a successful argument as each principle plays a part in every case that will be evaluated. Courts will look at and consider the three whether a case involves the NCAA regulatory action or the NCAA and antitrust law.

3.2 NCAA Regulatory Action

NCAA power has been challenged throughout its history. Recently, its power as a private voluntary governing body over college athletics has come into question. When it comes to regulatory actions taken by the NCAA, high courts have normally deferred to the NCAA. An evaluation of landmark cases will show how courts have responded through the years.

3.2.1 NCAA v. Tarkanian

Following a stint at Long Beach State University (LBSU), Jerry Tarkanian went to coach at the University of Nevada-Las Vegas (UNLV). Tarkanian left LBSU under NCAA probation and it was not long before he would get UNLV in hot water. In 1977, the NCAA enforcement staff accused Tarkanian of committing ten rules violations. In addition to putting UNLV on probation, “the NCAA took the unusual step of ordering UNLV to show cause why additional penalties should not be imposed if it should fail to discipline Tarkanian by removing him completely from the University's intercollegiate athletic program during the

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44 Ibid, 183.
UNLV complied with the NCAA and demoted Tarkanian to become a physical education instructor.

Tarkanian responded by suing the NCAA, claiming they were a state actor, depriving him of his Fourteenth Amendment due process rights. The NCAA maintained they were a private actor, which could not violate Tarkanian’s constitutional rights. The case made it to the Supreme Court, where a 5-4 decision sided with the NCAA, saying the organization was not a state actor, thus not violating the coach’s Fourteenth Amendment rights. Justice Stevens points out in the majority opinion that UNLV wanted to retain Tarkanian, thus making them adversaries to the NCAA instead of allies. He writes, “UNLV could have retained Tarkanian and risked additional sanctions, perhaps even expulsion from the NCAA, or it could have voluntarily withdrawn from the Association.”

Further, Stevens concludes this opinion by definitively stating, “it would be more appropriate to conclude that UNLV has conducted its athletic program under color of the policies adopted by the NCAA, rather than that those policies were developed and enforced under color of Nevada law.”

This case is important as it set a precedent for anyone involved with college athletics:

An individual who felt that the NCAA had not provided a fair hearing was still without recourse. The NCAA has fared well in convincing those that have reviewed its imposed penalties that its procedures and sanctions are generally fair. However, the possibility of impropriety remains. Because the NCAA serves the roles of prosecutor, judge, and jury and because the review procedure also utilizes an NCAA organization as the “appellate” authority, there are no external checks on the NCAA to ensure accuracy and fairness of findings and penalties imposed on private citizens.

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46 Mitten, Davis, Smith, and Berry, Sports law and regulation: cases, materials, and problems, 174.
47 Ibid, 175.
NCAA v. Tarkanian proved that the NCAA is not a state actor. If one were to accuse them of being a state actor violating their constitutional rights, they were not going to win in a court of law because of this case.

### 3.2.2 Brennan v. Board of Trustees for University of Louisiana Systems

Following a suspension for a failed NCAA administered drug test in 1997, student-athlete John Brennan sued the University of Southwestern Louisiana. Brennan claimed the drug testing policy violated his right to privacy and due process. A Louisiana Court of Appeals sided with the NCAA, saying Brennan knew the rules prior to becoming an athlete. Chief Judge Lottinger wrote the opinion, stating Brennan “has a diminished expectation of privacy…While a urine test may be an invasion of privacy, in this case, it is reasonable considering the diminished expectation of privacy in the context of intercollegiate sports and there being a significant interest by the NCAA that outweighs the relatively small compromise of privacy under the circumstances.”

Also of importance, Lottinger wrote “it is clear that participation in intercollegiate athletics is not a property right.” According to Brennan, student-athletes know the eligibility rules in advance and they could pursue other opportunities if they do not want to abide by them as participation is not a property right.

### 3.2.3 Bloom v. NCAA

One of the more recent cases involved Jeremy Bloom, a professional skier, who received endorsements for modeling following his participation in the Olympics. Bloom wanted to play college football for the University of Colorado in 2002, yet the NCAA declined a waiver from the school asking for permission for Bloom to participate in advertisements to advance his skiing career while participating in college football. Bloom

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49 Mitten, Davis, Smith, and Berry, *Sports law and regulation: cases, materials, and problems*, 223.
50 Ibid.
appealed the ruling in 2004, hoping to play football after having signed endorsement deals. The Colorado appellate court rejected his request of preliminary injunction. The court said that Bloom could not both play football and participate in advertising as the NCAA’s rules had been put in place to protect amateurism. They claimed that student athletes are to be amateurs motivated by getting an education while protected from exploitation. While this court allowed Bloom, the student-athlete, to have third-party standing, they once again deferred to the NCAA’s regulatory action. Justice Dailey of the Colorado appellate court wrote “the NCAA’s purpose, in this regard, is not only ‘to maintain intercollegiate athletics as an integral part of the educational program,’ but also to ‘retain a clear line of demarcation between intercollegiate athletics and professional sports.’”

Further, Dailey wrote, “salaries and bonuses are an acceptable means for attaining income from professional sports, but endorsement income is not acceptable if a student-athlete wishes to preserve amateur eligibility. According to NCAA officials, endorsements invoke concerns about the ‘commercial exploitation of student-athletes.’”

Evidenced by these cases, NCAA regulatory action is usually met by deferential action by courts of law. Normally, it is argued student-athletes, coaches, and universities know the rules and regulations when the decided to participate in NCAA sanctioned events and could have pursued other alternatives. The courts, however, have been more willing to listen to plaintiffs over time and, as Bloom shows, student-athletes can have standing to challenge NCAA eligibility determinations. Courts will interfere, however, when issues arise involving NCAA authority and antitrust law.

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51 Ibid. 229.
52 Ibid.
3.3 NCAA Authority and Antitrust Law

While courts often defer to the NCAA on their regulations and rules, high courts have stepped in through the years when the NCAA is looked at as violating antitrust law. Courts normally believe the NCAA should be able to regulate eligibility. Over time, however, the NCAA has come under strict scrutiny for its regulation of business under antitrust law. An evaluation of landmark cases will evaluate how courts have handled this issue throughout the years.

3.3.1 NCAA v. Board of Regents

Prior to this case, courts deferred to the NCAA when it was being challenged for violating the Sherman Act. As previously mentioned, things changed once the NCAA college football television plan was challenged in 1984. This plan had limited the number of games a team could appear on television. The University of Georgia and the University of Oklahoma were penalized by the NCAA following their decision to negotiate independent television contracts to have more televised games. The two schools filed suit against the NCAA, claiming it fixed the price of college football telecasts and held a monopoly over televised college football, violating the Sherman Act.

The case made it to the Supreme Court, where a 7-2 decision claimed “the NCAA television plan violated antitrust laws through an unreasonable restraint on trade and also illegal price fixing…The majority of the justices felt that the harm to the consumer (fewer televised games) outweighed the benefits gained by the NCAA.” Justice Stevens wrote in the majority opinion, “the plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on

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53 Wong, Essentials of sports law, 506.
alumni donations, tuition rates, or any other revenue-producing activity." Stevens also points out that “many more games would be televised in a free market than under the NCAA plan.” Board of Regents laid the groundwork for conferences and universities to negotiate the enormous television contracts found in the sport today. The Supreme Court, in this case, evaluated the NCAA differently as a regulator of commerce, instead of a regulator of competition.

3.3.1.1 The Sherman Antitrust Act and the Rule of Reason

The Sherman Antitrust Act is important to understanding Board of Regents. The Supreme Court distinguished that “the NCAA’s restrictions on televised college football games as commercial activity to Sherman Act Scrutiny. They conclude[d] that NCAA members ‘compete against each other to attract television revenues, not to mention fans and athletes,’ and therefore are economic competitors in some instances.” First written in 1890, the Sherman Antitrust Act was the:

First U.S. legislation enacted to curb concentrations of power that restrict trade and reduce economic competition. Proposed by Sen. John Sherman, it made illegal all attempts to monopolize any part of trade or commerce in the U.S. Initially used against trade unions, it was more widely enforced under Pres. Theodore Roosevelt. In 1914 Congress strengthened the act with the Clayton Antitrust Act and the formation of the Federal Trade Commission. In 1920 the U.S. Supreme Court relaxed antitrust regulations so that only “unreasonable” restraint of trade through acquisitions, mergers, and predatory pricing constituted a violation.

One important legal term related to this piece of legislation is the Rule of Reason. When the Rule of Reason is enacted, “the anticompetitive effects of the challenged restraint are balanced against its precompetitive effects on a case-by-case basis, considering the specific

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54 Mitten, Davis, Smith, and Berry, Sports law and regulation: cases, materials, and problems, 247.
55 Ibid.
56 Ibid, 250.
Another important legal term related to the Sherman Act is per se analysis. Courts can use per se analysis when “certain restraints are conclusively presumed to be illegal as a matter of law because of their significant adverse effects on competition and lack of redeeming precompetitive virtues.”\(^{59}\) The Sherman Act is an important policy that was evaluated in the upcoming cases.

### 3.3.2 Law v. NCAA

In 1992, the NCAA decided to limit the earnings of assistant coaches to $16,000, which became known as the REC ("restricted earning" coaches) Rule. These coaches challenged the NCAA, claiming the REC rule violated the Sherman Act. The NCAA claimed this rule was put in place to maintain competitive equity and lower the costs of running athletic programs. A district court and later a circuit court granted summary judgment in favor of the coaches by issuing a permanent injunction keeping the NCAA from regulating coaches’ salaries. Judge Ebel of the Tenth Circuit Court said that “the NCAA’s cost containment justification is illegitimate because…[r]educing costs for member institutions without more, does not justify the anticompetitive effects of the REC Rule.”\(^{60}\) Further, Ebel wrote, “on its face, the REC Rule is not directed towards competitive balance nor is the nexus between the rule and a compelling need to maintain competitive balance sufficiently clear on this record to withstand a motion of summary judgment.”\(^{61}\) This case continued the tradition of *Board of Regents* as the courts used rule of reason analysis to determine the NCAA was acting commercially instead of regulating amateur athletics. Specifically, Ebel writes:

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\(^{58}\) Mitten, Davis, Smith, and Berry, *Sports law and regulation: cases, materials, and problems*, 251.

\(^{59}\) Ibid.

\(^{60}\) Ibid, 260.

In *Board of Regents*, the Court rejected a nearly identical argument from the NCAA that a plan to sell television rights could not be condemned under the antitrust laws absent proof the NCAA had power in the market for television programming. “As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anti-competitive character of such an agreement.’”

It was becoming obvious that if the NCAA were acting in a commercial capacity, they would not be protected from antitrust litigation, especially when their policies were anti-competitive in character.

### 3.3.3 *Smith v. NCAA*

Following her undergraduate career as a volleyball player at St. Bonaventure University, Renee Smith was denied the opportunity to play volleyball at the institution she was attending for graduate school. The Postbaccalaureate Bylaw only allows student-athletes to continue to participate in their sport at the undergraduate institution they attended. Smith filed suit against the NCAA, claiming this violates the Sherman Act because it limited her opportunities. Circuit Judge Greenberg wrote in the opinion that while *Board of Regents* applied the Sherman Act to business regulations, the court was not sure if it applied to eligibility requirements. He writes, “the NCAA’s adoption of a rule furthering its noncommercial objectives, such as preserving the educational standards of its members, is not within the purview of antitrust law…Rather than intending to provide the NCAA with a commercial advantage, the eligibility rules primarily seek to ensure fair competition in intercollegiate athletics.” This was in fact an eligibility matter and not an antitrust issue, so the court deferred to the NCAA and upheld their requirements in this case.

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63 Ibid, 264.
3.3.4 *Banks v. NCAA* 

Following an injury after his third year of eligibility at Notre Dame, Braxston Banks decided to enter the NFL Draft and not return to school for his senior season. Banks was not taken in that year’s NFL Draft. Despite having one year of eligibility left, Banks could not play college football as he had entered a professional draft, thus ending his college career. Banks sued the NCAA, claiming this rule violated antitrust law as it limited his opportunities for the future. The NCAA claimed this was an eligibility issue designed to protect amateurism.

The Seventh Circuit Court of Appeals sided with the NCAA, saying the “no draft” rule did not violate antitrust law as it is an eligibility requirement. Circuit Judge Coffey wrote in the opinion, “Banks allegation that the no-draft rule restrains trade is absurd. None of the NCAA rules affecting college football eligibility restrain trade in the market for college players because the NCAA does not exist as a minor league training ground for future NFL players but rather to provide an opportunity for competition among amateur students pursuing a college education.”

Further, Coffey argued, “in order for the NCAA Rules to be considered a restraint of trade in violation of the Sherman Act, Banks must allege that the no-draft and no-agent rules, as the dissent explains are terms of employment that diminish competition in the employment market.”

Coffey makes it clear the policies implemented by the NCAA, such as the no-draft rule, are implemented to distinguish college athletics from professional athletics. Specifically, he writes:

In contrast to professional football, NCAA student-athletes are required to attend class, maintain a minimum grade point average, and enroll and complete a required

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64 Ibid. 267.
65 Ibid.
number of courses to obtain a degree. The no-draft rule is evidence of the academic priority of the NCAA because it forecloses a student-athlete from hiring an agent or entering the NFL draft and after failing to meet the professional standards, returning to play college football to improve his football skills in hopes of entering an upcoming draft. In denying a college football player the right to play professional football (entering the NFL draft) and then return to college football, the no-draft rule merely serves as an NCAA eligibility requirement and precludes the existence of a college football labor market for athletes who are ineligible by NCAA standards.\textsuperscript{66}

According to Coffey, the NCAA rules are in place because student-athletes are meant to be amateur students participating in collegiate athletics. They are not employees of the universities they compete for and, based on this ruling, should not be treated as such, despite having many responsibilities placed on them.

\textsuperscript{66} Ibid.
4: O’BANNON v. NCAA

As previously mentioned, courts have deferred to the NCAA for many years in many situations. Today, however, the current model of college sports has come under intense scrutiny. Enter Ed O’Bannon:

O’Bannon v. NCAA, a lawsuit filed in July 2009 by former UCLA basketball star Ed O’Bannon on behalf of other former college athletes against the NCAA and the Collegiate Licensing Company (CLC), tackles the issue of using the "likeness" of athletes in rebroadcasts of games, DVD sales, photos, video games, etc., without compensation after an athlete graduates or stops playing in the NCAA. This likeness could be the athlete him or herself in DVD of a classic game, or a video game "version" of an athlete that almost exactly resembles him or her, save the name (these names can be easily downloaded and incorporated into the given game, however).  

This section will take an in-depth look at O’Bannon v. NCAA by evaluating a timeline of the case and each side’s plight.

4.1 Who is Ed O’Bannon?

Before looking at the case specifically, it is important to understand the man became the center of this case. To many, Ed O’Bannon has become the figure of the plight of the student-athlete. In 1990, O’Bannon, a highly touted recruit, switched from his commitment to play basketball for the aforementioned Jerry Tarkanian at UNLV to play for the University of California-Los Angeles (UCLA) Bruins. Less than a week prior to the beginning of the 1990-1991 season, O’Bannon tore his ACL and missed the entire season. O’Bannon recovered, and in his junior season, the Bruins made it to the NCAA tournament, only to fall to the University of Tulsa in their opening game. Following that game, O’Bannon took it

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upon himself to be a vocal leader for the team. In his senior season, he led the Bruins to a 32-1 record and the 1995 national championship. In the title game, O’Bannon had thirty points and seventeen rebounds.\(^{68}\)

O’Bannon was the ninth selection by the New Jersey Nets in the NBA draft following his senior season. However, he had an extremely unsuccessful transition to the NBA, not even finishing two seasons with the Nets. He finished his second professional season on the bench for the Dallas Mavericks before being released by the Orlando Magic before the following season. O’Bannon played seven seasons for European teams in Poland, Spain, and Italy. Ultimately, he was labeled as a bust in professional basketball.\(^{69}\) In 2004, the former Final Four MVP moved to Las Vegas, Nevada after retiring from basketball. Realizing he could only survive for so long on his basketball earnings, O’Bannon began working at a car dealership. Many would not believe a former basketball star would make crazy television commercials for his car dealership, but he was not afraid to completely immerse himself in this new stage of life.\(^{70}\) It would be only five years later, however, before O’Bannon would put his name back in the news.

In 2009, it was announced O’Bannon would be the lead plaintiff in a lawsuit alleging claiming former college athletes are illegally denied profits made by the NCAA through their likeness. “I've always been one to wonder why former student athletes weren't compensated for their games on television,’ said O'Bannon. ‘The NCAA is making money off of DVDs and old reruns with people like me in it. Hey, I'm no longer in college.

\(^{69}\) Ibid.
Something is wrong here.""71 This case has thrust O'Bannon back into the national spotlight and while he had a short moment of fame during the 1995 Final Four, this case could give him more of an impact on college sports than he ever thought imaginable.

**4.2 2009-2014: O’Bannon v. NCAA from Then to Now**

In May of 2009, former Nebraska football player, Sam Keller filed a class action complaint against the NCAA, Electronic Arts, Inc., and the Collegiate Licensing Company in a United States District Court in San Francisco, California. Keller claimed the NCAA and Electronic Arts, when creating video games like their famous NCAA Football series, had “gone too far in using the likenesses of college players who are prohibited from sharing in the games’ profits…the games make illegal use of football and basketball players' names — through the download of team rosters — and unidentified but scarcely hidden likenesses and that the NCAA condones the practice in violation of its own rules.”72 Only three days later, the NCAA would publicly say “our agreement with EA Sports clearly prohibits the use of names and pictures of current student-athletes in their electronic games. We are confident that no such use has occurred.”73

Two months later, Ed O’Bannon was recruited by Sonny Vaccaro to be the lead plaintiff in an extremely similar lawsuit. Vaccaro was a prominent name in college athletics, as he:

helped transform college basketball in the 1970s by brokering sponsorship deals with coaches and schools for companies like Nike, Adidas and Reebok. The companies paid the schools, and the coaches and players wore a single brand of shoes and apparel, setting into motion a multibillion-dollar commercial industry. Now an unpaid

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consultant for the plaintiffs and their attorneys at the firm Hausfeld LLP, Vaccaro says he owes it to the kids, whom he believes have been treated unfairly by the NCAA.\textsuperscript{74}

On July 21, 2009, they filed a class action lawsuit in a Northern California court. As in the Sam Keller case, the NCAA claimed it had done nothing wrong and filed a motion to dismiss the case. By February 2010, the motion to dismiss was thrown out by the San Francisco district court. “In her opinion, Judge Claudia Wilken wrote: ‘Accordingly, under a rule of reason analysis, O’Bannon pleads facts to make out a prima facie case that Defendants' conduct constitutes an unreasonable restraint of trade.’”\textsuperscript{75} One month later, O’Bannon’s suit, representing antitrust violations, was consolidated with Keller’s suit, representing the issue of publicity of student-athletes in college sports. For the first time in many years, it looked as if the NCAA might face a substantial legal challenge.

\textbf{4.3 The Class Action Certification of O’Bannon}

For decades, using the rule of reason, courts would have denied cases similar to \textit{O’Bannon} against the NCAA. However, because of Judge Wilken’s ruling in 2010, the case proceeded. Over the course of the next two years, many former student-athletes joined the case against the NCAA, highlighted by basketball legends Bill Russell and Oscar Robertson. It would not be until August of 2012 that this case would take its next major turn.

“O’Bannon filed a motion to include current student-athletes in the class, seeking temporary trusts for current student-athletes, to be funded with proceeds for playing in football and basketball games which they claim is the sale of their names, images and likenesses. They want the trust available at the conclusion of their intercollegiate athletics eligibility.”\textsuperscript{76}  

\begin{itemize}
  \item \textsuperscript{74} PBS. "The NCAA Lawsuit."
  \item \textsuperscript{75} Ibid.
  \item \textsuperscript{76} "Student-athlete likeness lawsuit timeline." NCAA Legal Issues.
\end{itemize}
response, the NCAA claimed this was done because the plaintiffs realized that they did not prevent their licensing opportunities following graduation. The NCAA said:

This about face runs [the plaintiffs] smack into a very old argument, and one that the NCAA has defeated in court many times. Plaintiffs now claim that the NCAA's financial aid rules restrain 'trade' by preventing schools from 'paying' for 'labor' of certain current student-athletes by offering to share media royalties with those student-athletes. They want to be cut in on TV revenues, but every court that has examined this type of issue has said that plaintiffs have no right to such a claim. Many courts, including the United States Supreme Court, have repeatedly rejected the notion that the NCAA's financial aid rules violate the Sherman Act by preventing these sorts of commercial transactions between schools and current student-athletes. Plaintiffs want the court to believe that student athletes are the same as professional athletes and unionized employees – which is pure fiction. We are confident that plaintiffs will find no more success in this case than they have in past cases.77

Because of O'Bannon, the debate over the rights of student-athletes began to enter public consciousness:

On the one hand, scandals like Penn State have fueled perceptions that college sports in general are morally dysfunctional, while published articles are marshaling long lists of players and the specific injustices and abuses they’ve purportedly suffered...“Certainly, in its day-to-day business, from enforcement to apparel sales, it seems that of late the NCAA cannot do anything right,” says Timothy Liam Epstein, a partner at SmithAmundsen LLC and Chair of that firm’s Sports Law Practice Group.78

The NCAA has seemingly been on damage control ever since. For example, NCAA Executive Vice President and General Counsel Donald Remy published:

The simple, straightforward truth is that the NCAA has never licensed student-athlete likeness or interfered with their ability to sell or license their collegiate likenesses... While the public shorthand for this is the “O'Bannon case,” it now it appears that Mr. O'Bannon's lawyers are largely abandoning him, as well as Bill Russell and Oscar Robertson, and looking for other plaintiffs, hoping they may succeed with new claims. The NCAA remains confident it will prevail when this case is appropriately tried: in court, with all the evidence.79

77 Ibid.
The NCAA was looking for any sort of claim that would give them the upper hand. They realized it was losing favor in the public so it quickly issued this statement to prevent what they deemed as prejudice against the organization. It looked as if the NCAA was fighting an uphill battle as public consciousness was gaining behind O’Bannon: “Equally to the point, what happens if the defense ultimately prevails? The answer lies not just in the impact of this one case, but in the climate of public opinion that surrounds it. Win or lose, O’Bannon and his co-plaintiffs have given the NCAA’s critics a powerfully invigorated voice. The Internet swelled that voice to a din.”

However, the damage had been done and the case was about to move forward very quickly.

In October 2012, the NCAA filed a motion to strike down the class-action certification of the case. Further, they wanted to strike down allowing live broadcasts to be part of the case as they believed that changed the nature of O’Bannon. The NCAA asserted the plaintiffs “ha[d] basically deserted the claims of O’Bannon, Russell, and Robertson and are trying to bring a backdoor suit against the NCAA’s core principle of amateurism. This is an astonishing admission that their original claims are invalid.” Less than one month later, the NCAA filed a brief in a federal court reiterating this position by claiming the plaintiffs were attempting to “conduct litigation by ambush.”

In March 2013, the NCAA filed yet another brief in the San Francisco federal court rejecting the class-action nature of the lawsuit. In order to defend itself, the NCAA went

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back to its argument that the organization works for the betterment of the student-athlete.

The NCAA asserted:

We are pleased to move from the theory to the factual part of the case so we can show the court and the public what we have been saying all along: The NCAA is not exploiting current or former student-athletes but instead provides enormous benefit to them and to the public. This case has always been wrong -- wrong on the facts and wrong on the law. We look forward to its eventual resolution in the courts. Amateurism in intercollegiate sports has been repeatedly upheld by courts at all levels from the Supreme Court in 1984 to a District Court just last month. 83

The NCAA believes precedent will protect them for the length of this case. Further, the organization’s best strategy was to go back to the storyline many question—amateurism.

The class action nature of this suit could greatly debilitate the NCAA.

In June 2013, the NCAA’s motion to reject the class action nature of the suit was declined by Judge Wilken of the San Francisco federal court. The decision to allow this lawsuit to proceed with class action certification is important as it shows the magnitude of the case. Not only is the short list of former student-athletes included as the plaintiffs in the case, but all current student-athletes are included also in this one class. “The potential payout would grow astronomically if [the] plaintiffs were successful, not to mention how that would change the fundamental principle, some say illusion, of amateurism in big time college sports.” 84

4.3.1 The Significance of Class Action Certification

A short explanation of class certification will illustrate the importance of it not only in this case, but any legal matter that could involve a large group of people:

Class certification is when a judge permits a plaintiff or group of plaintiffs to sue on behalf of a much larger group of persons who have not sued. Class certification, in other words, is not about whether the plaintiff's underlying legal arguments are correct or wrong. Along those lines, a judge certifying a class does not mean the plaintiff will win a trial. Just as important, a judge denying certification does not mean the plaintiff cannot go to trial. A plaintiff whose petition for class certification has been denied can still bring the case himself or with others, but not on behalf of persons who have not sued. To be sure, a case is less intimidating when certification is denied -- the defendant is threatened by far fewer persons -- but the legal arguments could still prevail should the plaintiff continue the fight.\(^{85}\)

According to an analysis of Wilken’s previous class certification rulings, she has granted partial or full certification around eighty percent of the time, which gave the plaintiffs optimism.\(^{86}\) This could be the reason this case was filed in Wilken’s court in California. Lawsuits filed as class action in federal courts have been granted certification in around twenty to forty percent of the time, significantly less than that of Wilken’s court.\(^{87}\)

Because this case has countless plaintiffs instead of a short list, it makes it more difficult for the NCAA to settle, and, ultimately, more costly for the organization. The NCAA could have settled with O’Bannon and the other plaintiffs prior to Judge Wilken’s decision in June. However, that did not occur and *O’Bannon v. NCAA* will go to a jury trial in 2014 as a class action suit. The implications of this decision will be further evaluated in the upcoming sections, but, without a doubt, the class action certification of this case dealt a big blow to the NCAA and their hopes of success with this case.

### 4.3.2 The Noll Report

An important portion of the class-action certification of O’Bannon was the submission of the Noll Report by the plaintiffs. Roger Noll is a professor emeritus of

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\(^{86}\) Ibid.

economics from Stanford who was asked by the plaintiffs to submit an evaluation of the model of college sports. An assessment of this lengthy document reveals many of the main concerns for the plaintiffs in college athletics that go far beyond just the class-action certification. Noll asserts “that the NCAA forces student-athletes to grant colleges the rights to make commercial use of their images, likenesses, and names after their careers as student-athletes are over and sets the fee for granting these rights at zero.” He argues the NCAAs licensing policies limit choice for consumers and give student-athletes no option to license the rights to their own images from their time as student-athletes. Noll’s extensive studies and research lead him to argue the NCAA causes four particular harms to competition:

The first is exploitation of student-athletes by not sharing the financial bonanza from college athletics during the past two decades, including by keeping all revenues from licensing their images, likenesses, and/or names. The second is the loss of student-athletes from participation in college athletics, as indicated by the data on rejection and abandonment of college scholarships. The third is the reduction in the quantity and quality of licensed products that are available to consumers. The fourth is inefficient substitution, both in licensed products to work around NCAA restrictions in the use of the images, likenesses and/or names of student-athletes and in other aspects of the process of recruiting athletes, most notable the salaries of coaches.

An important portion of the Noll report is the discussion of the term amateur and its use by other sports associations. Noll writes that amateurism has been defined multiple ways by these associations. Generally, “the rules regarding amateurism have been getting more permissive for decades, and today several sports governing bodies no longer even recognize the distinction.” Further, Noll points out that the Olympics left amateurism all together.

The Amateur Athletic Union (AAU), USA Cycling, USA Fencing, and the US Golf

89 Ibid, 63.
90 Ibid, 74-75.
91 Ibid, 86.
Association (USGA) define amateurism based on the purpose of participation, but have significantly looser standards than the NCAA. As a result, Noll asserts, “there is no objective basis for the specific definition of amateur that the NCAA uses.”\textsuperscript{92}

In conclusion, he proposes that colleges and student-athletes split the allocation for licenses 50-50, allowing the schools to retain some money and the players to actually profit off the use of their image/likeness.\textsuperscript{93} While this report was only used during the class-action certification of the case, it raises some important points and asks important questions about some of the alleged injustices of the college athletics system as a whole. Ultimately, the plaintiffs in \textit{O’Bannon} were able to successfully argue for class action certification and the NCAA was facing groundbreaking change in the face. However, this certification, a small victory in this case, was about to change.

\section*{4.4 Changes to the Class}

On November 8, 2013, Judge Claudia Wilken revealed a major stipulation to the class action certification of the case to the plaintiffs in \textit{O’Bannon}. Wilken ruled current and former college football and basketball players could challenge NCAA limits on player compensation. However, in this situation, the class was certified:

\begin{quote}
for the purposes of injunctive relief only, which would prevent the N.C.A.A. from acting in the same way in the future, but not for damages. Wilken said the plaintiffs had not identified a legitimate method to calculate damages to former players. That left O’Bannon and [the] former athletes…without what they desired in the first place: compensation for their likenesses and images after their playing career ended. If their case makes history, they are unlikely to profit from it.\textsuperscript{94}
\end{quote}

\begin{flushright}
\end{flushright}
While the NCAA could still be forced to make groundbreaking changes to their system of amateurism, they will not have to pay former athletes, meaning they dodged a huge financial burden.

Wilken believed O’Bannon did not effectively show common harms to the members of the class, in this case, the former student-athletes. Specifically, she had questions about the Noll Report. Noll argued college basketball players would have remained in college if they were given financial motivation to do so. Wilken believed if these student-athletes would have remained in school, it would have displaced other student-athletes who would never received scholarships to play. She:

stressed these ‘displaced student-athletes …would not have suffered injuries as members of the teams for which they actually played because…they would never have been able to play for those teams.’ In fact, the displaced student-athletes likely benefited by star underclassmen jumping to the NBA. Therefore, Wilken reasoned, the displaced student-athletes did not belong in O'Bannon's class.”

This could be claimed a victory by both sides. For O’Bannon, the case will proceed as was expected and hoped. Vaccaro said O’Bannon was pleased as he expects student-athletes in the future to have rights he never had. Moreover, Vaccaro said he spent the 2013 college football season watching major matchups realizing how much money those games generate and how little the players will see of it. According to Vaccaro, while the decision by Wilken in November 2013 was a setback for former student-athletes and O’Bannon, this was the first step in changing the atmosphere of college sports for the student-athlete. On the other side, “The NCAA, in a statement, said the ruling validated its argument that the case was wrong on facts and law. Its statement ignored the other half of the ruling, the half the other side celebrated as a win. The organization undoubtedly avoided potential damages to former players that could have escalated into billions of dollars, even as the very real threat

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McCann, Michael. "Judge partially certifies class action status in O'Bannon suit."
to the system that governs college sports remains.” Following Wilken’s decision, both sides turned their attention to the next stage of the case, preparing for the trial in 2014.

96 Bishop, Greg. "N.C.A.A. Dodges a Bullet, but Change Is on the Way."
5: WHERE O’BANNON CURRENTLY STANDS

Following Judge Wilken’s decision in November 2013, both sides still had many potential options in this case. In particular, the plaintiffs can still seek damages as individuals as opposed to doing so on behalf of a class. “Individuated or smaller group lawsuits may ultimately help O’Bannon and other famous student-athletes. These players have a better case they were represented by avatars in video games and were financially hurt by amateurism rules.”

In November 2013, Ed O’Bannon submitted a request for summary judgment from Judge Wilken. The plaintiffs issued “an injunction that would prohibit the NCAA and its members from limiting what athletes can receive in exchange for playing sports. Known as a summary judgment request, the filing essentially asks U.S. District Judge Claudia Wilken to decide the case in the plaintiffs’ favor without a trial.” According to their request, the plaintiffs assert the NCAA does not adequately show that limiting student-athletes enhances competition. Further, they believe the NCAA relies too heavily on apocalyptic scenarios for avoiding the payment of student-athletes.

This filing previews the points the plaintiffs are going to use to attack the NCAA. First, “The filing says the NCAA’s justification for limiting athletes to a scholarship that basically comprises tuition, fees, room and books is undermined by testimony from NCAA

97 Bishop, Greg. "N.C.A.A. Dodges a Bullet, but Change Is on the Way."
economic expert Daniel Rubinfeld ‘that less restrictive alternatives may exist.’”99 There are money and resources out there that can make their way to the student-athletes. Theoretically, the universities that turn a significant profit could afford to provide more to their student-athletes. Would that be possible, however, for the universities that lose money on their athletic programs?

On the issue of amateurism, the plaintiffs intend to show the amateur standing of the athletes have no impact on the popularity of the game. They assert the major programs have hundreds of thousands of alumni willing to buy tickets regardless of the level of the sport. Further, they propose that the major sports are already commercialized, with the high salaries for coaches and the high ticket prices, which are sometimes higher than those in professional sports, which does not look like an amateur model.

Also, the plaintiffs assert there is no competitive balance in college sports, despite what the NCAA says:

The plaintiffs argue that even with the limits on what football and men's basketball players received, “the NCAA is not actually competitively balanced.” They cite a comment from NCAA President Mark Emmert in which he said “some universities have huge competitive advantages (because) of history and culture and decisions that the university made over decades that are in some ways insurmountable.” They also say that since 1950, 13 schools have accounted for 50% of appearances in Final Four basketball games.100

As previously mentioned, college athletics have become a system of haves and have-nots. Some programs are normally perennially successful, making significant income off of their athletic programs and having significant resources, also. Other programs struggle to compete with those programs, and lose money on their athletics programs. Competitive balance in college sports have become a myth and Emmert’s admission proves this point.

99 Ibid.
100 Ibid.
Finally, the plaintiffs want to challenge the NCAA on the issue of the viability of the sports other than football and basketball. They claim in some programs, the minor sports (for example, baseball, soccer, and softball) are only able to function because of the restrictions placed on the football and basketball programs and players. Further, they believe in some programs, the income from football and basketball are not guaranteed to be used for other sports or to improve the condition for student-athletes. This filing shows the intentions and goals of the plaintiffs and many of the main points of their argument against the NCAA, primarily believing they did not show enough evidence that the current model of college athletics should remain in place. Despite what the media portrays, the plaintiffs have been quick to point out they:

“are not advocating an end to the principle of amateurism, nor are they advocating salaries” for college athletes. But they have made clear they are targeting as much as 50% of the NCAA's and the conferences’ television rights fee revenue for some form of increased compensation, including the possibility of money being set aside for athletes to have after they have stopped playing.

In December 2013, the NCAA responded to the plaintiffs’ request from the prior month. They “asked a federal judge not to issue an injunction that would prohibit the association and its member schools from limiting what athletes can receive in exchange for playing sports. At the same time, it also asked U.S. District Judge Claudia Wilken to decide an underlying anti-trust lawsuit concerning use of college athletes’ names and likeness in its favor without a trial.” Further, the NCAA refuted the plaintiff’s claim that there is not enough evidence to support the current model of college sports. The NCAA outlined five justifications for the limits placed on student-athletes and attempted to use extensive

101 Ibid.
103 Ibid.
evidence to defend their points. The exhibits used for their filing included nearly ninety statements from athletic directors, college commissioners, and university presidents or chancellors.

The first justification for the NCAA was, naturally, amateurism. J. Michael Dennis, an independent market research expert hired by the NCAA, did a survey asking respondents how they would react to paying money to student-athletes. The results of Dennis’ survey suggest nearly seventy percent of respondents would feel negatively if student-athletes were to receive payment in addition to their scholarships being covered. Further, the NCAA used a statement from Big XII Commissioner Bob Bowlsby that implies fans, donors, and alumni would not want student-athletes to be paid. This theoretically could be incorrect as donors and alumni would be more willing to pay for their program to have the resources to be successful. College football and basketball, however, could lose casual fans, also.

Second, the NCAA attempts to justify competitive balance will only be possible by placing limits on the student-athletes. Kenneth Starr, the President of Baylor University, is quoted in this portion. His statement includes, “Even for the schools that did decide to make payment to its student-athletes, there would be a wide variation of the amount and method of these payments which would ultimately result in a destruction of competitive balance among the paying schools.” Baylor University, located in Texas, has often lived in the shadow of the University of Texas, and been at a disadvantage because of their grand facilities and large budget. Starr’s statement in this situation could be implying his fears of having his university compete with Texas were the current model to change, as the gap between have-nots could increase significantly.

104 Ibid.
105 Ibid.
Third, the NCAA asserts the traditional role of the student-athlete would be upset if compensation were allowed. A deposition from Darius Robinson, a current player for the Clemson Tigers football team, was quoted in the filing. The NCAA uses this deposition to show how colleges and universities provide services to student-athletes that are not granted to other students on campus. Robinson outlines how Clemson has a facility for student-athletes to use for academic work, including tutors and advisors that help them reach their full potential. For this argument, Starr is once again quoted by the NCAA, saying “[P]aying student-athletes in men's basketball and football would have a corrosive effect on University culture at Baylor and elsewhere, would be demoralizing to numerous other students, and would create an elitist group of paid athletes whose separateness from other students could interfere with their relationships with other students and faculty.”\(^{106}\) This argument by the NCAA is weak at best. The NCAA argues student-athletes are an elite group of students on campus, at least the athletes for the major sports, as they receive the benefits, outlined by Robinson, not afforded to the other students. However, student-athletes are not afforded the opportunities to profit as other students who have considerably less responsibilities.

Fourth, the NCAA attempts to argue that sports other than basketball and football will be negatively impacted in the case student-athletes receive payment. The NCAA uses the Michigan State athletic director in this portion because he believes the university would need to cut sports if they were required to pay student-athletes. Further, the chancellor of Wisconsin believes athletic opportunities, including scholarship and roster slots, would be limited if they had to greatly change their athletic budget.\(^{107}\)

\(^{106}\) Ibid.
\(^{107}\) Ibid.
In response to the NCAA’s filing for summary judgment, in January 2014, the plaintiffs claimed the NCAA defined amateurism in varying ways. This could be because the NCAA uses amateurism to defend the current model of college sports. Moreover, they asserted the NCAA “may not see to its student-athletes being properly educated.” Further, the plaintiffs requested documents pertaining to rule changes discussions from the NCAA convention that month.

On February 20, 2014, at a hearing in San Francisco, California, Judge Wilken gave the trail a green light to proceed, beginning on June 9:

The purpose of Thursday's hearing was for Wilken to ask questions of both sides in response to their dueling requests for a summary judgment that would have ended the case before proceeding to trial. It's a rare occurrence, and as Wilken flatly acknowledged near the end of the two-hour proceeding, "The whole case is not going away on summary judgment." But she could issue a ruling that dismisses certain types of evidence or narrows the scope of the case.

The questions and comments made by Judge Wilken during this hearing brought up important points for each side that will be outlined in the upcoming section, setting the stage for the trial in June.

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6: THE FUTURE OF COLLEGE SPORTS IN THE CONTEXT OF O’BANNON

As noted throughout this piece, Board of Regents v. NCAA significantly changed the college sports landscape during the 1980s. O’Bannon has the potential to have major ramifications as well. While O’Bannon and other former athletes were denied the ability to sue for damages as part of the class action certification, they somehow still have the opportunity to fight for damages in court, as previously mentioned. This could give O’Bannon and his lawyers, and the other former athletes, the chance to somehow make something out of the years of hard work they have put into this case. It almost would seem to be an injustice for them to receive no benefits in the case they were to win.

These complaints would need to be filed in different courts by different players, each with their individual story and details of their career as a student-athlete, in addition to why they are filing their case in that particular court. This could prove to be successful as it answers critiques given by Judge Wilken. She “emphasized that video game rosters were smaller than actual rosters, meaning some players in a class of tens of thousands would not have been in those games. A select group of former players, however, could more credibly establish that they were in those games. Wilken also stressed that some former college players benefited by amateurism rules.”110 She believed some student-athletes benefitted from the scholarships they received by staying in school when they had the opportunity to leave to play professionally. If each different suit is able to answer to these concerns, they might be successful for these former student-athletes.

110 Ibid.

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The second major option for change could take place if student-athletes were able to unionize.

A trade association for college athletes would function as a players’ association and would negotiate contacts with television networks, video game companies and other organizations that profit from college players' images, likenesses and names… This entity would be classified as a non-profit trade association and not as a "union", mainly because student-athletes are students and not employees for purposes of labor law. Trade associations are very similar to unions. Most crucially, they can negotiate contracts on behalf of industry parties.  

This would greatly change the landscape of college sports, and without a doubt, hopefully grant student-athletes more rights. However, there are some major hurdles these athletes would have to overcome in order for this vision to become a reality as this issue will likely be brought up when O'Bannon goes to trial.

First, the NCAA will attempt to assert student-athletes should not be paid for their games that appear on live television, despite the plaintiff’s request. The NCAA believes the First Amendment protect broadcast companies televising live news events “without compensating persons shown in those events. The underlying logic is that the public has a stake in knowing about live events and broadcast companies should not be deterred from covering news out of concern they may be sued if they don't pay. The NCAA contends this same principle applies to live broadcasts of college games.” On the other side, it can be argued the NCAA demands large sums of money to televise events like March Madness, which CBS and Turner Sports pay more than $770 million in order to have the broadcasting


112 McCann, Michael. "Two potentially game-changing developments in O'Bannon vs. NCAA."
Further, news events are often spontaneous, while college sports are often scheduled far in advance.

Second, television networks may not be willing to negotiate with student-athletes, increasing the fees to broadcast college sporting events. “A college players' association would make an economic case to college players. It would emphasize that they are now on nationally-televised broadcasts, even aired against NFL games on Thursday night -- traditionally the most-watched night of network programming. Put another way, college athletes would be told they are prime time TV stars and should be paid as such.” While some student-athletes receive scholarships, they receive nowhere near what people participating in programming with similar viewership would receive.

Third, and finally, many believe support for college sports would not be as high if student-athletes were able to unionize and be paid. On the other side, in the case of O’Bannon, one could “point out that they envision college athletes as unpaid until the end of their college careers, when they would then draw from a trust. The trust would reflect monies generated by the licensing and sale of the players' names, images and likenesses.”

6.2 Potential Future of College Athletics

As O’Bannon heads to trial in the near future, college athletics faces the potential for great change. However, what is going to come out of this case? The two sides could negotiate a settlement outside of court, but that looks extremely unlikely as neither side is going to budge. The two sides seem content spending more money and time in order to

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115 Ibid.
protect their ideals. There really is no precedent to this case, so predicting an outcome is essentially taking a shot in the dark. However, no case brought against the NCAA by a student-athlete or former student-athlete has been able to gain this much traction in court, so that could spell good news for O’Bannon.

Examining the plaintiff’s arguments during class action certification and their request for summary judgment show the major points they will continue to use as the case moves to trial. Further, they must be able to show the policies by the NCAA violate anti-trust law as the Universities of Oklahoma and Georgia were able to do in Board of Regents. The NCAA will respond by relying on their argument of amateurism, but will it work? As previously outlined, for decades, this argument has worked, but thus far the NCAA has been unable to use it to prevent this case from moving to trial and it is appearing to become weaker as time moves forward. As with the plaintiffs, the arguments made during the class action certification during the request for summary judgment are a good preview for the major points the defendants will make as the trial moves ahead.

Wilken raised concerns during the summary judgment hearing that each side will be expected to address in the trial. First, she questioned why the NCAA sells the rights to athletic events like March Madness and the College World Series to CBS and ESPN, yet claims these events are of public domain.116 Further:

Wilken also expressed skepticism regarding three of the NCAA’s five pro-competitive justifications for why its no-pay rule does not violate antitrust laws. Most notably, she expressed a "problem" with the notion that sharing revenue with the athletes would negatively impact competitive balance within college sports. "Maybe there's a less restrictive alternative?" she wondered. "Maybe you could enforce more competitive balance by having coaches' salaries addressed." One of the NCAA’s other justifications is protecting amateurism. Wilken largely skipped past the topic with a dismissive line: "I don't think amateurism is going to be a useful word here."117

116 Mandel, Stewart. "Judge allows Ed O'Bannon v. NCAA to proceed to trial."
117 Ibid.
As already mentioned, there is a lack of competitive balance in college sports. This statement shows Wilken shares the public’s sentiment towards amateurism and makes this trial look like it could be an uphill battle for the NCAA.

Judge Wilken has already been favorable to the plaintiffs compared to precedent from similar lawsuits. Further, her comments could signify a hostile environment to the NCAA. Is this a sign that her court will rule in favor of the plaintiffs? This trial will take place in front of a jury, which could be more or less sympathetic to O’Bannon and former college athletes depending on who is selected to serve.

Regardless of the outcome from the federal court in Northern California, appeals will more than likely follow the ruling from Wilken. Both sides have invested significantly in this case, and neither will be satisfied if they were to lose at this point. As in Board of Regents, O’Bannon could, and more than likely will, make its way all the way up to the Supreme Court, where a decision would be landmark and definitive whether the Court sided with O’Bannon or the NCAA. An evaluation of the make-up of the Supreme Court could show which way it would lean if it were to listen to this case. However, the make-up of the Court could be significantly different from 2014 by the time the case would make it there.

The Supreme Court has the power to decide whatever they please in the situation this case were to be placed in front of them. First, they could essentially end the NCAA as it is currently modeled, obliterating the guise of amateurism that has lasted for decades. This would in a sense create a “minor league” for professional football and basketball and change the landscape of college sports. In this situation, this would not be an example of limited judicial review. Instead, this would be an example of significant judicial interference through not deferring to the NCAA or believing their rules are legal. Some are fearful of this
outcome, not wanting college sports to resemble professional sports in any way. Second, they could keep the NCAA, but require change to current model through issuing an injunction changing rules and governance. This would require the NCAA to change their rules, but it would still keep their organization intact.

In these situations, and any potential victory for the plaintiffs, monetary relief will not be provided to former student-athletes. Despite what they said, this has to be a major disappointment for O’Bannon and other former student-athletes, who hoped the NCAA would have to pay for their rules if they won the case. This has to be a major relief for the NCAA, as they do not have to pay all former student-athletes if they were to lose this case.

As mentioned, another possible outcome would be if the NCAA were to settle with the plaintiffs outside of court before the case goes to trial in June 2014. This does not look as if it is a likely outcome, but it still should be addressed. In the case either side begins to believe they are going to lose the case, they should settle outside of court as it will minimize the damages. It could also let them settle on softer terms than if the case was settled in court. The NCAA, without a doubt, would have to admit they need to change (which they have not been willing to do thus far) and actually follow through and make changes to their policies. Their public image would certainly take a hit for the time being, but would it really be as bad as if the organization got destroyed altogether or if they fought for “amateurism” all the way to the Supreme Court?

What would a settlement look like? It’s already known the former student-athletes will not receive anything from the NCAA, but what changes will be made by the organization for the future? First, the NCAA cannot continue to limit student-athlete’s income. This could possibly be done through a fund, made up of money from television
contracts, modeled after the plaintiff’s desire, giving student-athletes money once they have graduated or left the university. This would allow the NCAA to keep from giving players “salaries,” but it would allow student-athletes to profit from their participation in major college athletics. Second, the NCAA will have to trim its cumbersome rulebook, allowing the schools to have more power. This would be beneficial to everyone involved. It would allow the NCAA to take a step back, redesign their role in college athletics, and hopefully change public perception of the organization. For schools, this will alleviate the stress of complying with burdensome and outdated rules. This would hopefully further allow schools to better serve the student-athletes and create a culture where they would want to stay in school instead of leave to play professionally as soon as possible. Third, and finally, the NCAA would have to admit the end of amateurism as a justification for college athletics. Clearly, with the money involved, student-athletes for basketball and football programs are not amateur athletes; they are preparing for a professional career. The NCAA should ensure that student-athletes take advantage of the education they are receiving, while making sure everything is in place for them to succeed once they are out of school.

There are questions about the future of college sports regardless of what happens in O’Bannon. What are the futures of women’s and Olympic sports on college campus? Will these minor sports be able to survive if football and basketball essentially become preparatory programs for the NFL and the NBA, respectively, as more money would be funneled into them. Further, will there be limits on what student-athletes can make? People will argue that they want the game to remain the same, yet allow student-athletes to make money. If there are no limits on the income of student-athletes, would college sports
basically become a system without a “salary cap?” These are only a couple of numerous questions and concerns facing college sports as a new era will more than likely begin.

6.3 Northwestern Football Unionization

The thought of college athletes unionizing took a step towards becoming a reality in January 2014, when members of the Northwestern football team announced their plans to unionize. This decision could be the impetus for change in college sports, while also having a significant impact on the decision in O’Bannon.

Along with longtime college athlete advocate Ramogi Huma, former Northwestern quarterback Kain Colter, announced the formation of the College Athletes Players Association, which is backed by the United Steelworkers. Colter, who said the current system resembles a dictatorship, added it was time players had a seat at the table. An undisclosed number of Northwestern players filed a petition with the National Labor Relations Board asking to be certified. At issue: whether college athletes are employees.  

While the NCAA has responded by asserting this is an attempt to undermine the main objective of college athletics, an education, Colter has outlined what he believes are the lack of rights for student-athletes. “Among priorities for change: improved medical care, especially after players’ careers are finished; funds for continuing educational opportunities; and scholarships that would cover the full cost of attendance for athletes.” They were not even explicitly advocating payment for their participation, yet the NCAA attempted to paint the Northwestern football players with that characterization.

In February 2014, the National Labor Relations Board (NLRB) listened to Colter as he attempted to defend his position to give student-athletes a voice. Because he was protesting against Northwestern University, the NCAA was not present at the hearings. If the


119 Ibid.
NLRB were to side with Colter, college athletics would greatly change. “It would put the athletes in a position to bargain, to demand things that college athletes have never had before -- like stipends, continuing medical coverage after graduation, more concussion testing and even a portion of the profits of the multibillion dollar windfall created by college football and basketball.”¹²⁰

Allowing student-athletes to unionize would change the power structure of college athletics. But, what changes would take place and would it be beneficial to these student-athletes? This outcome could create even more uncertainty in college sports.

Though collective bargaining might sound good in theory, even professional athletes can have trouble getting their respective leagues to meet their demands. Could college athletes really be successful, or would they be better off if the NCAA reformed to allow substantial player representation within the current structure? The group only includes football and men’s basketball players. Could Title IX regulations force it to include athletes who hold scholarships in other sports?¹²¹

It could also change public perception of college sports. “With unions come bargaining, the potential for strikes and lack of stability. Imagine pickets instead of rivalry games.”¹²²

During the hearings in February 2014, each side’s arguments were what would be typically expected. “The players are trying to prove that they are employees of the university who are forced to put football first or risk losing their compensation -- in the form of free tuition. The university is sticking to the century-old collegiate athletics stance: that student-athletes are students before they are athletes.”¹²³ Colter argued that football was a job for him and he was not able to reach his full academic potential because of his commitment to the sport. If football is a job for Coulter, should he be considered an amateur student-athlete?

¹²¹ Ibid.
¹²² Ganim, Sara. "Northwestern football players take union hopes to labor board hearing."
“‘We are first and foremost an athlete,’ Colter testified. ‘Everything we do is scheduled around football...It's truly a job.’”\textsuperscript{124} The university responded by questioning the decision to use Northwestern as a test case. “‘Northwestern is not a football factory,’ university attorney Alex Barbour said. ‘Northwestern is having difficulty understanding why it was even chosen as the test case... The experience of a football player at Northwestern is part and parcel of his overall educational experience.’”\textsuperscript{125}

The NLRB ultimately determined that scholarship athletes are indeed employees as they receive financial aid for their football related performance. This could have major implications on \textit{O’Bannon} as the players are indeed employees instead of amateur student-athletes. As a result, many of the rules of amateurism, or in this case, employment would be violating antitrust law as they are limiting employees instead of student-athletes.\textsuperscript{126} This ruling completely changes the complexion of \textit{O’Bannon} and college athletics for that matter. Football players for Northwestern are currently struggling with the decision to unionize as some believe it will damage the university instead of the NCAA.\textsuperscript{127} Regardless of their decision, the classification of these athletes as employees could mean change is on the horizon for college sports.

The NCAA has balked at the opportunity to change the rules for amateurism recently. However, they may have to make changes in order to survive as an organization and prevent the formation of a new model of college athletics, favoring the major conferences. This would not be the first time an amateur sport has greatly changed as the Olympics left the

\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid.
model during the 1980s, allowing the participants to profit off the use of their image. They could have adopted this “Olympic model,” relaxing the rules on amateurism and making enforcement easier for colleges and universities. This could have left the burden of payment to players to the companies wanting to use the student-athletes. However, this model was not adopted.

In the case *O’Bannon* relies on the ruling from the NLRB to strike down NCAA policies under the Sherman Act, they can either adjust by figuring out a new model for college sports or they could even cease to exist. Another possibility would be to work with a labor union comprised of college athletes, determining the terms and conditions of employment. Both sides could negotiate what they desired and the ultimate outcome would be legally protected and protected from antitrust scrutiny. The NCAA could retain many of the rules to protect college athletes from exploitation, while the athletes could have their voice heard during the rule-making process.

### 6.3 Recommendation for the NCAA Today

In conclusion, it is important to revisit the image of the NCAA. As outlined throughout this piece, the public has come to believe the NCAA is focused more about the entertainment and the money than the protection of student-athlete. The NCAA needs to decide whether it wants to continue to perpetuate the myth of amateurism and supporting student-athletes or be honest and admit they are more focused on regulating a multi-billion dollar industry. Because of the decision to allow Northwestern football players to unionize, the NCAA would be best served to abandon the amateurism argument. While they continue to claim they work for the betterment of the student-athlete, yet many of their actions show

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129 Berry, William. "How Labor Unions Can Save the NCAA."
they are hypocrites. The current system of college athletics they built is worth billions of dollars, yet the student-athlete sees little to none of it.

As already mentioned, the NCAA could work with athletes that are technically employees and unionized if that would be allowed at public and private colleges and universities. This would allow for policies that both sides could agree on, and hopefully decrease the amount of lawsuits directed at the NCAA. There are many questions and many problems that would arise with this system. Some of the non-revenue sports might be eliminated and women’s sports would not make nearly as much money as men’s sports. However, another model that might be beneficial would be the Olympic model. Without a doubt, rules would need to be put in place to protect these athletes from exploitation. For universities, this might increase the burden of compliance, yet it would protect the non-revenue sports. This could also allow for a system in which the most visible and most popular student-athletes would be able to capitalize on their fame. This system, however, has its own problems also as the distinction between the haves and have-nots could increase as the schools with the most wealthy alumni bases could afford more star athletes than other schools. This would look as if it was modeled after professional sports, particularly baseball, without a salary cap. Further, the teams from powerful conferences could possibly become the elite class of college sports if no limitations were in place. A hybrid model, allowing for unionization and taking principles from the Olympic model, would protect the NCAA as a governing organization, give college athletes a voice in the decision-making process, and allow for the non-revenue sports to remain, while allowing for famous football and basketball players to capitalize from their popularity and keeping the power conference teams from running away from all other colleges and universities. There is no ideal solution for both
sides, but this possibility would allow the great parts of the current model to remain, and could

The NCAA is currently facing a challenge of regulatory action that calls into question their authority and the antitrust limits that come along with it. Yes, the NCAA was designed to regulate college athletics, which at the time were not the business they are today. Student-athletes were to play for the love of the game. Today, however, the game has become a major business. Athletes bring in millions of dollars to their universities and see none of it, creating an unfair and unjust system that is ripe for change.
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