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SCHOOL NICKNAMES AND ACRONYMS AS TRADEMARKS: KICKING THE BAND OFF THE BANDWAGON

JOSEPH C. GIOCONDA*

I. ABSTRACT

Colloquial and quaint nicknames have often been devised by the public to refer to students and alumni linked with specific colleges and universities. Similarly, acronyms and initials have become widely utilized to refer to these schools. However, collegiate licensing programs have aggressively sought to appropriate these same nicknames and acronyms as trademarks. This effectively monopolizes as commercial brands and allows the schools to use the legal system's heavy hand to prevent unauthorized uses.

Consequently, legal conflicts can erupt within the schools' local communities. Intellectual property lawyers working for these universities have devised clever and effective legal strategies to squelch any legal opposition, but not without a real cost—the schools often alienate their own alumni. Schools should become mindful that vigorously enforcing their newfound legal rights against members of their own communities and alumni can lead to unpopular results and, ironically, tarnish the very brand they are reportedly protecting.

II. INTRODUCTION

The public has devised colloquial and quaint nicknames to refer to students and alumni associated with various colleges and universities. For example, "aggie" is a diminutive form of the

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word "agricultural," which forms part of the name of several state universities, such as Texas Agricultural & Mining (Texas A&M).[1]

The nickname "domers" connotes any student of the University of Notre Dame in South Bend, Indiana, past or present.[2] "Hokies" is a term used to describe students, alumni, supporters, or any combination thereof of Virginia Tech.[3] "Drewids" describes students attending Drew University in New Jersey, "mudders" go to Harvey Mudd College, "skiddies" to Skidmore, "whoopis" are students at Worcester Polytechnic Institute, and Yale students and alumni are sometimes called "elis."[4] Additionally, college students and alumni have occasionally adopted unofficial mascots to help them support their alma mater. For example, the University of California at Santa Barbara adopted the colorful term "gauchos" to describe themselves.[5]

Similarly, acronyms and initials provide an easy shorthand to describe entire regions of cities and towns that house universities and colleges. For example, "NYU" refers to a portion of Manhattan south of Houston Street, including Washington Square Park. "ASU" is used to refer to Alabama State University, Arizona State University, and others. "BU" has been used to describe Baylor University in Texas, Binghamton University in upstate New York, as well as Boston University, Bradley University, and Butler University.[6]

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[1] *See infra* Section III.B.

[2] In contrast, the wider term "hoosier" can be applied to any resident of the state of Indiana, but "Hoosiers" is also the official name of the Indiana University athletic team. *See What Is a Hoosier?*, WE DO HISTORY, *http://www.indianahistory.org/feature-details/what-is-a-hoosier#.Wb_M262ZNok* (last visited Nov. 1, 2018); *see also infra* Section III.C.

[3] *See infra* Section III.A.

[4] *See generally* MARK T. JENKINS, NICKNAME MANIA: THE BEST OF COLLEGE NICKNAMES AND MASCOTS AND THE STORIES BEHIND THEM (1997).

[5] *See* Paul Rivas, *The Men Behind the Myths: From Argentine Cowboys to Tossed Tortillas, the True Story of UCSB's Mascot*, SANTA BARBARA INDEP. (April 21, 2009), http://www.independent.com/news/2009/apr/21/men-behind-myths/.

[6] Other commonly used acronyms for colleges and universities include: "CU", "NU", "OSU", "PCC", "SU", "UC", "UCLA", "UMD" and "WSU."

Collegiate licensing programs have become immensely valuable intellectual property assets, generating hundreds of millions of dollars in revenue each year for colleges and their profitable licensees.[7] But when collegiate licensing programs aggressively seek to appropriate colloquial nicknames as federal trademarks and monopolize them as commercial brands, conflicts can erupt within the local communities where these schools are located, as well as between schools.[8]

This article will canvass several real-world examples of such conflicts. It will analyze the legal and practical problems inherent in aggressive collegiate brand strategies that seek to own and ultimately prohibit the unauthorized use of nicknames and acronyms originally coined by the public to describe local regions, students, alumni and supporters of that same university.

One strategy that some universities appear to use is that of a war of attrition—by foisting significant litigation costs onto small companies and creating long delays before applicants can receive trademark registrations, universities are unafraid of exerting their size and influence to create value in their highly lucrative intellectual property portfolios.[9] As one trademark

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[7] *See* Cork Gaines, *The 25 Schools That Make the Most Money in College Sports*, BUSINESS INSIDER (Oct. 13, 2016), https://www.businessinsider.com/college-sports-revenue-leaders-2015-9 ("In all, there are now 24 schools that make at least $100 million annually from their athletic department."); *see also* Darren Heitner, *Sports Licensing Soars To $698 Million In Royalty Revenue*, FORBES (June 17, 2014), https://www.forbes.com/sites/darrenheitner/2014/06/17/sports-licensing-soars-to-698-million-in-royalty-revenue/#6c7a5013756b (total revenues from collegiate licensing estimated at $209 million, or $3.88 billion at retail).

[8] *See, e.g.,* Lauren T. Warbington, *Crossing the Line: The Collegiate Licensing Company's Overindulgent Attempt to Limit Small Businesses' Online Marketing Techniques Based on Frivolous Claims of Trademark Infringement*, 19 J. INTELL. PROP. L. 517 (2012) *http://digitalcommons.law.uga.edu/jipl/vol19/iss2/12*; *see also* Lee Green*, Trademark Issues with Use of College Names, Logos, Mascots*, NAT'L FED'N OF HIGH SCHOOL ASSOCIATIONS (April 13, 2015) *https://www.nfhs.org/articles/trademark-issues-with-use-of-college-names-logos-mascots/*.

[9] *See generally* JACOB H. ROOKSBY, THE BRANDING OF THE AMERICAN MIND: HOW UNIVERSITIES CAPTURE, MANAGE, AND

lawyer colorfully put it, the university jumps on the bandwagon, then shamelessly kicks the band off.[10]

III. HISTORICAL ORIGINS OF LOCAL COLLEGIATE NICKNAMES

Approximately 3,000 institutions of higher learning in the United States offer four-year scholastic degrees, such as a Bachelor of Arts or Bachelor of Science.[11] Several hundred of these colleges and universities date their founding back a century or more.[12] Many of these schools have witnessed their alumni rise to the highest ranks of society. Consequently, these institutions have profound cultural impacts on their wider communities.

Additionally, most institutions of higher learning are major employers in their geographic regions. Their presence has significant economic and environmental impacts on the local communities that host their students.[13] While these universities offer many local benefits, there is often tension between universities and their neighboring communities as both continue to grow and change.[14] Schools' acronym and licensing issues contribute to that tension.

MONETIZE INTELLECTUAL PROPERTY AND WHY IT MATTERS (JHU Press 2016).

[10] *See* U.S. Trademark Opposition No. 91207895, Opposer's Main Brief [Dkt. 88] ("The public created and adopted the HOKIE nickname to refer to members of the Virginia Tech community, but [Virginia Tech] … waited more than two decades before deciding to jump on the bandwagon and use term HOKIE too, along with the public. Yet now, Applicant is trying to kick the public off of that bandwagon.").

[11] *See* NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=84 (last visited Nov. 8, 2018).

[12] *See e.g.*, *Historical Facts*, HARVARD UNIV., https://www.harvard.edu/about-harvard/harvard-glance/history/historical-facts (last visited Nov. 8, 2018).

[13] *See, e.g.*, John Falconer, The Impact of Public Four-Year Colleges and Universities on Community Sustainability in Non-Metropolitan Areas of the Great Plains (June, 2006) (unpublished Ph.D. dissertation, University of Nebraska—Lincoln), http://digitalcommons.unl.edu/dissertations/AAI3218892/.

[14] *See* Wallace Warfield, *Town and Gown: Forums for Conflict and Consensus Between Universities and Communities*, NEW DIRECTION FOR HIGHER EDUC., Winter 1995, at 63–69.

A. "HOKIES" IN BLACKSBURG, VIRGINIA

Virginia Polytechnic Institute and State University, popularly known as Virginia Tech, is a public land-grant research university with a main campus in Blacksburg, Virginia, as well as educational facilities in six regions statewide, and a study-abroad site in Switzerland.[15] Through its Corps of Cadets ROTC program, Virginia Tech is also designated as one of six senior military colleges in the country.[16] Virginia Tech was founded in 1872.[17]

As Virginia's third-largest university, Virginia Tech offers 225 undergraduate and graduate degree programs to some 30,600 students and manages a research portfolio of $513 million—the largest of any university in Virginia.[18] The university fulfills its land-grant mission of transforming knowledge into practice through technological leadership, and by fueling economic growth and job creation—both locally and across Virginia.[19]

According to the federal trademark office database, the university owns legal rights to its nickname "Virginia Tech,"[20] its formal name "Virginia Polytechnic Institute and State University,"[21] the tagline "Invent the Future,"[22] and logos including the university's official motto, "Ut Prosim," which in Latin means "That I may serve."[23]

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[15] Topic – Virginia Tech, WASH. TIMES, *https://www.washingtontimes.com/topics/virginia-tech/* (last visited Nov. 8, 2018).

[16] *Is the Corps Right for Me?*, VIRGINIA TECH, https://www.vtcc.vt.edu/join.html (last visited Nov. 9, 2018).

[17] *The Minor Years*, VIRGINIA TECH., https://www.unirel.vt.edu/history/historical_digest/minor_years.html (last visited Nov. 3, 2018).

[18] Virginia Polytechnic School and State University, *VIRGINIA TECH,* SEXSEED (Oct. 13, 2018, 5:00 AM), http://www.fc.up.pt/sexseed/virginia.html.

[19] *Id.*

[20] *See* VIRGINIA TECH, Registration No. 5,216,616.

[21] *See* VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY, Registration No. 2,389,184.

[22] *See* INVENT THE FUTURE, Registration No. 3,181,946.

[23] *See* VIRGINIA POLYTECHNIC AND STATE UNIVERSITY UT PROSIM, Registration No. 5,221,329.

The term "Hokie" has been associated with Virginia Tech's students for over a century.[24] According to Virginia Tech's website, the term "Hokie" was coined by a student in 1896:

> The origin of the word "Hokie" has nothing to do with a turkey. It was coined by O.M. Stull (class of 1896), who used it in a spirit yell he wrote for a competition. Here's how that competition came to be. Virginia Tech was founded in 1872 as a land-grant institution and was named Virginia Agricultural and Mechanical College. In 1896, the Virginia General Assembly officially changed the college's name to Virginia Agricultural and Mechanical College and Polytechnic Institute, a name so long that people shortened it in popular usage to VPI. The original college cheer, which made reference to the original name of the institution, was no longer suitable. So a contest was held to select a new spirit yell, and Stull won the $5 top prize for his cheer, now known as Old Hokie . . . . Later, the phrase "Team! Team! Team!" was added at the end, and an "e" was added to "Hoki."[25]

However the legend began, extensive historical research shows that the term "Hokie," when used to mean a student, athlete, alumnus or supporter of Virginia Tech, likely arose sometime around 1949, despite Virginia Tech's claim that its first use began in 1901 or earlier.[26] In any event, there is no dispute that, at some point, the public spontaneously gave the term its present meaning and made it part of the everyday regional language. For example,

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[24] *See History and Traditions*, VA. POLYTECHNIC SCH. AND STATE UNIV. (Sept. 18, 2017), https://vt.edu/about/traditions.html.

[25] *What is a Hokie Hoopty?,* BLOGSPOT.COM (Oct. 18, 2005, 6:24 PM), http://thehokiehooptydefined.blogspot.com.

[26] In none of the yearbooks from 1895 through 1972 was there any specific example of trademark use of the terms HOKIE or HOKIES by Virginia Tech. *See* Opposer's Main Brief at 16, Hokie Objective Onomastics Soc'y LLC v. Va. Polytechnic Institute and State Univ., Opposition No. 91207895 (T.T.A.B. 2017) (hereinafter "Onomastics Opposition"). "Rather, all uses in these yearbooks of HOKIE and its variants were purely nominative and descriptive." *Id.* In fact, "[t]he earliest evidence of trademark use of any HOKIE variant by Applicant is in the 1973 yearbook, which contains photographs of cheerleaders wearing jerseys bearing the term HOKIES (which presumably were taken during the 1972 football season)." *Id.* at 16–17.

Dr. Wayne Massey, a former Virginia Tech student who attended the university from 1959 to 1961, testified before the Trademark Trial and Appeal Board ("TTAB") that during his time on campus and afterwards, students and alumni referred to themselves as "Hokies."[27]

During Dr. Massey's time at the school, the primary popular nicknames for Virginia Tech students were "gobblers" and/or "techmen."[28] "Hokies" did not become the favored nickname until the 1970's.[29] Virginia Tech appears to have officially changed its nickname from Gobblers to Hokies around 1978.[30] Student newspapers published by Virginia Tech students from 1935 to 1979 confirm widespread use of the term "Hokies" peaked by the late 1970's.[31]

Virginia Tech's sports teams' website confirms that "[t]he official definition of 'hokie' is 'a loyal Virginia Tech Fan.'"[32] Furthermore, Virginia Tech has approved and marketed designs for apparel that indicate that the wearer is a "Hokie," bearing statements such as "Hokie Girl," "I am a Hokie," "It's Official, I'm a Hokie," and "What's a Hokie? I Am!"[33] By the time Virginia Tech made its first commercial use of the term "Hokies," the word had spent at least several decades in the linguistic public domain.[34]

Nonetheless, Virginia Tech's administration decided to take advantage of modern federal intellectual property laws. In 1998, Virginia Tech sought to federally register the word "Hokies" for diverse commercial goods such as jewelry, watches, bumper stickers, backpacks, waste paper baskets, baby bibs, and bath robes.[35] That trademark registration issued in May 2000 and has now been renewed through 2020.[36] In 2009 alone, Virginia

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[27] *Id.* at 12.

[28] *See id.* at 15–18.

[29] *Id.* at 3.

[30] *Id.*

[31] *Id.* at 15.

[32] *What's a Hokie,* VA. TECH ATHLETICS (July 24, 2018), https://hokiesports.com/sports/2018/4/19/whats-a-hokie.aspx.

[33] *See* Onomastics Opposition, *supra* note 26, at 12.

[34] *Id.*

[35] *See* HOKIES, Registration No. 2,351,364.

[36] *Id.*

Tech made about $1.6 million in fees and royalties from sales of licensed products and services.[37]

Virginia Tech's intellectual property lawyers quickly became assertive in protecting their client's newfound legal rights. For example, in 2010, Virginia Tech sued a Blacksburg real estate agent and Virginia Tech alumnus in federal court for using the word "HOKIE" in his business's name.[38] He named his business Hokie Real Estate, Inc.,[39] even though Virginia Tech has never been commercially engaged in local residential real estate.[40]

The Virginia Tech alumnus had submitted a request to the University's licensing program to use the name, but was refused for unknown reasons.[41] Virginia Tech's Amended Complaint alleged that Hokie Real Estate was nonetheless infringing upon and diluting Virginia Tech's exclusive legal right to commercialize the "famous Hokies and Hokie trademarks."[42] The school demanded that the defendant be ordered to reimburse its legal fees and pay the school unspecified compensatory damages in the form of triple the real estate business's profits.[43]

The defendant argued that the term "Hokies" was legally "generic" and in common use, and therefore legally unprotectable

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[37] Complaint at ¶ 11, Va. Polytechnic Inst. and State Univ. v. Hokie Real Estate, Inc., 813 F. Supp. 2d 745 (W.D. Va. 2011) (No. 7:10CV00466), 2010 WL 4232598.

[38] *Id.* at 5.

[39] *Id.* at 6.

[40] Virginia Tech alleged in its Amended Complaint that Virginia Tech houses thousands of students annually in its residence halls; that it is a substantial landowner in the Blacksburg, Virginia area; that there has been and is a significant amount of property that Virginia Tech purchases and develops; and that it has been involved in and has endorsed and helped to develop the HOKIE HOMES program since at least 2005 under which Virginia Tech has worked with an architect to develop home plans that are specifically drawn up for and targeted to Virginia Tech alumni, fans, and friends. Amended Complaint at 3–4, Va. Polytechnic Inst. and State Univ. v. Hokie Real Estate, Inc., 813 F. Supp. 2d 745 (No. 7:10CV00466).

[41] Tonia Moxley, *Blacksburg Real Estate Firm Gets Right to Use "Hokie" in Company Name*, ROANOKE TIMES, (Sept. 8, 2011), https://www.roanoke.com/news/blacksburg-real-estate-firm-gets-right-to-use-hokie-in/article_10f263f7-9682-5b98-a4f4-70c8e49540e8.html.

[42] Amended Complaint at 8–11, Va. Polytechnic Inst. and State Univ. v. Hokie Real Estate, Inc., 813 F. Supp. 2d 745 (No. 7:10CV00466).

[43] *Id.* at 15.

as a federal trademark.[44] By seeking the exclusive right to use the term Hokie, the defendant argued that Virginia Tech was "attempting to usurp the right of the public . . . to use a term that [Virginia Tech] did not itself invent, and which the public adopted as a nickname for members of the Virginia Tech community long before [Virginia Tech] ever attempted to use the term as a mark."[45]

The defendant also argued that Virginia Tech essentially gave up any legal claims to control and ownership of the term.[46] It believed that it did so by allowing, or at least failing to challenge, use of the term by several local businesses, three of which were still operating—HOKIE HOUSE, HOKIE HAIR and HOKIE SPOKES.[47] The defendant alleged that none of these businesses ever paid any licensing fees to Virginia Tech.[48]

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[44] Memorandum in Support of Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) at 3–7, Va. Polytechnic Inst. and State Univ. v. Hokie Real Estate, Inc., 813 F. Supp. 2d 745 (No. 7:10CV00466).

[45] Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 17, Va. Polytechnic Inst. and State Univ. v. Hokie Real Estate, Inc., 813 F. Supp. 2d 745 (No. 7:10CV00466).

[46] *See* Memorandum in Support of Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), *supra* note 44, at 3.

[47] Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction, *supra* note 45, at 31–32.

[48] Hokie Spokes' owner Dave Abraham apparently told reporters that several years ago he had signed a royalty-free contract with Virginia Tech to continue using the name as part of his business, thus avoiding a legal fight Tonia Moxley, *Virginia Tech Files Trademark Suit Over 'Hokie'*, THE ROANOKE TIMES (Oct. 29, 2010), https://www.deseretnews.com/article/700077265/Virginia-Tech-files-trademark-lawsuit-over-Hokie.html. It is also worth noting that one of the three allegedly grandfathered businesses, a local bar in Blacksburg, Virginia recently attempted to federally register its name "HOKIE HOUSE" in International Class 43 for bar services and restaurant services, a name that it has apparently used since November 1967, presumably without paying any licensing fees to the university. However, this trademark application was later abandoned after the Trademark Examiner refused registration. U.S. Trademark Application Serial No. 86/827,306 (filed Nov. 20, 2015).

Virginia Tech ultimately settled the dispute with the real estate agency by granting it a retroactive license.[49] Recently, however, that defendant's trademark counsel began to formally complain to the U.S. Patent and Trademark Office.[50] Specifically, he opposed Virginia Tech's most recent efforts to own the term "Hokie" for "educational services," by creating a new "educational" company that would seek to undercut the school's attempts to control the term, "Hokies" as commercial property in International Class 41.[51]

The legal test employed was fairly clear. In H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.,[52] the Federal Circuit Court of Appeals had identified the following two-step inquiry for determining the possible "genericness" of an applied-for trademark. "First, what is the genus of the goods or services at issue? Second, is the term sought to be registered on the register understood by the relevant public primarily to refer to that genus of goods or services?" Therefore, the challenge with mounting a successful legal attack on Virginia Tech's efforts to own a registered trademark is that such a term does not "generically" refer to a genus of any educational goods or services.[53] That is, one does not "go to a Hokie," or "take a Hokie." Rather, a "Hokie" might take a class at Virginia Tech. Ultimately, this fine distinction mattered to the TTAB who resolved the legal dispute in the school's favor, as "genericness" was the primary obstacle to Virginia Tech's application for registration of that term in International Class 41 for educational services.[54]

The TTAB ruled that Virginia Tech successfully argued that "HOKIES" is not generic for the precise services defined in the application.[55] As to the second part of the "genericness" test, the Board found that "the record does not demonstrate how the

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[49] Tonia Moxley, *Blacksburg Real Estate Firm Gets Right to Use "Hokie" in Company Name,* THE ROANOKE TIMES (Sept. 8, 2011), https://www.roanoke.com/news/blacksburg-real-estate-firm-gets-right-to-use-hokie-in/article_10f263f7-9682-5b98-a4f4-70c8e49540e8.html.

[50] Hokie Objective Onomastics Soc'y LLC v. Va. Polytechnic Inst. and State Univ., No. 91207895, 2017 WL 4790886 (T.T.A.B. Oct. 20, 2017).

[51] HOKIE, Registration No. 5,398,859.

[52] H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.,782 F.2d 987, 990 (Fed. Cir. 1986).

[53] Onomastics Opposition, *supra* note 26, at 10.

[54] *Id.*

[55] *Id.* at 11.

term 'Hokie' is understood by the relevant consuming public in the context of educational and entertainment services."[56] The TTAB went on to hold that:

> [e]ven if, *arguendo*, we accept Opposer's contention that 'Hokie' is a generic reference meaning a supporter of Applicant and such supporter or 'Hokie' may also be a consumer of Applicant's services, the evidence does not establish that the consuming public uses this term as a generic reference for educational and entertainment services.[57]

Thus, the TTAB found that Virginia Tech correctly argued that even if "Hokie" means a student or supporter of Virginia Tech, it is not "generic" as used in the context of the applied-for educational services in Class 41.[58] Virginia Tech had won: A fine legal distinction ruled the day.

Virginia Tech's aggressive efforts to commercially appropriate the term "Hokies," even though it was ultimately successful as a matter of technical trademark law, will continue to annoy and harass the local community. Virginia Tech will be forced into the uncomfortable posture of repeatedly suing members of that local community to stop unauthorized use of the term, which will likely include its own alumni and supporters.

B. "AGGIES" IN TEXAS AND ELSEWHERE

It should come as no surprise that Texas A&M zealously seeks to protect its intellectual property, given that it regularly generates $37.5 million each year in revenue from licensing alone.[59] Texas A&M owns well over one hundred federally-registered trademarks, including many variants of its name and numerous logos.[60] However, the tactic that has probably generated the most controversy for the school has been its attempt to own

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[56] *Id.* at 10.

[57] *Id.*

[58] *Id.*

[59] *See* Gaines, *supra* note 7.

[60] *See, e.g.*, FIGHTIN' AGGIE TEXAS BAND, Registration No. 1,881,969; *see also* TEXAS AGGIES, Registration No. 1,979,207; AGGIELAND, Registration No. 3,200,003; TEXAS A&M AGGIES, Registration No. 3,970,755; GIG 'EM AGGIES, Registration No. 3,981,001; AGGIE ENERGY, Registration No. 3,999,623; AGGIEFBLIFE, Registration No. 4,735,302.

and control the use of the widely used term "AGGIES." Derived from the "AG" of "Agricultural & Mechanical" commonly associated with universities established under the Morrill Land-Grant Acts of July 2, 1862,[61] dictionary definitions describe "AGGIES" generically as any agricultural college or students attending such a school.[62]

Students at Delaware Valley University in Doylestown Pennsylvania, as well as students attending New Mexico State in Las Cruces New Mexico are called "AGGIES."[63] Additionally, Kansas State University College of Agriculture in Manhattan, Kansas and the University of Florida College of Agricultural and Life Sciences in Gainesville, Florida are examples of schools whose students have been called "AGGIES" for over a century.[64] And Utah State University, located in Logan, Utah, has used the term to describe its athletic teams.[65] Nonetheless, Texas A&M has zealously sought to corral the term.[66]

1. *"WE ARE THE AGGIE NETWORK"*

In January 2011, A group of Texas A&M alumni successfully registered the trademark "WE ARE THE AGGIE NETWORK" for "association services, namely, promoting the

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[61] *See generally* Tanya Ray Fox, *March Madness Mascots & Nicknames 101: What is an Aggie?*, SPORTSGRID (Mar. 13, 2017, 6:30 PM), https://www.sportsgrid.com/real-sports/ncaa-basketball/march-madness-mascots-nicknames-101-what-is-an-aggie/ (discussing how colleges that use the nickname "Aggie" are agricultural and mechanical colleges).

[62] *See Aggie*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/aggie (last visited Nov. 3, 2018).

[63] *See List of College Sports Team Nicknames*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_college_sports_team_nicknames (last visited Nov. 3, 2018).

[64] *See Kansas State Bands*, KANSAS STATE UNIVERSITY, https://www.k-state.edu/band/thepride/history.html (last visited Nov. 3, 2018) (explaining that Kansas State students were referred to as "Aggies" at the turn of the century).

[65] *See List of College Sports Team Nicknames*, *supra* note 63.

[66] *See* Collin Binkley, *Trademark Bullies? Many Big Colleges Fiercely Protect Brands*, US NEWS (Aug. 28, 2018, 3:08 PM), https://www.usnews.com/news/best-states/minnesota/articles/2018-08-28/trademark-bullies-many-big-colleges-fiercely-protect-brands (discussing how Texas A&M University asked trademark officials to cancel a trademark its own alumni association had registered).

interests of alumni" in International Class 35.[67] Texas A&M later filed a formal petition to cancel that registration, claiming that the students had been using the trademark "pursuant to a license from Texas A&M" and that it had no authorization or permission "to file for registration of the mark in its own name."[68] Subsequently, Texas A&M withdrew its petition with prejudice.[69]

2. *"AGGIE ANGEL NETWORK"*

In 2012, a corporation located in Texas filed for a registration for "AGGIE ANGEL NETWORK" in connection with financial and investment services.[70] Specifically, the corporation assists entrepreneurs to obtain financing and provide "seed capital[,] financial information[,] and resources related to creating and building a business in International Class 36."[71] Texas A&M initially sought additional time to oppose the application, but never did so.[72] The university's filings led to delays, but the mark ultimately registered and has been subsequently renewed.[73]

3. *"AGGIENOSTIC"*

An individual from Texas filed an application for "AGGIENOSTIC" in connection with t-shirts.[74] Texas A&M opposed the application, claiming that consumers would falsely perceive an association, and that the use would both confuse and

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[67] *See* WE ARE THE AGGIE NETWORK, Registration No. 3,912,028.

[68] *See* Petition for Cancellation at ¶6, Tex. A&M Univ. v. The Ass'n of Former Students, No. 92063077 (T.T.A.B. 2016).

[69] *See* Withdrawal of Petition to Cancel, Tex. A&M Univ. v. The Ass'n of Former Students, No. 92063077 (T.T.A.B. 2016).

[70] U.S. Trademark Application Serial No. 85/224,731 (filed Jan. 24, 2011).

[71] *Id.*

[72] *See* Request for Extension, Tex. A&M Univ. v. Aggie Angel Network, Inc., No. 85224731 (T.T.A.B. 2011).

[73] *See* AGGIE ANGEL NETWORK, Registration No. 4,117,091.

[74] U.S. Trademark Application Serial No. 85/724,811 (filed Sept. 10, 2012).

dilute the "AGGIES" trademarks.[75] The applicant simply abandoned the application rather than fight the university.[76]

4. *"AGGIELAND" for Credit Cards*

The term "AGGIELAND" now describes College Station, the geographic region in Texas surrounding Texas A&M University.[77] In 2002, before Texas A&M ever sought a trademark for "AGGIELAND," the Greater Texas Federal Credit Union applied for a trademark registration for the term in International Class 36 for "credit union services and credit card services."[78]

Texas A&M nonetheless commenced a formal cancellation proceeding and alleged that the school's use of "AGGIELAND" predated the bank's usage for credit card services.[79] The bank avoided a protracted dispute with the school by amending its trademark application to claim the entire term, "AGGIELAND CREDIT UNION," but the bank simultaneously disclaimed any rights to the words, "credit union" and the registration issued and has been subsequently renewed several times.[80]

5. *"AGGIELAND DEPOT"*

In 2001, Hudson Ventures, Inc. applied for a trademark for "AGGIELAND DEPOT" in connection with retail store services.[81] The store claimed that it had used the term since 1998.[82] Texas A&M filed a formal opposition, and proceedings dragged on for nearly four years.[83] Ultimately, Hudson Ventures amended its application to formally disclaim any products

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[75] Notice of Opposition at 4, Texas A&M Univ. v. Peer, No. 91/211,057 (T.T.A.B. 2013).

[76] Voluntary Surrender of Application with Consent, Texas A&M v. Peer, No. 91/211,057 (T.T.A.B. 2013).

[77] *See* TEXAS A&M UNIVERSITY, https://www.tamu.edu/about/index.html (last visited Nov. 9, 2018).

[78] AGGIELAND CREDIT UNION, Registration No. 2,050,398.

[79] Petition to Cancel at 3, Texas A&M Univ. v. Greater Texas Fed. Credit Union, No. 92/040,492 (T.T.A.B. 2002).

[80] *See* Resubmission of Amendment at 1–2, Texas A&M Univ. v. Greater Texas Fed. Credit Union, No. 92/040,492 (T.T.A.B. 2003).

[81] AGGIELAND DEPOT, Registration No. 3,069,612.

[82] *Id.*

[83] Notice of Opposition, Texas A&M Univ. v. Hudson Ventures, Inc., No. 91/151,749 (T.T.A.B. 2002).

associated with Texas A&M.[84] The trademark issued but was ultimately abandoned by 2012.[85]

As is evident from these various skirmishes, despite its massive resources, Texas A&M has not fared as well as Virginia Tech in legally monopolizing the term the Texas school treasures.

C. "DOMER" IN SOUTH BEND, INDIANA

Founded in 1842, the University of Notre Dame du Lac ("Notre Dame") is an independent, national Catholic research university located adjacent to the city of South Bend, Indiana.[86] Notre Dame is one of America's leading teaching institutions.[87] It is regularly rated among the nation's top 25 institutions of higher learning in surveys conducted by U.S. News and World Report, Princeton Review, Time, Kiplinger's, Kaplan/Newsweek, and others.[88]

Notre Dame is also home to one of the most storied college football programs in the nation. It has a history of success that includes 11 consensus national championships over six decades (one of the highest winning percentages in college football), and seven Heisman trophy winners—more than any other college football program in the country.[89]

The term "domer" has regularly been used for decades to refer to Notre Dame students and alumni.[90] Students that attend

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[84] *See* Order Granting Agreed Motion to Amend Applicant's Description of Goods of Services, Texas A&M Univ. v. Hudson Ventures, Inc., No. 91/151,749 (T.T.A.B. 2003).

[85] AGGIELAND DEPOT, *supra* note 81.

[86] *See History*, UNIVERSITY OF NOTRE DAME, https://www.nd.edu/about/history/ (last visited Nov. 9, 2018).

[87] *See, e.g., University of Notre Dame*, U.S. NEWS REPORT & WORLD REPORT, https://www.usnews.com/best-colleges/notre-dame-1840 (last visited Nov. 9, 2018).

[88] *Id.*

[89] The Notre Dame "Fighting Irish" have about twenty varsity NCAA Division I athletic teams and are well known for their consistently strong football program. *See Notre Dame Championships*, UNIVERSITY OF NOTRE DAME, https://www.uhnd.com/history/national-championships/ (last visited Nov. 9, 2018); *Notre Dame Heisman Trophy Winners*, UNIVERSITY OF NOTRE DAME, https://www.uhnd.com/history/heismans/ (last visited Nov. 9, 2018).

[90] *See, e.g.*, KEVIN COYNE, DOMERS: A YEAR AT NOTRE DAME (Penguin Books 1996).

Notre Dame are known as "domers" in reference to the gold-colored top of the school's administration building.[91] Notre Dame began to sell apparel items, including t-shirts, under the "DOMER" trademark at least as early as 1998.[92] Notre Dame also uses "The Daily Domer" as the name of a website that collects local and national news stories about Notre Dame.[93] Students make on-campus purchases using "Domer Dollars" which are electric funds remotely programed into the campus ID cards.[94]

In 2002, Notre Dame sought a federal trademark registration for "DOMER" in connection with clothing, including headwear.[95] Initially, the Trademark Examiner refused registration, citing a pre-existing trademark design registration including the term "domer" for headwear and caps owned by Domer Sportswear, a Minnesota company.[96]

The University vehemently argued that its "goods will be marketed through on-campus bookstores, and through authorized licenses and retailers."[97] Thus, it argued that "there is almost no chance of Applicant's and Registrant's products being marketed together or sold on the same store shelves."[98] Nonetheless, the Examiner refused to withdraw the refusal, and formal appeal was ultimately taken to the TTAB, which thus permitted the

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[91] According to Notre Dame's website, the main campus building was built in 1879 after the previous building burned down. The famous golden dome was added to the structure in 1882 and has been gilded multiple times to maintain its shiny luster, most recently in 2005. *See The Great Fire*, UNIVERSITY OF NOTRE DAME, https://175.nd.edu/175-moments/the-great-fire/ (last visited Nov. 9, 2018); *The Statute and the Dome*, UNIVERSITY OF NOTRE DAME, https://175.nd.edu/175-moments/the-statue-and-the-dome/ (last visited Nov. 9, 2018).

[92] *See* DOMER, Registration No. 2,852,483.

[93] *See* THE DAILY DOMER, https://dailydomer.nd.edu (last visited Nov. 9, 2018).

[94] *See Domer Dollars,* UNIVERSITY OF NOTRE DAME: IRISH1CARD (last visited Nov. 9, 2018), *https://irish1card.nd.edu/domer-dollars2/.*

[95] *See* U.S. Trademark Application Serial No. 76/391,175 (filed Apr. 2, 2002).

[96] *See* DOMER, Registration No. 1,679,480.

[97] *See* Procedural History, DOMER, Registration No. 1,679,480, *available at* https://perma.cc/M2YK-B6MJ.

[98] *Id.*

University's registration to issue in 2004.[99] Both registrations currently coexist on the Principal Register.[100]

In 2015, an individual sought to register the phrase "Once a Domer, Always a Domer" in International Class 25 for "Polo shirts; Shorts; Sweatpants; Sweatshirts; T-shirts" on an intent-to-use basis.[101] Notre Dame opposed his application, claiming that it owned exclusive rights in the term "domer."[102] The applicant was given multiple opportunities to address Notre Dame's arguments, but his attorney ultimately withdrew as counsel, a default judgment was entered, and his contested trademark application was abandoned.[103]

In 2017, a distilling company located in Iowa sought to register the term "Domer," but met similar opposition efforts by Notre Dame. As a result, that application was also later abandoned.[104] Thus, the Indiana university has largely succeeded in controlling the use of the term, "domer."

IV. COLLEGIATE ACRONYMS/INITIALS

A. ONGOING BATTLES TO CONTROL "ASU"

Similar to nicknames, acronyms and initials used as linguistic shorthand to describe universities and colleges are often as old as the schools themselves.[105] ASU, for example, has been used to refer to a number of schools, including Alabama State University, Arizona State University, Angelo State University, and others.[106] As a result, in the United States Patent and

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[99] *See* DOMER, *supra* note 92.

[100] *See id.*; *see also* DOMER, Registration No. 1,679,480.

[101] *See* U.S. Trademark Application Serial No. 86/535,930 (filed Feb. 16, 2015).

[102] *See* Notice of Opposition, Univ. of Notre Dame v. Vrana, No. 91225439 (T.T.A.B. 2015).

[103] *See* Withdrawal of Counsel, Univ. of Notre Dame v. Vrana, No. 91225439 (T.T.A.B. 2015); *see also* Board Decision, Univ. of Notre Dame v. Vrana, No. 91225439 (T.T.A.B. 2015).

[104] *See* Univ. of Notre Dame v. Foundry Distilling Co., No. 87191838 (T.T.A.B. 2017).

[105] *See*, *e.g.*, Notice of Opposition, Hokie Objective Onomastics Soc'y, LLC v. Virginia Polytechnic Inst. and State Univ., Opposition No. 91207895 (T.T.A.B. 2012).

[106] *See* ALABAMA STATE UNIVERSITY, http://alabama.stateuniversity.com (last visited Nov. 3, 2018); *see also* ARIZONA STATE UNIVERSITY, https://www.asu.edu (last visited Nov. 3,

Trademark Office, there have been many competing interests vying over legal ownership of these initials.[107]

In the 1980's, Arizona State University first applied for and received a federal trademark registration for a specific ASU logo to be used on clothing and headwear.[108] That registration was cancelled in 1993 because Arizona State had failed to show that it was still using it.[109] Arizona State gained renewed interest in protecting intellectual property, leading it to file a slew of trademark applications for "ASU" and related logos in the late 1980's and early 1990's.[110] Many registrations ultimately issued.[111] Similarly, Arizona State currently owns a number of trademark registrations covering classes like educational services in International Class 41, clothing in International Class 25, and mugs and cups in International Class 21.[112] Arizona State admits that it spent "hundreds of thousands of dollars on registration and enforcement activities" and "even greater amounts on marketing activities" to promote its trademarks.[113]

Arizona State's investment of resources successfully precluded many others, including other schools and universities, from acquiring intellectual property rights to the letters, "ASU."[114] For example, in 1999, Augusta State University, located in Georgia, filed trademark applications for a logo containing the letters "ASU" in a variety of classes including clothing and

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2018); ANGLO STATE UNIVERSITY, https://www.angelo.edu (last visited Nov. 3, 2018).

[107] *See*, *e.g.*, U.S. Trademark Application Serial No. 75/842,036 (filed Nov. 5, 1999); *see also* U.S. Trademark Application Serial No. 85/461,475 (filed Nov. 1, 2011); *see also* U.S. Trademark Application Serial No. 75/270,563 (filed Apr. 7, 1997).

[108] *See* ASU, Registration No. 1,433,972.

[109] *Id.*

[110] *See* ASU, Registration No. 1,445,083; *see also* ASU, Registration No. 1,445,086; ASU, Registration No. 1,449,742; ASU, Registration No. 1,433,973; ASU, Registration No. 1,462,309.

[111] *See, e.g.*, ASU, Registration No. 1,462,309; *see also* ASU, Registration No. 1,449,742.

[112] *See, e.g.*, ASU Registration No. 1,462,309; ASU Registration No. 1,433,973; ASU Registration No. 1,449,742.

[113] Petition for Cancellation at 6, Ariz. Bd. of Regents v. Angelo State Univ., No. 92067468 (T.T.A.B. 2017).

[114] *See*, *e.g.*, *id*. at 7.

educational services.[115] Those applications were later abandoned because of Arizona State's pre-existing registrations.[116]

Subsequently, legal conflicts erupted between Angelo State University, which sought and received a registration for its logo which included the initials "ASU" and the words "Arizona State."[117] In its Petition to Cancel, filed in late 2017, Arizona State alleged that Angelo State's trademark registration is intentionally designed to "trade on" Arizona State's goodwill, and thus, make it "likely, when applied to the registered goods and services, to cause mistake and confusion among, and to deceive, the trade and the public, with consequential injury" to Arizona State.[118] No specific instances of any actual confusion are cited by Arizona State's Petition, despite the fact that Angelo State's trademark was issued in 2013, and has been used by that school since January 2002.[119]

Nonetheless, Angelo State is now forced to litigate and defend its existing trademark registration against Arizona State's petition to cancel it.[120] In the unlikely event that Arizona State litigates its Petition to an ultimate legal victory, not only will Angelo State's trademark be removed from the Principal Register of the Trademark Office, the school also faces the possibility of an injunction and liability for financial damages.[121]

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[115] U.S. Trademark Application Serial Nos. 75/823,792 (filed Oct. 15, 1999); 75/842,036 (filed Nov. 5, 1999).

[116] *Id.*

[117] Petition for Cancellation, s*upra* note 113, at 8.

[118] *Id.* at 11.

[119] *Id.* at 8.

[120] *See*, *e.g.*, Answer to Petition for Cancellation*,* Ariz. Bd of Regents v. Angelo State Univ., No. 92067468 (T.T.A.B. 2017).

[121] In such a hypothetical civil action, Angelo State could to present an affirmative defense of estoppel by laches based on Arizona State's unexplained delay before filing suit. *See* J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:30 (5th ed. 2013). However, a loss in the TTAB on the substantive issue of likelihood of confusion could potentially create collateral estoppel if Angelo State tried to re-litigate that same issue in District Court. *See* B&B Hardware Inc. v. Hargis Indus. Inc., 135 S.Ct. 1293, 1299 (2015).

B. THE CROWDED FIELD OF "BU"

"BU" has been used to describe Baylor University in Texas, Binghamton University in upstate New York, as well as Boston University, Bradley University, and Butler University. No single one of these entities has been successful in monopolizing the shared initials. Such a situation is typically called a crowded field.[122]

Baylor University beat Boston University in taking advantage of federal intellectual property laws. In 1987, Baylor filed the first trademark applications for its interlocking BU logo for clothing in Class 25, printed matter in Class 16, and cups and mugs in Class 21.[123] Baylor also owns a trademark for a similar logo in Class 9 for computer application software.[124]

However, in 2006, Biola University, a California school, filed a trademark application for an eagle logo, also containing the acronym "BU," which issued in 2008.[125] The field became even more crowded in 2015, when Bloomsburg University of Pennsylvania filed and received a trademark which consists of stylized letters "B" and "U" with the image of the head of a husky in between the two letters.[126] Thus, no one entity has successfully managed to corral legal rights to the letters "BU" for educational services and related products.

V. LEGALLY CAPTURING A NICKNAME OR ACRONYM AS A TRADEMARK

A. THE PUBLIC USE DOCTRINE

Are universities within their legal rights to corral a nickname or acronym from the popular lexicon into their private trademark portfolios? Appellate courts have not authoritatively addressed this controversial issue, and legal and academic commentators are split on the propriety of their approach. For example, one district court said that it is "doubtful" whether a manufacturer can legitimately claim legal protection for an abbreviation that only the public, and not the manufacturer, has

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[122] *See*, *e.g.*, Juice Generation, Inc. v. GS Enter. LLC, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection).

[123] *See* BU, Registration No. 1,558,080.

[124] *See* BU, Registration No. 5,429,446.

[125] *See* BU, Registration No. 3,494,058.

[126] *See* BU, Registration No. 4,666,136.

used.[127] Other court decisions indicated that where, as a result of use by customers, the trade, or the media, an abbreviation has become identified in the public mind with a particular company or source, then that abbreviation should be a protectable trademark—even if the company itself has not formally adopted that abbreviation as a trademark or trade name.[128] This is often called the "Public Use" doctrine.[129] One commentator has noted that some courts are hesitant to recognize such trademark rights created solely by the public use doctrine because it seems contrary to the rule of law that the owner of a trademark must actually use that mark in commerce.[130]

With respect to such publicly-generated nicknames, the United States Court of Appeals for the Second Circuit dealt with a similar situation in *Harley-Davidson, Inc. v. Grottanelli*.[131] In that case, the Harley-Davidson motorcycle manufacturer sought to prevent a motorcycle repair shop from using the term "HOG" to refer to Harley-Davidson motorcycles.[132] In the late 1960's and 1970's, motorcycle enthusiasts had organically begun to use the nickname, "HOG" to refer to all large motorcycles, but from the

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[127] Cont'l Corrugated Container Corp. v. Cont'l Group, Inc., 462 F. Supp. 200, 204 (S.D.N.Y. 1978); *see also* MCCARTHY, *supra* note 121, § 7:18 (discussing cases).

[128] MCCARTHY, *supra* note 121, (citing Big Blue Prod., Inc. v. Int'l Bus Mach. Corp., 19 U.S.P.Q.2d 1072 (T.T.A.B. 1991)) (IBM may be able to prove that the designation "BIG BLUE" was a trade name identifying IBM because of use in the trade, news media and public, even prior to actual use in commerce as a trademark by IBM in 1988).

[129] *See* Nat'l Cable Television Ass'n Inc. v. Am. Cinema Editors Inc., 937 F.2d 1572 (Fed. Cir. 1991) (finding that an organization need only to have used a name or acronym in a manner that identifies the company by that name or acronym to the public, no particular formality of adoption or display is necessary to establish trade name identification).

[130] *See* Peter M. Brody, *What's in a Nickname? Or, Can Public Use Create Private Rights?*, 95 TRADEMARK REP. 1123, 1164 (2005); *see also* Llewellyn J. Gibbons, *Crowdsourcing a Trademark: What the Public Giveth, the Courts May Taketh Away*, 35 HASTINGS COMM. & ENT. L.J. 35, 69–70 (2012).

[131] Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 809 (2d Cir. 1999).

[132] *Id.* at 808.

1970's into the early 1980's, motorcyclists increasingly used the nickname to refer to Harley-Davidson motorcycles specifically.[133] However, the Harley-Davidson company did not use the term in a commercial trademark manner until 1981, or in connection with the advertising of its motorcycles until 1990.[134]

Consequently, because the evidence showed that the public's use was not consistently in line with always referring to Harley-Davidson brand motorcycles as "HOG," the New York court found the term "HOG" to be "generic as applied to motorcycles" and held that the Harley-Davidson company had "no . . . right . . . to withdraw from the language a generic term, already applicable to the relevant category of products, and accord it trademark significance, *at least as long as the term retains some generic meaning.*"[135]

Large university detractors argue, like Harley-Davidson, Virginia Tech and others are attempting to appropriate exclusive rights in essentially generic words coined by the public. Thus, they argue the "Public Use" doctrine should not apply.[136] Applying these critics' arguments against the public use doctrine would hold that the nicknames the public applied to members of their own community long before the schools ever attempted to use them in a commercial manner should remain generic and in the public domain.[137]

However, other legal commentators agree with the line of cases that uphold trademark rights even in nicknames and abbreviations used only by the public.[138] Professor McCarthy argues:

> an abbreviation should be protectable from infringement if in the public mind the abbreviation identifies a company or its product, even if the company itself has not used the abbreviation in a

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[133] *Id.* at 808–09.

[134] *Id.* at 809.

[135] *Id.* at 811–12 (emphasis added).

[136] *See* Brody, *supra* note 130, at 1158–62; *see, e.g.*, George & Co. v. Imagination Entm't Ltd., 575 F.3d 383, 403 (4th Cir. 2009) ("[T]he Public Use doctrine generally is confined to instances in which the public modifies a well-known brand into a nickname or abbreviation.").

[137] *See* Brody, *supra* note 130, at 1158–62; *see also* Gibbons, *supra* note 130, at 70–71.

[138] MCCARTHY, *supra* note 121, at § 7:18.

> formalistic way as a trade name, trademark or service mark. It is public use that will set the stage for confusion, which is the evil to be remedied in trademark cases.[139]

Interestingly, Virginia Tech essentially concedes that the term HOKIE retains some generic meaning by indicating that the term's common and ordinary meaning is "a loyal Virginia Tech Fan" or "a supporter of Virginia Tech."[140] The rationale adopted by the court in *Grottanelli* therefore seems relevant: "[n]o manufacturer can take out of the language a word, even a slang term, that has generic meaning as to a category of products and appropriate it for its own trademark use."[141]

However, the TTAB sidestepped the controversy of the Public Use doctrine in its *Hokie* decision by holding: "[t]he facts in Harley-Davidson are inapposite to the relevant circumstances of this proceeding."[142] The Second Circuit found that "'hog' was a generic term in the language as applied to large motorcycles before the public (or at least some segments of it) began using the word to refer to Harley-Davidson motorcycles."[143] That is, the court held that the term "hog" was a generic reference in connection with respect the relevant genus of goods, namely large motorcycles, before ruling that the motorcycle manufacturer could not prohibit the opposing party from using "hog" to identify his motorcycle parts and services. In contrast, the plaintiff in the *Hokie* case "ha[d] not argued, or proven, that the term HOKIE is generic for the relevant genus of services, namely, educational or entertainment services."[144]

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[139] *Id.*

[140] *See* VA. TECH ATHLETICS, *supra* note 32; *see also* Complaint at 3, Hokie Real Estate, 813 F. Supp. 2d at 752 (W.D. Va.) (No. 7:10CV00466).

[141] Harley-Davidson, Inc. v. Grottanelli, 164 F.3d 806, 810 (2d Cir. 1999); *accord* Am. Online, Inc. v. AT&T Corp., 243 F.3d 812, 821 (4th Cir. 2001) ("[T]he law of trademarks . . . protects for public use those commonly used words and phrases that the public has adopted, denying to any one competitor a right to corner those words and phrases by expropriating them from the public 'linguistic commons.'").

[142] Onomastics Opposition, *supra* note 50, at 22.

[143] *Harley-Davidson*, 164 F.3d at 812.

[144] Onomastics Opposition, *supra* note 50, at 38.

Thus, while not precedential, the recent *Hokie* decision by the TTAB and other applicable case law supports the general proposition that universities can legally appropriate a generic or descriptive term by developing a single source identification among the relevant consuming public, at least for a slightly different type of services or goods.[145]

B. RATIONALE FOR APPROPRIATING GENERIC/DESCRIPTIVE TERMS

Even if the law permits such an aggressive and creative approach, why would a university choose to market its products or services by attempting to capture a previously-used nickname coined by the public, instead of inventing a wholly new arbitrary one? To the extent that a term has already been time-tested and established (*e.g.*, it has functioned in the local lexicon), it may stand a better chance of garnering and retaining brand equity than a new one that is unknown.

First, a captured nickname is more "authentic." Such an authentic captured term starts out with an advantage in having public recognition and acceptance on day one. Virginia Tech is in a better marketing position with ownership of the term, "HOKIES" than it would be with ownership of an artificially invented term like "VTEKKER," because it is not certain that students would ever adopt the artificial nickname.

"Rights in a trademark are acquired and maintained through *commercial* use," which the universities will invariably make.[146] A mark is used in commerce on goods in the United States when "it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale."[147] Similarly, a mark is used in conjunction with services "when it is used or displayed in the sale or advertising of services."[148]

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[145] *See id.*

[146] Major League Baseball Props., Inc. v. Sed Non Olet Denarius, Ltd., 817 F. Supp. 1103, 1126 (S.D.N.Y. 1993) (emphasis added) ("The law of trademarks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption" (quoting United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 97 (1918))), *vacated by settlement*, 859 F. Supp. 80 (S.D.N.Y. 1994).

[147] 15 U.S.C. § 1127 (2006).

[148] *Id.*

Thus, various students, alumni, and supporters of the schools could have used these terms in a colloquial, generic, or descriptive fashion. However, if they have not consistently or *commercially* exploited the term as a brand, the nickname or acronym can ultimately be appropriated through commercial use that begins to alter the linguistic terrain, such that the term becomes associated with a single commercial source—namely, the university itself. Further, trademark rights are based on time—priority of rights is based on the principle of first in time, first in right. Thus, a university that plants its flag by claiming rights to a mark that was once descriptive (*e.g.*, Notre Dame's use of "domers") can force all newcomers off the market through protracted litigation. Over time, the mark would presumably begin to function as a single source identifier with the university alone.

VI. CONCLUSION

Collegiate licensing programs have aggressively sought to appropriate nicknames and acronyms as trademarks, and to monopolize them as commercial brands using the legal system's heavy hand to prevent unauthorized uses. While trademark law apparently permits such a creative approach to acquire legal rights, real conflicts can erupt within the local communities where these schools are located when those rights are vigorously enforced. Universities should be mindful to exert their newfound intellectual property rights in a measured way to recognize that the public should have a limited right to continue to use the terms they coined.

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THE TIPPING POINT: MAYHEM IN COLLEGE SPORTS REQUIRES CONGRESS TO FINALLY INTERVENE IN NCAA GOVERNANCE

MARSHA DURR*

I. INTRODUCTION

On April 25, 2018, the National Collegiate Athletic Association's ("NCAA") Commission on College Basketball released a report analyzing the operation of college basketball in America. The Commission on College Basketball determined that "the state of men's college basketball is deeply troubled. The levels of corruption and deception are now at a point that they ***threaten the very survival of the college game as we know it***."[1]

The report outlines a bleak existence for college basketball—one filled with lies, corruption and apathy.[2] Unfortunately, basketball is not the only NCAA sanctioned sport that threatens the existence of amateur athletics in America. This article scrutinizes the failed attempts by the NCAA to regulate the ever-growing commercialized nature of "big-time" Division I intercollegiate athletics and the resulting patchwork reform efforts Congress and the judiciary have implemented in response. The article then offers an alternative solution by means of Congress creating a federal intercollegiate athletics commission to implement consistent, governmental oversight. While congressional committees have researched and discussed problems facing intercollegiate athletics throughout its evolving

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[1] *Report and Recommendations to Address the Issues Facing Collegiate Basketball*, NCAA 1 (Apr. 2018), https://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf (emphasis added).

[2] *Id.*

industry,[3] a major overhaul from Congress has yet to come.[4] This article proffers why it is time for Congress to intervene in the business of big-time college sports.

Part II provides an overview of the problem with college sports today as encapsulated in recent issues headlined in the news. Part III argues that NCAA is not capable of managing big-time college athletics by exploring the failed attempts on their part to make institutional changes. Part IV reviews previous attempts by Congress to force institutional change and outlines national interests now at play that should prompt Congress to intervene in the NCAA's governance. Part V offers an alternative measure Congress may implement, through a federal commission controlled by the United States Department of Education ("Department of Education"), to reconcile the commercial nature of intercollegiate athletics with the educational purpose of American higher education institutions. Part VI concludes that intercollegiate athletics is an engrained part of the American higher education system and unless Congress acts to oversee the governance of intercollegiate athletics, then student-athlete welfare will remain compromised.

II. THE PROBLEM WITH COLLEGE SPORTS TODAY

Beginning in the early 20th Century, the NCAA was charged with regulating college sports to preserve the educational purpose of intercollegiate competition.[5] Since the NCAA's inception, college sports have evolved from a niche pastime to a multibillion dollar industry.[6] The current standard in big-time college athletics requires student-athletes to devote more time to their sport than the national average of hours spent per work-week

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[3] *See* RONALD A. SMITH, PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETIC REFORM 43–44 (U. Ill. Press ed. 2011).

[4] Doug Lederman, *College Sports Reform: Now? Never?*, INSIDE HIGHER ED (Jan. 10, 2012), https://www.insidehighered.com/news/2012/01/10/calls-major-reform-college-sports-unlikely-produce-meaningful-change.

[5] SMITH, *supra* note 3.

[6] Alex Kirshner, *Here's How the NCAA Generated a Billion Dollars in 2017*, SBNATION (Mar. 8, 2018), https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017.

for paid employees.[7] Yet, unlike paid employees, student-athletes are required to spend additional time on schoolwork to maintain a certain grade point average.[8] The physical demands of competition often cause exhaustion and hinder a student-athlete's ability to learn in the classroom and take advantage of social and professional development opportunities.[9] Reports consistently show these effects, yet the NCAA continues to assert that the opportunity for a formal college education is an adequate exchange for students who participate in revenue-producing sports.[10] Some have labeled this NCAA rhetoric as the "student-athlete illusion."[11]

While many realize that student-athletes are not being given an adequate opportunity for an education, the NCAA and its powerhouse institutions refuse to admit their system is insufficient.[12] Some argue that the NCAA fears formal professionalization of college sports because it would affect the loyalty and personal connection paying fans have with their alma mater's sports teams.[13] If a fan felt a student-athlete's primary motivation to play was a paycheck and not to honor the name on the jersey, then the colleges' biggest fan base, the alumni, would not be as willing to engage and support the teams.[14] So, instead of

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[7] Alison Doyle, *What is the Average Hours Per Week Worked in the US?*, THE BALANCE (Jan. 2, 2018), https://www.thebalance.com/what-is-the-average-hours-per-week-worked-in-the-us-206063; Dennis Dodd, *Pac-12 Study Reveals Athletes 'Too Exhausted to Study Effectively'*, CBS SPORTS (Apr. 21, 2015), https://www.cbssports.com/college-football/news/pac-12-study-reveals-athletes-too-exhausted-to-study-effectively/.

[8] *Id.*

[9] *Id.*

[10] *See* Val Ackerman & Larry Scott, *College Athletes Are Being Educated, Not Exploited*, CNN (Mar. 30, 2016), https://www.cnn.com/2016/03/30/opinions/college-athletes-not-exploited-ackerman-scott/index.html.

[11] Jake Novak, *Paying College Players Will Ruin the Game*, CNBC (Apr. 6, 2018), https://www.cnbc.com/2015/04/06/ege-athletes-shattered-illusions.html.

[12] William W. Berry III, *Employee-Athletes, Antitrust, and The Future of College Sports*, 28 STAN. L. & POL'Y REV. 245, 247–48 (2017).

[13] Novak, *supra* note 11.

[14] *Id.* Similar to the lackluster interest and publicity that minor league sports deal with right now. *Id*.

properly compensating student-athletes that garner big business, the NCAA and its member institutions funnel their money to coaches and other university administrators to incentivize recruitment of the best athletes to represent the name on the jersey—thus keeping the illusion going.[15]

Although the NCAA tried once before to cap coaching salaries, the rule was struck down as an unreasonable restraint on trade in *Law v. NCAA*.[16] The result of the *Law* decision opened the door for star coaches to compete for the highest salaries.[17] These exorbitant salary payments are just one part of the athletics "arms race"—a constant battle for institutions to build the best facilities, attract the best players, win the most championships, and ultimately garner the biggest paydays.[18] This athletics' arms race consistently results in the failed management of education, amateurism, and illegal activity.

A. BIG BUSINESS MAKES THE NCAA COMPLICIT TO ILLEGAL BEHAVIOR: VIOLENCE AND SEXUAL ASSAULT ISSUES

With their focus turned on winning games to maximizing revenue and away from consistent regulatory enforcement

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[15] Current coaching salaries at schools across the country provide evidence for this cycle. Laura McKenna, *The Madness of College Basketball Coaches' Salaries*, THE ATLANTIC (Mar. 24, 2016), https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/.

[16] Law v. NCAA, 134 F.3d 1010, 1024 (10th Cir. 1998); *see also* Marc Edelman, *Why an NCAA Cap on College Coaches' Salaries Would Be Illegal*, FORBES (Dec. 19, 2012), https://www.forbes.com/sites/marcedelman/2012/12/19/why-a-salary-cap-on-ncaa-coaches-is-illegal/#35b9386355e5.

[17] Edelman, *supra* note 16. Many think the Tenth Circuit decided the case incorrectly because college coaches exist in an "artificial marketplace" where this "student-athlete illusion" creates a false demand for coaches. Mckenna, *supra* note 15. This is because, unlike professional leagues, college teams cannot attract the top talent needed to win with the promise of a big paycheck. *Id.* Instead, players often choose their school based on access to coaches who have a proven track-record of winning and getting athletes into professional leagues where the big payoffs occur, which drives up the market demand for well-connected coaches. *Id.* Pressure from donors and alumni furthers the problem because there are no stakeholders who want to efficiently control costs. *Id*.

[18] Mckenna, *supra* note 15.

processes, the NCAA and its member institutions have repeatedly failed to protect students and community members from preventable assault. Notably, the media touted former USA Gymnastics and Michigan State University doctor Larry Nassar as the worst thing to ever happen to college sports.[19] More than 150 women came forward to testify in court that he sexually abused them.[20] These assaults lasted over the past two decades and continued even after students reported his misconduct.[21] Multiple accounts in the Nassar case detail the murmurs of misconduct that went on for years and how administrators chose to turn a blind eye.[22] These facts are similar to another harrowing scandal at NCAA football powerhouse Pennsylvania State University ("Penn State"). There, football and university administrators failed to prevent multiple sexual assaults of children on campus at the hands of former Penn State football coach Jerry Sandusky.[23] The Penn State scandal garnered headlines similar to that of the current Michigan State scandal and resulted in multiple criminal investigations.

Though the NCAA has launched an investigation on the university that employed Nassar during his time of abuse, few expect the NCAA to find wrongdoing on the part of Michigan State University.[24] This is in light of yet another egregious sexual assault scandal at Baylor University ('"Baylor") that was dismissed last year from NCAA investigation.[25] Student-athletes flagged Baylor's football program for over fifty rape allegations by student-athletes, at least five of which were gang rape

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[19] Eric Levenson, *Larry Nassar Sentenced to up to 175 Years in Prison for Decades of Sexual Abuse*, CNN (Jan. 24, 2018), https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html.

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Penn State Scandal Fast Facts*, CNN (Nov. 28, 2107), https://www.cnn.com/2013/10/28/us/penn-state-scandal-fast-facts/index.html.

[24] *Id.*

[25] Jon Solomon, *Why the NCAA May Never Punish Baylor for Its Rape Scandal the Way Fans Demand*, CBS SPORTS (Feb. 27, 2017), https://www.cbssports.com/college-football/news/why-the-ncaa-may-never-punish-baylor-for-its-rape-scandal-the-way-fans-demand/.

allegations.[26] The NCAA has yet to find wrongdoing on the part of the university or its athletics department.[27]

The pattern remains that each scandal regarding sexual assault and violence that is exposed under the NCAA's curtilage is more egregious than the last. And the implicit narrative of every story is always the same: the leaders of the university would rather sit back and hope the allegations of sexual assault and violence are not true rather than hurt their bottom line by acting to investigate and suspend a beloved coach or player. The decisions are made all for the sake of wins and losses and always at the expense of the victims. The NCAA then attempts to rectify its failure to properly monitor its member institutions by creating public relation campaigns[28] or a new policy of expectation for its member institutions.[29] But the attempts continue to fall short of ever creating meaningful change[30] because the member institutions creating the rules and policies all adhere to the "win at all costs" code of conduct.[31] This pattern makes clear that the NCAA has

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[26] *Id.*

[27] *Id.*

[28] *Temple Wins Division I It's on Us Video Contest*, NCAA (Mar. 29, 2016), http://www.ncaa.org/about/resources/media-center/news/temple-wins-division-i-its-us-video-contest.

[29] *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture*, NCAA SPORTS SCI. INST. (Oct. 2016), http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf.

[30] Diana Moskovitz, *The NCAA's Latest Sexual Violence Policy Is a Joke*, DEADSPIN (Aug. 11, 2017), https://deadspin.com/the-ncaas-latest-sexual-violence-policy-is-a-joke-1797731779.

[31] "True to its hypocritical form, the [NCAA] makes a dangerous problem such as domestic violence on campuses worse by shrugging its shoulders and leaving the universities to decide on punishment (often a tsk-tsk response to serious allegations). . . . The NCAA likes to pick and choose when it plays strict Big Brother. Deciding when an adult man should be allowed to become a professional in his chosen career? Check. Denying players' rights to make a profit off of their abilities but ensuring that college coaches and universities maximize their profits? Check. . . . The NCAA at times will stick so strongly to its rules, it will do things such as declaring former Baylor running back Silas Nacita, who was once homeless, permanently ineligible for accepting help from a well-meaning friend. But when it comes to things ranging from drug use to domestic violence to sexual assault, the NCAA takes a laissez-faire approach and

lost control of the business of college sports. If Congress does nothing to intervene and regain control, then student-athletes and the public at large will continue to be put at risk.

B. THE DOJ IS FED UP: CURRENT FBI INVESTIGATIONS INDICATE THE NCAA CAN'T KEEP CONDONING COLLUSION IN COLLEGE SPORTS

Recent FBI investigations have further uncovered the excessive, and often times illegal, dealings of college basketball—repeatedly by coaches who are pressured to recruit the best athletes to justify their enormous salaries.[32] In late 2017, the FBI unveiled a two-year investigation of coaches around the country who allegedly participated in a systemic bribery scheme.[33] The complaint, filed in September 2017, outlines alleged illegal conduct by basketball coaches at schools such as the University of Arizona, Oklahoma State University, and University of Southern California.[34] Specifically, the complaint asserts that these coaches defrauded the universities they worked for by misrepresenting their recruiting practices and exposing the universities to major NCAA violations.[35] The coaches allegedly used their influence to steer players to certain schools and then on to certain agents, financial advisors, and even certain athletic apparel companies.[36] In return, money was funneled to the coaches and players.[37] Prosecutors allege these practices created a thriving "black market" for teenage student-athletes.[38]

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lets the universities decide the appropriate punishment." Shannon Ryan, *Why Doesn't the NCAA Take a Tougher Position on Domestic Violence?*, CHI. TRIBUNE (Jan. 5, 2016), http://www.chicagotribune.com/sports/columnists/ct-ncaa-joe-mixon-domestic-violence-spt-0105-20160104-column.html.

[32] Marc Tracy, *N.C.A.A. Coaches, Adidas Executive Face Charges; Pitino's Program Implicated*, N.Y. TIMES (Sept. 26, 2017), https://www.nytimes.com/2017/09/26/sports/ncaa-adidas-bribery.html.

[33] Sealed Complaint, United States v. Chuck Connors Person (S.D.N.Y. Sept. 25, 2017), https://www.justice.gov/usao-sdny/press-release/file/999001/download./

[34] Tracy, *supra* note 32.

[35] Sealed Complaint, *supra* note 33.

[36] *Id.*

[37] *Id.*

[38] *Id.*

Some reporters were initially surprised by the case filing.[39] The sudden involvement by the Department of Justice was peculiar because the sports realm views these practices as the norm in big-time college athletics.[40] Indeed, investigations by the NCAA regarding illegal payments to star athletes span many decades.[41] Yet, the NCAA has not imposed any punishment harsh enough to curb this behavior.[42] The only time the NCAA seriously attempted to stop under-the-table dealings is when it rendered the "Death Penalty" against Southern Methodist University. [43] The university's athletics department nearly crumbled in the aftermath.[44] The department has yet to recover any semblance of the powerhouse athletics department it once was, and the NCAA has yet to use the Death Penalty again for fear of ruining more athletics departments.[45] But the recent complaint makes clear that the federal government views any conspiracy between coaches, agents and athletic apparel businesses to funnel student-athletes for monetary gain, whether customary behavior or not, to be fraudulent and illegal.[46]

Some proponents of NCAA reform see the federal investigations as an opportunity for the public to see how effective an investigation of wrongdoing in college athletics could be if an

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[39] *See, e.g.*, Michael Rosenberg, *Defrauded? Universities Named in Justice Department Complaint Got What They Deserved*, SPORTS ILLUSTRATED (Sept. 26, 2017), https://www.si.com/college-basketball/2017/09/26/ncaa-basketball-assistants-corruption-charges.

[40] *Id.*

[41] Sally Jenkins, *As the FBI Uncovers a Shadow Economy, Let's Be Clear Who Created It: The NCAA*, WASH. POST (Oct. 3, 2017), https://www.washingtonpost.com/sports/as-the-fbi-uncovers-a-shadow-economy-lets-be-clear-who-created-it-the-ncaa/2017/10/03/9560f426-a853-11e7-b3aa-c0e2e1d41e38_story.html?noredirect=on&utm_term=.5ec2892cc91e.

[42] *Id.*

[43] *See* Dennis Dodd, *30 Years Later: The Legacy of SMU's Death Penalty and Six Teams Nearly Hit With One*, CBS SPORTS (Feb. 22, 2017), https://www.cbssports.com/college-football/news/30-years-later-the-legacy-of-smus-death-penalty-and-six-teams-nearly-hit-with-one/.

[44] *Id.*

[45] *Id.*

[46] Sealed Complaint, *supra* note 33.

independent body outside the NCAA was charged with the task.[47] This is in part because the Department of Justice's subpoena power will allow a more thorough investigation to take place.[48] In any event, the federal investigations expose the fact that rising salaries, particularly at public institutions subsidized by taxpayer money, are impossible to justify amid illegal activity that is turning out to be the norm in big-time college sports.[49]

The NCAA has since expressed its outrage for the alleged behavior outlined in the Department of Justice's complaint and created a taskforce to examine the NCAA's place in allowing a culture of under-the-table dealings to thrive.[50] The NCAA's Commission on College Basketball was formed after the criminal complaint was filed and outlined its purpose to investigate whether the current NCAA model provides adequate investigative tools, cultural incentives, and structures to combat exploitation and corruption in college basketball.[51]

After a six-month period of fact-finding, the Commission on College Basketball released a report outlining suggested changes to NCAA governance.[52] Led by former Secretary of State

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[47] *See* Dylan Scott, *NCAA Basketball's Bribery Scandal and Its March Madness Conspiracy Theory, Explained*, VOX (Mar. 23, 2018), https://www.vox.com/2018/3/13/17109874/ncaa-scandal-fbi-basketball-march-madness.

[48] *Id.*

[49] To be sure, the exorbitant salaries of college coaches are not a new trend. Most states report that their highest earning public official is a college athletics coach—usually men's basketball or football. In some instances, college head coaches make at or above the average payment for head coaches in professional leagues. *See* Jason Kirk, *15 Reasons NFL Coaches Don't Want to Become College Football Coaches*, SB NATION (Dec. 2, 2014), https://www.sbnation.com/college-football/2014/12/2/7317659/nfl-college-coaches-jim-harbaugh-chip-kelly; Jonah Newman, *Coaches, Not Presidents, Top Public-College Pay List*, THE CHRON. HIGHER EDUC. (May 16, 2014), http://www.chronicle.com/blogs/data/2014/05/16/coaches-not-presidents-top-public-college-pay-list/.

[50] *Statement from President Mark Emmert on the Formation of a Commission on College Basketball*, NCAA (Oct. 11, 2017), http://www.ncaa.org/about/resources/media-center/news/statement-president-mark-emmert-formation-commission-college-basketball.

[51] *Id.*

[52] Press Release, NCAA, Joint Statement on Commission on College Basketball (Apr. 25, 2018)

Condoleezza Rice, the Commission on College Basketball found that "radical changes are long overdue" in intercollegiate athletics.[53] Specifically, the report recommended that: 1) the NCAA add public members to its board of governors, 2) the National Basketball Association end the "one-and-done" rule, 3) the NCAA require member institutions to honor academic scholarships for student-athletes who do not complete their degree within their athletic eligibility, 4) the NCAA certifies agents who are able to advise student-athletes during high school and college, 5) student-athletes be allowed to reinstate their eligibility if they go undrafted, 6) the NCAA create its own summer basketball camps to take apparel companies out of the recruitment process, 7) the NCAA significantly increase enforcement penalties for coach non-compliance, and 8) the NCAA create an investigatory body independent of the NCAA to deal with the complex cases of NCAA rule violation.[54]

While each recommendation acknowledges a significant shortcoming in the NCAA's treatment of college basketball, some experts say the recommendations are not likely to be implemented in their totality and will not alone stop the corruption in college sports.[55] Critics maintain that meaningful change will never come about unless the NCAA dismantles the root of all college sports evil: money.[56] Member institutions have unrestricted ability to throw money around for things such as new athletics facilities and enormous coaching salaries while college athletes go unpaid. Yet none of the powerhouse schools want to restrict spending because it would put them at a disadvantage in recruiting power.[57] The

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(https://www.ncaa.org/about/resources/media-center/news/joint-statement-commission-college-basketball).

[53] Matt Norlander, *Commission on College Basketball proposes major changes to NCAA to fix the sport's problems*, CBS SPORTS (April 25, 2018), https://www.cbssports.com/college-basketball/news/commission-on-college-basketball-proposes-major-changes-to-ncaa-to-fix-the-sports-problems/.

[54] NCAA, *supra* note 52.

[55] Ryan Boysen, *NCAA Report Not A Slam Dunk for Corruption Troubles*, LAW 360 (May 1, 2018, 3:11 PM), https://www.law360.com/articles/1038955/ncaa-report-not-a-slam-dunk-for-corruption-troubles.

[56] *See id.*

[57] *See* Allie Grasgreen, *Division I Divisiveness*, INSIDE HIGHER ED (Feb. 16, 2012),

NCAA, in turn, focuses all its efforts on increasing its monetary gain from the men's basketball championship tournament—its biggest revenue source.[58] The financial burden riding on college basketball every year is the reason exploitation and corruption in college basketball thrives.[59] And no matter what findings the Commission on College Basketball unveils, nothing will change in the culture of college athletics unless the NCAA is forced to be held accountable by an outside authority.

III. THE PROOF IS IN THE PUDDING: NCAA NOT CAPABLE OF MANAGING BIG-TIME COLLEGE ATHLETICS

The NCAA oversees over 1,200 institutions across its three divisions.[60] This article focuses on institutions comprising the largest schools in Division I. Even within the Division I subsection there is great diversity in the almost 400 schools represented, including: public, private, non-sectarian, religiously affiliated, large land grant universities, and small liberal arts colleges.[61] The three-division spread was enacted in the 1970s so that institutions with similar demographic characteristics, such as student enrollment and operating budget, could be similarly managed.[62] In addition, the NCAA further divided Division I schools into Division I-A for larger, higher-resourced institutions participating in football and Division I-AA for schools with reduced resources.[63] These subdivisions have since been renamed the Football Bowl Subdivision and the Football Championship Subdivision.[64] Before the 1990s, the member institutions operated on a "one institution [school], one vote" model across all three

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https://www.insidehighered.com/news/2012/02/16/ncaa-governance-brink-reform.

[58] Kirshner, *supra* note 6.

[59] Boysen, *supra* note 55.

[60] *Membership*, NCAA.ORG, http://www.ncaa.org/about/who-we-are/membership (last visited Sept. 22, 2018).

[61] Brian D. Shannon, *The Revised NCAA Division I Governance Structure After Three Years: A Scorecard*, 5 TEX. A&M L. REV. 65, 66–67 (2017).

[62] *Id.* at 68.

[63] *Id.* at 68–69.

[64] *Divisional Differences and the History of Multidivision Classification*, NCAA,http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification (last visited Sept. 22, 2018).

divisions.[65] After larger schools became fed up with smaller schools blocking legislation, particularly concerning monetary spending, "Proposal 7" was approved as a compromise to give more authority to the larger Division I schools.[66] The NCAA and its revenue sharing model remain intact, but the largest universities are no longer placed on an equal voting footing as smaller schools.[67]

A. NCAA'S CURRENT REGULATORY AND ENFORCEMENT MECHANISMS ARE NOT ADEQUATE

In 2014, after the schools in the largest five conferences again became restless with their limited authority, the NCAA passed a new governance model that would allow the Southeastern Conference, Atlantic Coast Conference, Big Ten Conference, Pac-12 Conference and Big 12 Conference ("Power 5") to create their own rules in certain areas to benefit their student-athletes.[68] Specifically, the new model allowed the largest member institutions to vote independently on issues such as: cost of attendance stipends to cover the gap between an athletic scholarship and what financial aid offices determine to be the actual cost of attending college, medical coverage for student-athletes, allowing schools to pay for families to attend games, loosening the rules on contact between student-athletes and

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[65] Grasgreen, *supra* note 57.

[66] Anthony G. Weaver, *New Policies, New Structure, New Problems? Reviewing the NCAA's Autonomy Model*, 7 Elon L. Rev. 551, 557 (2015).

[67] *Id.* Proposal 7 created a new voting structure whereby a sixteen-member executive committee was created to oversee the policymaking powers of each division. *Id.* The executive committee, comprised of university presidents, in turn gave more control to Division I schools to decide issues affecting the NCAA overall. *Id.* Three-fourths of the executive committee was made up of Division I members. *Id.* In addition, three separate board of directors were created to represent each of the three major NCAA divisions. *Id.* Each level was given a higher degree of autonomy because each of the separate boards would vote on their own divisional issues. *Id.*

[68] Jon Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014), https://www.cbssports.com/college-football/news/ncaa-adopts-new-division-i-model-giving-power-5-autonomy/.

agents, and putting in dead periods when student-athletes cannot officially workout at their school.[69]

One major criticism of the NCAA's new regulatory structure is that it continues to allow the gap between the organization's "have" and "have-not" members to grow.[70] This continues to vest power disproportionately and unfairly in the universities with the biggest sports programs.[71] Critics allege that university leaders representing the wealthiest institutions in the Power 5 conferences commit to securing the largest shares of revenue for their own institutions to the detriment of other Division I institutions, particularly in men's basketball and football.[72] The NCAA governance leadership, comprised mostly of these Power 5 administrators, in turn, stands largely silent on crucial issues and offers no suggestions for improvement.[73]

The enforcement arm of the NCAA garners similar levels of criticism. The investigation and enforcement process is comprised of the Enforcement Staff, the Committee on Infractions ("COI"), and Infractions Appeals Committee ("IAC").[74] In addition to the Enforcement Staff, the NCAA requires its member institutions to assist the Enforcement Staff during each investigation.[75] Once evidence is garnered by the Enforcement Staff, the hearings on institutional infractions and various student grievances are performed by the COI.[76] The IAC acts as an appellate body to review decisions by the COI.[77]

The most pervasive attack on the NCAA's enforcement process is its inconsistency.[78] For example, the rape allegations

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[69] *Id.*

[70] Grasgreen, *supra* note 57.

[71] *Id.*

[72] Gerald S. Gurney & B. David Ridpath, *Why the NCAA Continues to Work Against Athletes' Best Interests*, THE CHRONICLE (Feb. 29, 2016), https://www.chronicle.com/article/Why-the-NCAA-Continues-to-Work/235522.

[73] *Id.*

[74] Joshua J. Despain, *From Off the Bench: The Potential Role of The U.S. Department of Education in Reforming Due Process in the NCAA*, 100 IOWA L. REV. 1285, 1295–99 (2015).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *See, e.g.*, Matt Norlander, *NCAA Punishment is Inefficient, Inconsistent, Compromised; Here's How to Fix It*, CBS SPORTS (Oct. 25, 2012), https://www.cbssports.com/college-basketball/news/ncaa-

scandal at Baylor in 2016 went unpunished by the NCAA while five years prior the NCAA came down with the hammer when evidence of child abuse was discovered to be intertwined in the football program at Penn State.[79] Many cited the fact that the NCAA was ridiculed for going outside of its normal enforcement procedures during the Penn State investigation as justification for Baylor's perceived "pass."[80] The NCAA did not want to make the same mistake twice.[81] However, this dialog just highlights the fact that the NCAA has no repercussions for deviating from its own procedures. This fact boosts the argument that the NCAA's infractions process needs to employ a different investigator and decisionmaker.[82]

Other criticisms include the conflict of interests created by the enforcement process.[83] The COI is composed of three independent members and seven representatives from member institutions.[84] In other words, the member institutions "basically judge one another."[85] A member institution is less likely to impose a severe punishment, even if it is warranted, for fear the same punishment may be made against itself one day. In addition, all the COI's decisions are unanimous, which denies the benefits of differing perspectives that dissenting opinions can provide.[86] The view many have come to develop is that the COI is not an equitable authoritative body; it instead "marches in step, rubber stamps the position of the enforcement staff, and defends the NCAA turf."[87]

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punishment-is-inefficient-inconsistent-compromised-heres-how-to-fix-it/.

[79] *See* Andy Staples, *Why the NCAA Isn't Going to Punish Baylor*, SPORTS ILLUSTRATED (May 17, 2017), https://www.si.com/college-football/2017/05/17/baylor-sexual-assault-scandal-lawsuit-ncaa-death-penalty.

[80] *Id.*

[81] *Id.*

[82] Stephen A. Miller*, The NCAA Needs to Let Someone Else Enforce Its Rules*, THE ATLANTIC (Oct. 23, 2012), https://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012/.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] Despain, *supra* note 74, at 1308.

[87] *Id.*

B. NCAA'S PREVIOUS REFORM ATTEMPTS AND THE FAILURE TO MAKE MEANINGFUL CHANGE

While major criticisms of the NCAA governance model currently focus on commercialization in the policymaking process and lack of fairness in the enforcement process, the NCAA governance model has previously suffered attacks on a plethora of issues. Two major areas addressed by the NCAA in the past, academic monitoring and sexual assault, provide examples of how, even with the best intent, the NCAA's reform efforts come up short in truly providing meaningful change to its governance ability.[88] In addition, the 2014 structural changes to the NCAA's governance model may follow suit and fail to meet expectations of the member institutions and the public.

1. *Academic Progress*

In the early 2000's, the NCAA implemented sweeping academic reforms as a response to federal legislation such as the 1990 Student Right to Know Act.[89] The legislation in part addressed the heightened demand for accurate academic reporting on the behalf of student-athletes because many students were not graduating or, if they were graduating, they were not graduating with degree tracks and qualifications to prepare them for life.[90] The NCAA membership originally passed rules requiring schools to report graduation rates disaggregated by race, gender and sport.[91] This would evolve into the Graduation Success Rate ("GSR") measurement used by the NCAA today.[92] The GSR

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[88] *See* Jeremy Bauer-Wolf, *NCAA Clears Michigan State Over Nassar Case*, INSIDE HIGHER ED (Aug. 31, 2018), https://www.insidehighered.com/quicktakes/2018/08/31/ncaa-clears-michigan-state-over-nassar-case; *see also* Marc Tracy, *N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal*, N.Y. TIMES (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html.

[89] Greg Bischoping, The NCAA: Legislating and Litigating the College Sports Government (Apr. 2015) (unpublished B.S. thesis, Boston College) (on file with the Boston College University Libraries).

[90] Student Right-To-Know and Campus Security Act, S. 580, 101st Cong. (1989-1990) (enacted).

[91] Gary Brown, *NCAA Graduation Rates: A Quarter-Century of Tracking Academic Success*, NCAA (Oct. 28, 2014), http://www.ncaa.org/about/resources/research/ncaa-graduation-rates-quarter-century-tracking-academic-success.

[92] *Id.*

calculates Division I graduation rates based on "the proportion of first-year, full-time student-athletes who entered a school on athletics aid and graduated from that institution within six years . . . [the rate] does not account for students who transfer from their original institution and graduate elsewhere; they are considered non-graduates at both the college they left and the one from which they eventually graduate."[93]

Another such reform involved academic eligibility and progress. [94] The Academic Progress Rate ("APR"), holds institutions accountable for the academic progress of their student-athletes through a team-based metric that accounts for the eligibility and retention of each student-athlete for each academic term.[95] Institutions are penalized if teams do not meet the base APR standards.[96] Penalties range from loss of official practice time (to let student-athletes focus on their academic studies) to postseason bans.[97]

Although the NCAA's intent was to improve transparency in academic performance and provide structure for improved academic success among student-athletes across the board, the result remains that the nation's largest institutions continue to graduate student-athletes at a rate glaringly below the national average.[98] A major critique of the GSR and APR also includes its effect on students from different racial groups.[99]

One study found that when comparing federal graduation rates of only full-time students, the graduation gap for black football players in the largest five conferences was nearly five

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[93] *Graduation Rates*, NCAA, http://www.ncaa.org/about/resources/research/graduation-rates (last visited Oct. 15, 2018).

[94] *Academic Progress Rate Explained*, NCAA, http://www.ncaa.org/aboutresources/research/academic-progress-rate-explained (last visited Oct. 15, 2018).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See, e.g.*, Jake New, *Graduation Gap for Black Football Players*, INSIDE HIGHER ED (Oct. 19, 2016), https://www.insidehighered.com/news/2016/10/19/study-finds-large-gap-between-graduation-rates-black-white-football-players.

[99] *See* Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism*? 15 UCLA ENT. L. REV. 225, 229 (2008).

times larger than that of white players.[100] White football players graduated at a rate five percentage points lower than other full-time students.[101] Black players graduated at a rate 25.2 percentage points lower than other full-time black male students.[102] In addition, researchers have found that Historically Black Colleges and Universities are disproportionately punished for APR infractions as compared to other schools.[103] These findings have been particularly concerning given the increasing economic exploitation of black football players at the NCAA's largest universities and the new understanding medical researchers have of the long-term medical damage student-athletes endure when participating in football.[104] Critics maintain that not only are student-athletes leaving without a sufficient education (black students at a disproportional rate), but the student-athletes are also leaving in a worse medical condition than when they entered school.[105] The coupling of the under-education and adverse medical conditions is hindering these student-athletes from living a fulfilled life as promised to them when they were recruited to these institutions.[106]

2. *Modernized Title XI Policies*

Over the past few decades, crimes of violence have been an issue on college campuses across the country.[107] Congress addressed the issue in 1990 when it passed the Clery Act, requiring all colleges and universities that participate in federal

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[100] New, *supra* note 98.

[101] *Id.*

[102] *Id.*

[103] Blackman, *supra* note 99, at 242.

[104] Antonio Moore, *Football's War on the Minds of Black Men*, VICE SPORTS (Dec. 24, 2015, 8:05 AM), https://sports.vice.com/en_us/article/eze4gj/footballs-war-on-the-minds-of-black-men.

[105] *See* Lisa Rapaport, *25-Year-Old Former College Football Player Diagnosed With CTE*, HUFFINGTON POST (Jan. 5, 2016, 8:52 AM), https://www.huffingtonpost.com/entry/25-year-old-cte-college-football_us_568bc7dfe4b014efe0db8c87.

[106] *See* Elisia J.P. Gatmen, *Academic Exploitation: The Adverse Impact of College Athletics on The Educational Success of Minority Student-Athletes*, 10 SEATTLE J. FOR SOC. JUST. 509, 510–11 (2011).

[107] Jayma M. Meyer, *It's on the NCAA: A Playbook For Eliminating Sexual Assault*, 67 SYRACUSE L. REV. 357, 358 (2017).

financial aid programs to keep and disclose information about crime either on or near their campuses.[108] The Department of Education monitors institutions' compliance with the law, and participation in federal student financial aid programs is dependent on compliance with the terms of the act.[109] Though the NCAA in particular does not have to comport with terms of the Clery Act, its member institutions do.[110] Although the Clery Act is supposed to provide all students on campus with information regarding sexual assault and due process rights in the event of a sexual assault accusation, many believe that student-athletes are not held to the same standard as other students on campus.[111]

The NCAA has attempted to address this issue of favoritism with a relatively new Title IX policy.[112] As part of the new policy, leaders on each NCAA campus — including the school president or chancellor, athletics director and Title IX coordinator — must attest annually that members of the athletic department were educated in sexual assault and violence prevention.[113] Specifically, the coaches, student-athletes and athletics administrators are required to complete education each year in sexual violence prevention.[114] The NCAA also provides resources for member institutions to assist in implementing a "culture" of inclusion to prevent and reduce incidents of sexual violence on campus.[115]

Reception of the policy has been overwhelmingly critical, with one reporter going so far as to call the policy "a joke."[116]

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[108] Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, §§ 204, 485, 104 Stat. 2381, 2385 (1990).

[109] *Id.*

[110] *Id.*

[111] Meyer, *supra* note 107, at 384.

[112] *NCAA Board of Governors Policy on Sexual Violence*, NCAA (Aug. 8, 2017), http://www.ncaa.org/sport-science-institute/topics/ncaa-board-governors-policy-campus-sexual-violence.

[113] *Id.*

[114] *Id.*

[115] *Sexual Violence Prevention: An Athletics Tool Kit for a Healthy and Safe Culture*, NCAA SPORTS SCIENCE INSTITUTE (Oct. 2016), http://www.ncaa.org/sites/default/files/SSI_Sexual-Violence-Prevention-Tool-Kit_20161117.pdf.

[116] Diana Moskovitz, *The NCAA's Latest Sexual Violence Policy is a Joke*, DEADSPIN (Aug. 11, 2017, 9:49 AM),

Detractors of the new policy contend that the policy is nothing more than a reiteration of the requirements the schools must already follow under the Clery Act.[117] A 2011 "Dear Colleague Letter" published by the Department of Education's Office of Civil Rights shows the criticisms contain merit.[118] In the Dear Colleague Letter, the department clarified that under the Clery Act schools were required to train all employees and administration to identify and report sexual harassment and violence.[119] The letter further required all schools to implement preventive education programs in the training of student-athletes and coaches, including: what constitutes sexual harassment and sexual violence; the school's policies and disciplinary procedures; and the consequences of violating these policies.[120] With this 2011 letter in mind, it is clear the NCAA failed to pass any legislation that would likely improve the existing educational requirement regarding the issues of sexual assault and violence within their member institution's athletics departments.[121]

3. *Power 5 Conference Autonomy*

As mentioned before, the NCAA's member institutions voted in 2014 to form a new governance model that would allow the Power 5 conferences to create their own rules in certain areas to benefit their student-athletes.[122] Proponents of the new model indicated that it would allow the schools with the most resources to provide more support services to their student-athletes.[123]

While on the surface the new autonomy appeared to give large institutions the opportunity to provide their student-athletes

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https://deadspin.com/the-ncaas-latest-sexual-violence-policy-is-a-joke-1797731779.

[117] S. Daniel Carter & Katherine Redmond Brown, *NCAA's New Sexual Violence Policy Underwhelming at Best*, HUFFINGTON POST (Aug. 12, 2017, 12:35 AM), https://www.huffingtonpost.com/entry/ncaas-new-sexual-violence-policy-underwhelming-at_us_598e82a3e4b0caa1687a6031.

[118] Office for Civil Rights, *Dear Colleague Letter from Assistant Sec'y for Civil Rights Russlyn Ali*, U.S. Dep't of Educ. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] Shannon, *supra* note 61, at 67.

[123] *Id.* at 72.

with better care, some saw it as the further establishment of a *quid pro quo* situation in big-time college athletics where "student-athletes are now expected to give more because they have been given a little."[124] In addition, the newfound freedom may adversely impact student-athletes because the Power 5 conferences now have leverage to potentially schedule more games overall and schedule more national and international games that require excessive travel.[125] There is also now a greater opportunity for these schools to take advantage of strategic planning with each other to maximize revenues through things such as conference realignment and television deals.[126] This power may ultimately open up more opportunities to take advantage of student-athletes' time and increase possibilities for more unethical behavior rather than provide student-athletes with more support services.

To be sure, early successes in the new Power 5 conference model do not show signs of overt exploitation on the horizon[127] because some think the Power 5 conferences have not used their newfound authority as aggressively as many anticipated.[128] But with the historical track-record of member institutions taking

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[124] Weaver, *supra* note 66, at 558.

[125] *Id*; *see also* Jeff Goodman, *Around the World: Full List of International Trips*, ESPN (July 26, 2016), http://www.espn.com/blog/collegebasketballnation/post/_/id/115735/around-the-world-full-list-of-international-trips.

[126] Matt Hinton*, Division Zero: What the NCAA's 'Power Five' Autonomy Decision Means for the Future of College Sports*, GRANTLAND (Aug. 8, 2014), http://bit.ly/1oMpTjU.

[127] The Power 5 conferences recently adopted legislation such as: precluding required athletics activities overnight for a continuous eight-hour period, generally prohibiting travel days as counting towards the "days off" calculation, and including events like team promotions, recruiting, media events, and fundraising as part of the "required athletically related activities" definition. Jake New, *'A True Day Off'*, INSIDE HIGHER ED (Jan. 23, 2017), https://www.insidehighered.com/news/2017/01/23/power-five-leagues-adopt-new-rules-lessening-time-demands.

[128] Jon Solomon, *Power Five Passes on Tackling Big NCAA Issues to Help Athletes*, CBS SPORTS (Jan. 15, 2016), https://www.cbssports.com/college-football/news/power-five-passes-on-tackling-big-ncaa-issues-to-help-athletes/.

advantage of every loophole provided in the NCAA rules,[129] it is anyone's guess on how the autonomy will be used in the coming years.

IV. CONGRESS CAN FILL THE NEED FOR AN INDEPENDENT OVERSIGHT BODY

A. CONGRESSIONAL ACTION HAS WORKED BEFORE

Congress has historically taken more of an investigatory approach to issues in intercollegiate athletics.[130] Arguably one reason Congress has not acted as aggressively in overhauling college athletics is the influence the federal judiciary has had in identifying the legal limits on intercollegiate athletics. Landmark cases such as *NCAA v. Smith* and *NCAA v. Tarkanian* have outlined the NCAA as a non-governmental actor. *NCAA v. Board of Regents of the University of Oklahoma*, and *Law v. NCAA* defined the contours of anti-trust law by which the NCAA and its member institutions must abide. *White v. NCAA* again addressed anti-trust issues, but in the context of the NCAA's requirement to provide true full cost of attendance to athletes. *NCAA v. Miller* addressed the NCAA's place in interstate commerce and eliminated states' abilities to regulate NCAA action within their

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[129] *See, e.g.*, Peter Jacobs, *Here's the Insane Amount Of Time Student-Athletes Spend On Practice*, BUSINESS INSIDER (Jan. 27, 2015), http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1.

[130] For example, prompted by the rising revenues in college athletics, Illinois Representative Cardiss Collins lead a congressional subcommittee in 1991 through a series of hearings on the state of the NCAA. *Intercollegiate Sports: Hearings Before the Subcomm. on Commerce, Consumer Prot., and Competitiveness of the Comm. on Energy and Commerce*, 102d Cong. (1991). Specifically, the hearings focused on unequal revenue sharing with athletic departments housed at Historically Black Colleges and Universities and overall ambiguous reporting of athletic department revenues and coaching salaries. *Id.*; *see also* Mark Asher, House Official Questions Data on Coaches' Income, THE WASHINGTON POST (Sept. 12, 1991), https://www.washingtonpost.com/archive/sports/1991/09/12/house-official-questions-data-on-coaches-income/7e392c88-7b3e-45bf-b3f3-402355805774/?utm_term=.3ea4c3de140d; Lionel C. Barrow, Jr., Black Colleges Still Not Sharing in the Gold, CRISIS MAG., Nov. 1991, at 15–16. Though they lasted a series of days, the hearings were inquisitive in nature and led to no real reform or action on the part of Congress or the NCAA.

borders. These, and many more, piecemeal decisions have seemingly appeased Congress into underwhelming reform action. But, on rare occasions, Congress has successfully intervened in NCAA governance by passing legislation to protect overarching interests at the core of higher education and intercollegiate athletics. While this legislation proves Congress has the ability to change college sports for the better, Congress has not endeavored to completely balancing the promotion of a multi-billion-dollar entertainment business to comport with the American higher education system's mission of equity and opportunity.[131]

1. *Racial and Gender Equity*

Starting with the passage of the Civil Rights Act of 1964 ("Civil Rights Act") and the Higher Education Act of 1965 ("Higher Education Act"), the NCAA was forced to reconcile college athletics' internal issues with those of the institutions with which it was affiliated with—forming its place within the overall mission of higher education in America. The Civil Rights Act codified previous decades of litigation efforts to dispel segregation in education at all levels.[132] Though some institutions integrated the classroom and playing field well before the Civil Rights Act,[133] congressional action made the discrimination based on race, color, religion, sex or national origin the law of the land. [134] In addition, the Higher Education Act expanded opportunities for lower and middle-income families with program assistance for small and less developed colleges.[135] The expansion of federal funding for smaller universities allowed a wider access

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[131] Thomas J. Horton, Drew DeGroot & Tyler Custis, *Addressing the Current Crisis in NCAA Intercollegiate Athletics: Where is Congress?*, 26 MARQ. SPORTS L. REV. 363, 372 (2016).

[132] *See e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950).

[133] Jimmy Robertson, *Civil Rights Act Helps Break Sports Boundaries*, INSIDE HOKIE SPORTS, Nov. 2014, at 18, http://inside.hokiesports.com/issues_pdf/volume7/vol_7_no_4_nov_2014.pdf.

[134] Civil Rights Act of 1964, Pub. L. No. 82-352, 78 Stat. 241 (1964).

[135] Pell Inst., *Do You Know TRIO? A TRIO History Fact Sheet*, NATIONAL TRIO CLEARINGHOUSE (Feb. 2003), http://www.pellinstitute.org/downloads/trio_clearinghouse-The_Early_History_of_the_HEA_of_1965.pdf.

to athletics, and the NCAA had to seriously contemplate economic considerations, such as grant-in-aid, that it previously did not have to address.

Almost a decade later, Title IX of the Education Amendments of 1972 ("Title IX") demonstrated the sweeping effect congressional action could have on intercollegiate athletics.[136] A natural outgrowth of the Civil Rights Act, Title IX radically improved educational equality between the sexes.[137] Arguably the most influential federal legislation regulating the NCAA, the provision was famously enacted without sports in mind.[138] The amendment instead focused on the gender discrimination that was ostensibly left out of the Civil Rights Act.[139] Although the positive impact of the amendment was initially threatened in the 1984 United States Supreme Court case *Grove City College v. Bell*, the law was soon extended to athletics through the Civil Rights Restoration Act of 1988.[140]

Decades later in 2008, Congress passed the Equity in Athletics Disclosure Act ("EADA") as a part of The Higher Education Opportunity Act ("HEOA").[141] The HEOA re-authorized the Higher Education Act.[142] Specifically, the Equity in Athletics Disclosure Act extended disclosure requirements for co-ed higher education institutions accepting federal funds and participating in intercollegiate athletics.[143] The schools must

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[136] Ana M. Martinez Aleman & Kristen A. Renn, Women in Higher Education: An Encyclopedia 207 (2002).

[137] CRAIG A. HOROWITZ, THE LEGISLATIVE LEGACY OF EDWARD M. KENNEDY: ELEVEN MILESTONES IN PURSUIT OF SOCIAL JUSTICE, 1965–2007 49 (2014).

[138] Aleman & Renn, *supra* note 136, at 376.

[139] *Id*. at 237.

[140] Grove City College v. Bell, 465 U.S. 555 (1984), stood for proposition that Title IX only applied to those programs receiving direct federal aid, seemingly leaving intercollegiate athletics outside of the covered realm. The Civil Rights Restoration Act of 1988 extended coverage of Title IX to programs of any educational institution receiving both direct and indirect federal aid. Civil Rights Restoration Act of 1987, 1988, Pub. L. No. 100-259, 102 Stat. 28 (1988).

[141] Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

[142] *Id*.

[143] *Equity in Athletics Disclosure Act*, U.S. DEP'T OF EDUC. (Jan. 24, 2017), https://www2.ed.gov/finaid/prof/resources/athletics/eada.html.

disclose to the Department of Education statistics accounting for athletic participation, staffing, and revenues and expenses by men's and women's teams.[144] The EADA allowed for unprecedented transparency for gender equity in college sports.

2. *Oversight of Amateurism*

In the late 1960s and through the 1970s, a series of congressional hearings were held to resolve an ongoing issue between the NCAA and the Amateur Athletic Union ("AAU").[145] The AAU had governed international amateur competitions and domestic amateur competitions since its inception in 1888.[146] With the creation of the NCAA, the AAU relinquished control of governing intercollegiate games but maintained control for international competitions.[147] The NCAA began to disrupt this model and looked to gain a voice in international competition by creating affiliate organizations to put on "open" competitions and encouraging students to participate only in NCAA sanctioned competitions.[148] The AAU responded by threatening athletes' membership in its organization (and thus eligibility to compete in the Olympics) if they competed in NCAA sanctioned events.[149] The argument created a national dialogue about the future of athletic eligibility in Olympic competition—an important subject in the midst of the Cold War.[150]

Congress initially intervened with a series of hearings to help arbitrate the dispute.[151] Ultimately, after fifteen years of congressional arbitration and litigation in federal court, the issue resulted in the Amateur Sports Act of 1978 ("Amateur Sports Act").[152] The act, among other things, created the United States Olympic Committee ("USOC"), which ultimately took the ability to regulate Olympic eligibility out of the hands of both the NCAA and AAU and vested it in the USOC.[153]

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[144] *Id.*

[145] Bischoping, *supra* note 89.

[146] *Id.* at 13.

[147] *Id.* at 4.

[148] *Id.* at 13.

[149] *Id.*

[150] *Id.* at 14.

[151] *Id.*

[152] Amateur Sports Act of 1978, Pub. L. No. 95-606, 92 Stat. 3045 (1978).

[153] *Id.*

Congress's legislative intervention to 1) provide equal access to intercollegiate athletics and 2) limit the NCAA's reach on international amateur athletic competition shows that legislative action can be an effective response to changing American social ideals. In addition to the Commission on College Basketball's recommendations for change, other issues developing in higher education necessitate Congress' involvement in NCAA governance.

B. THE NATIONAL INTERESTS THAT PROMPT CONGRESS' NEED TO ACT NOW

In recent years the lack of attention paid to safety has created many issues for the health of student-athletes. In addition, college athletics' negative public perception has greatly contributed to the American public's changing attitude toward the effectiveness of traditional higher education systems. The NCAA maintains a mission of "balancing [student-athletes'] academic, social and athletics experiences." [154] Yet, education has increasingly been pushed out of the equation to make room for profits from the college sports industry. [155] Instead of complementing the educational experience, many believe that athletic competition has instead diminished the educational opportunities for student-athletes and tainted the overall educational purpose of schools. [156] If the NCAA is allowed to operate on its current trajectory, the higher education system in America will greatly suffer.

1. *Health and Safety of Student-Athletes*

Recent research shows that each year thousands of student-athletes playing college football are at risk of incurring traumatic brain injuries. [157] Increasingly, people examine the

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[154] *NCAA Core Values*, NCAA (Sept. 23, 2018, 6:30 PM), http://www.ncaa.org/about/ncaa-core-values.

[155] Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.

[156] *Id.*

[157] Bryant Lee, *Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV. 613, 616 (2017).

inherent dangers of contact sports and the duty of the NCAA to protect student-athletes from these risks.[158]

For example, the Pennsylvania Supreme Court will soon determine what standard colleges within its jurisdiction must adhere to in order to satisfy their duty of care to student-athletes.[159] Although the defendant-college in the lawsuit is not a member institution of the NCAA, the ruling will apply to all colleges and universities in Pennsylvania that participate in intercollegiate athletic activities.

The ruling in *Lackawanna* will likely open the door for lawsuits to be filed in other state trial courts, prompting other state supreme courts to determine what safety standards must be met by colleges and universities offering athletic sports within their borders. Conflicting rulings between states on the standard of care issue may cause confusion and further issues in applying the various laws. Most intercollegiate athletics teams compete across many state borders throughout the school year. The opportunity for schools litigating health and safety issues to garner more favorable choice of law determinations in one state over another may hinder the effectiveness of those states imposing high standards of care to protect student-athlete safety. Without a uniform system to keep such forum shopping in check, the health and safety of student-athletes will continue to be compromised.

Recognizing the need to protect student-athlete interests, a few members in Congress have attempted, with no avail, to invoke change in intercollegiate athletics. In 2013, Representative Charlie Dent, a Republican from Pennsylvania, and Representative Joyce Beatty, a Democrat from Ohio, introduced legislation that would establish a presidential commission on intercollegiate athletics.[160] Again in 2015, three other House members joined Dent and Beatty to introduce another version of the bill that would have created a seventeen-member panel to review and analyze college sports issues, including the academics

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[158] *Id.*

[159] Max Mitchell, *Justices Take Up Case on Colleges' Duty of Care to Student-Athletes*, THE LEGAL INTELLIGENCE (Dec. 4, 2017, 3:29 PM), https://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/12/04/justices-take-up-case-on-colleges-duty-of-care-to-student-athletes/.

[160] H.R. 2903, 113th Cong. (2013).

of student-athletes, the financing of college athletics, and safety protections.[161] The panel would regularly report their findings to the White House and Congress.[162] The majority of Congress has yet to come around to the idea of federal oversight in college sports. But the rapid developments in scientific research regarding contact sports should make them rethink that choice before it is too late.

2. *NCAA Shortcomings Increasingly Give Student-Athlete's the Opportunity for Legal Recourse*

In addition to addressing the potential inconsistencies in health and safety standards, recent litigation is forcing the NCAA to spend significant money addressing several other issues. Each case emboldens more students to use litigation as a tool to address NCAA shortcomings. For example, the landmark Ninth Circuit decision in *O'Bannon v. NCAA* determined the NCAA's then-existing compensation rules for revenue-producing student-athletes violated Section One of the Sherman Act.[163] Specifically, the NCAA could not license the name, image and likeness of a student-athlete without providing just compensation for the monetary benefit that student-athlete's persona created.[164] Other current litigation revolves around the NCAA's unwillingness to adequately protect the health and safety of its participants.[165] In *In re National Collegiate Athletic Association Student-Athlete Concussion Litigation*, the players alleged that the NCAA breached its duty to protect student-athletes by failing to implement appropriate rules regarding concussions and head injuries.[166] The NCAA recently settled the claim, agreeing to pay $70 million and fund a program to monitor medical studies on concussion-related injuries and the medical effects.[167] Yet, new litigation regarding football-related head injuries continues.[168]

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[161] H.R. 2731, 114th Cong. (2015).

[162] *Id.*

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

[164] *Id.*

[165] Jeremy Bauer-Wolf, *College Football's Avalanche of Lawsuits*, INSIDE HIGHER ED (Dec. 1, 2017), https://www.insidehighered.com/news/2017/12/01/avalanche-football-related-concussion-lawsuits-against-ncaa-and-conferences-could.

[166] *Id.*

[167] *Id.*

[168] *Family of Late Pittsburg St. Player Sues NCAA*, USA TODAY (June 5, 2017, 5:04PM),

O'Bannon and *In re Student-Athlete Concussion Litigation* are important disputes because they show the ease of which student-athletes may certify a class against the NCAA. *O'Bannon* defined the class as:

> All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as 'University Division' before 1973) college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.[169]

Similarly, the court in *In re Student-Athlete Concussion Litigation* engaged in a lengthy discussion as to the various limitations student-athletes may face when attempting to certify a class across different schools and different sports teams.[170] The court ultimately concluded that class certification in such an instance was proper under Federal Rule 23(b)(2).[171] The court reasoned that the class of student-athletes sufficiently alleged that the NCAA "acted or refused to act on grounds that apply generally to the class."[172]

The broad definitions used in both cases show the potential that class action and multidistrict litigation may have in creating an appealing avenue for student-athletes to join forces and take matters into their own hands against the NCAA. If courts continue to allow student-athletes to pursue litigation under such broad class definitions, then the NCAA and its member institutions will be involved in significantly more expensive legal battles than in years past—which will waste government

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https://www.usatoday.com/story/sports/ncaaf/2017/06/05/family-of-late-pittsburgh-st-player-sues-ncaa/102526844/.

[169] O'Bannon v. NCAA, 802 F.3d 1049, 1055–56 (9th Cir. 2015) (emphasis added).

[170] In re Student-Athlete Concussion Litigation, 314 F.R.D. at 592–600.

[171] *Id.* at 599–602.

[172] *Id.*

resources.[173] Instead of wasting time and money on litigation, the NCAA should instead be held accountable on the front-end to provide adequate educational and health services to its student-athletes.

3. *Rapidly Changing Perceptions of Higher Education*

It is no secret that higher education institutions feel they have been under attack in recent years.[174] Significant state and federal funding cuts coupled with the trillion-dollar student loan deficit have made headlines and are frequently cited as the reason for the rising cost of attendance.[175] In a globalized world where labor dynamics are rapidly changing,[176] the American public is slowly beginning to question traditional systems of higher education.[177]

Intercollegiate athletics is at the forefront of this shifting tide because many higher education institutions' use their athletics department as a marketing tool to attract high enrollment numbers.[178] The athletic prowess of a university arguably drives enrollment; the evidence of which is so prevalent that it has its own name—the "Flutie Effect."[179] In a climate of decreased federal and state monetary support, colleges and universities

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[173] *See* Daniel J. Capra, Thomas W. Jackson, & John Koeltl, *Financial Arrangements in Class Actions, and the Code of Professional Responsibility*, 20 FORDHAM URB. L. J. 831, 832 (1993).

[174] Thomas Ehrlich & Ernestine Fu, *Troubling Attacks on Public Higher Education*, FORBES (Mar. 23, 2015, 12:55PM), https://www.forbes.com/sites/ehrlichfu/2015/03/23/troubling-attacks-on-public-higher-education/#9e8e1824e125.

[175] Preston Cooper, *How Unlimited Student Loans Drive Up Tuition*, FORBES (Feb. 22, 2017), https://www.forbes.com/sites/prestoncooper2/2017/02/22/how-unlimited-student-loans-drive-up-tuition/#7b8d188552b6.

[176] *The Global Search for Education: What Skills?*, CMRUBINWORLD (Nov. 1, 2016), http://www.cmrubinworld.com/the-global-search-for-education-what-skills.

[177] Jeb Harrison, *The Beginning of the End of Traditional Higher Education*, HUFFINGTON POST (July 28, 2015), https://www.huffingtonpost.com/jeb-harrison/academia-redux-then-and-n_b_7829364.html.

[178] Doug J. Chung, *The Dynamic Advertising Effect of Collegiate Athletics*, 32 MARKETING SCI., no. 5, Sept.–Oct. 2013, at 679.

[179] *Id*; *see also* Pappano, *infra* note 182.

depend on high enrollment numbers and athletic success to offset multi-million-dollar operating budgets.[180]

Despite many institutions' dependence on athletic marketing, the NCAA and its largest member institutions have increasingly gained a reputation for being "money-hungry" entities that profit off the backs of student-athletes who are not held accountable for their actions.[181] If Americans continue to internalize the perception that tuition and fee payments are simply subsidies for overpaid coaches involved in illegal activity and training athletes who are constantly rewarded despite bad behavior, the average household will be less willing to send their children to traditional, flagship institutions.[182] This festering public perception among fans could spell disaster for higher education funding.[183] The American public has a vested interest in keeping colleges and universities accountable in advancing education. Congress must take this accountability seriously and shift the NCAA's actions back to equally balancing educational opportunity and athletic competition.

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[180] U.S. Dep't of The Treasury & U.S. Dep't of Educ., THE ECONOMICS OF HIGHER EDUCATION, 22 (2012), https://www.treasury.gov/connect/blog/Documents/20121212_Economics%20of%20Higher%20Ed_vFINAL.pdf; Doug J. Chung, *How Much Is a Win Worth? An Application to Intercollegiate Athletics*, 63 MGMT. SCI., no. 2, Feb. 2017, at 548.

[181] *See* Diane Roberts, *College Football's Big Problem with Race*, TIME (Nov. 12, 2015), http://time.com/4110443/college-football-race-problem/.

[182] *See* Laura Pappano, *How Big-Time Sports Ate College Life*, THE NEW YORK TIMES (Jan. 20, 2012), http://www.nytimes.com/2012/01/22/education/edlife/how-big-time-sports-ate-college-life.html.

[183] *Sharp Partisan Divisions in Views of National Institutions*, PEW RESEARCH CENTER (July 10, 2017), http://www.people-press.org/2017/07/10/sharp-partisan-divisions-in-views-of-national-institutions/ (this group of voters is the fastest growing demographic who are turning against enrollment in traditional higher education systems). *See generally* Walter Hickey, *Your Politics Are Indicative of Which Sports You Like*, BUSINESS INSIDER (Mar. 19, 2013), http://www.businessinsider.com/politics-sports-you-like-2013-3 (the majority of college football and basketball fans are Republican or Republican-leaning independent voters).

V. NEW MODEL: A FEDERAL INTERCOLLEGIATE ATHLETICS COMMISSION

The shortcomings of the NCAA's self-governance model are clear. Yet, the NCAA consistently fails to address important issues regarding student rights in a meaningful way because of its commercialized nature at the highest levels of competition.[184] A consistent focus on revenue production from the NCAA's office[185] coupled with decades of unencumbered self-governance has allowed the NCAA to treat student-athletes in ways that often conflict with American moral and legal standards.[186] Nonetheless, the NCAA presses on, making structural changes on its whim and often only after public outcry threatens its bottom line. From the smallest Division III departments to the behemoths in the Power 5 conferences, the political climate of intercollegiate athletics reinforces the idea that it has become like the banking industry — "too big to fail." Operating in this reality, Congress can either remain a spectator to NCAA governance and continue to allow sexual violence, fraud and health hazards to reign supreme in college athletics, or, Congress can act now to keep a consistent watch on the business of big-time college sports. This article attempts to assist Congress by offering a new model for institutional oversight.

A. PURPOSE

The use of government agencies to regulate public and private industries is not a novel concept. Congress has created agencies such as the Equal Employment Opportunities

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[184] GERALD GURNEY, DONNA A. LOPIANO & ANDREW ZIMBALIST, UNWINDING MADNESS: WHAT WENT WRONG WITH COLLEGE SPORTS AND HOW TO FIX IT 16 (Brookings Institution Press, 2017).

[185] *See* Richard Sandomir & Pete Thamel, *TV Deal Pushes N.C.A.A. Closer to 68-Team Tournament*, N.Y. TIMES (Apr. 23, 2010), http://www.nytimes.com/2010/04/23/sports/ncaabasketball/23ncaa.html?_r=0.

[186] Joe Nocera, *The N.C.A.A.'s Ethics Problem*, THE NEW YORK TIMES (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/opinion/nocera-the-ncaas-ethics-problem.html.

Commission ("EEOC") to accomplish such tasks.[187] Often these agencies are created out of public pressure to provide additional protection to certain groups of people.[188] Creating a commission to oversee the athletic affairs of the largest NCAA institutions would provide a centralized and independent body to enforce the current federal laws addressing athletic affairs and provide a filtering system for student grievances. A uniform monitoring system is even more important in the wake of multiple higher education alternatives currently in development for the sake of athletic competition.[189]

In a similar vein as the bill introduced by Representatives Dent and Beatty in 2013,[190] this article proposes that Congress create a federal commission on intercollegiate athletics (the "Federal Commission") to be housed in the Department of Education. Taking the Dent and Beatty bill further, the new Federal Commission should have the primary purpose of enforcing federal laws regulating intercollegiate athletics and monitoring the NCAA to ensure student-athlete rights and maintaining the educational component of intercollegiate athletics. In addition, the Federal Commission would be responsible for overseeing equitable rule application and providing feedback for institutional improvements and investigating complaints dealing with charges arising out of intercollegiate athletics.

B. STRUCTURE

The Federal Commission would serve as an oversight body for all schools operating in the NCAA's Division I. The Department of Education is a pertinent home for the Federal

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[187] *See* Jacqueline A. Berrien, *Statement on 50th Anniversary of the Civil Rights Act of 1964*, EEOC (July 2, 2014), http://www.eeoc.gov/eeoc/history/cra50th/index.cfm.

[188] *Id.*

[189] *See e.g.*, Patrick Hruby, *The Plot to Disrupt the NCAA with a Pay-for-Play HBCU Basketball League*, VICE SPORTS (June 20, 2017), https://sports.vice.com/en_ca/article/59zejz/the-plot-to-disrupt-the-ncaa-with-a-pay-for-play-hbcu-basketball-league; Tom Pelissero, *New developmental league could mark shift for college football*, USA TODAY (Jan. 11, 2017), https://www.usatoday.com/story/sports/nfl/2017/01/11/pacific-pro-football-league-developmental-college-ed-mccaffrey/96416744/.

[190] National Collegiate Athletes Accountability Act, H.R. 2731, 114th Cong. (2015).

Commission because it already offers limited oversight for federal laws addressing intercollegiate athletics. The Federal Commission would include an advisory board of 6–10 people appointed by the Secretary of Education to oversee the implementation of Federal Commission activities. Each board member would serve a limited term such as no more than 4–6 years. Similar to the NCAA's Commission on College Basketball, a limited number of positions on the board should be comprised of members who are familiar with the NCAA's culture and governance process. Unlike the Commission on College Basketball, the Federal Commission should not include any members whose professional responsibilities are directly affected by determinations made through the Federal Commission. For example, retired university presidents, athletic directors, coaches, agents and players would all be good candidates. Anyone currently participating in such roles would not be good candidates. This distinction will address the common complaints regarding conflicts of interest within NCAA decision-making because none of the decision-makers at the top of the chain would have outside pressures affecting their job security. The remaining majority of the board should be comprised of individuals with expert familiarity in areas such as higher education administration, governmental industry monitoring, financial auditing, and so forth. The varying perspectives would ensure considerations affecting college sports are analyzed from every angle.

The operation would be based out of the nation's capital and administered through regional offices throughout the country. One effective method would be to create 4–6 regions similar to the NCAA's existing competition regions.[191] In addition, each athletic conference who participates in Division I would be required to employ a federal-reporting officer who would be required to report information to its designated regional office.

As mentioned before, the main tasks would include monitoring intercollegiate athletic associations and their member institutions to: 1) enforce federal laws governing intercollegiate athletics, 2) ensure equitable rule application and provide feedback for institutional improvements, and 3) investigate complaints dealing with charges arising out of intercollegiate athletics. The board would maintain overall responsibility for the activities of the Federal Commission. This responsibility would

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[191] *See Men's Basketball Regional Rankings*, NCAA (Feb. 26, 2018), https://www.ncaa.com/rankings/basketball-men/d3/regional-rankings-0.

include determining the functions that best execute the Federal Commission's three core responsibilities.

1. *Federal Law Enforcement*

Creating an agency that focuses solely on intercollegiate athletics would centralize the enforcement process and create an easier line of communication between the NCAA and the federal government. In addition, the Federal Commission would have the opportunity to advise any future congressional action regarding intercollegiate athletics. Thus, instead of various subcommittees calling sporadic hearings to gather disjointed information each time an issue arises in intercollegiate athletics, the Federal Commission would be a resource for Congress to provide expert analysis on current issues facing intercollegiate athletics.

2. *Monitoring and Feedback*

Though Congress has commissioned studies of the NCAA before, it has rarely required constant monitoring of the NCAA's activities outside of gender equity.[192] In addition, Congress has consistently asked the NCAA to self-report the data used for the reviews.[193] Instead of sporadic inquiry reports, the Federal Commission could create a type of auditing committee to provide consistent oversight.

In addition to monitoring the reporting requirements under laws such as the Equity in Athletics Disclosure Act, the Federal Commission would regularly review NCAA rules and bylaw changes, review all disciplinary actions taken against member institutions and individual student-athletes, and issue opinions on the efficacy of each decision. Although the NCAA and other intercollegiate governing bodies would still have the autonomy to create their own rules and bylaws, the Federal Commission would have authority to appoint neutral members, who must demonstrate their expertise in investigatory and enforcement processes, to the Committee on Infractions and the Infractions Appeals Committee. One of the biggest critiques of the

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[192] *See* Jon Solomon, *Congress Members Reintroduce NCAA Bill Seeking Presidential Commission*, CBS SPORTS (June 11, 2015), https://www.cbssports.com/college-football/news/congress-members-reintroduce-ncaa-bill-seeking-presidential-commission/.

[193] *See* Branch, *supra* note 155.

NCAA is its arbitrary disciplinary actions.[194] With monitoring in place, the NCAA will have to operate in a system with consequences for irregular rule application.

The Federal Commission would also provide an annual report on the state of intercollegiate athletics and recommend institutional changes when necessary at the national, conference and school levels. Again, although the NCAA would have the autonomy to set its own rules and bylaws, the recommendations ensure that a neutral party is consistently evaluating the systems for weakness and offering unbiased, concrete solutions. This reporting would further transparency in intercollege athletics and strengthen the public's trust in the NCAA and higher education institutions' management systems.

3. *Grievances*

The frequency of student-athletes, coaches, and other organizations suing the NCAA is unlikely to diminish anytime soon. Instead of allowing the federal judiciary to continue randomly determining the outline of the NCAA's legal responsibility, the Federal Commission may step in and 1) offer the opportunity for a neutral third-party investigation of alleged wrongdoing and 2) offer clarification for the legal responsibility of intercollegiate athletic associations. The United State Supreme Court's denial to review *O'Bannon v. NCAA* is an example of why a government function such as this is necessary.[195] Now, three years after *O'Bannon*, little clarification has been given about the status of student-athletes in revenue producing sports, and the litigation regarding similar issues continues.[196]

Like charges filed with the EEOC, the Federal Commission's grievance process would require a person suing the NCAA or a member institution for issues arising from federal laws governing intercollegiate athletics to file a charge with the Federal Commission. The Federal Commission would then independently investigate the issue and decide whether a valid claim exists. This

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[194] Sara Ganim, *NCAA Punishment is Anyone's Guess*, CNN (Aug. 12, 2015), http://www.cnn.com/2015/08/12/us/ncaa-academic-fraud/index.html.

[195] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 U.S. 277 (2016).

[196] Ben Strauss, Steve Eder & Mac Tracy, *99-Page Ruling in O'Bannon Case Is Missing Something: Clarity*, N.Y. TIMES, Aug. 9, 2014.

would protect student-athlete interests and the NCAA's interests because it offers an unbiased record of an independent investigation and it could consolidate similar claims. It would also provide an opportunity for an objective assessment for the NCAA to determine if settling a claim is more prudent than litigation.

The Department of Education is a feasible agency to implement this grievance process because it already houses conflict resolution programs for some higher education students.[197] For example, the Federal Student Aid Ombudsman Group is a part of the Department of Education.[198] Its purpose is to resolve disputes relating to any of the loan programs originated by the federal government, such as the Direct Loan Program and the Federal Family Education Loan Program.[199] As a neutral and confidential department, the Ombudsman provides an avenue for borrowers to submit complaints and get help to resolve them before resorting to judicial action such as bankruptcy.[200] With this sort of framework already in place, creating an investigative process for intercollegiate athletic grievances would be achievable.

VI. CONCLUSION

Two of the biggest reforms in college sports—expansion of women's sports and racial integration—have come from congressional efforts outside the NCAA. Following this history, it is not absurd to think that the next major intercollegiate reform will come from Congress. Many authors who argue for congressional intervention in intercollegiate athletics seek reform by way of anti-trust exemptions and stricter tax laws.[201] While both suggestions would likely change NCAA governance for the

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[197] Despain, *supra* note 74, at 1319.

[198] *See* FEDERAL STUDENT AID: AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, https://studentaid.ed.gov/sa/ (last visited Oct. 12, 2018).

[199] *Getting Prepared Before Seeking Help*, FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/repay-loans/disputes/prepare (last visited Sept. 22, 2018).

[200] *Id.*

[201] Patrick Michael Tutka & Dylan Williams, *The Expensive Truth: The Possible Tax Implications Related to Scholarship and Cost Of Attendance Payments For Athletes*, 27 J. LEGAL ASPECTS SPORT 145 (2017); William W. Berry III, *Employee-Athletes, Antitrust, And The Future Of College Sports*, 28 STAN. L. & POL'Y REV. 245 (2017).

better, the heart of the issue remains with the NCAA's unwillingness to create meaningful structural change. Some critics to regulatory control maintain that more rules will not in itself fix the issue.[202] Yet the truth remains that without the checks and legal pressures other governmental agencies must endure, the NCAA and its member institutions will continue to push the boundaries on acceptable moral and legal behavior in intercollegiate athletics.

Congress must take a realistic approach to intercollegiate athletics in America because it has grown to be an integral part of our higher education system. Dismantling the NCAA is not likely a feasible option. Instead, instituting a federal commission to monitor changes and assist in governance and conflict resolution would at least allow the public to regain confidence in the American higher education system. This article states a framework for such reform. Establishing a federal commission will not alleviate all issues within intercollegiate athletics—the pressure to win will always affect sports at all levels. Even so, government action is essential to form some semblance of uniformity in the face of a changing landscape of higher education in America.

One author summed up the effectiveness of congressional involvement in intercollegiate athletics by stating:

> [o]ne can question the success of congressional intervention in college athletics. However, such activity, coupled with pressure from groups such as the media, state legislatures, the Knight Commission, and the Internal Revenue Service, has been important in the process of college athletic reform because it has nudged the NCAA to initiate some reform efforts of its own.[203]

It is time for the Congress to stop nudging and finally take the reins of big-time college sports.

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[202] Josephine R. Potuto, *Two, Four, Six, Eight; What Can We Now Regulate? The Regulatory Mentality and NCAA Satellite Camps (Et al)*, 35 QUINNIPIAC L. REV. 287, 317 (2017).

[203] Deborah Katz, Graduate Assistant, Ohio State Univ. *Government Attempts at Regulation*, 1995 Symposium on Intercollegiate Athletics Reform at Notre Dame University (Feb. 24-25, 1995), *in* 22 J.C. & U.L. 20, 24 (1995).

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NCAA INDIVIDUALS ASSOCIATED WITH PROSPECTS (IAWP) RULE: IMPACT ON COLLEGE FOOTBALL AND ANTITRUST CONCERNS

BROOKS BRENNAN*

I. INTRODUCTION

Coach Smith aspires to one day become the head football coach at a major Division I college football program. As a high school football coach in Texas, Smith established himself as one of the bright young minds in the game by leading South High School to four straight State Championships. Colleges around the state have taken notice, as Smith has sent a number of talented young high school prospects to their programs over the past few years. One of those programs, the University of XYZ comes to Coach Smith and wants to offer him a position as a local recruiting coordinator for the program. The University explains that success in his off-field role will lead to an opportunity to advance to on-field coaching position with the team—the common practice for high school coaches entering the college ranks.

Unfortunately for Coach Smith, a recent rule passed by the National Collegiate Athletic Association (NCAA) eliminates this opportunity. Intended to eliminate the practice of larger schools luring recruits by offering jobs to their unqualified family and friends, the new rule severely penalizes colleges for hiring an individual to a non-coaching position who has a relationship with current or former recruits. Since Smith has former players who now play at the University of XYZ, taking the job would render those players automatically ineligible to play. Furthermore, all of Smith's current players at South High with scholarship offers to attend the University of XYZ would now also be considered ineligible to attend that program. With the University of XYZ unwilling to sacrifice the eligibility of its current players and recruits from South High, and Coach Smith not willing to sacrifice

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the opportunity for his current and former players to play for the University, he is forced to turn down his big break and return to the high school ranks.

While merely hypothetical, this is the reality currently facing college football in the wake of the NCAA's passing of the Individuals Associated with Prospects (IAWP) rule. Enacted as a way to address the inequalities associated with recruiting student-athletes, the rule has reached far beyond its intended effect and caused collateral damage to the ability of both coaches and players to move between NCAA member schools. Therefore, this article will argue that the IAWP rule must be reformed from its current state, as it currently constitutes an illegal restraint of trade in violation of Article 1 of the Sherman Antitrust Act.

Part I of this article will briefly introduce the problem created by the IAWP Rule. Part II will analyze the NCAA's recent legislation bundle addressing college football recruiting—specifically the IAWP Rule—and identify its core objectives and overall impact on college football programs. Part III will examine the IAWP rule's unintended negative effects on high school coaches, colleges football support staffers, and student-athletes. Part IV will discuss how these negative effects constitute an illegal restraint of trade in violation of Section 1 of the Sherman Antitrust Act by analyzing the potential claim of coaches, support staffers, and student-athletes against the NCAA. Finally, Part V will make recommendations as to how the NCAA can reform the current IAWP rule to avoid antitrust liability.

II. UNDERSTANDING PROPOSAL 2016-116 AND THE IAWP RULE

In an effort to better regulate the college football recruiting environment, which gives a marked advantage to larger programs with more disposable income, the NCAA Division I Council, composed of University Presidents and Chancellors, set out to overhaul the current recruiting process and restore competitive balance.[1] Citing a strong need for more transparency and better protection for student-athletes,[2] the NCAA Division I board of directors challenged the Division I Council to develop a

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[1] Michelle Brutlag Hosick, *College Football: DI Council Adopts New Recruiting Model*, NCAA (Apr. 14, 2017), http://www.ncaa.com/news/football/article/2017-04-14/college-football-di-council-adopts-new-recruiting-model.

[2] *Id.*

comprehensive package of recruiting rule changes.[3] After nearly five years of debate and numerous proposals, the Council introduced its final version, Proposal 2016-116, for a vote in the Spring of 2017.[4]

Addressing a wide variety of recruiting-related concerns, the Proposal was developed as an "all or nothing" style legislation bundle, requiring unanimous approval of all new rules in order to pass.[5] Those opposed to the blanket adoption argued it would be better to address each new rule individually, as not all rules were as well-regarded as others.[6] Despite this opposition, the Division I Council compromised and approved the Proposal in full, which took effect January 9, 2017.[7]

The legislation was touted by Council Chair Jim Phillips as "the most significant progress in recent years to improve the football environment and culture for current and prospective student-athletes and coaches."[8] The package's most significant changes included:

- Allowing for earlier official recruiting visits in the calendar year,
- Creating an early December signing period,
- Limiting the number of Division I football scholarships to 25, and

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[3] George Schroeder, *What the New NCAA Recruiting Rules Mean for Players, Coaches*, USA TODAY (Apr. 14, 2017), https://www.usatoday.com/story/sports/ncaaf/columnist/george-schroeder/2017/04/14/what-ncaa-recruiting-rules-mean-college-football-signing-day/100479194/; *see also* Hosick, *supra* note 1.

[4] Jeremy Crabtree, *NCAA Approves Proposal Overhauling College Football Recruiting*, ESPN (Apr. 14, 2017), http://www.espn.com/college-football/story/_/id/19157689/ncaa-division-council-passes-proposal-overhauling-college-football-recruiting-rules; *see also* Hosick, *supra* note 1.

[5] George Schroeder, *Rule Proposal Restricting Hiring of High School Coaches Creates Division*, USA TODAY (Apr. 11, 2017), https://www.usatoday.com/story/sports/ncaaf/2017/04/11/college-football-proposed-rules-changes-hiring-high-school-coaches/100348806/.

[6] *Id.*

[7] *See* Crabtree, *supra* note 4.

[8] Hosick, *supra* note 1.

- Adding a 10th assistant coach to the current college football staff size.[9]

The most controversial and criticized rule of the bunch, however, involves restrictions placed on the hiring of individuals associated with prospects.[10]

A. THE IAWP RULE AND ITS MECHANICS

The Individuals Associated with Prospects rule—better known as the "IAWP" rule—is a restriction on a college football program's ability to hire individuals who have relationships with players that a school is currently recruiting or has recruited in the past.[11] The language of the rule, enumerated in Bylaw 11.4.3 of the current Division I Manual, reads:

> [i]n bowl subdivision football, during a two-year period before a prospective student-athlete's anticipated enrollment and a two-year period after the prospective student-athlete's actual enrollment, an institution shall not employ (either on a salaried or volunteer basis) or enter into a contract for future employment with an individual associated with the prospective student-athlete in any athletics department noncoaching staff position or in a strength and conditioning staff position.[12]

In plain English, for a two-year period prior to a recruit's anticipated enrollment in a program and for two-years after the recruit's enrollment, a college may not hire individuals associated with a prospect (IAWP) to a non-coaching staff position.[13] According to Bylaw 13.02.19 of the NCAA Division I Manual, an IAWP is defined as:

> [A]ny person who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student-athlete's athletic skills

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[9] *See* Schroeder, *supra* note 3.
[10] *See* Schroeder, *supra* note 5.
[11] Crabtree, *supra* note 4.
[12] NCAA Division III Bylaw 11.4.3.
[13] Schroeder, *supra* note 5.

> and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution.[14]

While the rule clearly extends to parents, legal guardians, and coaches,[15] the broad language of the rule seems to encapsulate handlers, personal trainers, and possibly teachers. Because the rule merely requires "contact with an indirect relationship" to the athlete's abilities or recruitment, it begs the question as to whether the rule is too sweeping in its classification of who qualifies as an IAWP.[16]

B. VIOLATIONS OF THE IAWP RULE

Penalties issued for violations of the IAWP are wide-ranging, including, but not limited to, the permanent ineligibility of those players involved, as well as suspensions of collegiate coaches.[17] For example, a parent who is hired in violation of the rule would likely only qualify as an IAWP for their child. As a result, the penalty would be limited to rendering that single prospect ineligible to participate in intercollegiate competition, as well as potential penalties for the coach who hired the IAWP.[18] When the illegal hire involves a high school coach, however, the implications become far more reaching.[19]

High school coaches are currently considered IAWP's to all current and former players. As a result, hiring a high school coach in violation of the rule has the potential to affect a large number of student-athletes. Stated another way, if a college chose to hire a high school coach to a "non-coaching" position in its program (recruiting analyst, player quality control, etc.), it "[could] not have recruited a [single] player from that high school for two years prior to hiring the coach, and must . . . refrain from recruiting players from said high school for another two years after his employment."[20] For college football programs who rely on

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[14] NCAA Division III Bylaw 13.02.19.

[15] *Id.*

[16] *See id.*

[17] Crabtree, *supra* note 4.

[18] *See id.*

[19] *See* Zach Barnett, *This NCAA Proposal Could Have a Disastrous Effect on High School Coaches Looking to Move Up*, FOOTBALL SCOOP (Apr. 11, 2017), http://footballscoop.com/news/ncaa-proposal-disastrous-effect-high-school-coaches-looking-move/.

[20] *Id.*

certain high schools for recruits year after year the implications of this type of penalty can be crippling.

C. PURPOSE OF THE IAWP RULE

The Division I Council's purpose for creating the IAWP rule was to create more competitive balance in college football's recruiting environment.[21] By restricting the hiring of those close to recruits, the NCAA sought to curb package-style recruiting deals in which commitments from highly-rated recruits became contingent upon programs finding jobs for coaches and family members.[22] With larger programs increasing the size of their support staffs to absurd numbers in recent years,[23] the NCAA feared that larger programs with more disposable income could create "sham" positions within their program for the sole purpose of attracting top-tier recruits.[24] The most recent example of this type of practice occurred when Michigan head football coach Jim Harbaugh attempted to hire an offensive analyst who turned out to be the father of Michael Johnson, the number one rated quarterback in the class of 2019.[25] Though Johnson's father was a former NFL offensive coordinator who may have been qualified for the position,[26] this is the type of questionable practice the NCAA intended to stop. Allowing larger programs with more resources to use job creation as a recruiting tool creates a clear disadvantage for smaller programs who lack the resources necessary to match these types of offers.[27]

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[21] Richard Johnson, *How a New NCAA Rule Hurt High School Coaches and Players,* SB NATION (Apr. 15, 2017), https://www.sbnation.com/college-football-recruiting/2017/4/12/15267040/ncaa-rule-high-school-coach-recruit-camp-hire.

[22] Barnett, *supra* note 19.

[23] Dennis Dodd, *As NCAA Zeroes in on College Football Staff Size, Survey Shows Inconsistencies*, CBS SPORTS (May 15, 2017), https://www.cbssports.com/college-football/news/as-ncaa-zeroes-in-on-college-football-staff-sizes-survey-shows-inconsistencies/ (the University of Notre Dame maintains a staff of 45 individuals for its football program alone, including "on field coaches, strength coaches, graduate assistants, and support staff").

[24] *See* Schroeder, *supra* note 5.

[25] Barnett, *supra* note 19.

[26] *Id.*

[27] *See* Schroeder, *supra* note 5.

D. IS COLLEGE FOOTBALL SUFFICIENTLY DIFFERENT FROM COLLEGE BASKETBALL TO WARRANT ITS OWN IAWP RULE?

One of the main justifications for the design of the IAWP rule was that the same rule had already been successfully implemented in college basketball just a few years prior.[28] The executive director of the American Football Coaches Association, Todd Berry, commented on the decision to borrow basketball's rule, stating, "[i]t's a workable framework for the NCAA to enforce, so it made great sense to take the model already out there."[29] But while the rule has worked successfully in basketball, some question whether college football and college basketball are similar enough to justify the same rule.[30] Current Southern Methodist University head football coach Chad Morris believes that fundamental differences between the two sports protects football from falling into college basketball's trend of hiring individuals to lure recruits.[31] So what are these major differences?

The most obvious difference has to do with the immediate impact college basketball recruits can have on a team's success.[32] With only five players on the court at a time in basketball, a single basketball player can have a much more profound impact on a game than can a single football player. College football teams often require a handful of high-caliber players to see sustained success. On the other hand, a single college basketball recruit can often mean the difference between an average season and a top-25 finish.[33] The other key difference has to do with the time table of recruit's contributions to a team. Unlike college football, where freshman seldom contribute in a substantial manner, elite freshman recruits dominate the sport of college basketball.[34] In the

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[28] *Id.*; *see also* Schroeder, *supra* note 3.

[29] Schroeder, *supra* note 5.

[30] *See id.*

[31] *Id.*

[32] Gene Clemons, *NCAA's Ban on IAWP: Good Intentions Bad Form*, FOOTBALL GAMEPLAN.COM (Apr. 2017), http://footballgameplan.com/ncaa-good-intentions-bad-form/.

[33] *Id.*

[34] *See* Eamonn Brennan, *Elite Group of Freshman Ready to Take Over College Basketball*, ESPN (Oct. 31, 2016), http://www.espn.com/mens-college-basketball/story/_/id/17909028/it-year-freshmen-college-basketball. University of Kentucky coach John

2016 season alone, five freshman college basketball players elected to turn pro and were drafted in the first round of the NBA draft.[35]

So how does this translate to a need for different IAWP rules? With high school recruits making a more immediate and substantial impact on a college basketball program's success, college basketball programs have far greater incentive to use IAWP hires to lure in top level recruits. For basketball teams, the difference between an average season and a trip to the NCAA tournament can mean millions of dollars.[36] If one elite freshman recruit can help a team to make the tournament, programs have clear motive to engage in questionable practices. Football, on the other hand, is not as simple. Considering all the moving parts and physical development required of top football recruits, the payout for an elite recruit often isn't realized until years after he commits to the program.[37]

III. NEGATIVE EFFECTS OF THE IAWP RULE

Despite the IAWP rule's good intentions and seemingly effective policy, it fails to account for one glaringly important scenario—when a qualified individual is hired to a support staff role in a college program for a legitimate purpose, but happens to qualify as an IAWP.[38] In this scenario, a college with good intentions is effectively barred from hiring a qualified applicant simply because that applicant happens to have a relationship

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Calipari relied on a core group of elite Freshman to lead his team to a National Title in 2012. *Id.*

[35] *Id.*

[36] *See* Tim Parker, *How Much Does the NCAA Make off of March Madness?*, INVESTOPEDIA (Mar. 13, 2017), http://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp. In 2017, 68 teams got an invitation to play in the tournament. *Id.* Each of those team's conferences will get a piece of a $220 million pot of money. *Id.* For each game a team plays, its conference gets a payout, spread over six years. *Id.* For playing one game the team's conference gets roughly $1.7 million. *Id.*

[37] *See* Jenna Johnson, *Freshman Football Players Balance Stresses of College Life*, THE WASHINGTON POST (Dec. 25, 2013), https://www.washingtonpost.com/local/education/freshman-football-players-balance-stresses-of-college-life/2013/12/25/ff5b446a-6673-11e3-a0b9-249bbb34602c_story.html?utm_term=.063c5ee8e96c.

[38] *See* Schroeder, *supra* note 5.

(possibly minimal) with a student-athlete who currently plays for that college, or is being recruited by that college.[39] This scenario is particularly applicable to two key groups within the college football demographic—high school coaches and NCAA support staffers.[40] In each group's case, the IAWP rule creates a clear obstacle for career advancement opportunities.[41]

A. EFFECT ON HIGH SCHOOL COACHES

While recognizing the need to regulate larger programs' hiring to lure recruits,[42] a number of college football coaches have expressed their strong displeasure with the IAWP rule's effect on their ability to hire legitimately qualified high school coaches.[43] As Auburn head football coach Gus Malzahn described it, the new rule is "a death sentence to any high school coach wanting to coach college (football)."[44]

To better understand the new rule's effect on high school coaches, consider the experience of Dave Ballou, the head strength and conditioning coach of the Florida high school, IMG Academy.[45] After being named a finalist for the "2014 National Strength and Conditioning Association High School Strength Coach of the Year," Ballou was hired in 2017 as a football strength coach at the University of Notre Dame.[46] Unfortunately for

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[39] *Id.*

[40] *Id.*; *see also* Nick Moyle, *UT's Herman Believes NCAA Got It Wrong with Latest Rule Change*, SAN ANTONIO EXPRESS-NEWS (Apr. 18, 2017), http://www.expressnews.com/sports/college_sports/longhorns/article/UT-s-Herman-believes-NCAA-got-it-wrong-with-11081761.php.

[41] *See* Schroeder, *supra* note 5.

[42] *Id.*

[43] Ben Baby, *Why SEC Football Coaches are Unhappy with a New NCAA Recruiting Rule*, SPORTSDAY (May 2017), https://sportsday.dallasnews.com/college-sports/collegesports/2017/05/31/sec-football-coaches-unhappy-new-ncaa-recruiting-rule. *See also* Schroeder, *supra* note 5.

[44] Schroeder, *supra* note 5.

[45] Jim Halley, *High School Football Coaches Say New NCAA Rule Limits Their Ability to Make a Living*, USA TODAY HIGH SCHOOL SPORTS (Apr. 20, 2017), http://usatodayhss.com/2017/high-school-football-coaches-say-new-ncaa-rule-limits-their-ability-to-make-a-living.

[46] *Id.*

Ballou, Notre Dame had three members of its roster who attended IMG Academy and was heavily involved in the recruiting of two more IMG players in the class of 2018.[47] Since the IAWP rule would render these players ineligible to play at Notre Dame if Ballou accepted the position, he was forced to return to his high school job.[48] While Ballou was later given an exception to the rule to take the job, a large number of high school coaches fear they will not be as lucky in the future.[49]

While Dave Ballou's scenario is only a single instance of the new IAWP rule's unfortunate effect, Ballou's path to college football is not uncommon. In fact, the strength coach's situation mirrors the career path of a large number of current college football coaches who would have violated the IAWP rule if it had been in place when they took their first job.[50] Current University of Tennessee head coach, Jeremy Pruitt, was once a local Alabama high school football coach hired by University of Alabama coach, Nick Saban, to serve as director of player development.[51] Current offensive coordinators at Auburn and North Carolina respectively, Chip Lindsay and Eliah Drinkwitz, each started their careers in non-coaching roles as offensive analysts.[52] Last year alone, twelve high school coaches were hired by college programs.[53] Of those, eight of the positions were for support staff roles that did not involve coaching.[54] The IAWP has effectively eliminated the most common pathway for high school coaches with larger career aspirations to take the next step in their careers.

Supporters of the new IAWP rule argue that since the rule permits colleges to hire high school coaches directly to on-field positions without triggering the rule, all concerns about stifling high school coach career advancement opportunities are

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[47] *Id.*

[48] *Id.* It is uncertain whether Ballou made the individual decision to return to his high school job or whether Notre Dame revoked his offer in hopes of retaining the recruits' eligibility. *Id.* Ballou was unavailable for comment. *Id.*

[49] *See id.* The NCAA later made an exception for Ballou to take the job at Notre Dame. *Id.* This was likely based on his role as a strength coach, as opposed to an analyst or player quality control position with less concrete job descriptions. *Id.*

[50] *See* Barnett, *supra* note 19; Schroeder, *supra* note 5.

[51] Barnett, *supra* note 19.

[52] *Id.*

[53] *See* Halley, *supra* note 45.

[54] *Id.*

unfounded.[55] When taking a closer look at the method behind college football hires, however, this exception to the rule fails to solve the problem.

College football programs are only allowed a total of ten on-field assistant coaching positions per season.[56] While that may seem like a large number in isolation, it loses zeal when considering that NCAA rules permit college football teams to carry 105 players on a roster.[57] Therefore, it is not hard to comprehend why colleges would be hesitant to use one of those "limited" ten spots on a high school coach who remains unproven in the college ranks.[58] As current North Carolina State football offensive coordinator Eliah Drinkwitz explains, "[t]he problem is it's hard to hire a guy right into an on-field role without any prior (college football) experience. You're grooming them for this (on-field) position. It's a great way to train up a staff."[59]

Current UNLV football head coach Tony Sanchez reinforced this sentiment while discussing the possibility of hiring high school coaches to his own staff.[60] "I would love to hire some of those guys on at some point in some capacity and give them an opportunity," stated Sanchez.[61] "But I want to get to know them, I want to see their work ethic. I want to see their true knowledge . . . and if [it] is what I think it is, those are the guys I eventually end up hiring as on-the-field assistants."[62] With a large number of college coaches sharing the thought process of both Drinkwitz and Sanchez, relying on the "on-field" exception to the IAWP rule does not seem to be a long-term solution to high school coaches looking to make the leap into the college ranks.

While there are undoubtedly scenarios where colleges take advantage of a recruiting loophole by hiring unqualified high

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[55] *See* Crabtree, *supra* note 4.

[56] *See generally* Zach Barnett, *How Most FBS Programs Will Use a 10th Assistant Coach*, FOOTBALL SCOOP (Oct. 5, 2016), http://footballscoop.com/news/fbs-programs-will-use-10th-assistant-coach/.

[57] *See Roster FAQ's*, LOYAL COUGARS, https://www.loyalcougars.com/football-roster/roster-faqs/ (last visited Nov. 6, 2018).

[58] *See* Schroeder, *supra* note 5.

[59] *Id.*

[60] *See* Halley, *supra* note 43.

[61] *Id.*

[62] *Id.*

school coaches into "sham" positions for the sole purpose of securing potential recruits, it seems the more common purpose for these hires has to do with a vetting process that allows high school coaches a meaningful opportunity to prove themselves and better learn the college game.[63]

B. EFFECT ON COLLEGE FOOTBALL SUPPORT STAFFERS

Unfortunately, the indirect effect of the IAWP rule on career advancement is not limited to high school coaches. Based upon the broad language of the rule, the IAWP rule could also cost career college administrators and support staff's future advancement opportunities.[64] Texas head football coach Tom Hermann pointed this problem out in a teleconference with other Big 12 Conference head coaches.[65] Using a hypothetical scenario, Hermann stated, "if my director of player personnel leaves and I want to hire Texas Tech's director of player personnel, I can't, because he has a relationship with thousands of recruits that [the IAWP rule] would deem ineligible to participate at the University of Texas."[66]

Hermann's hypothetical raises a legitimate concern. While a Director of Player Personnel (DPP) position carries with it various responsibilities relating to player support and management of day to day player experiences, the main job duty of a DPP is the recruitment of prospects.[67] Recruiting is a cornerstone duty within a program, and can mean the difference between sustained success and program downturn.[68] But every time a DPP makes contact with a recruit in any capacity, that DPP would qualify as an IAWP.[69] Since larger schools recruit thousands of prospects each year, a school looking to hire a DPP from one of those larger schools would have to be willing to forfeit the eligibility of all of prospects that DPP had contact with. The

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[63] *See* Barnett, *supra* note 19.

[64] Moyle, *supra* note 40.

[65] *Id.*

[66] *Id.*

[67] Clayton Browne, *Director of Player Personnel Job Description*, HOUSTON CHRONICLE, http://work.chron.com/director-player-personnel-job-description-23382.html (last visited Nov. 19, 2018).

[68] *See* Chris Hummer, *Our Yearly Reminder: Why Recruiting Rankings Matter*, 247 SPORTS (Jan. 30, 2017), https://247sports.com/Article/National-Signing-Day-Why-recruiting-unquestionably-matters-for-c-50905753.

[69] *See* NCAA Division III Bylaw 13.02.19.

cost of losing thousands of potential prospects would seemingly always outweigh the benefit of hiring one individual, and therefore experienced and qualified DPP's are being denied the opportunity to advance their careers. In Hermann's hypothetical, this would leave University of Texas in quite a bind. With a vacancy in one of the programs most key positions, the school is essentially forced to overlook the most qualified individuals who reside at other colleges in order to hire an inexperienced applicant who does not violate the IAWP rule.

Since the IAWP rule's purpose is to curtail shady practices of colleges hiring unqualified individuals for the sole purpose of attracting recruits, the rule seems to reach far beyond its principal justification. Indeed, there are undoubtedly examples of colleges using bad faith motives when deciding to hire a new support staff employee.[70] However, the new rule will arguably place college football in an even worse position by disqualifying a substantial number of the qualified college football support staffers who serve important roles within programs.

C. EFFECT ON STUDENT-ATHLETES

Keep in mind that colleges are not barred from hiring high school coaches and support staffers to off-field positions if willing to face the consequences of forfeiting recruiting rights and eligibility of those players that have an IAWP relationship with the hire. While coaches like Auburn's Gus Malzahn claim that they have never recruited or signed a recruit from a school in which they hired a high school coach,[71] it begs the question—what effect does the IAWP rule have on student-athletes?

When a high school coach joins a college staff in a non-coaching capacity, all high school players currently being recruited from that coach's school are now barred from playing for that college.[72] While a great deal of coaches may choose to turn down the job to preserve their players' eligibility—as Dave

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[70] University of Miami conveniently landed commitments from two coveted high school teammates around the same time they hired an assistant coach of the boys' high school. Rob Cassidy, *New NCAA Hiring Rule Has Some Coaches Perplexed*, RIVALS.COM (Apr. 17, 2017), https://n.rivals.com/news/new-ncaa-hiring-rule-has-some-coaches-perplexed.

[71] Schroeder, *supra* note 5.

[72] *See* NCAA Division III Bylaw 11.4.3.

Ballou did at Notre Dame[73]—this might not always be the case. If a coach or staffer did choose to take a job, this could leave a large number of high school players who had scholarship opportunities to play football at that school without a way to attend college.

The rule also creates conflicts of interest for high school coaches trying to advance their own careers. Now, if a coach believes he may have an opportunity to take a job at a college in a coming season, he may avoid helping a player from his team receive a scholarship to that college to avoid triggering the rule and making himself more unattractive to the college.

With Division I member institutions now forced to overlook certain players as a result of hiring an individual who happens to have known or coached the players in the past, it seems as though the IAWP rule is hurting, rather than helping student-athletes—which is what the rule aimed to promote in the first place.[74] While encouraging balanced recruiting competition, the IAWP rule actually has a negative impact on the scholarship opportunities of student-athletes.

IV. ANTITRUST VIOLATIONS OF THE IAWP RULE

Legal recourse for those key groups affected by the passing of the IAWP rule is grounded in federal labor law. As University of Texas head football coach Tom Hermann put it, "[T]o say that to a person that is in a support staff role as a career and not allow them upward mobility . . . to me, you're talking about federal labor laws now."[75] The laws Hermann refers to are codified in the Sherman Antitrust Act,[76] a piece of legislation designed to promote free competition in the marketplace and curtail the monopolization of trade and commerce.[77]

By implementing harsh sanctions on schools who violate the IAWP rule, and placing eligibility penalties on the athletes involved, the NCAA has created two anticompetitive effects. First, high school coaches and support staffers may no longer freely move between NCAA Division I schools, restraining the market for NCAA support staff and potentially affecting the price

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[73] Halley, *supra* note 45.

[74] Hosick, *supra* note 1.

[75] Cassidy, *supra* note 70.

[76] Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

[77] *Sherman Antitrust Act*, AMERICAN-HISTORAMA.ORG (July 1, 2014), http://www.american-historama.org/1881-1913-maturation-era/sherman-antitrust-act.htm.

for qualified employment candidates. Rather than basing potential hires on the qualifications and organizational fit of candidates, schools are now forced to overlook the most qualified candidates and base their hiring decision on the number of eligible recruits they may lose as a result of the hire. Second, athletes with scholarship offers to schools that have chosen to hire an IAWP are now unable to play for that school, restraining the market for athletic talent in the NCAA marketplace. Without the IAWP rule, athletes would be able to freely bargain with the schools of their choice to exchange their on-field labor for an athletic scholarship. These unnecessary restraints create anticompetitive behavior and form the basis for a potential antitrust challenge against the NCAA.

After analyzing the mechanics of a claim under the Sherman Act, this section will explore the applicability of the Sherman Act to the NCAA, analyze recent case law relating to antitrust challenges against the NCAA, and attempt to layout a potential Sherman Act claim against the IAWP rule.

A. SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[78] To establish a valid Sherman Act claim, a plaintiff bears the burden of establishing the presence of three key elements.[79] These include: "(1) a contract, combination, or conspiracy; (2) which unreasonably restrains competition in a relevant market; (3) which affects interstate commerce."[80] However, it is important to understand that in analyzing the second element, the presence of a restraint alone is not considered a violation of the Sherman Act. Rather, a plaintiff must demonstrate that the restraint is unreasonable.[81]

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[78] Sherman Antitrust Act, 15 U.S.C § 1 (2004).

[79] Justin Seivert, *NCAA Legislation Will Continue to Be Attacked Under Antitrust Law*, SPORTING NEWS (Mar. 17, 2016), http://www.sportingnews.com/ncaa-football/news/ncaa-legislation-antitrust-lawsuit-law-sherman-antitrust-act-mark-emmert/1qhywyk6qhxxo16byd7g0xceq7.

[80] *Id.*

[81] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 92, 98 (1984).

When analyzing whether a restraint challenged under the Sherman Act is "unreasonable," courts apply "one of two analytical standards."[82] The first is the *per se* rule, which is reserved for the most obviously unlawful restraints on trade, with little-to-no procompetitive value.[83] If used, the *per se* rule deems restraints unlawful without any analysis of the justifications or reasonableness of the restraint.[84]

The more standard framework applied by the courts is known as the "Rule of Reason" analysis.[85] Under the Rule of Reason, courts employ a rigorous burden shifting framework.[86] The plaintiff has the initial burden of proving the restraint will result in a significant anticompetitive effect in the relevant market. If the plaintiff successfully demonstrates an anticompetitive effect, the burden then shifts to the defendant to justify the restraint based on some procompetitive ground.[87] If the defendant is successful, the burden shifts once more to the plaintiff who must either demonstrate that the restraint is unnecessary to meet its main objectives, or establish the presence of substantially less restrictive alternatives to achieving those objectives.[88]

B. APPLICABILITY OF THE SHERMAN ANTITRUST ACT TO THE NCAA

Sherman Act challenges to NCAA rules and regulations are not an issue of first impression on the courts, who have tried a number of cases involving restraint of trade allegations against the NCAA.[89] Unfortunately, precedent is far more inconsistent than

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[82] Daniel Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 Perspectives in Antitrust 2, AMERICAN BAR ASSOCIATION (2013).

[83] *Id.*

[84] *Id.* at 2.

[85] *See* Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012); *see also* Fundakowski, *supra* note 82.

[86] Fundakowski, *supra* note 82, at 2.

[87] *Id.*

[88] *Id.*

[89] *See generally* NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (involving an antitrust challenge against NCAA's restriction of college football broadcasting rights); *Agnew*, 683 F.3d at 339 (involving student-athletes challenge to an NCAA rule capping the number of allowable scholarships); O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (involving an antitrust challenge against the NCAA compensation rules relating to player name, likeness, and image).

unified on the issue of whether plaintiffs can successfully challenge NCAA bylaws on antitrust grounds.[90] The NCAA often relies on its non-profit business model to advance the argument that its educational objectives and focus on amateurism exempt it from the reach of Section 1 of the Sherman Antitrust Act, which is "tailored for the business world, not for the non-commercial aspects of the liberal arts and the learned professions."[91] This argument loses muster, however, when considering the enormous revenue generated by college football for its member institutions year after year. In 2016 alone, the University of Alabama football program generated $103.9 million in revenue,[92] paying its head coach a salary of nearly $11.1 million.[93] Courts cannot ignore the business aspect associated with the coaching of student-athletes and the production of games and other athletic events to the general public.[94] Some courts have strongly suggested that the NCAA is not entitled to an exemption from antitrust scrutiny.[95] In fact in *O'Bannon v. NCAA*, one of the seminal cases on antitrust applicability to NCAA rules, the U.S. Court of Appeals for the Ninth Circuit reasoned that all regulations passed by the NCAA are subject to the Sherman Act.[96] The following cases provide a look at some of the more recent Sherman Act challenges against the NCAA.

1. *Hennessey v. Nat'l Collegiate Athletic Ass'n*

Although ultimately unsuccessful, *Hennessey v. NCAA* provides the framework for one of the early challenges brought against an NCAA bylaw directly affecting working opportunities of coaches.[97] In August of 1975, the NCAA passed a bylaw which limited the number of full-time assistant football and basketball coaches who could be employed by an NCAA member school.[98]

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[90] *Id.*

[91] Hennessey v. NCAA, 564 F.2d 1136, 1148 (5th Cir. 1977).

[92] Ahiza Garcia, *Alabama's Crimson Tide is Rolling in Green*, CNN MONEY, https://money.cnn.com/2017/01/09/news/alabama-clemson-championship-revenue/index.html (last visited Oct. 22, 2018).

[93] *NCAA Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/ (last visited Oct. 22, 2018).

[94] *See Hennessey*, 564 F.2d at 1149.

[95] *Id.*

[96] *O'Bannon*, 802 F.3d at 1079.

[97] *See Hennessey*, 564 F.2d at 1136.

[98] *Id.* at 1140.

As a result, the University of Alabama, who exceeded the number of permissible assistant coaches in both sports, demoted Lawrence Hennessey and Wendell Hudson to part-time coaches to avoid penalty.[99] The coaches responded to the demotions by challenging the new bylaw in federal court under a theory of—among other things—an illegal restraint of trade in violation of Section 1 of the Sherman Antitrust Act.[100]

The court began by acknowledging that the bylaw satisfied the "agreement" element of a restraint of trade claim due to the agreement amongst the various members of the association in relation to the rule.[101] Despite the NCAA's argument that its educational nature exempted it from the reach of antitrust laws, the court determined the bylaw was subject to Section 1 Sherman Act analysis.[102] The court next turned to the interstate commerce element, where it relied on the multi-state nature of coaching college athletics and the revenue of NCAA competition to make its determination.[103] With NCAA competition involving travel around the country, and coaches providing their services to athletes across state borders at these competitions, the court concluded the bylaw had a "sufficient impact" on interstate commerce so as to fall under the Section 1 Sherman Act blanket.[104]

The coaches' restraint of trade claim ultimately failed, however, when the court reached the "unreasonableness element."[105] The coaches advanced a theory that the bylaw acted as a "group boycott," and was therefore *per se* illegal.[106] Relying on the non-profit nature and purpose of the NCAA, however, the court concluded that the bylaw was not *per se* illegal, and rather subject to a rule of reason analysis.[107]

After conducting the rule of reason analysis, the court found for the NCAA.[108] The driving factor in the decision was the NCAA's purpose for the rule, which was to balance the

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[99] *Id.*
[100] *See id.* at 1147.
[101] *See id.*
[102] *Id.* at 1148.
[103] *See id.* at 1150–51.
[104] *Id.*
[105] *See id.* at 1154.
[106] *Id.* at 1151.
[107] *Id.* at 1152–53.
[108] *Id.* at 1154.

competitive and economic advantages of larger schools who had expanded their programs and placed economic pressure on smaller schools to "catch up" and "keep up."[109] However, the court did admit that the actual effect of the bylaw on coaches was still largely unknown, as it had only been in place for a little over a month at the time the suit was brought.[110] As a result, the court acknowledged that the adverse impact of the rule could ultimately outweigh its procompetitive effects, and admitted these negative impacts could form the basis for a subsequent lawsuit in the future.[111]

2. *Law v. Nat'l Collegiate Athletic Ass'n*

In a more recent and successful challenge to an NCAA bylaw affecting coaches, a group of NCAA basketball coaches filed an antitrust challenge in August 1995. The coaches alleged that an NCAA bylaw that set a salary cap for entry level coaches violated Section 1 of the Sherman Act.[112] Citing a need to stop a "catastrophic cost spiral" in which NCAA member schools continued to increase spending on recruiting and coaches to compete with other schools, the NCAA formed a Cost Reduction Committee in 1989 which developed the "Restricted Earnings Coach Rule."[113] The rule functioned by limiting the number of coaches a Division I program could hire, and forced the school to designate one of those coaches as a "restricted earnings coach," who could not be paid in excess of $12,000 during the academic year and $4,000 during summer months.[114]

Citing Supreme Court precedent relating to antitrust challenges against the NCAA, the U.S. Court of Appeals for the Tenth Circuit affirmed the District Court's determination that the Rule of Reason inquiry was the appropriate mechanism for Sherman Act analysis of NCAA bylaws, as opposed to a *per se* analysis.[115] Conducting the Rule of Reason analysis, the court

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[109] *Id.* at 1153.

[110] *Id.*

[111] *Id.* at 1154.

[112] *See* Law v. NCAA, 902 F. Supp. 1394, 1394 (D. Kan. 1995).

[113] *Id.* at 1399–1400.

[114] *Id.* at 1400.

[115] *See* Law v. NCAA, 134 F.3d 1010, 1018–19 (10th Cir. 1998); *see also NCAA*, 468 U.S. at 101–03.

denied the NCAA's argument that because restricted earnings coaches could find coaching jobs in other arenas—NCAA Division II, high school, non-NCAA college teams—no anticompetitive effect existed.[116] The court reasoned that despite Division I coaching positions making up only a small portion of the overall coaching market, the NCAA's lack of market power did not eliminate clear anticompetitive effects under the Sherman Act."[117] Since the rule effectively reduced the responsiveness of price (coaching salaries) to demand, no market power analysis was needed to determine the anticompetitive effect on the "market for coaching services."[118]

The NCAA attempted to counter this anticompetitive effect by providing procompetitive justifications for the rule similar to those presented in Hennessey.[119] Namely, that the new rule "maintain[ed] competitive equity," "retain[ed] entry-level coaching positions," and protected NCAA member schools from destructive cost increases.[120] However, the court stated that the Hennessey court placed too much emphasis on the good intentions of the NCAA, without requiring it to present concrete evidence showing the bylaw actually helped to achieve those proffered objectives.[121] As a result, the NCAA's inability to present evidence showing the Restricted Earning Rule's positive effect caused the court to find for the coaches.[122]

As the NCAA failed to meet its burden of demonstrating legitimate procompetitive objectives, the court affirmed the District Court's granting of summary judgement for the Plaintiff's as to antitrust liability, without inquiry into whether there were less restrictive means of achieving those objectives.[123]

C. ESTABLISHING A SHERMAN ACT CLAIM BASED ON THE IAWP RULE AND THE POTENTIAL RESTRAINT OF TRADE VIOLATION

As indicated by analysis of the forgoing precedent, courts have been somewhat inconsistent in their rulings related to

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[116] *See Law*, 134 F.3d at 1019–20.
[117] *Id.* at 1020.
[118] *Id.*
[119] *Id.* at 1020–21.
[120] *Id.* at 1021.
[121] *Id.* at 1021–24.
[122] *Id.*
[123] *Id.* at 1024.

restraint of trade claims against the NCAA.[124] Despite this inconsistency, the IAWP rule seems to present a clear restraint of trade on more than one key demographic of the NCAA market. This may be a distinguishing factor which has not been seen by the courts when analyzing previously challenged NCAA regulations. As a result, a legitimate Sherman Act challenge could be made against the IAWP rule on the basis of both its restraint on the market for high school coaches and college football support staff available for hire, as well as student-athlete's ability to freely engage with Division I schools for a scholarship.

As noted in Section IV(a) above, coaches, support staff or players wishing to bring a restraint of trade challenge against the NCAA would bear the burden of establishing a "(1) a contract, combination, or conspiracy; (2) which unreasonably restrains competition in a relevant market; (3) which affects interstate commerce."[125] The first element, a "contract, combination, or conspiracy" is presumptively satisfied by the IAWP rule, and therefore will not be discussed in great detail. To demonstrate the existence of a contract, the plaintiff must establish the presence of agreement "between two separate entities rather than a single entity."[126] Just like the bylaw in *Hennessey*, the IAWP rule was codified through the NCAA legislative process, which requires agreement by all NCAA Football Bowl Subdivision (FBS) institutions. With 130 colleges and Universities currently making up the FBS,[127] agreement among these institutions regarding the new rule satisfies the "agreement between separate entities" requirement.[128]

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[124] *Compare Hennessey*, 564 F.2d at 1148 (finding a restriction on the number or college coaches was not an unreasonable restraint on trade), *and Agnew*, 683 F.3d at 335 (dismissing student-athletes challenge to an NCAA rule capping available scholarships under the Sherman act), *with Law*, 134 F.3d at 1010 (granting coaches challenging an NCAA rule restricting their pay summary judgement as to antitrust liability).

[125] *Id.*

[126] *Id.*

[127] *See Football Bowl Subdivision Records*, NCAA 187 (2017), http://fs.ncaa.org/Docs/stats/football_records/2017/FBS.pdf.

[128] *See* Seivert, *supra* note 79; *see also Hennessey*, 564 F.2d at 1147 (explaining that an NCAA Bylaw constitutes an agreement amongst member institutions and thus satisfies the contract requirement of Sherman Act analysis).

1. *The IAWP Rule Unreasonably Restrains Competition*

As is the case in a majority of antitrust claims involving the NCAA, the most difficult of the three elements to establish will likely be demonstrating that the new IAWP rule unreasonably restrains trade or commerce in a relevant market.[129] Consistent with Section IV(a) above, courts will look to make the unreasonableness determination by conducting a *per se* or Rule of Reason framework analysis.[130]

a. *Per Se Rule Analysis*

The *per se* Rule analysis is used in only the most extreme anticompetitive circumstances.[131] In other words, when the surrounding circumstances indicate that the likelihood of an anticompetitive effect is so great, the restraint is "condemned as a matter of law," without any further examination of its unreasonableness.[132] Key indicators of *per se* unreasonableness include horizontal restraints on price and output, which almost always result in a restriction on competition.[133] Among these horizontal restraints are "group boycotts," which involve "some concerted refusal to deal with persons or companies because of some characteristic of those persons and companies."[134]

Just like the coaches in *Hennessey*, who argued that a bylaw restricting the number of coaches an NCAA member school could hire constituted a group boycott,[135] high school coaches and support staffers could certainly argue the IAWP rule functions as a group boycott on employment prospects who embody a particular characteristic. After all, the IAWP rule's main function is to categorically prevent schools from engaging in economic activity (the hiring process) with certain employment prospects on the basis of their IAWP classification. This same argument could be made for student-athletes challenging the IAWP rule. When a school has hired a football support staff member who happens to have a relationship with a student-athlete, there is now "concerted refusal" on the part of that school to engage with that student-athlete in the labor-for-scholarship exchange, since that student-

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[129] Seivert, *supra* note 79.
[130] Fundakowski, *supra* note 82, at 1–2.
[131] *Id.* at 1.
[132] *NCAA*, 468 U.S. at 100.
[133] *Id.*
[134] *Hennessey*, 564 F.2d at 1151.
[135] *Id.*

athlete is rendered ineligible to play for the institution according to the rule.[136]

To discount this argument, the NCAA will likely rely on the depth of precedent concerning the *Per Se* Rule's application to NCAA bylaws. Both the *Hennessey* and *Law* courts make it clear that NCAA bylaws are treated differently by the courts than other *per se* restraints of trade.[137] Even the Supreme Court has weighed in on the issue, holding that the application of the *Per Se* Rule to NCAA rules would be "inappropriate" because college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[138] To uphold the "integrity of [college football]," some restraints must be agreed on by member schools so as to regulate fair competition.[139]

Therefore, while there is a convincing argument to be made that the IAWP rule could be considered *per se* illegal on the basis of a group boycott, recent precedent indicates coaches, support staffers, and student-athletes would likely be fighting an uphill battle in urging the court to apply the analysis.[140] As a result, a court hearing this challenge would likely evaluate the unreasonableness of the restraint under the Rule of Reason analysis.

b. *Rule of Reason Analysis*

When conducting the Rule of Reason analysis, a court hearing this claim would employ the three-part burden shifting framework discussed in Section IV(a) above.[141] To reiterate the framework, the plaintiff must first demonstrate the anticompetitive effect of the regulation, at which point the defendant must advance a procompetitive justification for the restraint. If successful, the plaintiff has the burden of

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[136] *See* Leonard W. Aragon & Cameron Miller, *National Letter of Intent's Basic Penalty: Analyses and Legal Basis to End the Practice*, 7 ARIZ. ST. SPORTS & ENT. L.J. 7, 61 (2017).

[137] *See Hennessey*, 564 F.2d at 1151–52; *Law*, 134 F.3d at 1017–18.

[138] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 92, 100-01 (1984).

[139] *O'Bannon*, 802 F.3d at 1069.

[140] *See, e.g.*, Fundakowski *supra* note 82.

[141] *Id.* at 1–2.

demonstrating those objectives could be met by less restrictive alternatives.[142]

c. *Establishing the Anticompetitive Effects of the IAWP Rule*

A plaintiff may establish an anticompetitive effect either directly by showing actual anticompetitive effects, such as control over output or price, or indirectly by proving that the defendant possessed the requisite market power within a defined market.[143] In both cases, the existence of a relevant commercial market is key.[144] The ultimate question to be answered when determining the effect of a restraint, however, is "whether or not the challenged restraint enhances competition."[145]

Coaches and Support Staffers: There is a strong likelihood that the IAWP rule, just like the bylaw restricting earnings of entry level coaches in *Law*, has a clear anticompetitive effect on both the output and the price of a relevant market. Like the market for coaches analyzed in *Law*, there is a clear market for college football support staff employees involved with the IAWP rule. In this market, coaches and support staffers are considered the product, and the member institutions act as the consumers. Thus, when the NCAA passes a rule which restricts schools from hiring certain individuals who happen to qualify as IAWP's, it effectively restricts the output of available employment candidates. Schools who are unable to hire an individual are eliminated from the consumer market, reducing both competition and demand for that individual. With less competition for the candidate, the salary required to hire him decreases, directly affecting price.

The NCAA may counter by claiming that they maintain minimal market power, which eliminates any existing anticompetitive effect. This argument relies on an assumption that the market for Division I football support staff jobs makes up just a small portion of the overall market for football support staff employees.[146] In other words, while high school coaches and

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[142] *Id.*

[143] *Law*, 134 F.3d at 1019.

[144] *See O'Bannon*, 802 F.3d at 1070.

[145] *Agnew*, 683 F.3d at 335 (quoting California Dental Ass'n v. F.T.C., 526 U.S. 756, 780 (1999)).

[146] This argument is based on the argument presented by the NCAA to the district court in *Law*. *See Law*, 902 F. Supp. at 1405.

support staffers who classify as IAWPs may be restrained from employment at certain Division I institutions, they can still find other employment opportunities at Non-Division I institutions, non-NCAA member colleges, and professional organizations.[147] This argument is fatally flawed in two key respects.

First, *Law* stands for the proposition that when there is an agreement not to compete, proof of market power is unnecessary because the agreement's anticompetitive nature is clear.[148] In the case of the IAWP rule, there is a clear agreement among member schools not to compete for certain individuals who may have a relationship with recruits. Second, assuming analysis of the market power was undertaken by a court hearing this case, the market for football support staff jobs is much smaller than the market for coaching generally.[149] While football coaching jobs are found in the high school, college, and professional ranks, the market for football support staff employees is confined to the major college and professional ranks. Therefore, closing off the opportunity to work for a Division I program eliminates a significantly larger portion of the overall market.

Student-Athletes: For student-athletes, the main hurdle to establish an anticompetitive effect is to demonstrate the existence of a relevant commercial market. [150] Fortunately, "commerce" has been defined broadly to "include almost every activity from which the actor anticipates economic gain."[151] In *Agnew v. NCAA*, a court analyzing the applicability of the Sherman Act to NCAA regulations capping the number of scholarships allowed per year determined that transactions between student-athletes and NCAA schools are "commercial in nature." [152] Since football programs and student-athletes take

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[147] *Id.*

[148] *See NCAA*, 468 U.S. at 100–01; *see also Law*, 134 F.3d at 1020.

[149] Support staff jobs can include roles in recruiting, quality control, scouting, and research. *NCAA Football Positions*, INDEED, https://www.indeed.com/q-Football-jobs.html (last visited Mar. 10, 2018).

[150] *See O'Bannon*, 802 F.3d at 1064–65 (9th Cir. 2015) (stating that the existence of an affected commercial market is key to establishing a restraint of trade claim).

[151] *Id.* at 1065

[152] *Agnew*, 683 F.3d at 341.

economic factors into consideration when deciding how to recruit and which schools to attend respectively, bylaws relating to recruiting satisfy a relevant commercial market for Sherman Act purposes.[153]

Similar to the regulation in *Agnew*, the IAWP rule, while relating to eligibility, is directly connected to an economic transaction. The IAWP rule functions by governing the eligibility of potential recruits who have signed or will be signing with a school. At the heart of this recruiting process is an economic transaction between player and school.[154] By supplying labor in the form of participation in football, the player is worth hundreds of thousands of dollars per year to the school.[155] Therefore, the school anticipates economic gain from the signing. Similarly, the student is bargaining with schools for the price of tuition, room and board, and the cost of books, with those incentives making up the student-athlete's economic gain.[156]

With a commercial market established, student-athletes could demonstrate the anticompetitive effect the IAWP rule has on the labor-for-scholarship exchange. With the IAWP rule rendering athlete's ineligible to play for any program who hires an individual associated with them to a non-coaching position, the market for that player's services has now been restricted. As a result of the IAWP rule's penalties, schools who would otherwise engage with this athlete in the economic exchange of labor-for-scholarship will be forced to look elsewhere for student-athletes who do not trigger the IAWP rule.

To rebut the existence of an anticompetitive effect, the NCAA will likely argue that NCAA rules related to eligibility are "presumptively procompetitive," and thus not subject to Sherman Act scrutiny.[157] However, this argument is unpersuasive. Courts

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[153] *Id.*

[154] *See* Aragon & Miller, *supra* note 136, at 71.

[155] "The average FBS player is worth $163,087 a year" to their respective schools. Cork Gaines and Mike Nudelman, *Why the NCAA may Eventually be Forced to Pay Some Student Athletes, in One Chart.*, BUSINESS INSIDER (Nov. 24, 2017), http://www.businessinsider.com/college-football-player-value-2017-11.

[156] *See* Aragon & Miller, *supra* note 136, at 71.

[157] *See Agnew*, 683 F.3d at 341–42 (discussing the Supreme Court's reasoning in *NCAA v. Bd. of Regents* that most NCAA bylaws should be presumed procompetitive because they enhance public interest in intercollegiate athletics and foster competition); *see also NCAA*, 468 U.S. at 117.

have explicitly rejected the notion that an NCAA rule which contains characteristics of an eligibility rule must always escape antitrust scrutiny.[158] "Were the law otherwise, the NCAA could insulate its member schools' relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an 'eligibility rule.' The antitrust laws are not to be avoided by such 'clever manipulation of words.'"[159] Therefore, student-athletes would likely succeed in establishing the existence of anticompetitive effects on relevant commercial markets.

d. *NCAA's Procompetitive Justifications for the IAWP Rule*

With an anticompetitive effect established, the NCAA would carry the "heavy burden of establishing an affirmative defense," which competitively justifies "infringement on the Sherman Act's protected domain." [160] The pro-competitive justifications advanced by the NCAA would likely include maintaining competitive balance amongst member schools in recruiting, and promoting amateurism. Plaintiffs bringing a claim could persuasively refute each of these justifications.

As discussed in Section II of this paper, the NCAA's primary motivation for the IAWP rule was to maintain competitive balance in recruiting. [161] Specifically, the NCAA intended to curb the practice of larger Division I programs using program revenue to create sham employment positions for family and close friends of highly touted prospects.[162] Unfortunately, the IAWP rule does little to deliver on its promise of creating competitive balance and eliminating recruiting advantages of larger Division I programs. This is because competitive balance does not exist in the NCAA.[163] While the ability to hire individuals

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[158] *O'Bannon*, 802 F.3d at 1064.

[159] *Id.* at 1065.

[160] *NCAA*, 468 U.S. at 86.

[161] Johnson, *supra* note 21.

[162] Barnett, *supra* note 19.

[163] *See O'Bannon*, 802 F.3d at 1059 (discussing the district court's reasoning that "numerous economists have studied the NCAA over the years and that 'nearly all' of them have concluded" that NCAA rule fail to promote competitive balance); s*ee also* Andy Schwarz, *The Competitive-Balance Argument Against Paying Athletes is Bullshit*, DEADSPIN (May 15, 2014), https://deadspin.com/the-competitive-balance-argument-against-paying-athlete-1576638830.

close to potential prospects favors larger programs with more disposable resources, it is but one small avenue by which larger schools use money to gain a competitive advantage over smaller schools in recruiting.[164]

This argument is supported by *O'Bannon v. NCAA*. In *O'Bannon*, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's reasoning that while NCAA compensation rules relating to athletes helped to prevent larger schools from paying athletes large amounts to entice them to sign, it did not stop schools from spending on other aspects of the program, like facilities and coaching.[165] As a result, any positive effect on competitive balance realized from the passing IAWP rule is likely minimized by the ability of wealthier programs to continue to spend on other areas that make their schools more enticing to attend.

The NCAA could also argue that the IAWP rule helps to preserve amateurism by eliminating the financial pressures felt by smaller institutions who may choose to ignore athlete compensation restrictions in an effort to "keep up" with larger programs.[166] However, this argument is weak. First, the IAWP rule is not related to the concept of amateurism, which deals with

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Studies conducted by a variety of economists show that recruiting rules do little to promote competitive balance in the NCAA. *Id.*

[164] In 2014 alone, 48 schools residing in the five wealthiest college football conferences spent a total of $772 million on athletic facilities. Will Hobson and Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHICAGO TRIBUNE (Dec. 23, 2015), http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html. Clemson's new facility is even equipped with a movie theatre, laser tag arena, and barber shop. *Id.* University of Oregon's apparel agreement with Nike provides players with the latest Nike gear, access to internship opportunities with the company, and "player-exclusive sneakers." Matthew Kish, *10 Fun Facts About the Oregon Ducks' Unique Nike Deal*, PORTLAND BUSINESS JOURNAL (Jan. 7, 2015), https://www.bizjournals.com/portland/blog/threads_and_laces/2015/01/10-fun-facts-about-the-oregon-ducks-unique-nike.html.

[165] *O'Bannon*, 802 F.3d at 1059 (explaining that any equalizing effect generated by the compensation rule was essentially negated by the other areas of program spending).

[166] This argument is largely paraphrased from the argument presented by the NCAA when opposing an antitrust challenge against a bylaw restricting the earnings of college coaches. *See Law*, 134 F.3d at 1023.

the financial compensation that *student-athletes* receive to attend a school.[167] Rather, the IAWP rule effects the ability for coaches and football support staffers to take employment opportunities and receive compensation. While courts have given the NCAA "room under the antitrust laws to preserve the amateur character of intercollegiate athletics, courts have only legitimized rules designed to ensure the amateur status of student-athletes, not coaches."[168] Second, the "easing of financial pressures on smaller institutions" argument runs into the same problem as the "maintaining competitive balance" argument. Namely, that while the IAWP rule may relieve some financial pressure on smaller schools to "keep up" with larger programs initially, that effect will eventually be negated by the unregulated spending of larger schools on other areas of their football program.

e. *Establishing Less Restrictive Alternatives*

In the event that the court does accept the NCAA's procompetitive justifications for the IAWP rule, plaintiffs bringing a claim could present less restrictive alternatives to achieving these goals, thus satisfying the third prong of the burden shifting framework.[169] While discussed in greater detail in Section V below, these include reworking the IAWP definition to exclude high school head football coaches and current NCAA support staffers (legitimate employment candidates) from the rule's reach, creating a formal appeals process for legitimate candidates classified as IAWP's, or creating a defined coaching development role within each program that escapes the reach of the IAWP rule.

In conclusion, the IAWP rule is an "unreasonable" restraint on both the relevant market for college football support staff employees, as well as the market for athletic talent. By restricting the free movement of high school coaches, college football support staffers, and student-athletes, the NCAA has reduced competition amongst member schools who engage in regular economic exchange for these key groups' services. While the NCAA may justify its actions based on a push for competitive balance and preservation of amateurism, it lacks sufficient evidence to demonstrate that either of these objectives are actually met by passing the IAWP rule. Finally, even if the NCAA

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[167] *See Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited Nov. 12, 2018).

[168] *Law*, 134 F.3d at 1022 n.14.

[169] Fundakowski, *supra* note 82, at 1–2.

demonstrates procompetitive justifications, there exists less restrictive alternatives to achieving these goals.

2. *The IAWP Rule Affects Interstate Commerce*

To complete a successful Sherman Act challenge against the IAWP rule, plaintiffs would need to demonstrate that the rule has an effect on interstate commerce, thus satisfying the third and final element of the restraint of trade claim. "Interstate commerce" is defined as "the buying, selling, or moving of products, services, or money across state borders." [170] In the case of both coaches/support staffers and the student-athletes affected, this element is likely satisfied.

As was discussed in the analysis of *Hennessey v. NCAA*, a bylaw limiting the number of assistant coaches a member school could hire had a "sufficient impact on interstate commerce."[171] The court reasoned that intercollegiate athletics recognizes enormous revenues from schools and tournaments spread throughout the U.S., and coaching is a vital element of that process.[172] A significant portion of coaching is performed in other states when teams travel to compete, and the very nature of the employment market for college coaches is multi-state. [173] In *Agnew v. NCAA* , a bylaw capping the number of student-athlete scholarships allowed per year had a similar impact on commerce. Relying on the economic factors taken into consideration by both student-athletes and schools in deciding where to attend school and when to extend scholarships (respectively), transactions between student-athletes and NCAA schools were deemed "commercial in nature."[174]

Like the challenged bylaw in *Hennessey*, the IAWP rule directly impacts the free flow of coaches and college support staffers to NCAA member schools throughout the country. The market for college football coaches and support staff is national in nature, with candidates typically residing in different programs and institutions throughout the U.S. With non-coaching support staff positions playing a vital part in the recruiting process of all NCAA member schools, the IAWP rule surely affects the

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[170] *Interstate Commerce*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/interstate_commerce# (last visited Nov. 12, 2018).

[171] *Hennessey*, 564 F.2d at 1150–51.

[172] *Id.*

[173] *Id.*

[174] *Agnew*, 683 F.3d at 341.

"moving . . . of services, or money across state borders." The same can be said of the impact the IAWP rule has on student-athletes. Similar to the bylaw capping the number of scholarships in *Agnew*, the IAWP rule has a direct effect on both the recruiting and scholarship processes of college football by limiting the amount of schools who may recruit an athlete and offer scholarships. Both of these processes are multi-state, with potential recruits residing throughout the U.S. To put this in perspective, 14 of the 21 athletes that made up Ohio State University's 2017 football recruiting class came from outside the state of Ohio.[175] Therefore, each group affected by the IAWP rule can likely argue that the rule's restrictions sufficiently impact interstate commerce.

V. SUGGESTIONS FOR REFORM OF THE IAWP RULE

The issue with the IAWP rule is not its intention (*i.e.*, to put a stop to questionable recruiting practices and maintain competitive balance), but rather its mechanics. In its current form, it opens the NCAA up to potential antitrust liability and results in detrimental consequences to some of the key inputs to the college football product. Therefore, the following suggestions provide the NCAA with some alternatives to the current IAWP rule, which might still achieve the NCAA's main objectives.

A. REWORK THE DEFINITION OF AN IAWP

The most workable solution to the current problems associated with the IAWP rule is to redefine who qualifies as an IAWP. By creating a definition that exempts high school head coaches and current NCAA football support staff employees, the NCAA can effectively filter out "sham" employees without restricting the advancement of legitimate employment prospects. This could be accomplished by creating a categorical exception, or redefining the IAWP entirely. Below is a side-by-side comparison of the NCAA's current definition of an IAWP and a proposed revision of the definition addressing antitrust-related concerns:

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[175] *College Football Recruiting Classes*, ESPN, http://www.espn.com/college-sports/football/recruiting/school/_/id/194/class/2017 (last visited Nov. 12, 2018) (listing Ohio State football recruit information for the 2017 season).

Current Language:	Revised Language:
[A]ny person who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student athlete's athletic skills and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution.[176]	[A]ny person who is *not currently employed by an NCAA Division I member institution athletic department,* who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student athlete's athletic skills and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution, [177] *but excluding any and all contact, currently or previously made as the head football coach of the high school or preparatory institution attended by the prospective student-athlete.*

By exempting NCAA Division I athletic department employees entirely within the first part of the definition, the rule no longer unnecessarily lumps in current support staff employees who make up a large portion of the qualified candidate pool for future support staff jobs in NCAA football programs.

[176] NCAA Division I Bylaw 11.4.3.
[177] *Id.*

Furthermore, by exempting all contact made by the high school head football coach of the institution attended by the prospective student-athlete, colleges can continue to promote promising young high school coaches to the college ranks without any concern as to the eligibility of potential recruits. The exception is not overly broad, however, exempting contact made only as a *head football coach*. The result is that colleges looking to hire from the high school ranks are forced to look at only the most qualified individuals (*i.e.*, head coaches), as opposed to the "sham hires" involving unqualified assistant coaches or trainers.

B. CREATE AN EFFICIENT APPEALS PROCESS

Another possible solution to the problem involves the NCAA developing an efficient appeals process for individuals who have been classified as an IAWP. Under this solution, IAWP's who anticipate taking a support staff position with an NCAA member institution may file a timely appeal to an NCAA sanctioned board. Developing a set of factors for consideration, this board would be able to better distinguish legitimate hires from those based on improper motives.

Factors to be considered could include: (1) prior experience related to the anticipated position; (2) number of years spent coaching or working in a support staff role; (3) previous accomplishments which may qualify them for the position; (4) number of current and past recruits with which they have an IAWP relationship; (5) nature of the relationship with any recruit(s) to which they are considered IAWP's; and (6) the ranking of any recruits to which they are considered IAWP's. Ideally, each factor would weigh differently, with strong factors being able to make up for weaker ones. In other words, a long-time head coach with dozens of IAWP relationships over a number of years could overcome that factor by showing a great amount of success and experience which suits him for the anticipated position. Furthermore, no one factor would be determinative of whether or not the waiver should be granted, and determinations would need to be made on a case-by-case basis. While this may be a more costly and time-consuming solution to the problem, it creates an escape hatch for the NCAA to avoid antitrust scrutiny while still cracking down on illegal recruiting practices.

C. CREATE A DEFINED COACHING DEVELOPMENT ROLE

A third solution to the IAWP problem is the creation a defined coaching development position within each NCAA programs.[178] Under this solution, the NCAA would need to pass a bylaw which creates a new off-field support staff role specifically designated for high school head coaches who college programs are looking to develop for future on-field roles, but which does not trigger the IAWP rule. By making this an off-field support staff role, it would allow colleges to take a chance on promising high school coaches without having to use one of their ten on-filed coaching vacancies, but at the same time prevent any IAWP related eligibility concerns. Limiting factors could be placed on the position in order to address the recruiting related concerns of the NCAA. These could include: (1) capping the number of designated development positions available to each program; (2) creating an eligibility requirement which requires a defined number of years spent coaching high school football to become eligible for the position; and (3) limiting the duties of the position to only on-campus recruiting, so as to avoid previous high school coaches going back into their local high school communities to recruit.[179]

VI. CONCLUSION

The NCAA's effort to restore some of the competitive balance missing from the college football recruiting environment is an admirable cause. With a huge disparity in the revenue generated by some of the smaller NCAA Division I football programs when compared to larger programs, there is a logical advantage for larger schools who have more disposable income to engage in seemingly questionable recruiting efforts. With that being said, the NCAA's use of the IAWP rule as the vehicle for this change is imprudent.

Not only does the IAWP rule negatively affect current NCAA support staffers' ability to take new job opportunities at other NCAA member schools, but it essentially cuts off college football's main pipeline for promising young coaches. The rule also directly affects student-athletes, who now fear losing scholarship opportunities and athletic eligibility due to a program's employment decisions—decisions which are entirely outside the control of a student-athlete. As a result of these negative effects, the IAWP rule potentially subjects the NCAA to

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[178] Johnson, *supra* note 21.

[179] *Id.*

legal liability. To wit, the rule unreasonably restrains competition in the market for NCAA support staffers, qualified coaches, and athletic talent in violation of Section 1 of the Sherman Antitrust Act.

I urge the NCAA to strongly consider the various negative implications associated with college football's new IAWP rule, and to engage in meaningful reform by considering the implementation of one (or all) of the solutions presented above.

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ONE-AND-DONE IS NO FUN: THE NBA DRAFT ELIGIBILITY RULE'S CONUNDRUM AND A PROPOSED SOLUTION

ZUBIN KOTTOOR*

"Like LeBron or Sebastian, high school graduates straight to the league, I ain't waitin'for my knee to blow, Yesterday I was needin' this dough, get it, I was kneadin' this dough."[1]

I. INTRODUCTION

A. THE TIPPING POINT

On September 26, 2017, four National Collegiate Athletic Association ("NCAA") Division I men's basketball coaches, an Adidas executive and five others were arrested on fraud and corruption charges.[2] The scandal also implicated Rick Pitino, coach of the University of Louisville's basketball team, and one of NCAA Division I's winningest men's basketball coaches.[3] The

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[1] JAY-Z, DEAD PRESIDENTS III (Def Jam Records) (Hip-Hop artist, Jay-Z, using a double entendre, juxtaposes two very different situations that great high school basketball players used to face: go to college and risk the chance of injury or enter the league with an uncertain future but make millions of dollars).

[2] Press Release, U.S. Dep't of Justice, U.S. Attorney Announces the Arrest of 10 Individuals, Including Four Division I Coaches, for College Basketball Fraud and Corruption Schemes (Sept. 26, 2017), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-arrest-10-individuals-including-four-division-i-coaches-college.

[3] *Id.*

United States Attorney's Office for the Southern District of New York and the Federal Bureau of Investigation ("FBI") found many instances of bribery and criminal activity intended to facilitate where a college basketball player went to school, who they hired if they made it to the NBA, and what types of shoe brands the athlete would endorse.[4] One specific scheme found that a University of Louisville basketball employee along with an Adidas executive paid a high school basketball prospect's family $100,000 in return for his commitment to enroll at and play for Louisville, whose athletic program is sponsored by Adidas.[5] He further agreed to sign with Adidas if he entered the NBA.[6] Ultimately, the "legendary" Rick Pitino was fired by the University of Louisville amid the FBI investigation.[7] However, this was just the beginning of the storm.

The FBI's investigation has led to the discovery of an underground college basketball recruiting operation implicating at least twenty Division I college basketball programs.[8] On February 23, 2018, it was reported that some of the documents recovered were balance sheets from ASM Sports.[9] One particular balance

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[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Tracy Connor, *Louisville Fires Rick Pitino Amid NCAA Bribery Probe*, NBC NEWS (Oct. 16, 2017, 2:44 PM), https://www.nbcnews.com/news/us-news/louisville-fires-rick-pitino-amid-ncaa-bribery-probe-n811021.

[8] Pat Forde & Pete Thamel, *Exclusive: Federal Documents Detail Sweeping Potential NCAA Violations Involving High-Profile Players, Schools*, YAHOO! SPORTS (Feb. 23, 2018, 3:33 AM), https://sports.yahoo.com/exclusive-federal-documents-detail-sweeping-potential-ncaa-violations-involving-high-profile-players-schools-103338484.html (schools implicated include Duke, North Carolina, Michigan State, and Kentucky).

[9] ASM Sports is a sports agency headed by Andy Miller who is considered one of the premier NBA agents. *See* Pat Forde & Pete Thamel, *Meet Andy Miller, the Controversial Agent Tied to College Hoops Scandal*, YAHOO! SPORTS (Nov. 21, 2017, 11:56 AM), https://sports.yahoo.com/meet-andy-miller-controversial-agent-tied-college-hoops-scandal-185645771.html. The agency represents prominent NBA athletes such as Kyle Lowry and Kristaps Porzingis. A few months after the indictment, Miller relinquished his agent certification. *Id.*; *see also* Paolo Uggetti, *FAQ: Prominent Agent Andy Miller Relinquishes Certification*, THE RINGER (Dec. 6, 2017, 5:20

sheet has the heading, "Loans to Players."[10] The document showed that some men's high school and college basketball athletes received tens of thousands of dollars from ASM Sports.[11] The storm grew even darker when, the very next day, it was reported that the FBI, through a wiretap, intercepted Sean Miller, head coach of University of Arizona's men's college basketball program, allegedly discussing a payment of $100,000 to DeAndre Ayton.[12]

Although this might appear "shocking,"[13] NCAA Division I men's college basketball has historically been known for its violations of NCAA rules.[14] The NCAA pushes aside the

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PM), https://www.theringer.com/nba/2017/12/6/16743348/nba-andy-miller-asm-sports-relinquish-certification.

[10] Forde, *supra* note 8.

[11] *Id.*

[12] Deandre Ayton was one of the top recruits this year and is considered to be one of the top picks in the upcoming 2018 NBA Draft. *See* Mark Schlabach, *FBI Wiretaps Show Sean Miller Discussed $100K Payment to Lock Recruit*, ESPN (Feb. 24, 2018), http://www.espn.com/mens-college-basketball/story/_/id/22559284/sean-miller-arizona-christian-dawkins-discussed-payment-ensure-deandre-ayton-signing-according-fbi-investigation. It is reported that if Miller is fired for cause, he will receive more than $10 million equaling about 85% of his contract. *Id.*; *see also* Darren Heitner, *Drafting Error Could Cost University of Arizona Millions if Sean Miller Is Fired*, FORBES (Feb. 24, 2018, 12:03 PM), https://www.forbes.com/sites/darrenheitner/2018/02/24/drafting-error-that-could-cost-university-of-arizona-millions-if-sean-miller-is-fired/#62e8ab86522d.

[13] Following reports of the ASM balance sheets and Miller's alleged payment, NCAA President Mark Emmert had this to say: "Did we or anybody else have suspicions that these things are going on, well of course. Everybody did. No one was shocked that these things occurred." *See* @CBSSportsCBB, TWITTER (Feb. 24, 2018, 10:43 AM), https://twitter.com/cbssportscbb/status/967470077061693440?s=12.

[14] *See, e.g.*, Shannon Ryan, *NCAA Penalizes Memphis in Derrick Rose Test Case*, CHICAGO TRIBUNE (Aug. 21, 2009), http://articles.chicagotribune.com/2009-08-21/sports/0908210085_1_penalizes-memphis-coach-john-calipari-infractions-report; *see also* Joe Smith, *"Fab Five" Legacy Tainted*, THE MICHIGAN DAILY (Mar. 25, 2002), https://www.michigandaily.com/content/fab-five-legacy-tainted.; *see also* Adam Spolane, *Remembering Kelvin Sampson's Scandal-Ridden Past*, CBS HOUSTON (Apr. 3, 2014),

efforts of men's college basketball student-athletes to benefit financially off of their own success. At the same time, the NCAA is willfully blind when sports apparel companies, boosters, and agents pay these student-athletes for their success on the hardwood. The NCAA is known for its hardline stance on not compromising a "student-athlete's eligibility."[15] Yet, underneath it all, lies a criminal enterprise that exploits high school men's basketball athletes who are left with very few choices.

The NCAA implements a stringent policy against any student-athlete receiving any type of monetary benefits. [16] Recently, some men's basketball college athletes have come out and said how unfair the NCAA system is to them. Shabazz Napier, a former first-team All-American and two-time NCAA champion, claimed that there had been nights where he went to bed without food.[17] Ben Simmons, the #1 pick in the 2016 NBA Draft and a former "One-and-Done" athlete, was also highly critical of the NCAA in a recent interview.[18] Simmons described "the business of college sports" as a "dirty business" and "sneaky."[19] Simmons recalled that when he first arrived at Louisiana State University ("LSU"), his number, but not his name, was draped across billboards all over Louisiana proclaiming that a superstar was on the horizon.[20] Yet Simmons never received a dime from the profits of the billboard advertisements.[21] Finally, and most importantly,

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http://houston.cbslocal.com/2014/04/03/remembering-kelvin-sampsons-scandal-filled-past/.

[15] *NCAA President: Not a Good Idea*, ESPN (Sept. 17, 2013), http://www.espn.com/college-sports/story/_/id/9682086/ncaa-budge-paying-college-athletes.

[16] *Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited Nov. 17, 2018).

[17] Sara Ganim, *UCONN Guard on Unions: I Go to Bed 'Starving'*, CNN (Apr. 8, 2014, 1:26 PM), http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html.

[18] *Kneading Dough: Ben Simmons*, UNINTERRUPTED (Nov. 9, 2017), https://www.uninterrupted.com/watch/CiQZqsrP/kneading-dough-ben-simmons.

[19] *Id.*

[20] *Id.*

[21] *Id.*

Simmons said that one year in the NBA has already taught him more than he had ever learned during his one year at LSU.[22]

B. THE DILEMMA OF THE ELITE MEN'S BASKETBALL STUDENT-ATHLETE

High school basketball athletes are not eligible to enter the National Basketball Association's ("NBA") annual draft immediately after graduating high school unlike in Major League Baseball ("MLB")[23] and the National Hockey League ("NHL").[24] Yet, not so long ago, the NBA did allow high school athletes to directly enter the league. This allowed Moses Malone, Kevin Garnett, Kobe Bryant, and LeBron James to grow from talented, young teenagers to some of the greatest players in NBA history.[25] Moreover, it allowed these players to monetize their abilities as athletes.[26]

The NCAA and its member schools monetize the athlete's abilities by, for example, denying the athlete the right of publicity through advertisements and jersey sales as was seen with Simmons.[27] All it takes is one elite, high school men's basketball player committing to a NCAA school for the school to generate revenue and ticket sales.[28] But, the men's basketball student-

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[22] *Id.*

[23] *Official Rules*, MLB, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited Nov. 17, 2018).

[24] National Hockey League & National Hockey League Players Association Collective Bargaining Agreement, art. VIII, § 8.4(a) (Feb. 15, 2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf.

[25] BILL SIMMONS, THE BOOK OF BASKETBALL: THE NBA ACCORDING TO THE SPORTS GUY 491, 501, 569 (2009). Simmons ranks the top ninety-six players in NBA history and ranks Garnett at 22, James at 20, Malone at 13 and Bryant at 8. *Id.* However, the book was written prior to Bryant winning one more championship and James winning three championships. *Id.*

[26] *See*, *e.g.*, Kurt Badenhausen, *Kobe Bryant Will Retire with Record $680 Million in Career Earnings*, FORBES (Nov. 30, 2015, 11:18 AM), https://www.forbes.com/sites/kurtbadenhausen/2015/11/30/kobe-bryant-will-retire-with-record-680-million-in-career-earnings/#7e6f3501217c.

[27] *Id.*

[28] Aaron Reiss, *Mizzou Men's Basketball Announces Season-Ticket Sales Record*, THE KANSAS CITY STAR (Nov. 7, 2017, 12:00

athletes are no fools. They see the NCAA and its member schools getting rich, while they are left with empty pockets. The NCAA's member schools and the school's boosters, sponsors, and unaffiliated agents take advantage of the young basketball athlete's dilemma by providing him with money and other gifts. Although against NCAA rules, some college men's basketball athletes feel the only choice they have is to accept money to support themselves and their families.[29] Ultimately, athletes in financial constraints are left with two options: receive money, in violation of NCAA rules, and potentially lose their NCAA eligibility, or watch as people make money off their athletic abilities. This article seeks to articulate a theory by which high school athletes can challenge the NBA's Draft Eligibility Rule in court. It also offers an alternative to the current eligibility rule in place.

C. THE "ONE-AND-DONE" RULE AND POSSIBLE LEGAL CHALLENGES

The NBA's draft eligibility rule was revised in the 2005 NBA Collective Bargaining Agreement (CBA).[30] The new rule changed the longstanding rule that high school men's basketball athletes, after graduation, could be eligible for the NBA Draft.[31] The current rule, known as the "One-and-Done Rule"[32] requires that:

PM), http://www.kansascity.com/sports/college/sec/university-of-missouri/article183216206.html.

[29] Sheryl Nance-Nash, *NCAA Rules Trap Many College Athletes in Poverty,* AOL (Sept. 13, 2011, 4:00 PM), https://www.aol.com/2011/09/13/ncaa-rules-trap-many-college-athletes-in-poverty/.

[30] Howard Beck, *N.B.A. Draft Will Close Book on High School Stars,* NY TIMES (June 28, 2005), http://www.nytimes.com/2005/06/28/sports/basketball/nba-draft-will-close-book-on-high-school-stars.html ("[T]he National Basketball Players Association agreed to the league's request to put the 19-year-old limit in the new labor agreement.").

[31] *Id.*

[32] Known as the One-and-Done Rule because the top college basketball athletes attend college for one college basketball season, and then immediately declare for the NBA Draft at the conclusion of the collegiate season. Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (Jun. 26, 2012) http://www.espn.com/mens-college-

> The player (A) is or will be at least nineteen (19) years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player . . . , at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).[33]

There are two avenues to challenge the One-and-Done Rule. The first is through a restraint of trade argument. Under this argument, high school men's basketball athletes argue that their right to monetize their athletic abilities is being infringed upon by excluding them from entering the NBA immediately after high school.[34] The restraint of trade argument arises when an athlete argues that the NBA is in violation of the Sherman Antitrust Act § 1, which says a contract is illegal if it is made in collusion with others to restrain trade.[35] The problem with the anti-trust argument is that sports leagues, including the NBA, are exempt from anti-trust lawsuits through a non-statutory labor exemption[36] if the players union and the league collectively bargain for the terms of a rule.[37] For an athlete to succeed on an anti-trust argument, the athlete must first show that the draft eligibility rule in place does not fall within the non-statutory labor exemption.[38]

Proving that the non-statutory labor exemption does not apply is the most crucial step for a high school men's basketball

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basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball ("[T]he one-and-done generation—players who leave after one season of college basketball.").

[33] NBA COLLECTIVE BARGAINING AGREEMENT, art. X, § 1(b)(i) (2017).

[34] *See* Michael McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft,* 3 VA. SPORTS & ENT. L.J. 113, 216–18 (2004).

[35] Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

[36] *See* Connell Constr. Co. v. Plumbers and Steamfitters Loc. Union No. 100, 421 U.S. 616, 622 (1975) (the non-statutory labor exemption was judicially created to promote the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions).

[37] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 390 (S.D.N.Y. 2004).

[38] *Id.*

athlete who wants to challenge the NBA's One-and-Done Rule. There are two cases that highlight the non-statutory exemption in sports leagues. In *Mackey v. National Football League*, the U.S. Court of Appeals for the Eighth Circuit resolved when the non-statutory labor exemption would apply through a three-factor test.[39] Under the *Mackey* test, courts must determine if: (1) "the restraint on trade primarily affects only the parties to the collective bargaining relationship;" (2) the restriction "concerns a mandatory subject of collective bargaining," which include wages, hours, and working conditions; and (3) the restriction is "the product of bona fide arm's-length bargaining."[40] In 1996, twenty years later, the U.S. Supreme Court decided *Brown v. Pro Football, Inc.*[41] In its decision, the Supreme Court did not apply the *Mackey* test, but instead chose to look at other Supreme Court decisions in their totality.[42] The Supreme Court did not make a distinction between what is and what is not covered by the exemption, leaving it to a case-by-case analysis of the facts.[43] Nonetheless, in 2004, the Southern District of New York applied the *Mackey* factors to hold that the non-statutory labor exemption did not apply in *Clarett DC*.[44] However, in the same year, the NFL appealed, and the U.S. Court of Appeals for the Second Circuit overturned the District Court's decision, refusing to apply the *Mackey* factors.[45] The decision by the Second Circuit was brought to the NBA's attention, and the NBA soon after amended the NBA Draft Eligibility Rule to its current state.

This Note will argue that the non-statutory labor exemption should not apply to the NBA's One-and-Done Rule, which exists within the NBA's CBA. Part II addresses the history of Draft Eligibility Rules in the NBA and compares it with those of the National Football League ("NFL"), and references the cases that changed the draft eligibility rules. Part III compares the

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[39] Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976).

[40] *Id.*

[41] Brown v. Pro Football, 518 U.S. 231 (1996).

[42] *Id.* at 237–38.

[43] *Id.* at 250.

[44] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 411 n.87 (S.D.N.Y. 2004).

[45] Clarett v. Nat'l Football League, 369 F.3d 124, 134 (2d Cir. 2004).

District Court decision and the Second Circuit decision in *Clarett*. Part IV explains why the Second Circuit's arguments for not applying the non-statutory labor exemption should not apply to the NBA Draft. Finally, Part V will look at a reform plan that the NBA could institute in place of the One-and-Done Rule.

II. HISTORY OF DRAFT ELIGIBILITY RULES IN THE NBA AND NFL

An examination of the NBA and NFL Draft's eligibility rules is needed to understand how and why the One-and-Done Rule exists. The NFL's rule was challenged by Maurice Clarett in an effort to gain early entry into the NFL Draft.[46] Ultimately, the *Clarett* decisions led to the NBA instituting the One-and-Done Rule.[47]

A. NBA DRAFT ELIGIBILITY RULE HISTORY

In 1961, the NBA mandated that men's basketball athletes could not be eligible for the NBA Draft until four years after an athlete's high school class graduated.[48] The NBA stated that it was protecting the interests of the athletes.[49] Perhaps, unknowingly, it also built the NCAA's college basketball brand. Accordingly, the NBA has always made sure the interests of the NCAA were met. In 1970, Spencer Haywood played professional basketball in the American Basketball Association ("ABA") after spending two years in college.[50] After one year and a MVP award in the ABA, Haywood canceled his contract.[51] He subsequently signed with a NBA team, the Seattle Supersonics, in 1971.[52] Haywood was only three years removed from high school, so the NBA threatened to void the contract and impose sanctions on the Supersonics.[53] In response, Haywood filed suit claiming the NBA's rule was a

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[46] *Clarett*, 306 F. Supp. 2d at 382.

[47] Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. SPORTS & ENT. L.J. 159, 171 (2012).

[48] *Id.* at 167–68.

[49] *Id.*

[50] Doug Merlino, *Spencer Haywood, the NBA Draft, and the Legal Battle That Shaped the League,* BLEACHER REPORT (May 6, 2011), http://bleacherreport.com/articles/691783-spencer-haywood-the-nba-draft-and-the-legal-battle-that-shaped-the-league.

[51] *Id.*

[52] *Id.*

[53] *Id.*

group boycott under anti-trust law.[54] Haywood's case reached the Supreme Court and the Court ruled in Haywood's favor. In *Haywood*, the Supreme Court agreed with the District Court ruling that Haywood would suffer an irreparable injury if he was unable to play for the Supersonics, and a great injustice would be done to him.[55] The Court reasoned Haywood's basketball career would suffer because he would not play against high-level competition.[56] Haywood's status as a superstar would fade causing him to lose pride and self-esteem.[57] Importantly, a major reason the court ruled this way is because the age requirement was never collectively bargained.[58] The *Haywood* decision became the precedent that anchored high school athletes' ascent into the NBA.

In 1976, the NBA changed the rule to one allowing any high school men's basketball athlete to enter the draft as long as the athlete sent a letter to the Commissioner stating the player's intent to forfeit his NCAA eligibility.[59] Until 1995, only three high school basketball athletes made use of this rule change.[60] In 1995, Kevin Garnett became the first high school men's basketball athlete drafted in twenty years.[61] From 1995 until the "One-and-Done" rule was implemented in 2005, thirty-nine high school men's basketball athletes were drafted.[62] During that timeframe, the NBA saw more high school basketball athletes declare for the draft after every season. David Stern, former Commissioner of the NBA, advocated for an age limit of twenty for the NBA Draft because of the sudden uptick in athletes skipping college.[63] Around this time, Maurice Clarett brought an anti-trust suit against the National Football League ("NFL") challenging the requirement that a football athlete be three years removed from

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[54] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Zola, *supra* note 47, at 168.

[59] *Id.*

[60] *Id.* at 168–69.

[61] *Id.* at 169.

[62] *Id.* at 170.

[63] *Id.*

high school in order to be draft eligible.[64] In that case, the U.S. [65] Court of Appeals for the Second Circuit ruled for the NFL. The court reasoned that the NFL did not violate anti-trust laws because it had collectively bargained draft eligibility requirements with the NFL Players Association ("NFLPA"), and thus was labor exempt from anti-trust suits.[66] In 2005, the NBA, with the approval of the National Basketball Players Association ("NBPA"), agreed to structure a draft eligibility rule into the league's CBA that required athletes to be nineteen years old and a year removed from their high school graduation.[67] This rule came to be known as the One-and-Done Rule. The NBA is protected from future legal challenges through the non-statutory labor exemption and by also collectively bargaining the draft eligibility requirements. Up to this point, the One-and-Done Rule has not yet been challenged. However, the NBA and NFL's draft eligibility rules and process have striking similarities which makes an examination of the *Clarett* decisions imperative for those who want to challenge the rule.

B. NFL DRAFT ELIGIBILITY HISTORY

The NFL had its inaugural season in 1920. In 1925, it implemented its first draft eligibility rule.[68] The rule precluded a player from entering the NFL unless four NFL seasons had passed since the athlete's high school graduation.[69] At the time, the NFL did not have a CBA, and the rule stood on its own.[70] In 1990, the NFL reduced the restriction from four NFL seasons to three.[71] In 1993, the NFL and the NFLPA negotiated a CBA that the NFL contended included the eligibility rule that was in the NFL's Constitution and Bylaws.[72] The 1993 CBA allowed for college athletes to get special permission from the Commissioner to be

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[64] Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004).

[65] *Id.*

[66] *Id.* at 142–43.

[67] NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 33.

[68] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 385 (S.D.N.Y. 2004).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

eligible for the NFL Draft.[73] Special permission would be granted if at least three NFL seasons had elapsed since the athlete's high school graduation.[74] Permission was routinely granted so long as the athlete fell within the scope of the rule.[75] The rule was amended in 2003, stating that three full college seasons must pass since an athlete's high school graduation before he can be eligible for the NFL Draft.[76] This rule set the stage for Maurice Clarett's cause of action.

Maurice Clarett graduated high school in 2001.[77] He then went on to attend Ohio State University ("OSU") on a college football scholarship.[78] During his first season at OSU, he led OSU to a National Championship and was considered the best running back in college football.[79] What seemed like the start of a bright future ended up being the highlight of his career. The following season, OSU suspended Clarett for the entire season because of several off-field incidents including receiving several thousands of dollars in violation of NCAA rules.[80] With his NCAA eligibility in limbo, Clarett sought to be eligible for the 2004 NFL Draft, two and a half years after he graduated from high school.[81] The NFL, sticking to its eligibility rule, denied Clarett entry into the NFL Draft.[82] In response, Clarett sued the NFL under Section 1 of the Sherman Antitrust Act.[83] Clarett argued that the NFL Draft Eligibility Rule ("The Rule") is an "illegal restraint of trade because the teams have agreed to exclude a broad class of players from the NFL labor market, thereby constituting a 'group boycott.'"[84] The NFL argued that the non-statutory labor exemption immunized the league from anti-trust lawsuits.[85] Ultimately, the Clarett litigation was the last challenge to a

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[73] *Id.* at 385–86.
[74] *Id.* at 386.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 387.
[78] *Id.*
[79] *Id.* at 387–88.
[80] *Id.* at 388.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 390.
[84] *Id.*
[85] *Id.* at 389.

professional sports league's draft eligibility rule, proving its importance.

III. THE *CLARETT* DECISIONS

Judge Shira A. Scheindlin's District Court decision and Judge Sonia Sotomayor's Second Circuit Court of Appeals opinion come to different conclusions in their determination of whether the non-statutory labor exemption was applicable to the NFL in *Clarett*. Although not binding in the Second Circuit, Judge Scheindlin applied the three-factor *Mackey* test, finding it persuasive, and determined that the non-statutory labor exemption was not applicable to the NFL.[86] Therefore, she held that Clarett was eligible for the NFL Draft because the NFL Draft's Eligibility Rule violated anti-trust law.[87] However, Justice Sotomayor did not apply the *Mackey* factors because *Mackey* was decided in the Eighth Circuit, and thus was not binding on the Second Circuit.[88] Instead, Justice Sotomayor looked at *Brown v. Pro Football* and other precedent within the circuit to determine that the non-statutory labor exemption does immunize the NFL, disregarding the possible persuasive value of *Mackey*.[89]

A. JUDGE SCHEINDLIN'S DISTRICT COURT DECISION

Judge Scheindlin conceded that the Second Circuit did not have an applicable test for the non-statutory labor exemption.[90] However, she acknowledged that the Sixth, Eighth and Ninth Circuits applied the *Mackey* three-factor test:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily *affects only the parties to the collective bargaining relationship.* Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted *concerns a mandatory subject of collective bargaining.* Finally,

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[86] *Id.* at 391–93.

[87] *Id.* at 410–11.

[88] *Id.*

[89] Brown v. Pro Football, 518 U.S. 231, 231 (1996); *see also* Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

[90] Clarett v. Nat'l Football League, 306 F. Supp. 2d at 391.

> the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the *product of bona fide arm's-length bargaining.*[91]

Judge Scheindlin interpreted the scope of the non-statutory labor exemption as limiting the exemption to compulsory subjects of collective bargaining that "covers only conduct that arises from the collective bargaining process," [92] following the Supreme Court's decision in *Brown v. Pro Football, Inc.*, which held that the exemption applied to the wage restriction because it was an "integral part of the bargaining process."[93] Judge Scheindlin also believed the exemption could only apply to "actions that affect employees within the bargaining unit or those who seek to become employees and who will be bound by those actions."[94] Thus, Judge Scheindlin determined that wages, hours, and working conditions could only apply to employees.[95]

Judge Scheindlin held that The Rule did not address a mandatory subject of collective bargaining.[96] The mandatory subjects of collective bargaining affected only people who are employed or are eligible to be employed; yet The Rule made a "class of potential players unemployable."[97] The NFL relied on three Second Circuit precedent cases to support its argument that the rules governing the NFL Draft were exempt from anti-trust litigation.[98] Judge Scheindlin distinguished the precedent cases from the instant case by commenting that all three precedent cases concerned either wages or working conditions, which are mandatory subjects of collective bargaining.[99] Judge Scheindlin found that none of the precedent cases involved job eligibility.[100] The precedent cases the NFL relied on were successful in arguing that the exemption applied because the provisions governed terms

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[91] *Id.*
[92] *Id.* at 393.
[93] *Brown*, 518 U.S. at 239.
[94] *Clarett*, 306 F. Supp. 2d at 393.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.* at 393–95.
[99] *Id.* at 393.
[100] *Id.* at 395.

"by which those who are drafted are employed."[101] Judge Scheindlin reasoned The Rule prevented athletes from entering the labor market entirely and affected wages only because the athlete subjected to the rule earned no wages.[102]

Judge Scheindlin also held that the exemption did not apply to individuals that were "excluded from the bargaining unit."[103] The Rule affected players who were "complete strangers to the bargaining relationship."[104] Relying on *Mackey*, Judge Scheindlin reasoned that the exemption could not apply to provisions that only affect individuals outside of the bargaining unit.[105] However, it is settled law that the non-statutory labor exemption applied to current and prospective employees.[106] Applying this standard, Judge Scheindlin concluded that an athlete, once drafted, could not object to a mandatory subject of collective bargaining on the basis that the athlete was not a party to the CBA.[107] However, Judge Scheindlin made an important distinction for Clarett. The Rule barred Clarett from being drafted because the NFLPA and NFL agreed to the provision.[108] Yet, Clarett's eligibility for the NFL Draft was not the NFLPA's to trade away.[109] Judge Scheindlin held that "those who are categorically denied employment, even temporarily, cannot be bound by the terms of employment they cannot obtain."[110] Finally, Judge Scheindlin held that the non-statutory labor exemption did not apply because the NFL Draft Eligibility Rule did not arise from arm's length negotiations.[111] Judge Scheindlin determined that because The Rule had originated prior to the first NFL CBA and because it was only briefly mentioned in the 1993 CBA, The Rule was never the subject of collective bargaining between the NFL an NFLPA.[112] After determining that the non-statutory labor exemption did not apply to the NFL, Judge Scheindlin held The

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[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 395–96.
[108] *Id.*
[109] *Id.* at 395.
[110] *Id.* at 396.
[111] *Id.*
[112] *Id.*

Rule violated anti-trust law and Clarett was eligible for the 2004 NFL Draft.[113]

B. JUSTICE SOTOMAYOR'S SECOND CIRCUIT COURT OF APPEALS DECISION

Justice Sotomayor declined to apply the *Mackey* factors because she refused to distinguish between employers using agreements to "disadvantage their competitors in the product or business market," and "restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit."[114] Instead, Justice Sotomayor chose to rely on the Second Circuit precedent.[115] Justice Sotomayor held that to permit anti-trust suits against sports leagues that engaged in concerted action which imposed a restraint on the labor market would undermine the policies of labor law.[116]

Disagreeing with Judge Scheindlin, Justice Sotomayor found that the NFL Draft Eligibility Rule was a mandatory bargaining subject.[117] Justice Sotomayor reasoned that The Rule acted as an initial condition of employment and had tangible effects on the working conditions and wages of NFL players currently in the league.[118] The NFL Draft, team salary caps, and free agency all impacted how a player's salary in the NFL is set.[119] Therefore, Justice Sotomayor said The Rule "cannot be viewed in isolation" because eliminating The Rule could alter certain assumptions between the NFL and NFLPA that underlie the CBA.[120] Justice Sotomayor also found that The Rule positively affected the "job security of veteran players"[121] and reduced the risk of veteran players being replaced by a potential draftee.[122] Justice Sotomayor, therefore, held that the NFL Draft Eligibility

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[113] *Id.* at 410–11.

[114] Clarett v. Nat'l Football League, 369 F.3d 124, 134 (2d Cir. 2004).

[115] *Id.* at 134–35.

[116] *Id.* ("[C]ongressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units.").

[117] *Id.* at 139.

[118] *Id.* at 140.

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

Rule was a mandatory collective bargaining subject, and not merely permissive.[123]

Clarett argued that The Rule was an impermissible bargaining subject because it affects players who are not parties to the union.[124] Justice Sotomayor disagreed, stating that just because The Rule is a hardship on a prospective, rather than an actual, employee did not make The Rule impermissible.[125] Justice Sotomayor reasoned that how a prospective player became eligible for the NFL Draft is for the NFLPA and NFL to determine.[126] Although Clarett believed he was qualified to play in the NFL and viewed the Rule as arbitrary, Justice Sotomayor disagreed.[127] Justice Sotomayor stated the NFL and NFLPA, in their collective bargaining capacity, could consider a person ineligible for the NFL Draft for any reason so long as it did not violate the law.[128] Justice Sotomayor reasoned that federal labor policy allows NFL teams to act in concert as a multi-employer bargaining unit in making the rules for player employment.[129] "Such concerted action is encouraged as a matter of labor policy and tolerated as a matter of antitrust law, despite the fact that it plainly involves horizontal competitors for labor acting in concert to set and to implement terms of employment."[130] Finally, Justice Sotomayor held that the CBA itself is clear enough evidence that the NFLPA and NFL agreed on how to handle The Rule.[131] Justice Sotomayor reasoned that terms outside the CBA could not be a reason for not applying the non-statutory labor exemption.[132] After reviewing those factors, the Second Circuit reversed Judge Scheindlin's judgment. Thus, Maurice Clarett's hopes of entering the NFL Draft that year quickly evaporated.[133]

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 141.
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* at 142.
[132] *Id.*
[133] *Id.* at 143. *See generally* Associated Press, *Timeline: The Rise and Fall of Maurice Clarett*, ESPN (Sept. 18, 2006), http://www.espn.com/nfl/news/story?id=2545204 (explaining that the NFL Draft had already passed, but Clarett would have been eligible for

IV. ANALYSIS OF THE NON-STATUTORY LABOR EXEMPTION AND ITS APPLICATION TO THE NBA

For a high school men's basketball athlete to challenge the NBA's One-and-Done Rule, the high school athlete will have to prove that the non-statutory labor exemption does not apply to the One-and-Done Rule.[134] The non-statutory labor exemption was designed to reconcile the difference between labor and anti-trust policies.[135] The crucial distinction courts make is whether the anti-trust claim will undermine any of the major labor policies "favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units."[136]

As previously mentioned, the One-and-Done Rule has not been challenged in court. However, the similarities between the NFL and NBA's draft eligibility rules and process make it likely that any high school men's basketball athlete that challenges the rule will have to educate themselves on the *Clarett* decisions. The NBA would likely use *Clarett COA* in its defense because of Justice Sotomayor's favorable decision for the NFL. Although Justice Sotomayor did not apply the *Mackey* factors test, she still considered whether the NFL's Draft Eligibility Rule was a mandatory subject of bargaining, whether it dealt with people outside the bargaining unit, and whether it was formed during arms-length negotiations.[137] Therefore, it is likely that a high school athlete will have to defeat one of the three *Mackey* factors for the athlete to succeed in arguing that the labor exemption does not apply. There is one critical distinction between the NBA's One-and-Done Rule and the NFL Draft's Eligibility Rule that Clarett challenged: the NBA and NBPA have collectively bargained a player's eligibility for the NBA Draft.[138] Thus, the NBA and NBPA included the provision during arms-length negotiations. However, the high school men's basketball athlete has several arguments he can make to prove that the NBA's One-

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the Supplemental NFL Draft if the Second Circuit affirmed the District Court's decision).

[134] Clarett v. Nat'l Football League, 369 F.3d 124, 125 (2d Cir. 2004).

[135] *Id.* at 141.

[136] *Id.* at 135.

[137] *Id.* at 133–134, 139–43.

[138] *Id.* at 135.

and-Done Rule does not apply because the One-and-Done Rule is not a mandatory bargaining subject and only concerns athletes outside the bargaining unit.

A. THE ONE-AND-DONE RULE IS NOT A MANDATORY SUBJECT OF BARGAINING

The One-and-Done Rule does not deal with a mandatory subject of bargaining. Mandatory subjects of bargaining are wages, hours, and working conditions.[139] The bargaining subject must vitally affect the terms and conditions of the employee's employment, must be closely related to legitimate union objectives that concern the mandatory subjects of bargaining and must not include conditions that indirectly affect the employees.[140] In addition, Justice Sotomayor reasoned, in *Clarett COA*, that many veteran players would be displaced or lose out on lucrative contracts if the NFL Draft's Eligibility Rule allowed ineligible athletes to enter the Draft.[141] The Court concluded that changing the NFL Draft's Eligibility Rule would vitally affect the conditions of the veteran player's employment.[142]

The NBA would likely use the same argument to conclude that the NBA's One-and-Done Rule is a mandatory subject of bargaining. The NBPA would argue that its veteran players have the right to keep playing and obtain new contracts without interference from high school athletes. First, the high school men's basketball athlete should argue that if he is not drafted, someone else will take his spot on the roster and likely end up taking the veteran player's roster spot or pay anyway. Further, in the NBA, rookies can only be paid a certain maximum salary, so if a team did not draft the high school men's basketball athlete, they could end up signing a Free Agent for more than what they

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[139] Brown v. Pro Football, 518 U.S. 231, 240–241 (1996).

[140] Allied Chem. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179–180 (1971) (holding that retiree benefits do not vitally affect terms and conditions of employment of current employees); Berman Enter. Inc. v. Local 333, 644 F.2d 930, 935 (2d Cir. 1981) (holding that challenged clauses in the collective bargaining agreement were legitimate union objectives and were thus considered mandatory subjects of bargaining).

[141] Clarett v. Nat'l Football League, 369 F.3d 124, 139–40 (2d Cir. 2004).

[142] *Id.*

would have paid the high school athlete.[143] In turn, the veteran player on the roster still ends up being cut or paid less. The veteran player's conditions of employment are altered every offseason, and having the current rule in place only indirectly affects the veteran player. The One-and-Done Rule does not vitally affect the terms and conditions of the veteran player's employment even though, in *Clarett COA*, Justice Sotomayor ruled that employers could have any number of pre-employment qualifications.[144] If high school men's basketball athletes could enter the NBA Draft, the only people that would be directly affected are the basketball athletes who would have been selected if the high school athletes were ineligible for the draft. Yet, these basketball athletes are not employees who get the preference of the exemption.[145] They cannot compete at the same level as the high school men's basketball athletes wanting to enter the NBA directly. Thus, the One-and-Done Rule only affects individuals who want to enter the NBA, not those already in the NBA.

Second, the NBPA would likely also argue that the NBA's One-and-Done Rule is in place because of its close relation to legitimate union objectives.[146] The NBA would argue that the One-and-Done Rule is in place to shield teams from taking a major risk on an undeveloped player.[147] The One-and-Done Rule also protects the league from the adverse consequences that might occur as a result of a high school men's basketball athlete underperforming or not meeting the team's expectations. In turn, it insulates a team's front-office for not doing its due diligence on a high school athlete that did not meet expectations. The One-and-Done Rule also immunizes the league from a possible decline in revenue and viewership due to too many high school men's basketball athletes declaring for the draft and diluting the league's talent base. On its face, the league has many arguments to achieve their "legitimate union objectives."[148] However, the objectives that the NBA will contend are merely pretextual.

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[143] *See* NBA Collective Bargaining Agreement Exhibit B-1 (2017).

[144] *Clarett*, 369 F.3d at 141 (2d Cir. 2004).

[145] *Id.*

[146] Berman Enter. Inc. v. Local 333, 644 F.2d 930, 936 (2d Cir. 1981).

[147] McCann, *supra* note 34, at 163.

[148] *Berman Enter. Inc.*, 644 F.2d at 936.

The high school men's basketball athlete could argue that the collateral consequence of the One-and-Done Rule is to protect the NCAA's college basketball interest. College basketball is a major contributor to the NCAA's revenue each year.[149] The loss of elite athletes bypassing college to go directly to the league hurts the NCAA's college basketball brand. In turn, viewership declines, and there is a resulting loss of revenue in NCAA college basketball because the best athletes are in the NBA.[150] College basketball has been wrought with numerous scandals over the years, and it has been to the detriment of the student-athletes.[151] As we have recently seen with the Louisville scandal, some schools will do anything they can to get an elite player to come to their school, even if it means breaking the law.[152] Public policy favors the NBA's right to collectively bargain the terms of the NBA Draft provided it meets legitimate union objectives—but what about protecting the high school men's basketball athletes from the greed of agents and NCAA schools?[153] The NBA in past years has chosen to seek the interests of the NCAA over its future athletes. Perhaps it is time for the NBA to reassess what is truly important to its brand and how the public views the league. If anything, the FBI's recent arrests should serve as a wakeup call to the NBA and NCAA. The NCAA should re-think how it looks after its basketball student-athletes' interests, and the NBA should look how it can reform the One-and-Done Rule.

Finally, the One-and-Done Rule is not a mandatory subject of collective bargaining because it does not concern an employer-employee relationship.[154] The NBA would likely argue,

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[149] *NCAA Revenue Returned to Division I Conferences and Member Institutions from 2010/11 to 2016/17*, STATISTA, https://www.statista.com/statistics/219586/revenue-returned-to-its-members-by-the-ncaa/ (last visited Oct. 31, 2018).

[150] *See Berman Enter. Inc.*, 644 F.2d at 936.

[151] *See generally supra* note 14.

[152] *See* U.S. Dep't of Justice, *supra* note 2.

[153] Stan Van Gundy, head coach of the Detroit Pistons, said that the "NCAA is one of the worst organizations—maybe the worst organization—in sports . . . [and] [t]hey certainly don't care about the athlete." *Stan Van Gundy Rips NCAA, NBA's One-and-Done Rule*, ESPN (Feb. 25, 2018), http://www.espn.com/nba/story/_/id/22579359/stan-van-gundy-shreds-ncaa-one-done-rule.

[154] Nat'l Labor Relations Bd. v. U.S. Postal Serv., 18 F.3d 1089, 1097 (3d Cir. 1994).

as the Second Circuit did, that the high school men's basketball athlete is a prospective employee, and a prospective employee's eligibility is for the NBA and the NBPA to determine. Justice Sotomayor supported this argument because she believes that, through collective bargaining, an employer and a union can set the terms of eligibility in any way provided the terms do not violate the law.[155] Justice Sotomayor's ruling in *Clarett COA* harms the chances of this argument succeeding in the Second Circuit.

The National Labor Relations Board ("NLRB") applied *Allied Chemical*, a case decided by the Supreme Court, in *Star Tribune*[156] with regard to hiring employees. The NLRB concluded that applicants are not considered employees because there is not an economic relationship that exists between an employer and an applicant.[157] The NLRB went on to say that any thought of an economic relationship existing between the two is mere speculation.[158] The NLRB's interpretation of a Supreme Court decision supports the argument that applicants are not employees. Yet, a high school men's basketball athlete is not even an applicant. Under the One-and-Done Rule, the high school athlete is not an applicant because the athlete is prohibited from even entering the application process. The high school athlete is not allowed to file paperwork to enter the draft, nor is he allowed to attend any pre-draft workouts held by teams. Thus, even if the mandatory bargaining subjects were embodied in the rule, the rule should not stand because the high school men's basketball athlete is not an employee or an applicant. Rather, the high school athlete is barred from applying entirely.

B. THE ONE-AND-DONE RULE AFFECTS PEOPLE OUTSIDE THE BARGAINING UNIT

In the alternative, the NBA's One-and-Done Rule is not labor exempt from an anti-trust suit because it affects those outside the bargaining unit.[159] The mandatory bargaining subject

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[155] Clarett v. Nat'l Football League, 369 F.3d 124, 141 (2d Cir. 2004).

[156] Star Tribune v. Newspaper Guild of the Twin Cities, 295 N.L.R.B. 543 (1989).

[157] *Id.* at 546.

[158] *Id.*

[159] Clarett v. Nat'l Football League, 306 F. Supp. 2d 379, 395 n.100 (S.D.N.Y. 2004).

must affect prospective or current employees but cannot pertain to applicants or other third parties.[160] Judge Scheindlin, in *Clarett DC*, made a strong argument when she stated that the NFL Draft's Eligibility Rule only affected players who were "strangers to the bargaining relationship."[161] Although the non-statutory labor exemption applies to prospective employees, the NBA's One-and-Done Rule should not apply to high school men's basketball athletes because they have been denied employment, and therefore "cannot be bound by the terms of employment they cannot obtain."[162] As was previously stated, the high school athletes are not even applicants in the NBA Draft process, so they should not be considered prospective employees. The Second Circuit, in *Clarett*, relied on the precedent cases in its circuit: *Wood*, *Williams*, and *Caldwell*. In *Wood*, Wood was drafted into the NBA and wanted to change how he was paid under the salary cap.[163] In *Williams*, Williams challenged the unilaterally-imposed terms of the expired CBA after the NBA and NBPA reached an impasse.[164] In *Caldwell*, Caldwell claimed he was wrongfully terminated after he represented the player's union against the ABA.[165]

There is a major distinction to be drawn between the athletes in the preceding cases and the high school men's basketball athlete. In each case, the player had been drafted or was already on a team at the time he sued. Judge Scheindlin, in *Clarett DC*, applied the *Mackey* factor test because she made the distinction that the three precedent cases in the Second Circuit did not encompass job eligibility.[166] In addition, the provisions that Wood, Williams, and Caldwell wanted to challenge "govern the terms by which those who are drafted are employed."[167] The NBA's One-and-Done Rule does not allow high school men's basketball athletes to enter the labor market entirely. Also, unlike the three preceding cases, the high school athlete does not want to change conditions of which the NBA subjects him to. The high

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[160] *Id.*

[161] *Id.*

[162] *Id.* at 396.

[163] Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 958 (2d Cir. 1987).

[164] Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 691 (2d Cir. 1995).

[165] Caldwell v. Am. Basketball Ass'n, Inc., 66 F.3d 523, 526–27 (2d Cir. 1995).

[166] *Clarett*, 306 F. Supp. 2d at 395.

[167] *Id.*

school athlete merely wants the opportunity to participate in the NBA Draft and be subject to the conditions that the NBA imposes on him. The high school men's basketball athlete is unlike the three claimants in the preceding cases because they sought to alter the labor policies embodied in the exemption. The high school athlete, on the other hand, just wants to be subjected to the policies.

In conclusion, the high school athlete has an uphill climb if he wants to challenge the NBA's One-and-Done Rule. There are, however, significant legal arguments that can help his cause. It is imperative for the athlete to argue that the non-statutory labor exemption has a narrow interpretation. In addition, forum shopping will play a major role in how the case is decided. Labor-friendly jurisdictions such as the Ninth Circuit are more likely to be sympathetic to the high school athlete's cause.[168] If the high school men's basketball athlete succeeds, the NBA could still create a rule that protects its own interests, and the interests of the NCAA while not diminishing a high school athletes' interest.

V. THE PROPOSAL: KD'S RULE[169]

A possible solution is Kevin Durant's Rule ("KD's Rule").[170] KD's Rule allows high school men's basketball athletes to make the jump to the NBA. However, it restricts an athlete that chooses to enroll in college from entering the NBA Draft until he completes at least 72 college credits *or* reaches the age of twenty-one, whichever comes first.[171] The rule is modeled after the MLB's draft eligibility requirements. The MLB allows high school baseball players to enter the draft if they have not entered college.[172] However, if the college baseball player does enroll in college, the college baseball player must wait three years after

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[168] *See generally*, Dent v. Nat'l Football League, 902 F.3d 1109 (9th Cir. 2018).

[169] *See infra* Appendix 1 for proposed rule.

[170] Named after NBA superstar Kevin Durant who was the first notable player affected by the one-and-done rule. *See* Aaron Dodson, *All The NBA Draft's One-And-Done Lottery Picks: A Scorecard,* THE UNDEFEATED (June 22, 2017), https://theundefeated.com/features/all-the-nba-drafts-one-and-done-lottery-picks-a-scorecard/.

[171] *CBA,* NBPA, (July 1, 2017) https://nbpa.com/cba/.

[172] *Official Rules*, MLB, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited Oct. 27, 2018).

enrolling or turn twenty-one, whichever comes first before becoming eligible for the MLB Draft.[173] KD's Rule allows athletes and the NBA to benefit in respect to the interests that each want to protect.

A. NBA'S INTERESTS UNDER KD'S RULE:

Justice Sotomayor's decision in *Clarett COA* and the One-and-Done Rule support the NBA's stance not to allow high school athletes to enter the draft. However, the Commissioner of the NBA, Adam Silver, has been open to change and reform since his appointment as Commissioner in 2014.[174] This past October, Commissioner Silver said that it is "clear a change will come" to the One-and-Done Rule.[175] Silver has also stated his intention to study the One-and-Done Rule "outside of the bright lights of collective bargaining."[176] Commissioner Silver and NBPA Executive Director Michele Roberts have met with the Commission on College Basketball for what was described as an informational meeting.[177] Most recently, Adam Silver said that he wants to expand the NBA's relationship with elite high school men's basketball athletes.[178] Silver intends to do this by revamping the G-League, the NBA's official minor league, and by

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[173] *Id.*

[174] *Adam Silver Replaces David Stern*, ESPN (Feb. 1, 2014), https://www.espn.com/nba/story/_/id/10387067/adam-silver-replaces-david-stern-nba-commissioner.

[175] Marcel Mutoni, *Adam Silver Expects 'One-and-Done' Rule to Change*, SLAM ONLINE (Oct. 17, 2017), http://www.slamonline.com/nba/adam-silver-expects-one-done-rule-change/#6GHz40xIvTkx1TTz.97.

[176] Ohm Youngmisuk, *Adam Silver: Age Issue 'Needs to Be Studied' Outside CBA Negotiations*, ESPN (Feb. 20, 2017), http://www.espn.com/nba/story/_/id/18715853/nba-commissioner-adam-silver-says-age-issue-worth-looking-deeper-cba.

[177] Matt Bonesteel, *NBA Commissioner Adam Silver Reportedly Meets with NCAA Group Over One-and-Done Rule*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/news/early-lead/wp/2017/11/17/nba-commissioner-adam-silver-reportedly-meets-with-ncaa-group-over-one-and-done-rule/?utm_term=.5b90c62ed117.

[178] Khadrice Rollins, *Report: Adam Silver Wants to Improve NBA's Relationship with Elite High School Players*, SPORTS ILLUSTRATED (Mar. 5, 2018), https://www.si.com/nba/2018/03/05/adam-silver-elite-high-school-player-one-and-done-change-g-league.

having more interactions with these athletes during the summer.[179] Silver cited the FBI investigation as a reason for his fast action.[180] Even more telling, Darius Bazley, the #8 recruit in the 2018 high school men's basketball recruiting class, is forgoing his college eligibility and going straight to the G-League.[181] In doing so, Bazley becomes the first high school player to go straight to the G-League.[182]

The NBA and NCAA will need to make changes to the rule soon or watch as others exploit the loopholes within the rule. Lavar Ball, outspoken father of NBA rookie Lonzo Ball, recently said he would be starting a basketball league called the Junior Basketball Association ("JBA").[183] The premise of the league is to give nationally ranked high school basketball athletes the choice of skipping college and playing in the JBA while earning a salary, something that is not possible under NCAA rules.[184] Though only in the early stages, the JBA could serve as competition to the NCAA. This might be the spark the NBA needs to change the One-and-Done Rule because the alternative could cost the NBA and the NCAA revenue.[185]

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[179] *Id.*

[180] *Id.*

[181] Sam Fortier, *As High School Star Skips College for NBA's G League, Others Remain Skeptical*, WASH. POST (Apr. 9, 2018), https://www.washingtonpost.com/sports/highschools/as-high-school-star-skips-college-for-nbas-g-league-others-remain-skeptical/2018/04/09/c55389ec-3bfa-11e8-a7d1-e4efec6389f0_story.html?utm_term=.70f70a5f3790.

[182] *Id.*

[183] Darren Rovell, *LaVar Ball Plans to Start League for High School Graduates*, ESPN (Dec. 21, 2017), http://www.espn.com/mens-college-basketball/story/_/id/21827823/lavar-ball-wants-start-league-high-school-graduates.

[184] *Id.*

[185] NCAA schools are impacted because high school athletes considering college could go to the JBA instead. *See* Will Hobson, *Fund and Games*, WASH. POST (Mar. 18, 2014), https://www.washingtonpost.com/graphics/sports/ncaa-money/. College basketball generates the bulk of its revenue from the yearly NCAA tournament. *Id.* Schools earn money for making the tournament and earn even more money the farther they advance in the tournament. *Id.* Schools could lose out on this revenue if top-tier high school athletes opt for the JBA as opposed to going to college, thereby hurting the school's chances of making the tournament. *Id.* The NBA loses

See Appendix 2 for the data and exhibits regarding the last seven NBA Drafts. [186] This data and these exhibits show that more athletes are taking advantage of the One-and-Done Rule.[187] Based on the data, one could assume that many, if not all, of the One-and-Done athletes drafted in the top four of the NBA Draft would declare for the draft after high school if KD's Rule was implemented.[188] If KD's Rule was implemented from 2011-2017, in each season, around three One-and-Done top four picks would have declared for the draft immediately after high school.[189] From

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because the NCAA is considered its "farm system." *Id.* If the NCAA is not luring the top-tier high school athletes to come play for its schools, then the NBA might start asking why they are playing for the JBA instead of the NBA. *Id.*

[186] NBA Draft Years: 2011–2017. *See infra* Appendix 2.

[187] The number of One-and-Done athletes drafted in the lottery had a positive trend from 2011-2017. *See infra* Appendix 2, Exhibit A.

[188] From 2011-2017, 75% of the top four picks in the NBA Draft were One-and-Done athletes. 21 One-and-Done athletes were selected during that time. *See infra* Appendix 2, Exhibit D. Only 1 of those 21 athletes were not considered lottery picks prior to the start of the collegiate season. *See* Adam Fromal, *2011 NBA Mock Draft: Projecting All 1st and 2nd Round Picks*, BLEACHER REPORT (June 20, 2011), https://bleacherreport.com/articles/740747-2011-nba-mock-draft-projecting-all-1st-and-2nd-round-picks#slide6; Andy Bailey, *2012 NBA Mock Draft: An Early Look at Next Year's Stacked Draft Class*, BLEACHER REPORT (July 20, 2011), https://bleacherreport.com/articles/769089-2012-nba-mock-draft-an-early-look-at-next-years-stacked-draft-class#slide0; Bryant West, *2013 NBA Mock Draft: Very Early First Round Predictions*, BLEACHER REPORT (Aug. 12, 2012), http://bleacherreport.com/articles/1293846-2013-nba-mock-draft-very-early-first-round-predictions; Jonathan Wasserman, *2014 NBA Mock Draft: Pre-Training Camp Edition*, BLEACHER REPORT (Sept. 11, 2013), http://bleacherreport.com/articles/1769826-2014-nba-mock-draft-pre-training-camp-edition; Jonathan Wasserman, *2015 NBA Mock Draft: Very Early Look at All 30 Projected First-Round Picks*, BLEACHER REPORT (Nov. 13, 2014), http://bleacherreport.com/articles/2265955-2015-nba-mock-draft-very-early-look-at-all-30-projected-first-round-picks; Jonathan Wasserman, *2016 NBA Mock Draft: September Projections for All 30 1st Round Picks*, BLEACHER REPORT (Sept. 2, 2015), http://bleacherreport.com/articles/2558179-2016-nba-mock-draft-september-projections-for-all-30-1st-round-picks.

[189]Based on the assumption that One-and-Done athletes selected in the top four would have declared for the NBA Draft under

2011-2017 the non-international One-and-Done athletes selected outside of the top four, but still in the lottery,[190] represented only 31% of the sample.[191] The sample of lottery picks outside the top four yields about three One-and-Done athletes per NBA Draft and yields about four when international athletes are included.[192] One could argue that the uptick in One-and-Done athletes would become worse if the same athletes were forgoing college altogether under KD's Rule. The One-and-Done Rule was put in place to stop the "influx" of high school basketball athletes entering the NBA Draft. However, many lottery picks outside the top four might not have been looked at with great hype if not for a stellar collegiate season or a strong NCAA tournament run, thus lowering the probability of those athletes declaring for the draft immediately after high school.[193] The NBA instituted the One-

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KD's Rule. *See infra* Appendix 2, Exhibit D, at NBA Draft Years: 2011–2017.

[190] NBA Draft picks: 5–13. *2011-2017 NBA Draft,* BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Dec. 9, 2018).

[191] *See infra* Appendix 2, Exhibit A at NBA Draft Year: 2011.

[192] *See infra* Appendix 2, Exhibit D.

[193] 75% of One-and-Done athletes selected in the 2011-2016 NBA Drafts outside of the Top 4, but in the lottery, either had their draft position fall or were not on any draft board prior to the start of their first and only collegiate season. *See* Adam Fromal, *2011 NBA Mock Draft: Projecting All 1st and 2nd Round Picks*, BLEACHER REPORT (June 20, 2011), http://bleacherreport.com/articles/740747-2011-nba-mock-draft-projecting-all-1st-and-2nd-round-picks; Andy Bailey, *2012 NBA Mock Draft: An Early Look at Next Year's Stacked Draft Class*, BLEACHER REPORT (July 20, 2011), http://bleacherreport.com/articles/769089-2012-nba-mock-draft-an-early-look-at-next-years-stacked-draft-class; Bryant West, *2013 NBA Mock Draft: Very Early First Round Predictions*, BLEACHER REPORT (Aug. 12, 2012), http://bleacherreport.com/articles/1293846-2013-nba-mock-draft-very-early-first-round-predictions; Jonathan Wasserman, *2014 NBA Mock Draft: Pre-Training Camp Edition*, BLEACHER REPORT (Sept. 11, 2013), http://bleacherreport.com/articles/1769826-2014-nba-mock-draft-pre-training-camp-edition; Jonathan Wasserman, *2015 NBA Mock Draft: Very Early Look at All 30 Projected First-Round Picks*, BLEACHER REPORT (Nov. 13, 2014), http://bleacherreport.com/articles/2265955-2015-nba-mock-draft-very-early-look-at-all-30-projected-first-round-picks; Jonathan Wasserman, *2016 NBA Mock Draft: September Projections for All 30 1st Round*

and-Done Rule to protect the game from getting diluted with too many high school basketball athletes who could take years to develop.[194] Yet from 1998-2004, the seven years preceding the implementation of the One-and-Done Rule, only 6.39% of the athletes drafted were high school athletes.[195] If so few athletes were drafted immediately after high school, what was the purpose of the One-and-Done Rule in the first place?

Before starting college, some high school men's basketball athletes probably did not consider leaving college after one season. Under KD's Rule, only a handful of athletes would enter the league directly from high school. The NBA would continue to produce quality basketball because many of the One-and-Done top picks have been "NBA ready" since high school. Under KD's Rule, the NBA would continue to protect the interests of college basketball in the NCAA by having all college basketball athletes enrolled in college for two to three years, depending on when the athlete completes seventy-two credits or turns twenty-one. The NCAA would lose some star power to the NBA, but it would gain a stronger brand as a result of athletes staying in college longer. Fans would associate star college athletes with their respective schools, building the NCAA's brand. After all, the NCAA's college basketball brand is what rakes in hundreds of millions of dollars, not the one-and-done college athletes.[196]

Picks, BLEACHER REPORT (Sept. 2, 2015), http://bleacherreport.com/articles/2558179-2016-nba-mock-draft-september-projections-for-all-30-1st-round-picks; *see also* Reid Forgrave, *These 10 Players Got Off to a Fast Start and Have Sent Their NBA Draft Stock Soaring*, CBS SPORTS (Dec. 20, 2017), https://www.cbssports.com/college-basketball/news/these-10-players-got-off-to-a-fast-start-and-have-sent-their-nba-draft-stock-soaring/.

[194] Myron Medcalf, *Roots of One-and-Done Rule Run Deep*, ESPN (June 26, 2012), http://www.espn.com/mens-college-basketball/story/_/id/8097411/roots-nba-draft-one-done-rule-run-deep-men-college-basketball.

[195] *See infra* Appendix 2, Exhibit E.

[196] This is not to say that the athletes do not impact the brand at all. The athletes, the on-court success, and the NCAA tournament are part of the NCAA's brand. However, long after the athlete leaves the school, the school still reaps the benefit of the athlete or the team's "one shining moment." *See* Jen Floyd Engel, *NCAA Tournament a sham until these kids get paid*, SPORTING NEWS (Mar. 29, 2016), http://www.sportingnews.com/ncaa-basketball/news/ncaa-tournament-final-four-college-basketball-scholarships-paid-players-athletes-

Additionally, by allowing high school basketball athletes to enter the NBA Draft, college basketball would achieve more parity. For example, Kentucky, a recruiting powerhouse for One-and-Done athletes, would not have an excess of scholarships available due to athletes leaving after one year. In turn, it would allow for schools across the country to recruit the athletes that Kentucky may have wanted, but cannot have. Although some individual schools would lose revenue, NCAA basketball, as an institution, would benefit. More parity among teams would bring more competition. The competition amongst teams would engage more fans because more teams would have the opportunity to compete at a competitive level. Parity in college basketball would ultimately result in a domino effect where the NCAA's revenue increases, and the public opinion of the NCAA improves.

KD's Rule has a "limitations clause" allowing the NBA to review the rule three years after its implementation.[197] After three years, the NBA can decide to limit a high school athlete's entry into the draft. This happens if the NBA and NBPA believe too many athletes are making the jump to the NBA, and the NBA deems the influx of those athletes has a negative impact on the game. Under the clause, the athletes allowed to enter the draft would presumably be the ones projected to be top picks in the NBA Draft. It is up to the discretion of the NBA and NBPA to work out a solution under the limitations clause. Under KD's Rule, the NBA could be seen as a progressive league that puts its players first.

B. ATHLETES' INTERESTS UNDER KD'S RULE:

The NBPA has standing to push for the adoption of KD's Rule.[198] The *Haywood* decision supports the argument that high school athletes face irreparable harm if they are not allowed to declare for the draft when they want.[199] Further, arguments have

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college-football/h73e86l3hnhi1e891ju5zjsof; *see also* McCann, *supra* note 34, at 190–92 ("[E]xperts conclude that the lack of star power in college basketball has made it difficult for CBS to market March Madness." Alumni donations and student applications increase at some universities who make it far in the NCAA tournament).

[197] *See infra* note 213.

[198] *See supra* note 169.

[199] Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204, 1205 (1971).

been presented above which can help in a challenge against the One-and-Done Rule by asserting that the non-statutory labor exemption is not applicable to the rule. Attending college for one year makes an athlete lose out on millions of dollars, doing a great injustice to the athlete.[200] Under KD's Rule, high school athletes have the power to decide if they want to declare for the draft. The NBA has previously worried about NBA agents taking advantage of high school athletes and their families by giving them bad advice.[201] To combat this, KD's Rule implements a NBA Draft Advisory Board, comprised of neutral NBA scouts, who would gather information about the high school athlete's prospects.[202] The NBA would hire the scouts that form the advisory board, to ensure that there is a strong and trusted system in place. After doing its due diligence, the NBA Draft Advisory Board would inform the athletes if they would be a top four pick, lottery pick, late first round pick, or second round pick. As a result, the athletes would make informed decisions regarding their draft status and would likely only declare for the draft if they were a first round pick. Under KD's Rule, disadvantaged high school athletes would be able to provide for their families. In the current rookie scale, the last pick in the first round makes close to a million dollars the first year he plays in the NBA.[203] If the money is managed right, the rookie contract can last a lifetime.

The second prong of KD's Rule does not allow athletes attending college to enter the NBA Draft until seventy-two college credits are completed *or* until the athlete turn twenty-one.[204]

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[200] Professor Michael McCann explains that athletes who skip college have a higher earning potential than those who attend college. *See* McCann, *supra* note 34, at 157–59. High school athletes are in a better negotiating position because they will likely be in their "prime" years at the time NBA teams are able to offer the athlete a max contract. *Id.*

[201] *See id.* at 170.

[202] Modeled after the NFL's Draft Advisory Board. "Since 2010, 85% of athletes who got a first or second round evaluation from the advisory board and declared for the NFL Draft have been selected in the first two rounds." *College Advisory Committee*, NFL FOOTBALL OPERATIONS, https://operations.nfl.com/the-players/development-pipeline/college-advisory-committee/ (last visited Nov. 19, 2018).

[203] *2016–2017 NBA Rookie Scale*, REALGM, http://basketball.realgm.com/nba/info/rookie_scale (last visited Nov. 19, 2018).

[204] *See infra* note 214.

College basketball athletes are considered student-athletes, and the NCAA has always stood by its principle that athletes are "students first."[205] Under the current One-and-Done Rule, many One-and-Done athletes play the college basketball season, and then leave the school before the semester ends to prepare for the upcoming draft. Seventy-two credits equal 60% of the one-hundred and twenty credits required to graduate by most colleges.[206] The credit limit can be reached in two to three years based on the amount of credits taken per semester. The credit requirement incentivizes athletes that are potential prospects in the draft. The requirement motivates these athletes to take more classes and finish the credit requirement within two years to become NBA Draft eligible. Furthermore, athletes that complete the credit requirement have a great opportunity to come back to school after their playing career is over and receive a degree. The decision to attend college should be made because athletes want to grow academically, not because they are forced to. KD's Rule allows for the interests of high school athletes to be recognized and upheld.

Under KD's Rule, there would be a benefit to entering college as opposed to declaring for the NBA Draft after high school. A clause under KD's Rule would have the NCAA and NBA jointly contribute to a Going-Back-To-College Fund ("College Fund"). This clause would benefit any athlete who chose to go to college, but after turning twenty-one years old or achieving seventy-two credits, entered the NBA Draft before earning their college degree. This clause would especially benefit the athletes whose basketball careers did not pan out professionally. For example, a college athlete that left after achieving seventy-two credits that got drafted by an NBA team but is later cut, and subsequently plays overseas, would benefit from the program. The athlete would not be making an NBA salary, but he has the prospect of going back to school to further his professional career at an affordable rate. All the college athletes entering the NBA Draft would be more than halfway done

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[205] *Frequently Asked Questions About the NCAA*, NCAA, http://www.ncaa.org/about/frequently-asked-questions-about-ncaa (last visited Nov. 19, 2018).

[206] *What Exactly is a College Credit? (and How Many do I Need to Graduate?)*, COLLEGE DEGREE COMPLETE, https://collegedegreecomplete.com/what-exactly-is-a-college-credit-and-how-many-do-i-need-to-graduate/ (last visited Nov. 19, 2018).

with their credits as a result of KD's Rule. The NCAA benefits due to the added brand exposure by possibly bringing back a college athlete after having a tremendous career in the NBA. The NCAA also benefits from the athletes spending longer time in college, and the NCAA getting the athlete's name and accolades associated with the association. In turn, the NCAA could put a percentage of the profits toward the College Fund through merchandise sales bearing any name, image, and likeness rights of its former athletes. Moreover, the NCAA and NBA agreeing to contribute toward a College Fund would be a mutually beneficial relationship between the associations and the athletes. This proposal will finally give the athletes a share of the profit, which they generated from their work in the classroom and their play on the court.

VI. CONCLUSION

Over the years, the NCAA,[207] schools,[208] boosters,[209] and agents[210] have exploited student-athletes by not allowing the athletes to receive any profits from their accomplishments on the court.[211] This note does not explore this issue further because in the proposed regime high school men's basketball athletes can avoid NCAA exploitation by going pro after high school. These athletes have a right to monetize their athletic abilities immediately upon graduation from high school. The One-and-Done Rule circumvents this right and jeopardizes the athlete's chance of ever playing professionally and monetizing his athletic

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[207] Kneading Dough: Ben Simmons, *supra* note 18; *see also* Dave McMenamin, *LeBron James Calls NCAA Ccorrupt' in Wake of Scandals,* ESPN (Feb. 27, 2018), http://www.espn.com/nba/story/_/id/22596036/lebron-james-calls-ncaa-corrupt-says-nba-give-alternative.

[208] U.S. Dep't of Justice, *supra* note 2.

[209] Smith, *supra* note 14.

[210] Forde, *supra* note 9.

[211] Student-athletes do receive free college tuition including room and board. *See* Jeffrey Dorfman, *Pay Student Athletes? They're Already Paid up to $125,000 Per Year*, FORBES (Aug. 29, 2013), https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#17861aeb2b82. They also have the opportunity to launch a platform for their non-sports career if they choose to take advantage of it. *Id.*

ability.[212] For a high school athlete to challenge the One-and-Done Rule in court, the athlete will have to prove that the non-statutory labor exemption does not apply to the One-and-Done Rule. *Clarett DC* and *Clarett COA* make convincing arguments for and against the application of the non-statutory labor exemption to a sports league's eligibility rules. Though a challenge to the One-and-Done Rule would not likely succeed in the Second Circuit because of *Clarett COA* serving as precedent, a challenge to the rule has merit in other Circuits. The One-and-Done Rule can be interpreted as not being a mandatory subject of bargaining or only affecting individuals outside of the bargaining unit. The key will be arguing at the outset that the non-statutory labor exemption should be interpreted narrowly.

Nevertheless, it is likely that the NBA and NBPA will come to a solution to fix the One-and-Done Rule prior to a high school athlete challenging the One-and-Done Rule in court. The corruption in college sports, the NBA Commissioner's willingness to look at new ideas, and the possibility of competition for high school athletes, *i.e.*, Lavar Ball's JBA and the G-League, makes it likely that a solution to the One-and-Done Rule will happen sooner than later. The proposal of KD's Rule finally puts the decision of an athlete's future into the high school athlete's hands. The high school athlete would, after consultation with family and the NBA Draft Advisory Board, decide to enter the NBA Draft or make the decision to go to college. The former choice allows the athlete to control his own destiny and monetize his athletic abilities. The latter choice commits the athlete to school for two to three years depending on when he completes the credit requirement. However, going to college provides the added benefit of receiving an education and becoming a professional in something other than sports. Also, under KD's Rule, athletes that attended college would have an opportunity to go back to college after the athlete's basketball career is over.[213] Ultimately, no rule

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[212] Although KD's Rule also restricts some athletes who attend college from monetizing their athletic abilities, a beneficial trade-off still exists for those athletes through the education they receive and the College Fund. Further, under KD's Rule, athletes who skip college can maximize their earning capacity, something they could not do under the One-and-Done Rule. *See* McCann, *supra* note 34 at 135.

[213] Athletes still have the option to go back to school under the One-and-Done Rule. *See* Fred Bowen, *Why Don't Pro Athletes go Back*

will be able to meet the standard that the NBA, NCAA, and athletes each expect. KD's Rule attempts to find a middle ground with all three groups by protecting the NBA's interests, the NCAA's interests and, most importantly, promoting the interests of the high school athlete. The NBA has done an excellent job taking care of its athletes both past and present. Now it is time for the NBA to usher in a new age by being attentive to the needs of its future athletes and allowing them to make choices for themselves. After all, One-and-Done is no fun.

to School?, WASH. POST (Apr. 20, 2011), https://www.washingtonpost.com/lifestyle/style/why-dont-pro-athletes-go-back-to-school/2011/08/04/AFagjvDE_story.html?utm_term=.915a61cbc427. However, KD's Rule strengthens the notion of going back to college especially for those athletes whose careers never panned out. *Id.*

Appendix 1

ARTICLE X[214]

PLAYER ELIGIBILITY AND NBA DRAFT ("KD's Rule")

Section 1. Athlete Eligibility

(a) No athlete may sign a contract or play in the NBA unless he has been eligible for selection in at least one (1) NBA Draft. No athlete shall be eligible for selection in more than two (2) NBA Drafts.

(b) An athlete shall be eligible for selection in the NBA Draft when he has satisfied all applicable requirements of Section 1(b)(i), b(ii) *or* 1(b)(ii) below:

(i.) The athlete is or will be at least eighteen (18) years old and is or will have graduated from high school during the calendar year in which the Draft is held (or, if the athlete did not graduate from high school, since the graduation of the class with which the athlete would have graduated had he graduated from high school).

(ii.) The athlete has maintained a permanent residence outside of the United States for at least three years before the NBA Draft, has never completed high school or attended college in the United States and is or will be at least eighteen (18) years old in the calendar year in which the NBA Draft is held ("international athlete").

(iii.) The athlete is attending or previously attended a four-year college or university in the United States, and

(A.) has achieved seventy-two (72) school credits; *or*

(B.) is or will be at least twenty-one (21) years of age during the calendar year in which the NBA Draft is held.

(c) **The Going-Back-To-College Fund** is available to all athletes who have been drafted into the NBA under Section 1(b)(iii). All athletes eligible for the fund must apply for the program. Preference is given to athletes who

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[214] The template was taken directly from Article X: Section 1 of the NBA CBA. *See* NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 33.

had a NBA career that lasted fewer than five seasons or can show financial hardship.

(d) **The Limitations Clause** allows the NBA and NBPA to re-negotiate the terms and conditions of KD's Rule three years after its implementation. The NBA *or* NBPA must show that KD's Rule is a detriment to the NBA.

(e) The **NBA Draft Advisory Board** must give an evaluation to any athlete seeking to enter the NBA Draft under Section 2(b)(i)-(ii) before the athlete can become eligible for the draft.

Appendix 2
Exhibit A

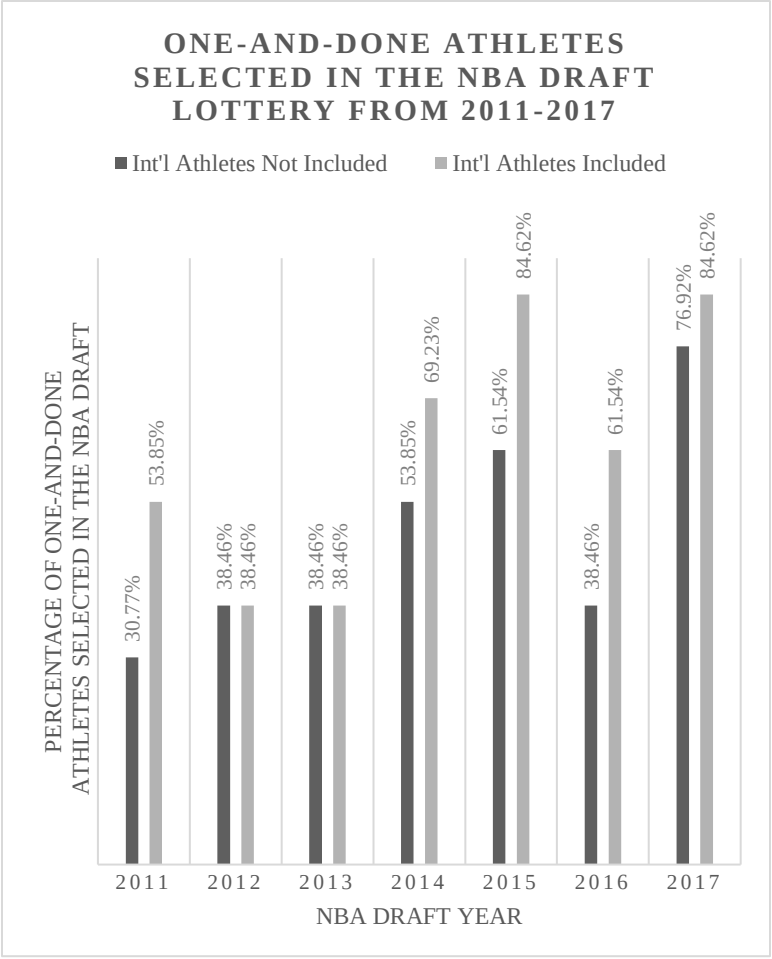


Exhibit A presents the percentage of One-and-Done athletes drafted in the lottery, the first thirteen picks of the NBA Draft, from 2011-2017. In Exhibit A, each draft year has two graphs associated with the year: one that includes international athletes and one that does not include international athletes. International athletes[i] are included in the four exhibits because they too are affected by the One-and-Done Rule and likely would have declared for the NBA Draft a year earlier had the rule not been in place. The orange graph represents international and One-and-Done athletes while the blue graph represents only One-and-Done athletes.

Exhibit B

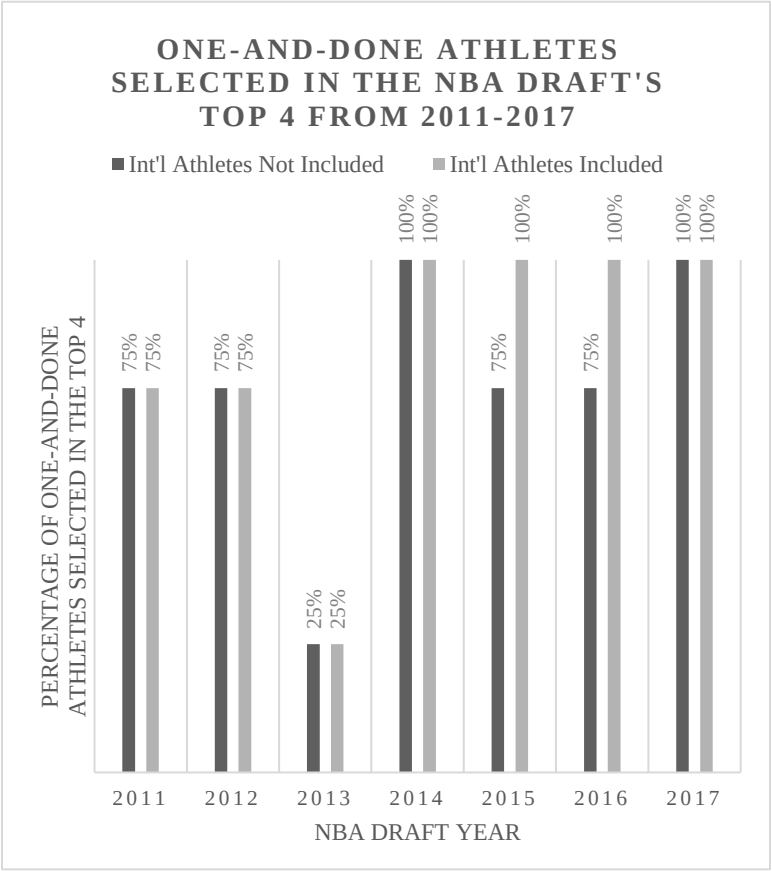
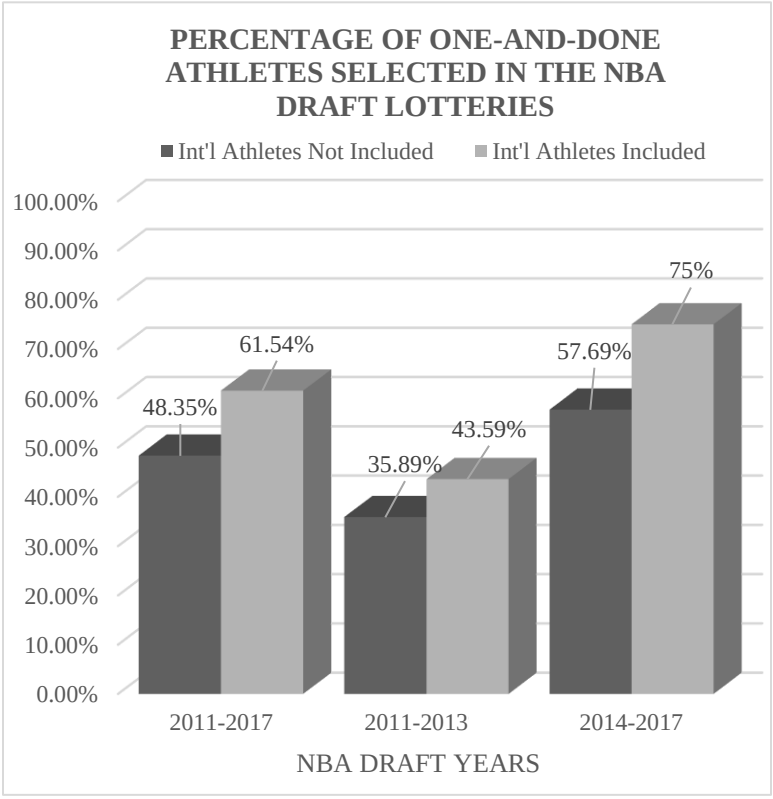


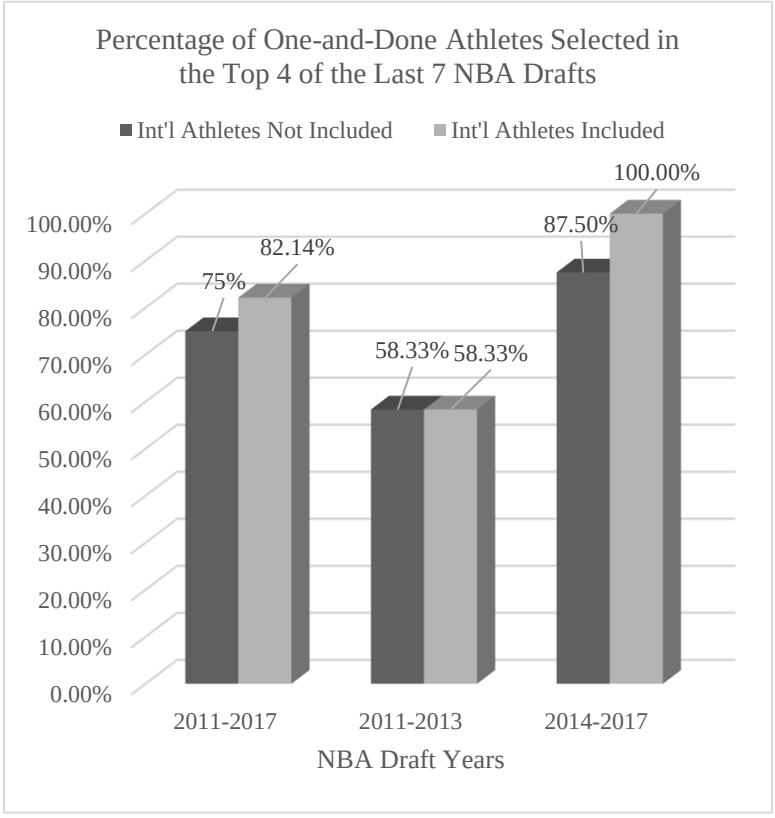
Exhibit B presents the percentage of One-and-Done athletes drafted within the top four picks of the NBA Draft from 2011-2017. The orange graph represents international and One-and-Done athletes while the blue graph represents only One-and-Done athletes. An overwhelming majority of the athletes selected in the top four of the NBA Draft from 2011-2017 have been One-and-Done athletes.[ii] The only outlier among the data set is the 2013 NBA Draft, which was considered a weak draft to begin with.[iii]

Exhibit C



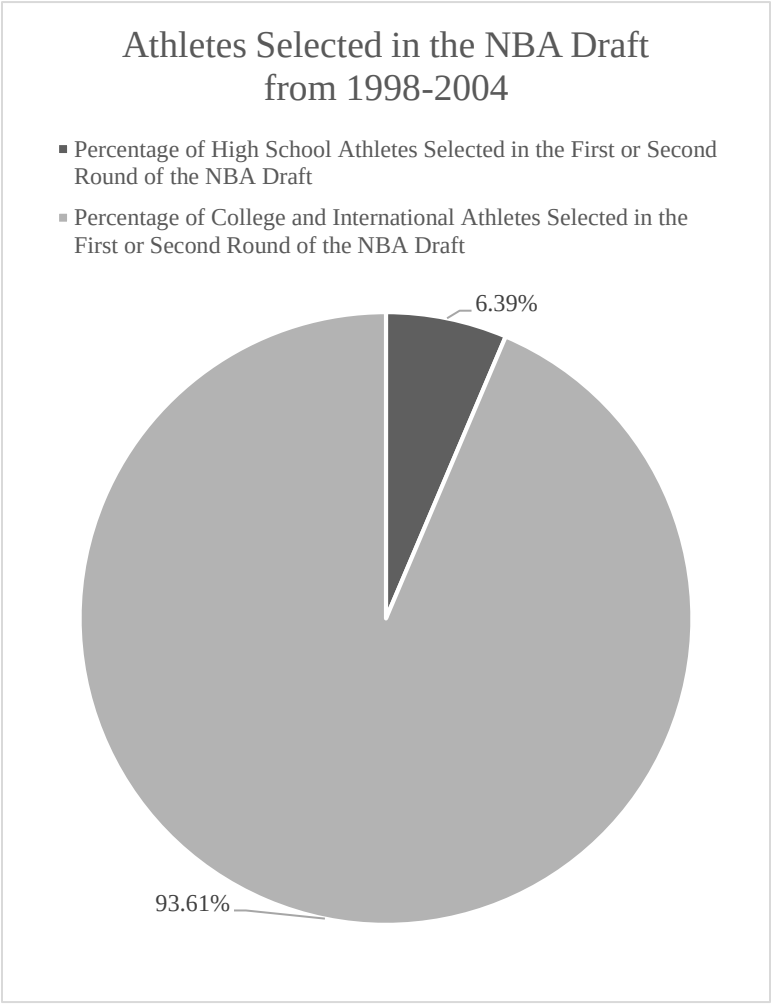
From 2011-2017, 48% of NBA players selected as "lottery picks"[iv] in the NBA Draft were One-and-Done athletes. When international athletes, who are the same age as One-and-Done athletes, are included in the calculation, the percentage increases to 61%. If the seven-year time period is split up between 2011-2013 and 2014-2017, a major increase in One-and-Done athletes getting drafted occurs between the two data ranges. There is a 21.8% increase from 2011-2013 and 2014-2017 among non-international athletes. When the international athletes are included there is a 31.4% increase in the number of athletes drafted between the two time frames.

Exhibit D



From 2011-2017, 75% of the top four picks in the NBA Draft were One-and-Done athletes and the statistic increases to 82% when international athletes are included.[v] If the original seven-year time period is split up again between 2011-2013 and 2014-2017, an even larger increase occurs than it did with lottery selected One-and-Done athletes. There is a 29.17% increase among non-international, One-and-Done athletes being selected in the top four from 2011-2013 and 2014-2017, and a 41.67% increase when international athletes are included. Even more striking is that from 2014-2017 87.5% of the top four NBA Draft picks were non-international, One-and-Done athletes, and the statistic increases to 100% when international athletes are included.

Exhibit E



There were twenty-six high school athletes selected in the NBA Draft from 1998-2004 out of a possible four-hundred and seven draft picks. Based on the data,[vi] approximately four high school athletes were selected in the NBA Draft each year during the seven years preceding the implementation of the One-and-Done Rule.

[i] In this context, international athletes refer to nineteen-year-old athletes who declared for the NBA Draft and played in the NBA the subsequent season (i.e. Kristaps Porzingis, Mario Hezonja, Dante Exum, and Frank Ntilikina). International athletes do not refer to athletes who were drafted in the NBA, and then played basketball internationally for a term of years before coming to the NBA. (i.e. Manu Ginobili, Milos Teodosic, and Arvydas Sabonis). Exhibit A's information is compiled from a database that lists all the players who entered the NBA draft. *2011-2017 NBA Draft,* BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Dec. 9, 2018); *NBA rosters feature 108 international players from 42 countries and territories,* NBA (Oct. 16, 2018), http://www.nba.com/article/2018/10/16/nba-rosters-108-international-players-start-season-official-release.

[iiiiii] *2011-2017 NBA Draft*, BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Dec. 9, 2018).

[iii] Neil Greenberg, *Man, the 2013 NBA Draft was Truly Awful. Actually, it was the Worst Ever,* WASH. POST (July 15, 2016), https://www.washingtonpost.com/news/fancy-stats/wp/2016/07/15/man-the-2013-nba-draft-was-truly-awful-actually-it-was-the-worst-ever/?utm_term=.3e1ec68250b5; Tony Manfred, *This is The Worst NBA Draft in More Than a Decade*, BUS. INSIDER (June 27, 2013), http://www.businessinsider.com/2013-nba-draft-worst-draft-2013-6.

[iv] *See* Exhibit C (Exhibit C's information is compiled from a database that lists all the players who entered the NBA draft) *2011-2017 NBA Draft*, BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Nov. 19, 2018).

[v] *See* Exhibit D (Exhibit D's information is compiled from a database that lists all the players who entered the NBA draft). *2011–2017 NBA Draft,* BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Jan. 2, 2018).

[vi] Twenty-six athletes divided by the seven drafts results in 3.7 high school athletes being drafted each year of the data set. *See* Exhibit E (Exhibit E's information is compiled from a database that lists all the players who entered the NBA draft) *2011–2017 NBA Draft,* BASKETBALL REFERENCE, https://www.basketball-reference.com/draft/NBA_2011.html (last visited Nov. 19, 2018).