

NCAA - “NO DRAFT” AND “NO AGENT” RULES: THE FUTURE OF THE FAILING AMATEURISM ARGUMENT

*Kyle Ketchings**

Introduction	156
I. Part One: An Overview of Antitrust and the Progression of NCAA Lawsuits	159
A. In the past, courts have applied personal views when analyzing the NCAA eligibility rules	160
B. The weakening of the NCAA’s amateurism argument..	162
1. The new NCAA “autonomy rule” will significantly damage the NCAA’s argument.	163
2. The NCAA’s rules do not support the NCAA’s purpose.	163
3. Recent court rulings evidence the fact that the NCAA will not pass a proper Rule of Reason analysis.....	164
II. Part Two: The NCAA Should Revise the “no draft” and “no agent” Rules.	166
A. The landscape of the NCAA has dramatically changed.	166
1. Along with O’Bannon, other courts have considered the changing landscape of college athletics.	166
2. The tainted reputation of the NCAA.	168
B. The NCAA should revise the “no draft” rule.	169
1. The NCAA “no draft” rule restricts multiple commercial markets.	169

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2. The “no draft” rule does not further the NCAA’s purpose because it does not protect the athletes.	171
C. The NCAA should revise the “no agent” rule.	171
1. The inconsistent nature of the NCAA “no agent” and negotiation rules.	172
2. The NCAA’s “no agent” rule is not safe from the court’s prospective.	174
III. Part Three: Proposed Revisions to the Current NCAA “no draft” and “no agent” Rules.	176
A. A proposed revision to the “no draft” rule.	177
B. Proposed revision to the “no agent” rule.	178
IV. Part Four: The NCAA Should Replicate the Proposed Revisions.	180
A. The revisions do not compromise the clear line of demarcation.	180
B. The revisions protect the NCAA from future antitrust attacks.	182
1. The proposed revisions do not restrain the labor market for college football players.	182
2. The NCAA should adopt the revisions because the NCAA would no longer restrain the professional recruitment market.	183
C. The NCAA “no draft” and “no agent” rules do not further the alleged purpose for the amateurism rules.	185
1. Education rarely motivates highly talented NCAA athletes.	186
2. The NCAA’s purpose for the rules violates antitrust laws.	186
3. The NCAA “no draft” and “no agent” rules actually cause commercial exploitation.	187
Conclusion.	189

INTRODUCTION

“The NCAA continues to purvey, even in this case, an outmoded image of intercollegiate sports that no longer jibes with

reality. The times have changed.”¹ While dissenting in *Banks v. NCAA*,² Judge Flaum was one of the first to observe the blemished version of amateurism that the National Collegiate Athletic Association (NCAA) has attempted to purvey since it is beginning. The current NCAA “no draft”³ and “no agent”⁴ rules violate American antitrust laws by not allowing an athlete to properly assess their professional market value. More problematic, courts are now sympathizing with the athlete instead of the NCAA. Each year, NCAA rules prevent athletes from properly exploring professional career options. This prevention of exploration does little harm to the NCAA; however, in some cases, the rules cause irreparable harm to an athlete’s career.

Henry Josey was a high school football and track standout who, like many high school football stars, had a dream that one day he would play professionally in the National Football League (NFL).⁵ After high school, Josey decided to play football at the University of Missouri and, in 2010, he was Missouri’s freshman of the year.⁶ After rushing for over 1,000 yards and nine touchdowns in his sophomore season, Josey suffered a horrific knee injury, forcing him to accept a medical redshirt and sit out the entire 2012 season.⁷ He returned his junior season and once again rushed for over 1,000 yards and 16 touchdowns.⁸ With one year of eligibility remaining, Josey chose to forgo his senior season with Missouri and declared for the NFL draft.⁹

¹ *Banks v. National Collegiate Athletic Ass’n*, 977 F.2d 1081, 1099 (7th Cir. 1992) (Flaum, J., dissenting).

² *Id.*

³ NCAA, 2014–15 NCAA DIVISION I MANUAL art. 12.2.4.2 (2015), available at <http://www.ncaapublications.com/productdownloads/D115.pdf> [hereinafter NCAA MANUAL].

⁴ *Id.* at art. 12.3.1.

⁵ Joe Lyons, *Henry Josey Still Confident He’ll Make It in the NFL*, STLTODAY.COM, Sept. 30, 2014, http://www.stltoday.com/sports/football/professional/henry-josey-still-confident-he-ll-make-it-in-nfl/article_67201836-1764-5627-a4da-27da637e5d73.htm.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

With two seasons of over 1,000 yards rushing, Josey was a promising candidate for the NFL draft; however, teams in the NFL did not see the same potential. Josey went undrafted in 2014, and the Philadelphia Eagles signed him as an undrafted free agent.¹⁰ The Eagles eventually cut him from the roster, and he is currently on the practice team for the Jacksonville Jaguars, making just over \$6,000 per week.¹¹ Josey's \$6,000 per week is drastically lower than the NFL's average salary of \$1.9 million dollars per year.¹² If Josey had known he would not be drafted, it is likely that he would have stayed an extra year in college football, working to improve his résumé for the NFL. Josey could not return to college football because the NCAA's "no draft" rule prohibits players from returning to collegiate sports after entering the NFL draft.¹³

This article argues that the NCAA "no draft"¹⁴ and "no agent"¹⁵ rules violate American antitrust laws.¹⁶ The sole reason the NCAA has avoided antitrust sanctions in the past is because courts have consistently ruled against the athletes while blindly deferring to the NCAA's definition of amateurism.¹⁷ Arguments for the defense of amateurism are weakened through the emergence of recent cases, such as *Northwestern*¹⁸ and *O'Bannon*,¹⁹ and through the implementation of the NCAA

¹⁰ *Id.*

¹¹ Lyons, *supra* note 5.

¹² Monte Burke, *Average Player Salaries in the Four Major American Sports Leagues*, FORBES.COM, Dec. 7, 2012, <http://forbes.com/sites/monteburke/2012/12/07/average-player-salaries-in-the-four-major-american-sports-leagues/>.

¹³ NCAA MANUAL, *supra* note 3, at art. 12.2.4.2.3.

¹⁴ *Id.* at art. 12.2.4.2.

¹⁵ *Id.* at art. 12.3.1.

¹⁶ See Sherman Act, 15 U.S.C. § 1 (2004).

¹⁷ See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 104 S.Ct. 2948 (1984).

¹⁸ Ben Strauss & Steve Eder, *College Players Granted Right to Form Union*, N.Y. TIMES.COM, Mar. 27, 2014, http://www.nytimes.com/2014/03/27/sports/ncaafball/national-labor-relations-board-rules-northwestern-players-are-employees-and-can-unionize.html?_r=0.

¹⁹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

“autonomy rule,” which will likely lead to athletes receiving full cost-of-attendance scholarships.²⁰

This article argues that the NCAA should change its “no draft” and “no agent” rules in order to prevent inevitable antitrust lawsuits. In Part I, this article provides an overview of antitrust legislation and how the NCAA’s amateurism argument has weakened over time. Part II describes how the NCAA will eventually lose an antitrust lawsuit and why the “no draft” and “no agent” rules warrant revision. Part III proposes revisions to the “no draft” and “no agent” rules. Finally, Part IV focuses on the weak defense of amateurism and how the proposed revisions would save the NCAA from antitrust lawsuits without destroying their current model.

I. PART ONE: AN OVERVIEW OF ANTITRUST AND THE PROGRESSION OF NCAA LAWSUITS

In 1890, Congress passed legislation called the Sherman Act, prohibiting any person to combine or conspire with any other person to restrain trade.²¹ The policy behind the Sherman Act is consistent within the meaning of English and American common law, thus making the policies behind the Act one of the foundations of contemporary American commerce.²² The main purposes of the Act are to secure competition, to ensure equal opportunity, and to protect the public from the destruction of competition through monopolies and combination with the restraint of trade.²³ One core value in American society is competition in a free-market capitalistic society, a value the Sherman Act aims to protect. Collegiate sports today are a major component of contemporary American society, yet their structure is contrary to these capitalistic values. Courts have allowed the NCAA to restrain competition through the NCAA’s “no draft” and

²⁰ Kevin Trahan, *Everything You Need to Know About the NCAA’s Coming Major Changes*, SBINATION.COM, Apr. 21, 2014, <http://www.sbnation.com/college-football/2014/4/21/5610872/ncaa-changes-union-lawsuits-obannon-kessler#benefits>.

²¹ 15 U.S.C. § 2 (2004).

²² See Robert H. Jerry II & Donald E. Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173, 186 (1984).

²³ *Id.*, at 200.

“no agent” rules.²⁴ The NCAA rules restrain the professional recruitment market and the labor market for college athletes.²⁵

According to the NCAA “no draft” rule, an individual forfeits eligibility when the individual formally asks to enter a draft or supplemental draft for a professional sport.²⁶ Even if the individual is drafted but does not sign a contract with a professional team, that individual is still ineligible to participate in collegiate athletics.²⁷ The “no agent” provision expressly prohibits college athletes from retaining an agent and using that agent to negotiate professional sports contracts.²⁸ Thus, if an athlete is a student of an NCAA member institution, the individual cannot compete for a contract in a professional sports league without forfeiting college eligibility. After an overview of the purpose of antitrust law and the NCAA “no draft” and “no agent” provisions, one can easily infer that the NCAA rules result in the type of restraint the Sherman Act aims to prevent.

The NCAA justifies these provisions by claiming that the purpose of the NCAA is to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”²⁹ The NCAA seeks to promote amateurism in collegiate athletics with the implementation of the “no draft” and “no agent” rules; however, the justification the NCAA clings to has weakened over time. Considering the current definition of amateurism the NCAA employs, it is only a matter of time before the NCAA loses an antitrust lawsuit and the current “no draft” and “no agent” rules become obsolete.

A. In the past, courts have applied personal views when analyzing the NCAA eligibility rules

For many years, courts validated the NCAA’s amateurism rules—in some cases the “no draft” and “no agent” rules—in order to preserve the NCAA’s “product” of college athletics.³⁰ In a 1984

²⁴ See NCAA MANUAL, *supra* note 3, at art. 12.2.4.2, 12.2.4.2.3, 12.2.4.2.4, 12.3.1.

²⁵ Banks v. Nat’l Collegiate Athletic Ass’n, 977 F.2d 1081, 1095 (7th Cir. 1992).

²⁶ NCAA MANUAL, *supra* note 3, at art. 12.2.4.2.

²⁷ *Id.* at art. 12.2.4.2(c).

²⁸ *Id.* at art. 12.2.4.3.

²⁹ *Id.* at art. 1.3.1.

³⁰ Bd. of Regents of Univ. of Okla., 104 S.Ct. at 2948.

decision, *NCAA v. Board of Regents*, the Supreme Court established blind immunity and absolute deference to the NCAA regarding eligibility rules.³¹ Although in dicta, the Supreme Court temporarily sealed the fate of all collegiate athletes seeking to explore their market value in professional sports when Justice Stevens stated:

Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.³²

Here, Justice Stevens did not base his opinion on any fact-finding; rather, he applied his personal views of collegiate sports to the ruling.³³ Pursuant to this ruling, courts defer any antitrust lawsuit involving the NCAA’s eligibility rules for the purpose of promoting amateurism.

In *Banks v. NCAA*,³⁴ the plaintiff was a college football player, who chose to enter the NFL draft, was not satisfied, and sought to continue his college football career. Banks filed for an injunction claiming that the NCAA violated Section 1 of the Sherman Act.³⁵ The court dismissed his claim, stating that Mr. Banks failed to allege an anticompetitive impact on an identifiable market.³⁶ The court did not end its analysis there. It furthered its argument by quoting *Board of Regents*, stating that the rules are procompetitive because they preserve the amateur status of college athletics.³⁷ In a similar case, *Gaines v. NCAA*, a Tennessee

³¹ *Id.* at 2978.

³² *Id.* at 2960.

³³ See Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 341 (2005).

³⁴ See *Banks*, *supra* note 1.

³⁵ *Id.* at 1084.

³⁶ *Id.* at 1087.

³⁷ *Id.* at 1091 (“We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly

district court reached the same conclusion that the NCAA eligibility rules are not subject to antitrust scrutiny.³⁸ These examples are part of a larger group of cases in which justices apply personal views to NCAA eligibility rules. Considering how the overall perception of the NCAA is changing, it is only a matter of time before someone challenges this again and the outcome will eventually be significantly different.

B. The weakening of the NCAA's amateurism argument

The main issue the NCAA will face in upcoming years is the fact that courts have yet to give a proper analysis of the NCAA eligibility rules facing an antitrust suit. Pursuant to *Board of Regents*, courts apply the Rule of Reason test to antitrust suits challenging the NCAA eligibility rules.³⁹ A Rule of Reason analysis requires three steps, which alternatively shift the burden of proof between the parties:

(1) The plaintiff must show that the agreement has a substantially adverse effect on competition.

(2) The defendant then has the opportunity to show that the challenged conduct promotes a sufficiently procompetitive objective.

(3) In rebuttal, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective.⁴⁰

An important factor of the Rule of Reason analysis, which courts have previously neglected, is that it is necessary to engage in fact finding.⁴¹ In most cases challenging NCAA eligibility rules, courts have not analyzed a record of fact when considering whether the questioned rules were essential to the product of college football.⁴² If a court were to apply a record of fact to this issue, it would find it difficult to prove the “no draft” and “no agent” rules are essential to collegiate athletics.

would interfere with the athletes proper focus on their educational pursuits and direct their attention to the quick buck in pro sports.”)

³⁸ *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F.Supp. 738 (M.D. Tenn. 1990).

³⁹ *Bd. of Regents of Univ. of Okla.*, 104 S.Ct. at 2948.

⁴⁰ Nagy, *supra* note 33, at 336.

⁴¹ *Id.* at 341.

⁴² *Id.*

1. The new NCAA "autonomy rule" will significantly damage the NCAA's argument.

The new NCAA "autonomy rule" allows for the Big Five conferences⁴³ to vote on proposed rules; if the vote passes within the Big Five, then the proposed rule will apply to the Big Five conferences and any other institution that chooses to implement the rule.⁴⁴ The first major change facing the NCAA through the "autonomy rule" is to allow universities to award athletes with full cost-of-attendance scholarships.⁴⁵ The full cost-of-attendance will allow institutions to give athletes extra money to compensate for the full cost of attending the university.⁴⁶ In short, universities will pay athletes for their "services" in their respective sport. Keep in mind that the purpose of the NCAA, as evidenced by the "no draft" and "no agent" rules, is to establish a clear line of demarcation between collegiate athletics and professional sport.⁴⁷ Most would understand this to be the fact that college athletes are not paid salaries, as opposed to professional athletes. When institutions begin to award full cost-of-attendance scholarships, the "clear" line between collegiate and professional sports becomes vague.

2. The NCAA's rules do not support the NCAA's purpose.

When reading the eligibility restrictions as a whole, the inconsistencies of the NCAA's argument to promote a specific product of collegiate athletics are clear. With regard to basketball and football athletes, the NCAA currently allows players to place themselves in the NBA or NFL draft once during their career and retain eligibility if the athlete clearly rescinds his or her intention to enter the draft before the draft begins.⁴⁸ Contrary to the basketball and football provision, an NCAA baseball player may

⁴³ The Big Five conferences include the Southeastern Conference (SEC); Big Ten; Big 12; Atlantic Coast Conference (ACC); and Pacific-12 (Pac-12). See Trahan, *supra* note 20.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ NCAA MANUAL, *supra* note 3, at art. 1.3.1.

⁴⁸ *Id.* at art. 12.2.4.2.1, 12.2.4.2.3.

be selected in the MLB draft and can still return to play college baseball if the athlete determines it is in his best interest.⁴⁹ The justification behind the baseball exception is that players do not declare themselves eligible for the MLB draft as opposed to the NBA and NFL, where players must declare their intention to enter the draft.⁵⁰

Considering these provisions, why is prohibiting basketball and football players from being drafted necessary to maintaining NCAA values while college baseball players are drafted and return to compete in the NCAA every year? Does the line of demarcation not apply to baseball players? The argument a plaintiff could make to counter this inconsistency is simple: revenue. Collegiate basketball and football are much more profitable to the NCAA as opposed to baseball.⁵¹ Therefore, it can be argued the NCAA has a greater interest in regulating basketball and football stars from exploring their market value in professional sports than the less profitable baseball stars. This is only one of many facts a plaintiff will argue when a court applies a proper Rule of Reason analysis.

3. Recent court rulings evidence the fact that the NCAA will not pass a proper Rule of Reason analysis.

The biggest problem facing the NCAA with respect to antitrust lawsuits is that courts have begun to notice the NCAA's inconsistencies within the amateurism argument.⁵² In the recent highly publicized case, *O'Bannon v. NCAA*, the court applied a proper Rule of Reason analysis, complete with fact-finding, and the court came to a significantly different conclusion than previous courts.⁵³ Although, *O'Bannon* did not challenge the NCAA's "no draft" and "no agent" provisions, the NCAA still chose to defend under their idea of amateurism, which the court did not

⁴⁹ *Baseball Players: Know the NCAA Rule Book . . . They Take It Seriously*, GOBIGRECRUITING.COM, Apr. 14, 2014, <https://www.gobigrecruiting.com/blog/2014/04/baseball-players-know-ncaa-rule-book-take-seriously/>.

⁵⁰ *Id.*

⁵¹ Scott Morgan, *How Much Money Do College Sports Generate?*, ZACKS.COM, Nov. 3, 2014, <http://finance.zacks.com/much-money-college-sports-generate-10346.html>.

⁵² See *O'Bannon*, *supra* note 19.

⁵³ *Id.*

find persuasive.⁵⁴ The NCAA cited their historical commitment to amateurism for support; however, the court found there was not an unyielding commitment to amateurism within the NCAA's history.⁵⁵ The court noted "the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways."⁵⁶

The court continued to analyze how an NCAA tennis recruit could receive ten thousand dollars in prize money from an outside tournament victory without any penalty, while if a Division I track recruit does the same, they will lose their amateur status.⁵⁷ The inconsistencies that the court points out here, with respect to no compensation rules, almost mirror the inconsistencies within the NCAA "no draft" and "no agent" rule. As previously mentioned, if an NCAA football or basketball player is drafted, they forfeit their amateur status, while an NCAA baseball player who is drafted, does not forfeit his amateur status. In a future case, a court is likely to find the same as the *O'Bannon* court did, that "[s]uch inconsistencies are not indicative of 'core principles.'"⁵⁸

In *O'Bannon*, the NCAA conducted its own fact-finding through a survey and found that eighty-three percent of respondents said they favored paying student athletes.⁵⁹ If a survey, similar to this, were conducted asking if the population would be less likely to attend or watch college sports if an athlete was allowed to explore how much they are worth in the professional market, it is likely that it would have no effect on the NCAA's market. Therein lies the problem with the NCAA's current defense to antitrust lawsuits: it simply will not pass in a modern court.

⁵⁴ *Id.* at 1000.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *O'Bannon*, *supra* note 19, at 974.

⁵⁸ *Id.* at 1000.

⁵⁹ *Id.* at 976.

II. PART TWO: THE NCAA SHOULD REVISE THE “NO DRAFT” AND “NO AGENT” RULES.

As noted above, the NCAA has a problem with respect to future antitrust suits challenging the NCAA “no draft” and “no agent” provisions. Courts are beginning to notice the inconsistent nature of the NCAA’s defense of amateurism, and this current trend shows no sign of deceleration. In 1992, Judge Flaum, dissenting in *Banks*, noticed the problems with the NCAA amateurism argument and stated, “[t]he NCAA continues to purvey . . . an outmoded image of intercollegiate sports that no longer jibes with reality.”⁶⁰ In 1992, the courts were already noticing the flaws in the NCAA’s argument, and the nature of intercollegiate athletics have recently moved even further from this view.

A. The landscape of the NCAA has dramatically changed.

1. Along with O’Bannon, other courts have considered the changing landscape of college athletics.

In the tragic case of Kent Waldrep, the court discussed how college athletics have changed, and expressed how this change could affect court decisions in the future.⁶¹ Waldrep, a football player for Texas Christian University (TCU) suffered an injury during a game in October of 1974 that left him paralyzed.⁶² In 1991, Waldrep was awarded workers compensation for his injury, and the Texas Employers Insurance Association appealed this decision.⁶³ After a jury found Waldrep not to be an employee, as a matter of law, he then appealed.⁶⁴ The Texas Court of Appeals upheld the trial court’s ruling, while comparing the facts to the landscape of the NCAA at the time the injury occurred.⁶⁵ Although the court ruled in favor of TCU, Justice Yeakel foreshadowed a potentially different outcome if the facts were applied to the

⁶⁰ *Banks*, 977 F.2d at 1092.

⁶¹ *See Waldrep v. Tex. Employers Ins. Ass’n*, 21 S.W.3d 692 (Tex. App. 2000).

⁶² *Id.* at 696.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 697.

current collegiate football standards as they stood in the year 2000.⁶⁶ Justice Yeakel did this by stating:

In conclusion, we note that we are aware college athletics has changed dramatically over the years since Waldrep's injury. Our decision today is based on facts and circumstances, as they existed almost twenty-six years ago. We express no opinion as to whether our decision would be the same in an analogous situation arising today; therefore, our opinion should not be read to broadly.⁶⁷

As evidenced by his analysis, Justice Yeakel noticed a significant change in the landscape of college football.

The NCAA recently suffered another historic setback to the amateurism argument when the National Labor Relations Board (NLRB) ruled that Northwestern football players were employees of Northwestern University.⁶⁸ The regional NLRB director justified this ruling by explaining that the football players devoted up to fifty hours per week solely to football.⁶⁹ In coming to this decision, the regional director illustrated that players received scholarships to the university in exchange for their hours of practicing and competing for the university.⁷⁰ The regional director deemed this as terms of employment when he granted the players the right to unionize.⁷¹ The director recognized that the hours spent per week devoted to football substantially outweighed the time players spent on their studies.⁷² The regional director then went on to state, "[i]t cannot be said that the employer's scholarship players are 'primarily students.'" ⁷³ With the implementation of full cost-of-attendance scholarships, per the

⁶⁶ *Id.* at 706.

⁶⁷ Waldrep, *supra* note 61, at 707.

⁶⁸ Strauss & Eder, *supra* note 18.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

NCAA “autonomy rule,” college athletics will change drastically since either of the above rulings.⁷⁴

2. The tainted reputation of the NCAA.

The NCAA should revise the “no draft” and “no agent” provisions not only because of the courts’ interpretation of the changing landscape of college athletics, but also because of the general public’s view of college athletics. Along with repetitive recruiting scandals, NCAA institutions have also come under fire because of multiple scandals related to academics. The University of North Carolina (UNC) permanently tainted its athletic program when the institution created a fake education department solely for athletes.⁷⁵ The university utilized the department as a medium for enhancing the academic standards of its student-athletes, and the department contained mostly independent study courses, many of which only required a final paper for course completion.⁷⁶ The NCAA initially refused to sanction UNC because the “scandal was academic in nature, not athletic.”⁷⁷ Though the NCAA claimed that this was an academic issue, the so-called “whistle-blower” at UNC said that the African-American studies department was “openly discussed . . . as a way to keep athletes eligible.”⁷⁸

This is not the only recent black eye to the NCAA in terms of academic scandals. The University of Notre Dame was also recently at the center of an academic scandal when reports surfaced that twenty-nine athletes participated in academic fraud by having other students write papers for them.⁷⁹ Both Notre Dame and UNC are widely considered great academic institutions.

⁷⁴ For additional information on *O'Bannon* and the future of the NCAA, see Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3.1 MISS. SPORTS L. REV. 77 (2013).

⁷⁵ See Sara Ganim, *UNC Fake Class Scandal and NCAA's Response Wind Their Way to Washington*, CNN.COM, Apr. 8, 2014, <http://www.cnn.com/2014/04/08/us/unc-academic-fraud-investigation/>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Dan Wolken, *Notre Dame Investigates Academic Fraud, Holds Out Four Players*, USATODAY.COM, Aug. 17, 2014, <http://www.usatoday.com/story/sports/ncaaf/2014/08/15/notre-dame-investigates-cheating-scandal/14116413/>.

These incidents are directly adverse to the values that the NCAA claims to uphold. By and large, highly talented athletes use college athletics as a type of minor league system and an avenue into professional sports leagues, contrary to the NCAA's purpose. If the NCAA does not fix this issue because of the public's perception, then they should act proactively to remedy the evolving situation because it will inevitably lead to less-favorable court rulings in the future.

B. The NCAA should revise the "no draft" rule.

1. The NCAA "no draft" rule restricts multiple commercial markets.

The NCAA should revise the current "no draft" rule because it restrains the market of college athletes deciding to either enter a professional league or continue competing in collegiate athletics, thus violating antitrust laws. In order for an athlete to win an antitrust suit, he or she would need to establish that the "no draft" rule has an anticompetitive effect on a relevant market,⁸⁰ which no plaintiff has successfully accomplished to date. Even though no plaintiff has been able to establish that the "no draft" rule has an anticompetitive effect on a relevant market, it would not be a difficult task. As the court in *Banks* noted, the plaintiff could have established an identifiable market with "a more carefully drafted complaint."⁸¹ The dissent in *Banks* claimed that Mr. Banks pled an anticompetitive effect on a relevant market, "the nationwide labor market for college football players."⁸² Judge Flaum's reasoning behind this was if the "no draft" rule were optional to NCAA institutions, then college recruits would consider an institution's draft policy before making a decision.⁸³ Although this is a relevant market to which the "no draft" rule has an anticompetitive effect, there is a more plausible market to identify.

⁸⁰ See *Banks*, 977 F.2d at 1087.

⁸¹ *Id.* at 1094.

⁸² *Id.* at 1095.

⁸³ *Id.*

The market upon which the NCAA “no draft” rule has the largest effect is the recruitment market for professional athletes, most notably the NBA and NFL prospect market. As of now, if a NFL or NBA team drafts a college athlete, that athlete is contractually bound to that team for at least one year.⁸⁴ This is normal practice in the NBA and NFL, at no fault of the NCAA’s; however, this gives the athlete very little negotiating power. If an athlete were able to walk away from negotiations and return to college, that athlete would have a significant amount of bargaining power. This enhanced bargaining power or “walk away option” is what the NCAA “no draft” rule prohibits.⁸⁵

Though the NCAA prohibits this walk-away option for college basketball and football athletes, college baseball prospects possess this bargaining power when negotiating professional baseball contracts.⁸⁶ One significant component that MLB scouts apply when evaluating a baseball prospect is the so-called “signability” factor.⁸⁷ This term relates to how much it will cost an organization to sign a player to their team.⁸⁸ With respect to baseball, it is easy to infer that a high school or college player with years of college eligibility left would have a higher signability factor because they can walk away from the negotiations. Currently, this is unavailable to college football and basketball players because of the “no draft” rule, which in turn restricts the market for these professional sports prospects.

If athletes were not restricted from returning to college athletics, the signability of the athlete would be more of a substantial factor to NBA and NFL organizations when evaluating

⁸⁴ See NBA, 2011 NBA COLLECTIVE BARGAINING AGREEMENT art. X, §5(a) (2011), *available at* [http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA\(2011\)_newversion_reflectsJeremyLinRuling\)May30_2013.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_newversion_reflectsJeremyLinRuling)May30_2013.pdf) [hereinafter NBA CBA]; *see also* NFL, 2011 NFL COLLECTIVE BARGAINING AGREEMENT art. 6.4(b)(ii) (2011), *available at* <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [hereinafter NFL CBA].

⁸⁵ NCAA MANUAL, *supra* note 3, at art. 12.2.4.2.

⁸⁶ Although, as discussed above, a baseball player may not use an agent during their negotiations per the NCAA “no agent” rule. *Id.* at art. 12.2.4.3.

⁸⁷ Richard T. Karcher, *The NCAA’s Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 220 (2005).

⁸⁸ *Id.*

prospective future professional athletes. If a player had the walk-away power and their signability were higher, then there is no longer a restraint on the market and thus would lead to procompetitive effects. If drafted players retained the ability to walk away from their negotiations, it would significantly increase the value of drafted athletes' rookie contracts.

2. The "no draft" rule does not further the NCAA's purpose because it does not protect the athletes.

Aside from the law concerning antitrust, the NCAA should revise the "no draft" rule simply because it is not equitable to NCAA athletes. One of the NCAA's justifications for the "no draft" rule is to protect the educational values of student-athletes, but it can be argued that this is not fair to student-athletes because it forces athletes to put other potential careers on hold. As other commentators have noted, "the problem with the philosophy that highly talented athletes should get an education first is that the player's physical ability to play as a professional is fleeting due to age and possible injury."⁸⁹ Also, the capability to get an education is not dependent on an individual's age. An athlete could return to continue his education after his professional career is completed.⁹⁰ Therefore, highly talented athletes must choose to either gamble on his or her value in the professional market or remain a collegiate athlete, where their talents will largely contribute to the profitability of their university. The inherent inequity to college athletes with respect to the "no draft" rule is a present issue in need of reform.

C. The NCAA should revise the "no agent" rule.

The NCAA should revise its "no agent" rules for similar reasons the "no draft" rule requires revision: fairness and violation of antitrust law. The primary reason this article calls for revision of the "no agent" rule is the lack of equity on the side of the

⁸⁹ Thomas R. Kobin, *The National Collegiate Athletic Association's "no agent" and "no draft" Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483, 521 (1994).

⁹⁰ *Id.*

athlete when negotiating a professional sports contract. In order to properly understand the lack of fairness within the NCAA's "no agent" rules, it is necessary to evaluate the rules as they presently exist.

1. The inconsistent nature of the NCAA "no agent" and negotiation rules.

Pursuant to NCAA rules, an individual is ineligible if they agree, either orally or in writing to representation by an agent, "for the purpose of marketing his or her athletics ability or reputation in that sport."⁹¹ On the other hand, an individual can secure advice from an attorney about a proposed professional sports contract without forfeiting his or her collegiate eligibility.⁹² The first issue with this rule is that it will rarely apply to an individual that has not already forfeited his or her eligibility.⁹³ If a professional sports team has offered a contract to a college athlete, then they have more than likely already entered a professional draft. Second, an athlete can consult a lawyer about a professional sports contract, but the athlete cannot consult an agent who has experience in the field of sports contracts. This rule is inherently unfair to a student-athlete with little or no legal knowledge. If an athlete were able to consult a sports agent, they would receive a much better analysis tailored to their sport-specific contract, rather than if they consulted an attorney who has limited or no experience in the field of professional sports contracts. Though the unfairness of the "no agent" provisions is a major issue in need of modification, the main problem lies within the NCAA's negotiation rules.⁹⁴

Even though an athlete may consult a lawyer without jeopardizing their amateur status, if the lawyer is present during any negotiations with professional teams, it is considered representation by an agent, and the athlete is ineligible pursuant to NCAA rules.⁹⁵ There is little advantage to an athlete consulting

⁹¹ NCAA MANUAL, *supra* note 3, at art. 12.3.1.

⁹² *Id.* at art. 12.3.2.

⁹³ For additional information on the NCAA no-agent rule, see Matthew Stross, *The NCAA "No-Agent" Rule: Blurring Amateurism*, 2.1 MISS. SPORTS L. REV. 167 (2012).

⁹⁴ NCAA MANUAL, *supra* note 3, at art. 12.2.4.3.

⁹⁵ *Id.* at art. 12.3.2.1.

an attorney if the attorney cannot help in negotiations. One of the only advantages to consulting an attorney is to divulge the legal issues of a contract; however, the issues within a sports contract are complicated and usually require special knowledge. An average attorney will rarely give adequate advice because of the complex business and legal issues that are inherent to professional sports.⁹⁶ The only advice an athlete can retain with respect to their professional careers is from a professional sports panel, which the university appoints.⁹⁷

Some negotiations between the athlete and a professional sports organization are permissible, but only under rules provided by the NCAA. The negotiation rule provides in part, "[T]he individual, his or her legal guardians or the institution's professional sports counseling panel may enter into negotiations with a professional sports organization without the loss of the individual's amateur status."⁹⁸ This results in athletes, usually around the age of twenty-one, entering negotiations with a professional organization. As mentioned above, some highly talented athletes are not fully concentrated on their education when in college, which is of no fault to the NCAA. Further, the athletes that this article concerns are those that have not yet completed their college education. Also, most college students in general have little to no experience with negotiations or contract components. Under NCAA-permitted rules, one option for an athlete inquiring as to their professional value is to negotiate with highly-experienced professional sports organization officials. Rarely, if ever, will this lead to a fair inquiry of the athlete's professional market value because the officials associated with the organization have much more experience than the college athlete. One of the only ways an athlete can overcome the provisions of the negotiation rule is if they are fortunate enough to have a parent or legal guardian with experience in business or legal negotiations.

The second element of the negotiation rule that the institution's professional sports counseling panel may enter into

⁹⁶ Karcher, *supra* note 87, at 215.

⁹⁷ NCAA MANUAL, *supra* note 3, at art. 12.3.4.

⁹⁸ *Id.* at art. 12.2.4.3.

presents more issues.⁹⁹ Any law student who has taken legal ethics learned an important question to ask on the first day of class: “Who is my client?” This question immediately comes to mind when reading this provision. Who is the institution’s professional sports counseling panel’s client? Is it the institution that is paying the members of the panel? Alternatively, is it the athlete they are theoretically advocating for?

If the client is the institution, and the institution would benefit from the athlete continuing to play collegiately, then there is no way the athlete will obtain a fair deal. Conversely, if the client is the athlete, and the athlete does not obtain a favorable contract, then the institution, which is paying the panel, would be the benefiting party. There is an inherent conflict of interest with an institution’s sports panel attempting to advocate for an athlete. Further, some institutions do not have professional sports panels.¹⁰⁰ If an institution does not have a professional sports panel, then the athlete must negotiate a potential contract on their own. The rules regarding agents and negotiations are not conducive to the success of athletes in contract negotiations, and they do not further the purpose of the NCAA: to protect athletes.

2. The NCAA’s “no agent” rule is not safe from the court’s prospective.

The Common Pleas Court of Erie County, Ohio, took notice of the unfairness of the NCAA “no agent” rule when the court ruled that the NCAA violated its contractual duty of good faith and fair dealing.¹⁰¹ In the case of *Oliver v. NCAA*, the plaintiff, Andrew Oliver, was a high school pitcher whom the Minnesota Twins drafted in the 17th round of the Major League Draft.¹⁰² Oliver retained the services of an attorney for an advisory role, which is not a violation of NCAA rules.¹⁰³ The attorney requested to be present when Oliver and his family met with the Twins.¹⁰⁴ Per

⁹⁹ *Id.*

¹⁰⁰ Karcher, *supra* note 87, at 224.

¹⁰¹ *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203, 216 (Ohio Com. Pl. 2009).

¹⁰² *Id.* at 206.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 207.

advice from his father, not the attorney, Oliver rejected the Twins' offer and chose to attend Oklahoma State University in the fall of 2005.¹⁰⁵ In May 2008, Oliver's attorney contacted the NCAA about this alleged violation of the NCAA rules, and the NCAA subsequently suspended Oliver.¹⁰⁶ Oliver then filed for an injunction to prevent the NCAA from enforcing the eligibility bylaws against him.¹⁰⁷

The NCAA defended on the ground that the "no agent" rule "help[s] to retain a clear line of demarcation between collegiate and professional sports"¹⁰⁸ The court noted that the bylaw prohibiting an attorney's presence during negotiations "allows for exploitation of the student-athlete 'by professional and commercial enterprises,' in contravention of the positive intentions of the defendant."¹⁰⁹ The court granted the injunction,¹¹⁰ but the NCAA "no agent" rule survived because the NCAA chose to settle out of court.¹¹¹ This is one way of challenging the "no agent" rule in court, and this case represents the court's willingness to side with an athlete. The "no agent" rule is not only in jeopardy because of the likelihood of future cases claiming the same as Oliver, but it is also in jeopardy because of a possible antitrust lawsuit.

A plaintiff filing an antitrust suit against the NCAA would have no trouble establishing an anticompetitive effect on a relevant market. As mentioned above, the NCAA is clearly a commercial market, as is the professional player recruitment market. Another identifiable market is the labor market for college athletes.¹¹² The "no agent" rule restrains the market for professional players because players, with collegiate athletic eligibility, are not able to adequately negotiate their contracts without forfeiting their amateur status. If the "no agent" rule allowed an agent to help with negotiations, then a prospective

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Oliver, 920 N.E.2d at 207.

¹⁰⁸ *Id.* at 209.

¹⁰⁹ *Id.* at 214.

¹¹⁰ *Id.* at 218–19.

¹¹¹ Brandon D. Morgan, *Oliver v. NCAA: NCAA's "no agent" Rule Called Out, but Remains Safe*, 17 SPORTS L.J. 303, 314 (2010).

¹¹² Banks, 977 F.2d at 1099.

professional athlete could properly negotiate a contract, thus resulting in more lucrative professional contracts.¹¹³

If a plaintiff were to challenge the “no agent” provision with an antitrust suit, the court would apply the Rule of Reason analysis.¹¹⁴ The NCAA would likely defend on the grounds of preserving amateurism and its main purpose of maintaining a clear line of demarcation between intercollegiate and professional sports.¹¹⁵ The problem with this defense is, as mentioned previously, if the court applied a proper fact-finding analysis, a court would see inconsistencies within NCAA rules. The NCAA rule permitting an institution’s professional sports council to negotiate a contract does no more to maintain a clear line of demarcation than an agent negotiating a contract. In both instances, someone who is competent in the skills of professional sports negotiations is negotiating a contract with a professional team. This is inconsistent and does not support the goal the NCAA claims to purport.

It is inevitable that the NCAA will lose a future suit brought under an antitrust theory concerning both the “no draft” and “no agent” provisions. Presently, the NCAA has the option of either retaining a version of their current rules by revising them or losing the provisions altogether by losing a future lawsuit. In short, the NCAA has a chance to be the “good guy” in the eyes of the American public. The NCAA can revise the rules and promote core fundamental values of our society while being an advocate for the athletes, as opposed to the tower of contradiction that it is today.

III. PART THREE: PROPOSED REVISIONS TO THE CURRENT NCAA “NO DRAFT” AND “NO AGENT” RULES.

As mentioned above, the NCAA “no draft” and “no agent” provisions cause an abundance of issues within the context of antitrust law, along with an arguable lack of fairness to athletes. The NCAA has emphatically argued it is necessary to “retain a clear line of demarcation between intercollegiate athletics and

¹¹³ Morgan, *supra* note 111. .

¹¹⁴ *See* Bd. of Regents of Univ. of Okla., 468 U.S. at 103.

¹¹⁵ NCAA MANUAL, *supra* note 3, at art. 1.3.1.

professional sports.”¹¹⁶ Specifically, the NCAA asserts that the purpose of amateurism is primarily to prevent an athlete from exploitation by the commercial market.¹¹⁷ Ironically, some argue that both rules exploit college athletes by only one market, the NCAA commercial market.¹¹⁸ Each of these justifications begs the question, is it possible to revise the “no draft” and “no agent” rules while maintaining the desired clear line of demarcation and still prevent the athlete from exploitation by the commercial market? This article argues that not only is it possible, it is also necessary to further the functionality of the NCAA in the modern era.

A. A proposed revision to the “no draft” rule.

The NCAA should revise the “no draft” provision and allow a player eligible for a professional sports draft to: (1) declare for the professional draft in his or her respective sport; (2) be drafted; (3) analyze the round they are drafted in and their market value for that sport; (4) adequately negotiate a contract with a professional organization; and (5) return to the NCAA if they so choose, within a specific time period, without forfeiting eligibility. Under this prospective revision, this rule would not be subject to an antitrust suit because the NCAA would no longer restrict the professional sports market or the labor market for college football players. This proposal will have some repercussions within a university, but these repercussions will be neither negative nor substantial. For proper analysis of these repercussions, it is important to analyze the process leading up to the draft for an athlete, beginning with the NFL process.

The annual NFL draft normally occurs during the spring, either in late April or early May.¹¹⁹ This is a rigorous process that some call a “2-3 month public boot camp,”¹²⁰ which consists of

¹¹⁶ *Id.*

¹¹⁷ *Id.* at art. 2.9.

¹¹⁸ *See* Banks, 977 F.2d at 1095.

¹¹⁹ *See* James Brady, *NFL has 2 Sets of Dates, 3 Cities in Mind for 2015 Draft*, SBNATION.COM, June 5, 2014, <http://www.sbnation.com/nfl/2014/6/5/5783856/nfl-draft-2015-city-location-date-time>.

¹²⁰ Frank Moreno, *Extreme Hiring Process – The NFL Draft*, ITABOUTTIME.KRONOS.COM, May 4, 2012, <http://itsabouttime.kronos.com/2012/05/04/extreme-hiring-process-the-nfl-draft/>.

interviews, background checks, tryouts, and for some, the NFL combine.¹²¹ Due to the timing and rigorous process leading up to the NFL draft, an athlete who seeks participation in the NFL draft will likely be too busy to participate in spring classes. More practically, the main repercussion presented with this proposal is that athletes would not be eligible to participate in annual spring football practices.¹²² This would undoubtedly be the biggest concern within an NCAA football program where spring football practices are an integral component to success.

Spring football is important to a football program because it is a great opportunity to evaluate players. On the other hand, any athlete who is eligible for the NFL draft has usually spent at least three seasons with a football program,¹²³ and the program has had a chance to fully evaluate the player. If anything, this would provide a football program with a better opportunity to fully evaluate the talent of players behind the NFL prospect on the depth chart. Further, this proposal seeks to save the NCAA from antitrust lawsuits, not to further the success of individual football programs.

This will not be a large issue with respect to collegiate basketball players seeking selection in the NBA draft, because the NBA draft is before July 10 and usually takes place in the summer.¹²⁴ Because the college basketball season is complete in the spring each year, the NBA recruitment process will not interfere with much, if any, collegiate basketball operations. Also, the typical environment for college basketball is that most “blue chip” prospects usually declare for the NBA draft after their first season.

B. Proposed revision to the “no agent” rule.

The NCAA should also revise its “no agent” provision and allow an athlete to retain a sports agent to help market their

¹²¹ *Id.*

¹²² NCAA bylaws prohibit an individual from participating in practice if they are not enrolled in the institution as a full-time student. NCAA MANUAL, *supra* note 3, at art. 14.2.1.

¹²³ An individual is not eligible for the NFL draft until three years after graduating high school. *See* NFL CBA, *supra* note 84, at art. 6.2(b).

¹²⁴ *See* NBA CBA, *supra* note 84, at art. X.2.

athletic ability without forfeiting their amateur status. A revision to the "no agent" rule would be difficult to regulate because of the tainted perception of sports agents.¹²⁵ Other commentators have suggested that the use of agents in this respect should be limited to NCAA-approved agents;¹²⁶ however, this creates an entirely different problem. If the NCAA implements this, then the NCAA would arguably be restricting the market for sports agents and would possibly be subject to antitrust lawsuits in that respect. This article aims to propose rules that save the NCAA from antitrust violations, not subject them to more potential violations. Alternatively, the NCAA could require member institutions to closely monitor an athlete's relationship with a sports agent and report to the NCAA to ensure there are no violations resulting therein.

One potential problem associated with this provision is the probability of a violation of the NCAA no compensation rule.¹²⁷ In the months preceding the NFL draft, once a player obtains an agent, that agent is generally responsible for paying for the player's training, which is important to the NFL recruiting process.¹²⁸ This article does not argue in any way that the NCAA should revise the no compensation or benefits rule, as this would undoubtedly erase any line of demarcation between collegiate and professional sports. Under this proposed revision, the athlete could only use an agent for negotiations to properly inquire his or her professional market value, and could not receive benefits from the agent. Alternatively, an athlete could seek individualized, external training for a specific period leading up to a draft. For the reasons outlined below, each of these provisions remedy several paramount issues related to the NCAA "no draft" and "no agent" rules.

¹²⁵ Kobin, *supra* note 89, at 526.

¹²⁶ *Id.* at 525.

¹²⁷ NCAA MANUAL, *supra* note 3, at art. 12.1.2.

¹²⁸ Andrew Brandt, *Football's Other Recruiting*, MMQB.SI.COM, Dec. 19, 2013, <http://mmqb.si.com/2013/12/19/nfl-agents-recruit-draft-prospects/>.

IV. PART FOUR: THE NCAA SHOULD REPLICATE THE PROPOSED REVISIONS.

The NCAA should duplicate the proposed revisions to the “no draft” and “no agent” rules because the new provisions remedy the problems outlined in Part I of this article that the NCAA is facing. First, if the NCAA were to implement the revisions, the NCAA would no longer violate the core values of the Sherman Act.¹²⁹ Second, the public’s perception of the NCAA is no longer what the NCAA believes or wants it to be, and concurrently, the courts no longer share the same perception of the NCAA.¹³⁰ If the NCAA were to revise the rules, the NCAA rules would be more in line with what the public and courts think of the NCAA. Third, the two revisions would no longer cause the NCAA to restrain a market, which would save the NCAA from a future antitrust suit. Finally, and perhaps most importantly, the revisions do not compromise the “clear line of demarcation between collegiate and professional athletics”¹³¹ that is integral to college athletics.

A. The revisions do not compromise the clear line of demarcation.

The NCAA has vigorously clung to the argument that the amateurism provisions are essential to “maintain a clear demarcation between collegiate and professional sports.”¹³² This article argues that the proposed revisions to the “no draft” and “no agent” rules do not in any way compromise this line. The basic definition of a professional is someone who pursues a profession for a livelihood. Under the proposed revisions, it is clear that an athlete would obtain more freedom to pursue a professional athletic career.

One might believe that this compromises the clear line of demarcation; however, the NCAA athletes that the revisions seek to protect are already pursuing professional sports for the purpose of a livelihood. Currently, the public largely perceives the NCAA

¹²⁹ 15 U.S.C. §§ 1,2 (2004).

¹³⁰ See *O'Bannon*, *supra* note 19.

¹³¹ NCAA MANUAL, *supra* note 3, at art. 1.3.1.

¹³² Banks, *supra* note 1. See also *O'Bannon*, *supra* note 19; Gaines, *supra* note 38.

as a minor league system for professional sports.¹³³ Larry Brown, a well-known NBA and college basketball coach, has even gone as far to say that the NCAA is "the greatest minor league system in the world."¹³⁴ Thus, as the current popular perception of the NCAA suggests, many believe there is no clear line between collegiate and professional sports.

The NCAA autonomy rule, outlined in Part I of this article, will result in an even more clouded line of demarcation. With the implementation of the "autonomy rule," the most notable rule change will be awarding athletes full cost-of-attendance scholarships.¹³⁵ In short, athletes will receive a stipend while they are attending and competing for their respective universities that choose to adopt this rule. When the NCAA implements this rule, it can be argued that NCAA athletes will then assume the exact definition of a professional. Therefore, the line of demarcation the NCAA has whole-heartedly clung to will be virtually non-existent. This proposal would not compromise the already cloudy line between collegiate and professional sports that the NCAA claims to be "clear."¹³⁶

Along with the fact that the revisions would not compromise the NCAA's values, the NCAA should revise the rules because they have historically shown no hesitation when revising their rules. When the *O'Bannon* court applied fact-finding to the Rule of Reason analysis, the court found that the NCAA had revised their amateurism definitions at least five times from 1916 to present.¹³⁷ The court also noted that the current NCAA definition of amateurism "stand[s] in stark contrast to definitions set forth in the NCAA's early bylaws."¹³⁸ In addition, there have been many revisions to the "no draft" rule over the years.¹³⁹ Therefore, it

¹³³ See Allison Schrage, *The NCAA Needs Reform, but Paying Players Doesn't Cut It*, BLOOMBERG.COM, Aug. 8, 2014, <http://www.bloomberg.com/articles/2014-08-08/the-ncaa-paying-players-wont-fix-college-sports-biggest-problem>.

¹³⁴ Ross Maghielse, *Larry Brown Says NCAA is 'Greatest Minor League System in the World'*, MERCURYNEWS.COM, Mar. 6, 2014, http://mercurynews.com/ci_25283901/larry-brown-says-ncaa-is-greatest-minor-league.

¹³⁵ Trahan, *supra* note 20.

¹³⁶ NCAA MANUAL, *supra* note 3, at art. 1.3.1.

¹³⁷ See *O'Bannon*, *supra* note 19.

¹³⁸ *Id.* at 975.

¹³⁹ See Kobin, *supra* note 89, at 516.

would not be a foreign concept for the NCAA to change any of its provisions to coincide with public perception. The NCAA is facing potentially the most important era of change since its origin, and should take the opportunity to proactively create rules that coincide with modern trends and circumstances.

B. The revisions protect the NCAA from future antitrust attacks.

The NCAA should revise the “no draft” and “no agent” rules in accordance with the above suggestions because courts no longer demonstrate deference to the NCAA with concern to antitrust attacks.¹⁴⁰ The Sherman Act’s purpose is to promote competition and protect trade and commerce from unlawful restraints of trade.¹⁴¹ Thus, one of the core fundamental values in America is the ability to freely market oneself; this is specifically what the NCAA “no draft” and “no agent” provisions are preventing. This article argues that this proposal is the resolution that the NCAA needs in preventing antitrust suits because under this revision the NCAA will no longer restrain any market.

1. The proposed revisions do not restrain the labor market for college football players.

Some have argued the market that the NCAA’s “no draft” and “no agent” provision are restraining is the labor market for college football;¹⁴² however, courts have repeatedly ruled in the past that the NCAA is not a commercial market.¹⁴³ Contrary to what courts have ruled in the past, the NCAA is clearly a commercial market.¹⁴⁴ The NCAA is a massive business, and this business creates an environment where institutions rigorously compete for the services of highly talented high school athletes. The extraordinary growth of the business of college athletics has caused athletic programs’ budgets to rise to numbers that were once inconceivable.¹⁴⁵

¹⁴⁰ See O’Bannon, *supra* note 19.

¹⁴¹ Jerry & Knebel, *supra* note 22, at 200.

¹⁴² Banks, 977 F.2d at 1095.

¹⁴³ *Id.*

¹⁴⁴ Kobin, *supra* note 89.

¹⁴⁵ Mike Szvetitz, *Money Matters: Auburn’s Athletic Budget Grows to More Than \$100 Million*, OANOW.COM, Feb. 23, 2014,

In the current setting, a talented college athlete who chooses to explore their professional market value is removed from the labor market of college football.¹⁴⁶ The NCAA is restricting this market because the NCAA, as well as the universities, has an interest in high profile college athletes remaining at their institutions due to the substantial financial benefits that are analogous with a successful athletic program.¹⁴⁷ The NCAA should revise the "no draft" rule because an institution could then retain highly profitable athletes and the NCAA would no longer restrain the market.

Judge Flaum's dissent in *Banks*¹⁴⁸ provides a different argument of how the NCAA restrains the labor market for college football players. Judge Flaum argued that if the NCAA were to allow member institutions to govern their draft policies individually, then some highly-recruited high school athletes would likely make a decision based on a school's policy concerning the individual institution's draft policy.¹⁴⁹ The majority in *Banks* countered this argument, writing that NCAA member institutions have all agreed to adopt this rule.¹⁵⁰ However, there are flaws in this argument because member institutions have no choice but to adopt the NCAA rules or they are not allowed to be a participating member of the NCAA. Regardless of the majority's use of circular reasoning, the fact still remains that the NCAA is undoubtedly restricting the labor market for college football players.

2. The NCAA should adopt the revisions because the NCAA would no longer restrain the professional recruitment market.

In addition to the NCAA market for highly talented athletes, the NCAA's "no draft" provision restricts the professional recruitment market for college players. If college players, who

http://www.oanow.com/sports/college/auburn/article_547e30fe-9c0e-11e3-9a2f-0017a43b2370.html (explaining that the Auburn athletic budget has grown to over \$100 million).

¹⁴⁶ See *Banks*, *supra* note 1.

¹⁴⁷ *Kobin*, *supra* note 89, at 511.

¹⁴⁸ *Banks*, 977 F.2d at 1081.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1088.

seek a career in professional sports, were allowed to return to the NCAA after being drafted, professional sports clubs would have an incentive to offer more lucrative contracts in order to prevent their draft picks from returning to the NCAA. As discussed previously, players who are negotiating a professional sports contract, specifically the NFL and NBA, have no option to walk away and return to the NCAA. If the athletes had this walk-away option, then the athlete would have a stronger negotiation tool, and this would lead to higher rookie contracts.¹⁵¹

Currently, the new NFL Collective Bargaining Agreement (CBA) predetermines the signing bonuses, salaries, and length of rookie contracts.¹⁵² Since the CBA predetermines most material negotiable matters, one could ask how the “no draft” rule restricts the NFL recruitment market. The market is currently restricted because players can negotiate how much guaranteed money they can receive from a club depending on which round they were drafted.¹⁵³ Players drafted in the first round are usually the only players that receive contracts that guarantee money under the current system.¹⁵⁴ Conversely, if a player that still has college eligibility remaining is drafted late, then they could threaten to walk away if they do not receive guaranteed money. If the NCAA were to implement the proposed revisions, then NFL clubs would need to gauge a draftee’s “signability” factor, which would be higher and would promote the NFL recruitment market.

The current provisions of the CBA were endorsed by more experienced NFL players who were not happy with young and unproven players receiving such lucrative contracts¹⁵⁵ The team owners also pushed for this change because of the embarrassment felt by the contracts given to rookies who eventually became NFL busts.¹⁵⁶ If the NCAA were to revise the “no draft” rule, then the owners, in future CBA negotiations, would likely push for a revision to permit more lucrative rookie contracts in order to avoid the embarrassment of a draft pick returning to the NCAA.

¹⁵¹ Karcher, *supra* note 87.

¹⁵² ANDREW BRANDT, *The New Age of Rookie Contract Negotiations*, MMQB.SI.COM, May 22, 2014, <http://www.mmqb.si.com/2014/05/22/nfl-rookie-contract-negotiations>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

The NFL is not the only professional recruitment market that is restricted by the current NCAA "no draft" rules. This rule also restricts another lucrative market, the NBA. Due to the current state of college basketball, this rule arguably affects the NBA market the most.¹⁵⁷ Under the current NBA CBA, the league determines rookie's salaries based on the position they are taken in the draft.¹⁵⁸ Although, the NBA does predetermine rookie salaries to an extent, NBA clubs have the ability to pay a draft pick between 80% and 120% of the allocated salary for that position in the draft.¹⁵⁹ If a player chosen in the draft were to have the option of returning to the NCAA, it is likely that a rookie's salary would be closer to the 120% range instead of a lower range. If the NCAA revises the "no draft" rule in accordance with the above proposal, then the NBA recruitment market would no longer be restricted, but instead promoted by the revision.

C. The NCAA "no draft" and "no agent" rules do not further the alleged purpose for the amateurism rules.

The NCAA should revise the current "no draft" and "no agent" rules, not only because of the risk of an antitrust lawsuit, but also because the rules simply do not support what the NCAA claims to be preserving: amateurism. As mentioned above, there are certainly some blatant inconsistencies within the NCAA constitution; however, the inconsistent nature of the NCAA's purpose of preserving amateurism requires a much deeper analysis. The NCAA constitution claims that "[s]tudent-athletes... should be motivated primarily by education and by the physical, mental and social benefits to be derived."¹⁶⁰ Further, the NCAA claims "student-athletes should be protected from exploitation by

¹⁵⁷ The most highly talented college basketball players usually play one season in the NCAA and then choose to enter the NBA draft. See Nicole Auerback & Jeffrey Martin, *One and Done, but Never as Simple as It Sounds*, USATODAY.COM, Feb. 18, 2014, <http://www.usatoday.com/story/sports/ncaab/2014/02/17/college-basketball-nba-draft-early-entry-one-and-done-rule/5552163/>.

¹⁵⁸ Alicia Jessop, *Structure of NBA Rookie Contracts*, FORBES.COM, June 28, 2012, <http://www.forbes.com/sites/aliciajessop/2012/06/28/the-structure-of-nba-rookie-contracts/>.

¹⁵⁹ *Id.*

¹⁶⁰ NCAA MANUAL, *supra* note 3, at art. 2.9.

professional and commercial enterprises.”¹⁶¹ By examining the current environment of collegiate sports, it is clear that the NCAA amateurism rules do not further the alleged purpose of amateurism, but in fact expose an athlete to the environment the NCAA claims to prevent.

1. Education rarely motivates highly talented NCAA athletes.

The NCAA’s stated purpose that education should motivate athletes is unquestionably a noble assertion, but this simply does not coincide with reality. With the repeated educational scandals mentioned above, notably the UNC and Notre Dame scandals,¹⁶² the fact is that highly talented college athletes are simply not primarily motivated by education. While there are many college athletes who are motivated by education, these athletes are not what the public perceives most NCAA student-athletes to be. Although some NCAA institutions do not help to further the NCAA’s goals, this does not change that this significantly hurts what the NCAA has emphatically clung to. The NCAA should revise the “no draft” and “no agent” rules because repetitive NCAA education scandals weaken, if not absorb, this argument.

2. The NCAA’s purpose for the rules violates antitrust laws.

The NCAA’s second justification for the amateurism rules—to prevent a student athlete from professional exploitation—is especially troubling. The NCAA’s “no draft” rule clearly furthers the goal of preventing an athlete from exploitation by the professional market; however, the NCAA does this by violating antitrust laws. The claimed purpose of promoting amateurism also lies in stark contrast with some other NCAA provisions. For example, an NCAA baseball player can be drafted and can even entertain offers from a professional club and still maintain college eligibility.¹⁶³ On the other hand, a NCAA football or basketball player is immediately ineligible if he or she asked to be placed on a draft list and is drafted.¹⁶⁴ What is the difference between a

¹⁶¹ *Id.*

¹⁶² *See* Wolken, *supra* note 79; *see also* GANIM, *supra* note 75.

¹⁶³ Kobin, *supra* note 89, at 516.

¹⁶⁴ NCAA MANUAL, *supra* note 3, at art. 12.2.4.2.1.1, 12.2.4.2.3.

baseball player and a football or basketball player? If the professional market exploits football and basketball stars through the draft then why does the same not apply to a baseball player?

The justification behind this is that a college baseball player does not ask to be placed in the MLB draft, while a football player is required to ask to be eligible in the NFL draft. It is a simple argument to make that this is an unfounded justification on the part of the NCAA while the only plausible justification for this discrepancy is financial motivation. It has been argued that there are serious financial motivations for the NCAA to coerce football and basketball players to stay in the NCAA, while the same motivation does not exist to keep NCAA baseball players.¹⁶⁵ This is undoubtedly inconsistent with the goals the NCAA claims to promote.

3. The NCAA "no draft" and "no agent" rules actually cause commercial exploitation.

The most troubling part of the NCAA's purpose for amateurism is that the "no agent" and "no draft" rules do not prevent the athlete from being commercially exploited. This rule, ironically, allows for the NCAA, a commercial enterprise, to exploit the athlete. In order to escape the reality that the NCAA is a commercial enterprise, the NCAA has argued that it is a non-profit organization.¹⁶⁶ Contrary to NCAA assertions, as early as 1990, the *Gaines* court noted that NCAA earnings far exceeded the majority of for-profit organizations.¹⁶⁷ Since the *Gaines* court recognized this in 1990, the NCAA has become a much larger business than it was at the time. In 2012, for instance, March Madness made the NCAA over \$1 billion.¹⁶⁸ In the 2012 BCS national championship game, two NCAA member institutions,

¹⁶⁵ Kobin, *supra* note 89, at 518.

¹⁶⁶ *See Gaines*, 746 F.Supp. at 743.

¹⁶⁷ *Id.*

¹⁶⁸ *How Much TV Money Does March Madness Make?*, MARKETPLACE.ORG, Mar. 21, 2013, <http://www.marketplace.org/topics/business/freakonomics-radio/how-much-tv-money-does-march-madness-make>. The statistics listed here are only what the NCAA makes during March Madness; they do not represent what the NCAA makes throughout the full college basketball season.

Notre Dame and Alabama, generated a combined \$30 million.¹⁶⁹ The NCAA is a commercial enterprise that grows each year and continuously exploits athletes under the NCAA amateurism rules.

The NCAA and their member institutions would not make as much money if it were not for the participation of highly publicized athletes. It can be argued the NCAA exploits them in the commercial market and does not treat the athlete fairly for their services.¹⁷⁰ The NCAA uses the athlete's name and likeness to make millions of dollars, which was the key issue in the *O'Bannon* lawsuit.¹⁷¹ The simple argument is that the NCAA does not seek to protect athletes from commercial exploitation; rather, the NCAA seeks to exploit the athlete commercially for its own gain.

The "no draft" rule can be used to further the argument that the hidden purpose of the NCAA is to retain the exclusive right to commercially exploit athletes. The "no draft" rule prevents a student-athlete from conducting a proper inquiry into their market value and, in turn, forces the athlete to remain with an NCAA member institution unless the athlete chooses to gamble in the professional market.¹⁷² By preventing an athlete from entering the draft and returning to the NCAA, albeit without receiving compensation, the NCAA is restricting the athlete from entering the professional market while retaining a right to gain from the athlete in the collegiate market.

The rule preventing a college athlete from obtaining an agent has the same effect as the "no draft" rule on athletes being commercially exploited by the NCAA.¹⁷³ The NCAA does not permit the athlete to obtain the services of a sports agent or attorney when negotiating, but the rules do allow a member institution's professional sports panel to negotiate professional

¹⁶⁹ Chris Smith, *Money Behind the BCS National Championship*, FORBES.COM, Jan. 7, 2013, <http://www.forbes.com/sites/chris-smith/2013/01/07/the-money-behind-the-bcs-national-championship/>.

¹⁷⁰ This article does not argue that NCAA athletes should be paid more than a cost-of-attendance scholarship. Also, this article does not argue against the NCAA no-compensation rule. Without the NCAA no-compensation rule, young athletes would clearly be exploited commercially with likely severe effects.

¹⁷¹ See *O'Bannon*, *supra* note 19.

¹⁷² NCAA MANUAL, *supra* note 3, at art. 12.2.4.2.

¹⁷³ *Id.* at art. 12.2.4.2, 12.3.1.

contracts for the athlete.¹⁷⁴ An inherent conflict of interest arises when this provision is in practice. In a perfect world, one would think the professional sports panel could properly advocate on behalf of the athlete; however, it would be nearly impossible to do as the member institution likely pays the sports panel. This furthers the assertion that the NCAA rules regarding amateurism allow the athlete to be exploited commercially only by the NCAA.

The NCAA should duplicate the proposed revisions to the "no draft" and "no agent" rules because the rules do not further the NCAA's purpose of preventing the athlete from commercial exploitation. The rules arguably promote the exploitation. If an athlete were to file an antitrust lawsuit against the NCAA, the NCAA would likely defend on the ground of protecting athletes from commercial exploitation. If the court were to apply a proper Rule of Reason analysis,¹⁷⁵ complete with fact-finding, the court could easily infer that the NCAA's purpose is not furthered by the current rules. If the NCAA were to revise the "no draft" and "no agent" rules along with the above proposal, then the NCAA would finally be furthering its stated purpose.

CONCLUSION

For all the reasons mentioned, this article calls for the NCAA to revise its current "no draft" and "no agent" policies. With the environment of collegiate sports changing now more than ever, it is time for the NCAA to adopt rules that coincide with reality. As of now, the NCAA does not align itself with one of the main values of American society: the ability to freely market one's ability. Highly talented athletes have a limited time to further their athletic careers and adequately investigate their market value. This limited time is hindered by the current state of the NCAA's "no draft" and "no agent" rules. The NCAA can revise their rules and promote fairness to their athletes, which would cause the NCAA to be the good guy in the eyes of courts, the American public, and college athletes themselves. The NCAA should take

¹⁷⁴ *Id.* at art. 12.2.4.3.

¹⁷⁵ *See* Nagy, *supra* note 33.

the opportunity and revise the rules before a court takes this opportunity out of the NCAA's hands.