ASSESSING QUALITATIVE JUSTIFICATIONS UNDER TAFT'S RULE OF REASON

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I. INTRODUCTION AND QUESTION POSED

In his landmark opinion in *United States v. Addyston Pipe & Steel Co.*,[1] then-Judge William Howard Taft focused on the question of whether the restraint of trade there at issue was the primary motivation for the agreement or "merely ancillary to the main purpose of a lawful contract."[2] The doctrine of naked and ancillary restraints that Taft developed in *Addyston Pipe* marked the origins of the per se rule and rule of reason, which together form the fundamental framework that governs the Sherman Act today. In Taft's presentation, restraints of trade must be understood in the context of their relationship to the purpose of the primary agreement. Where that purpose is legitimate and the relationship of the restraint is ancillary, courts should be hesitant to invalidate the restraint.

For decades after Taft's *Addyston Pipe* decision, however, courts implicitly rejected his purpose-driven framework. As one commentator noted, "the rule of reason [was] almost completely replaced by a comprehensive network of per se rules."[3] A sea-change occurred beginning in the late 1970s with the more extensive inclusion of economic analysis in antitrust law. Since that time, courts have expanded the class of restraints covered by the rule of reason and have been increasingly hesitant to apply per se rules of illegality.[4]

The rebirth of the rule of reason coincided with a rethinking of the purpose of antitrust law. The prevailing school of thought, as stated by influential judge and antitrust scholar Robert Bork, himself an admirer of Taft and proponent of the rule of reason, is that "the only legitimate goal of antitrust is the maximization of consumer welfare."[5]

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1 United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

2 *Id.* at 282.

3 Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 337 (2000).

4 *Id.*

5 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 7 (1978).

In his review of the legislative history of the Sherman Act, Bork concluded that, while "[w]ide discretion was delegated to the courts to frame subsidiary rules, . . . the delegation was confined by the policy of advancing consumer welfare."[6] Discussing Senator John Sherman (the Act's namesake), Bork notes that his concern was higher prices, which are caused by "what an economist today would call a restriction of output."[7] "Output" generally refers to the quantity and quality of the product or service provided.

While antitrust scholars and politicians debate Bork's formulation of the goals of antitrust law, perhaps the more pressing issue that currently confronts courts is the breadth of the consumer welfare model: Specifically, are only those justifications (or harms) that can be measured quantitatively cognizable under the rule of reason?

Stated differently, the question is whether "output" should be understood narrowly (that is, limited to tangible units that are subject to a quantifiable metric) or whether "output" can include qualitative, intangible "goods" (education, professionalism, health care) that are not subject to (ready) quantification.

Our thesis is that antitrust law has increasingly tended towards the narrow, quantitative interpretation of "output," and we support that thesis with a review of case law below. We further suggest that output should be recalibrated in the Taft tradition to include all dimensions and aspects of the legitimate activity to which the restraint is ancillary, even if the dimensions and aspects of the activity are intangible and not reducible to a quantifiable metric.

In the latter scenario, the court would assess (1) the relationship of the qualitative justification for the restraint to the legitimate purpose of the enterprise; (2) the evidence in support of the qualitative justification; and (3) the degree of ancillarity of the restraint to that justification. If the restraint is claimed to cause, or to have caused, a negative price effect, the evidence in support of the claimed effect should be

[6] *Id.* at 20.

[7] *Id.* at 20–21.

assessed, as should the comparability of the pre- and post-restraint prices given the change in quality that accompanied the restraint.

The 2019 Taft Lecture will address the questions of whether unquantified benefits and harms are cognizable under the rule of reason and, if cognizable, how they should be "balanced" under the rule of reason and the consumer welfare model.

II. OVERVIEW OF CASE LAW

In *United States v. Brown University*,[8] the Third Circuit suggested that, in evaluating restraints on competition by colleges and universities, courts should consider the qualitative purpose of higher education and whether the restraints promoted that purpose.[9] The *Brown University* court explained that it was "most desirable that schools achieve equality of education access and opportunity" and that "enhancing the quality of our educational system redounds to the general good."[10]

The circuit court found that, when assessing the competitive impact of the challenged agreement on the colleges' output, the district court should have considered the qualitative goals that the Third Circuit identified as part of its rule of reason analysis.[11] Such an approach presumes a broad understanding of collegiate output to include not only the price and quantity of degrees conferred but also the welfare of both the student-consumers of education and society at large.

With some ambiguity, the Supreme Court recognized as cognizable apparently qualitative justifications for a restraint in *California Dental Ass'n v. FTC* ("*Cal. Dental*").[12] In that case, the Court reversed and remanded a lower court decision applying an abbreviated rule of reason, or "quick look"

8 United States v. Brown Univ., 5 F.3d 658 (3d Cir. 1993).

9 *Id.* at 678–79.

10 *Id.* at 678

11 *Id.* at 678–79.

12 Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999).

analysis, to advertising restraints imposed by the California Dental Association (the "CDA"). The Supreme Court found that the Ninth Circuit, in permitting a presumption of illegality, failed to credit the plausible goal of the restraints, which was to avoid "misleading or false claims" in dental advertising.[13]

Cal. Dental thus seemed to recognize that the output of the practice of dentistry includes the transparent and non-deceptive communication between dentist and patient, arguably a form of professionalism, and a qualitative component that is not readily subject to quantification.[14] The Court, however, seemed to only partially credit this qualitative justification for the restraint, as it noted that "misleading or false claims [could] distort the market[,]" thereby perhaps returning to a quantifiable paradigm in assessing price and output.[15]

Cal. Dental held that, if the plaintiff claimed that the advertising restraint caused an upward pressure on price, some evidence of that price impact was necessary before the burden could shift to the defendant to justify the restraint under the rule of reason.[16] The Court did not offer guidance as to how a qualitative justification offsetting such a price effect should be presented or assessed.

More recent decisions have adopted an increasingly narrow view of output that ignores aspects not readily subject to quantitative metrics. For example, in *O'Bannon v. NCAA*,[17] which concerned restrictions on student-athlete use of the student-athletes' names, images, and likenesses, both the district court and the Ninth Circuit viewed "the NCAA's commitment to amateurism" as procompetitive primarily, if not only, insofar as "the amateur nature of collegiate sports increases their appeal to consumers."[18] While the *O'Bannon* courts acknowledged that the restrictions played "a limited

13 *Id.* at 777–78.

14 *Id.*

15 *Id.* at 778.

16 *Id.* at 775 n.12, 777–78, 777 n.13.

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

18 *Id.* at 1073.

role in integrating student-athletes with their schools' academic communities,"[19] that justification played an immaterial role in their decisions.

In *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* ("*Grant-in-Aid"* and, with *O'Bannon, the "NCAA Cases"*),[20] the district court confirmed that the benefits of amateurism should be viewed in quantitative terms, in gauging the impact that amateurism had on the quantity of viewership of college athletics.[21] In doing so, the court considered what level of amateurism was required to prevent a drop in viewer demand for college sports.[22] The district court ultimately concluded that the only restraints that would survive the rule of reason scrutiny were those that were necessary to prevent "demand-reducing unlimited compensation indistinguishable from that observed in professional sports."[23]

The immaterial role that qualitative justifications—such as the importance of amateurism to the quality and priorities of collegiate education—served in the *NCAA Cases*, however, may have resulted from a failure of proof by the NCAA. That is, the NCAA appears to have introduced inadequate evidence to support the factual basis for such qualitative justifications and the relationship between the justifications and the restraints. In any event, the vast majority of the competitive analysis in the *NCAA Cases* considered the role of amateurism only in securing a greater quantity of viewer demand for collegiate athletic contests, and the "gravitational force" of that quantitative analyses will affect the rule of reason methodology.

The emphasis on quantitative justifications has also been evident in the field of health care. In *Saint Alphonsus Medical*

19 *Id.* at 1072.

20 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *appeal docketed*, Nos. 19-15566, 19-15662 (9th Cir. Mar 27, 2019).

21 *Id.* at 1082–83, 1086.

22 *Id.* at 1082–83.

23 *Id.* at 1086.

Center-Nampa Inc. v. St. Luke's Health System, Ltd.,[24] which involved the merger of two health care providers, the Ninth Circuit rejected a quality-based efficiencies defense. The court began its review of the claimed efficiencies by holding that "[i]t is not enough to show that the merger would allow St. Luke's to better serve patients. . . . [T]he claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate."[25] Those predicted "anticompetitive effects" included estimated price increases in the services provided by the merged entity.[26]

The Ninth Circuit thus required that an efficiency, to be cognizable, must offset a predicted price increase, thereby placing qualitative benefits, such as the quality of health care, that do not have a price-reducing effect outside the scope of antitrust analyses.[27] That holding is particularly remarkable given the relational proximity of the quality of health care to the purpose of a hospital.

The question raised, and not fully answered, by the above cases is whether output should be understood only in quantitative terms (that is, in terms of quantifiable price and units of output). Or, should output include qualitative dimensions—for example, intangible goods generated by the productive activity? In the latter case, which we support, the Taft formulation of the rule of reason would assess (1) the relationship of the qualitative justification for the restraint to the legitimate purpose of the enterprise; (2) the evidence in support of the qualitative justification; and (3) the degree of ancillarity of the restraint to that justification. If the restraint is claimed to cause, or to have caused, a negative price effect, the evidence in support of the claimed effect should be assessed, as should the comparability of the pre- and post-restraint prices given the change in quality that accompanied the restraint.

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[24] Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015).

[25] *Id.* at 791.

[26] *Id.* at 786–87.

[27] *See id.* at 791.

To appreciate more fully the question that informs the 2019 Taft Lecture, we provide a fuller description of the cases surveyed above.

III. COGNIZABLE QUALITATIVE JUSTIFICATIONS: THE *UNITED STATES V. BROWN* DECISION

In *Brown University*, the Third Circuit faulted the lower court (the Eastern District of Pennsylvania) in part because that court failed to give adequate consideration to the "social welfare justifications" put forth by the defendant, the Massachusetts Institute of Technology ("MIT").[28] At issue were the financial-aid-setting practices of the "Ivy Overlap Group," which included MIT and the Ivy League schools.[29] The Ivy Overlap Group met each April to "jointly determine the amount of the family contribution for each commonly admitted student[,]" using a common methodology.[30]

MIT had argued that financial aid was "pure charity" that did "not implicate trade or commerce" and was therefore "exempt from antitrust scrutiny."[31] The Third Circuit affirmed the lower court's rejection of that argument. According to the Third Circuit, "[t]he exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction."[32] The court found that financial aid was "part and parcel of the process of setting tuition and thus a commercial transaction"; the practices were therefore not exempt from antitrust scrutiny.[33]

The Third Circuit continued, however: "Although MIT's status as a nonprofit educational organization and its advancement of congressionally-recognized and important

[28] United States v. Brown Univ., 5 F.3d 658, 661 (3d Cir. 1993). As the case name implies, the Department of Justice's action originally involved all of the Ivy League schools in addition to MIT; the Ivy League schools eventually entered into a consent decree while MIT proceeded to trial. *Id.* at 664.

[29] *Id.* at 662–63.

[30] *Id.* at 663.

[31] *Id.* at 665.

[32] *Id.* at 666.

[33] *Id.* at 668.

social welfare goals does not remove its conduct from the realm of trade or commerce, these factors will influence whether this conduct violates the Sherman Act."[34] In that regard, the court found that the district court had failed to account for some "procompetitive benefit[s]" such as the fact that the practices "improved the quality of the educational program at the Overlap schools" and "increased consumer choice by making an Overlap education more accessible to a greater number of students."[35]

The court also found that the "nature of higher education, and the asserted procompetitive and pro-consumer features of the Overlap, convince us that a full rule of reason analysis is in order here."[36] The Third Circuit acknowledged that "institutions of higher education [may] require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[37] The Third Circuit continued:

> It is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education. There is no doubt, too, that enhancing the quality of our educational system redounds to the general good. To the extent that higher education endeavors to foster vitality of the mind, to promote free exchange between bodies of thought and truths, and better communication among a broad spectrum of individuals, as well as prepares individuals for the intellectual demands of responsible citizenship, it is a common good that should be extended to as wide a range of individuals from as broad a range of socio-economic backgrounds as possible. It is with this in mind that the Overlap Agreement should be submitted to the rule of reason scrutiny under the Sherman Act.[38]

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34 *Id.*

35 *Id.* at 674–75.

36 *Id.* at 678.

37 *Id.* (internal quotation marks omitted).

38 *Id.*

The *Brown University* court did not approve social welfare justifications as a dispositive defense to antitrust concerns and indeed stated that "[a] restraint on competition cannot be justified *solely* on the basis of social welfare concerns."[39] It also noted that "[t]o the extent that economic self-interest or revenue maximization is operative in Overlap, it too renders MIT's public interest justification suspect."[40]

The Third Circuit did not offer guidance on the manner in which social welfare benefits are to be assessed under the rule of reason. In *Brown*, a significant portion of the social welfare benefits appear to have been attributable to persons who were not in the relevant market of prospective student-consumers of the educational services of the relevant schools—that is, the beneficiaries were largely the general public. In addition, the Third Circuit did not comment on how such benefits should be assessed in light of a negative price effect resulting from the restraint.

Still, the Third Circuit expressly recognized that "social welfare concerns"—a justification that is not susceptible to ready quantification—are cognizable in evaluating a challenged practice.[41]

IV. INCLUDING QUALITATIVE CONCERNS IN MARKET ANALYSIS: THE *CAL. DENTAL* CASE

In *Cal. Dental*, the Supreme Court vacated a Ninth Circuit Court of Appeals decision affirming an abbreviated rule of reason, or "quick look," analysis for advertising restrictions put in place by the CDA.[42] The Federal Trade Commission (the "FTC") had filed a complaint alleging that the CDA "unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services."[43]

39 *Id.* at 669 (emphasis added).

40 *Id.* at 677.

41 *Id.* at 668.

42 Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999).

43 *Id.* at 762.

In defending the restraints, the CDA offered qualitative justifications, namely that "the restrictions encouraged disclosure and prevented false and misleading advertising."[44] The Ninth Circuit found that those informational justifications "carried little weight because 'it [wa]s simply infeasible to disclose all of the information that [wa]s required,' and 'the record provide[d] no evidence that the rule ha[d] in fact led to increased disclosure and transparency of dental pricing.'"[45]

The Supreme Court, however, took the purported justifications more seriously. It found that the challenged "restrictions on both discount and nondiscount advertising [we]re, at least on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient."[46] The Court explained that, in such a market, "the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising."[47]

The Court further found that "the quality of professional services tends to resist either calibration or monitoring by individual patients or clients."[48] Additionally: "[t]he existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition."[49]

In response to the supposed anticompetitive effect of the restraints found by the Ninth Circuit, the Court questioned whether the restraints would ultimately adversely affect

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[44] *Id.* at 763–64.

[45] *Id.* (citation omitted) (quoting Cal. Dental Ass'n v. FTC, 128 F.3d 720, 728 (9th Cir. 1997)).

[46] *Id.* at 771 (footnote omitted).

[47] *Id.* at 772.

[48] *Id.*

[49] *Id.* at 773.

competition, commenting that "the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)."[50] We note the Supreme Court's inclination to link a qualitative informational justification to a "market analysis" (rather than to view the informational justification as an intangible good related to professionalism) in observing that more accurate information allows markets to perform more competitively.[51]

The Supreme Court also challenged the Ninth Circuit's treatment of the CDA's quality-based advertising restriction as a limitation on output. "[T]he relevant output for antitrust purposes[,]" the Court found, was "presumably not information or advertising, but dental services themselves."[52] The Court questioned whether the restraint actually did reduce output of dental services, noting that, "[i]f quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply."[53] The Court therefore did not approve a presumption that the advertising restraint was illegal on the ground that, in the absence of the restraint, the availability of dental services would increase.[54]

While the Court considered qualitative justifications for the CDA's advertising restriction, its focus remained primarily on the competitive effect of that restriction on the output, dental services. In response to the Ninth Circuit's finding that the restriction may prevent the dissemination of claims regarding dental-service quality that are "verifiable and true[,]" the Court noted that it was "at least equally plausible" that "restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect

50 *Id.* at 775.

51 *Id.* at 779; *see id.* at 774–75.

52 *Id.* at 776.

53 *Id.* at 776–77.

54 *See id.*

by preventing misleading or false claims that distort the market."[55]

V. THE NCAA ANTITRUST CASES

A. The *O'Bannon* District Court Opinion

As compared to the Third Circuit in *Brown University*, the Ninth Circuit and underlying courts have treated output more narrowly in cases concerning the NCAA's restrictions on student-athlete compensation and have not credited the qualitative benefits of education. We note at the outset, however, an ambiguity as to whether the courts' proclivity to focus on quantitative output—the viewership of athletic contests—was a result of the NCAA's offering inadequate proof of qualitative justifications or a restrictive understanding of the type of output that is cognizable under the Sherman Act.

In *O'Bannon v. NCAA*,[56] "a group of current and former college student-athletes" brought suit in the Northern District of California against the NCAA, which regulates college sports on behalf of its hundreds of member schools.[57] The students challenged "the set of rules that bar student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage."[58]

The district court identified two markets, the "college education market" and the "group licensing market[,]" that were at issue.[59] In the former market, the participants were "FBS football and Division I basketball schools" on one side and "the best high school football and basketball players" in

[55] *Id.* at 777–78.

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

[57] *Id.* at 962–63.

[58] *Id.* at 963.

[59] *Id.* at 965 (internal quotation marks omitted).

the country on the other.[60] The student-athletes in that market could receive scholarships covering education-related goods and services such as "the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services."[61]

In addition, the students received such benefits as "access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences."[62] In return, the schools received the "athletic services" of the students and the right to use "their names, images, and likenesses for commercial and promotional purposes."[63]

The group licensing market, according to plaintiffs, was a market where the students would have, absent the challenged restraints, "be[en] able to sell group licenses for the use of their names, images, and likenesses[,]" as professional athletes do.[64] The restraints on compensation prevented that market from emerging.[65]

The court first examined the effect of the restraints in the college education market, finding that the schools had agreed "to charge every recruit the same price for the bundle of educational and athletic opportunities that they offer: to wit, the recruit's athletic services along with the use of his name, image, and likeness while he is in school."[66] The district court held that "[t]his price-fixing agreement constitutes a restraint of trade."[67] Liability arose despite "[t]he fact that this price-fixing agreement operates by undervaluing the name, image, and likeness rights that the recruits provide to the schools—rather than by explicitly requiring schools to charge a specific

60 *Id.*

61 *Id.*

62 *Id.* at 966.

63 *Id.*

64 *Id.* at 968.

65 *See id.*

66 *Id.* at 988.

67 *Id.*

monetary price."[68] The court noted that antitrust law prohibited "indirect restraints on price[,]" as well as direct price-fixing.[69]

To defend its restraints, the NCAA offered four procompetitive justifications: "(1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets."[70] All of the above justifications were predicated on the role of the restraints in preserving student-athletes as non-professionals who do not receive compensation for their sports services.

The district court rejected the NCAA's argument that the restraints enhanced the competitive balance among collegiate teams.[71] The court stated that the NCAA had provided insufficient evidence "to show that it must create a particular level of competitive balance among FBS football and Division I basketball teams in order to maximize consumer demand for its product" or that the restraints served that goal.[72]

The NCAA also argued that its restrictions increased output—namely, "the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increase[d] the number of FBS football and Division I basketball games played"—in two ways: (1) "by attracting schools with a 'philosophical commitment to amateurism' to compete in Division I[,]" and (2) "by enabling schools that otherwise could not afford to compete in Division I to do so."[73]

The district court found, however, that the NCAA did not submit sufficient evidence to show that a noteworthy number of schools were attracted to Division I specifically because of its amateurism commitment, and the court noted that some

68 *Id.* at 989.

69 *Id.*

70 *Id.* at 999.

71 *Id.* at 1001–02.

72 *Id.* at 1002.

73 *Id.* at 1003–04.

conferences sought to gain autonomy to make their own rules regarding scholarships.[74] The court's reference to a lack of evidence supporting a "philosophical commitment to amateurism," such as the primacy of education and the subordination of athletics in collegiate "output," seems to imply that it rejected the "philosophical" justification more for a lack of evidentiary support than as a matter of law.

Indeed, the district court found that the "integration of academics and athletics" served as a legitimate competitive goal.[75] The court acknowledged that limiting compensation could help avoid a "wedge" from developing between student-athletes and their fellow students, which should constitute a qualitative justification for the compensation restrictions.[76] Still, the court found that, while "[l]imited restrictions on student-athlete compensation may help schools achieve this narrow procompetitive goal[,] . . . the NCAA may not use this goal to justify its sweeping prohibition on any student-athlete compensation."[77] The court's assessment implied that, although the qualitative justification was cognizable, the justification itself, and the factual and relational ancillarity of the restraints to that justification, were not sufficiently supported by the evidence.

The court was also not convinced "that any schools' athletic programs would be driven to financial ruin or would leave Division I if other schools were permitted to pay their student-athletes."[78] In this portion of the opinion, the court analyzed output primarily in terms of the number of schools participating in Division I athletics.

The NCAA's argument that amateurism was "necessary to maintain the popularity of FBS football and Division I basketball"[79] received the most attention in this and subsequent NCAA opinions. As discussed below, subsequent opinions would focus on the role of amateurism, not in

74 *Id.* at 1004.

75 *Id.* at 1002–03.

76 *Id.* at 980, 1003.

77 *Id.* at 1003.

78 *Id.* at 1004.

79 *Id.* at 1000.

delivering qualitative educational benefits—"studies over sports," for example—but in increasing the number of viewers of athletic contests, whether in person or through some form of media.[80]

Indeed, the district court in *O'Bannon* focused on amateurism solely as a means of driving viewer demand for college athletic contests and thus set the permissible compensation of college athletes for the use of their names, images, and likenesses at a level that would not reduce that demand. The district court enjoined the NCAA from prohibiting compensation up to the full cost of attendance and $5,000 a year, the latter to be placed in trust for recruits until they either left school or ceased being an NCAA-eligible student-athlete.[81]

The court credited NCAA witness statements that their "concerns about student-athlete compensation would be minimized or negated if compensation was capped at a few thousand dollars per year."[82] It justified this limit by explaining that the amount was "comparable to the amount of money that the NCAA permits student-athletes to receive if they qualify for a Pell grant and the amount that tennis players may receive prior to enrollment."[83]

B. The *O'Bannon* Ninth Circuit Opinion

On appeal, the Ninth Circuit accepted the district court's understanding of the purpose of amateurism, finding that "the amateur nature of collegiate sports increases their appeal to consumers[,]" and, therefore, the court's analysis almost exclusively focused on whether the restraints were the least

[80] *See infra* Section V.C.

[81] 7 F. Supp. 3d at 1007–08. The term "cost of attendance" delineated a "school-specific figure defined in the [NCAA] bylaws." *Id.* at 971. It included "the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance." *Id.*

[82] *Id.* at 1008.

[83] *Id.*

restrictive alternatives necessary to "preserv[e] the popularity of the NCAA's product"[84]

As an initial matter, the NCAA, on appeal, argued that the district court ignored another benefit of amateurism—that "amateurism also increases choice for student-athletes by giving them 'the only opportunity [they will] have to obtain a college education while playing competitive sports *as students*.'"[85] The Ninth Circuit rejected this argument on legal grounds not relevant to the issues discussed in this Article, holding that "[n]othing in the plaintiffs' prayer for compensation would make student-athletes something other than students and thereby impair their ability to become student-athletes."[86]

The Ninth Circuit affirmed the portion of the district court's ruling enjoining the NCAA from capping student grant-in-aid caps below the full cost of college attendance. The court found, based in part on the NCAA president's own testimony, that "raising the grant-in-aid cap to the cost of attendance would have virtually no impact on amateurism[,]" since the money would go to students' educational expenses.[87] Moreover, "[n]othing in the record . . . suggested that consumers of college sports would become less interested in those sports if athletes' scholarships covered their full cost of attendance."[88]

By contrast, the court reversed the portion of the district court's ruling allowing schools to place up to $5,000 per year in trust for the student-athletes. The Ninth Circuit held that the evidence below merely showed that "paying students large compensation payments would harm consumer demand more than smaller payments would."[89] The court found that "[t]he

84 O'Bannon v. NCAA, 802 F.3d 1049, 1073 (9th Cir. 2015) (internal quotation marks omitted). The NCAA chose to focus its arguments entirely on amateurism, as opposed to the integration of academics and athletics. *Id.* at 1072.

85 *Id.* at 1072 (alteration in original) (quoting NCAA submission).

86 *Id.* at 1073.

87 *Id.* at 1074–75.

88 *Id.* at 1075.

89 *Id.* at 1077.

difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."[90] Once that line was crossed, the court found, athletes could challenge the limit until the NCAA effectively transitioned "to minor league status."[91]

The Ninth Circuit gave little attention to a qualitative or "philosophical" commitment to amateurism as a means of preserving the proper composition of the product or service that colleges offer to students as primarily educational—again, "studies over sports." Rather, the court focused on the role of amateurism in attracting viewer demand to college athletic contests. As noted, however, that focus may have arisen more from the inadequacy of the presented evidence on the importance of amateurism to the composition of collegiate output than from a rejection as a matter of law of amateurism as a qualitative justification for the rules in question.

C. The *Grant-in-Aid* Case

The Northern District of California revisited the issue of student-athlete compensation in a more recent case, focusing on amateurism primarily as a means of increasing consumer demand. In *Grant-in-Aid*, a group of current and former student athletes again brought suit challenging restraints on compensation imposed by the NCAA rules.[92]

Prior to the trial, the NCAA did raise the following qualitative justification that it did not raise in *O'Bannon*:

> The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for

[90] *Id.* at 1078.

[91] *Id.* at 1078–79.

[92] *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061–62 (N.D. Cal. 2019), *appeal docketed*, Nos. 19-15566, 19-15662 (9th Cir. Mar. 27, 2019). The court in that case found that plaintiffs were not estopped by virtue of *O'Bannon* because: (1) there were certain differences between the classes; (2) the new suit did not concern name, image, and likeness rights; and (3) the rules had changed since the *O'Bannon* decision. *Id.* at 1092–96.

> student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundational principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education.[93]

The court, however, granted summary judgment for the plaintiffs with regard to that justification.[94] The court found that the defendants' expert "did not purport to opine on the impact of the challenged restraints on output or examine data that might support any such opinion."[95] Thus, the court concluded that "[d]efendants' attempt to characterize Dr. Elzinga's opinions as supporting a procompetitive justification he did not directly consider is insufficient to raise a genuine issue of material fact."[96]

As a result, the district court did not address how "improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundational principle" might be cognizable under the rule of reason.[97] Yet again, the NCAA seems to have offered insufficient evidence of both the qualitative justification for the restraint (e.g., amateurism as a foundational principle regarding the "collegiate experience" of "student-athletes, other students, and alumni") and the degree of ancillarity of the restraints to that justification.

In its opinion subsequent to a bench trial, the court conceived of amateurism in quantitative output terms: "Defendants first contend that the challenged rules are procompetitive because they promote the principle of

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93 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-CV-02758-CW, 2018 WL 1524005, at *10 (N.D. Cal. Mar. 28, 2018) (quoting NCAA response to plaintiff interrogatories).

94 *Id.* at *11.

95 *Id.*

96 *Id.*

97 *Id.* at *10.

amateurism, which enhances consumer demand. Defendants argue that consumers value amateurism, and that consumer demand for Division I basketball and FBS football would deteriorate if student-athletes received more compensation."[98] The NCAA's evidence consisted of testimony "regarding the preferences of viewers of college sports."[99]

As the *O'Bannon* district court had, the *Grant-in-Aid* court faulted defendants for failing to provide a clear definition of amateurism.[100] The court pointed to the fact that "[t]he NCAA permits grants-in-aid up to the cost of attendance [and,]… [i]n addition, student-athletes can receive cash or cash-equivalent compensation that exceeds the cost of attendance by thousands of dollars."[101] The court found that this additional compensation "has not led to a reduction in consumer demand for college sports as a distinct product, which continues apace."[102]

The court then turned to the evidence offered by the NCAA to support its position. It found that defendants' economics expert "did not even attempt to examine whether a relationship exists between compensation and consumer demand."[103] Indeed, "[t]he only economic analysis in the record that addresses the impact of changes to student-athlete compensation on consumer demand, that of Dr. Rascher, shows that recent increases in student-athlete compensation, related and unrelated to education, have not decreased consumer demand."[104]

The crucial distinction between college and professional sports was the fact that professional athletes could receive "unlimited cash payments."[105] Therefore, the court found,

98 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1098 (N.D. Cal. 2019), *appeal docketed,* Nos. 19-15566, 19-15662 (9th Cir. Mar. 27, 2019).

99 *Id.*

100 *Id.* at 1098–99.

101 *Id.* at 1099.

102 *Id.* at 1099–1100.

103 *Id.* at 1100.

104 *Id.*

105 *Id.* at 1101.

"some of the challenged compensation rules may have an effect on preserving consumer demand for college sports as distinct from professional sports to the extent that they prevent unlimited cash payments unrelated to education such as those seen in professional sports leagues."[106]

With that holding in mind, the court examined three challenged compensation limits: "(1) the limit on the grant-in-aid at not less than the cost of attendance; (2) compensation and benefits unrelated to education paid on top of a grant-in-aid; (3) compensation and benefits related to education provided on top of a grant-in-aid."[107] The court found that the first and second categories were procompetitive as they "prevent[ed] unlimited cash payments unrelated to education."[108] As for the third category, however, the court held that:

> limits or prohibitions on most other benefits related to education that can be provided on top of a grant-in-aid, such as those that limit tutoring, graduate school tuition, and paid internships, have not been shown to have an effect on enhancing consumer demand for college sports as a distinct product, because these limits are not necessary to prevent unlimited cash compensation unrelated to education.[109]

Under the court's new framework, only such limits as were necessary to maintain amateurism could be maintained, and, as the court clarified, only because doing so enhances consumer demand for college sports.[110] The *Grant-in-Aid* litigation is on appeal before the Ninth Circuit.[111]

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106 *Id.*

107 *Id.*

108 *Id.* at 1102.

109 *Id.*

110 The court found that the "integration" rationale, which was acknowledged as cognizable in *O'Bannon*, did not justify the restraints; defendants had "failed to show that the challenged rules have an effect on promoting integration . . . ." *Id.* at 1102–03.

111 *See* Defendants' Joint Opening Brief, Alston v. NCAA, Nos. 19-15566, 19-15662 (9th Cir. Aug. 16, 2019).

Although the *O'Bannon* district court identified the "college education market" as one of the relevant markets affected by the restraint,[112] courts evaluating the restrictions on student-athlete compensation spent little time discussing college education or its purpose. Instead, courts focused on the measurable, quantitative impact of the restraints: how many more sports consumers watched or attended the games than would have if students received unlimited compensation.[113]

Although the focus by the courts in the *NCAA Cases* on quantifiable impact may have been the result of a failed showing by the NCAA of qualitative justifications,[114] the fact remains that the "gravitational force" of the *NCAA Cases* litigation strongly favors assessing collegiate amateurism solely on quantitative, commercial grounds.[115]

VI. THE ST. LUKE'S HOSPITAL CASE

In the same year as the Ninth Circuit decided *O'Bannon*, the same court limited the consideration of qualitative justifications of a health-care merger in *Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd.* ("*St. Luke's*").[116] In that case, the court deemed the question of whether the merger would lead to improved patient care irrelevant to its competitive analysis.[117] Although that

112 O'Bannon v. NCAA, 7 F. Supp. 3d 955, 968 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

113 *See supra* Part V.

114 *See, e.g., In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-CV-02758-CW, 2018 WL 1524005, at *9–10 (N.D. Cal. Mar. 28, 2018).

115 Since the Taft Lecture occurred on September 27, 2019, the State of California passed a law requiring schools in California to allow students to receive compensation for endorsements, including for their name, image, and likeness rights. In October 2019, the NCAA governing board "directed its three divisions to immediately consider changing the rules governing such benefits for athletes." Brian Costa & Louise Radnofsky, *NCAA Clears Way for Athletes to Earn Endorsement Money*, WALL ST. J. (Oct. 29, 2019), https://www.wsj.com/articles/ncaa-clears-way-to-allow-athletes-to-be-compensated-11572372807 [https://perma.cc/AZ72-5BQY].

116 Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 789–92 (9th Cir. 2015).

117 *Id.* at 791.

analysis was undertaken pursuant to § 7 of the Clayton Act, not § 1 of the Sherman Act or the rule of reason, the legal cognizability of qualitative justifications should not turn on the statutory provision at issue.

At issue in *St. Luke's* was a proposed transaction in which St. Luke's Health Systems Ltd. ("St. Luke's") sought to acquire the assets of Saltzer Medical Group, P.A. ("Saltzer") and sign a professional services agreement with Saltzer's physicians.[118] The FTC, as well as private plaintiffs, brought suit to enjoin the merger.[119] The parties alleged anticompetitive harms in the adult primary care physician market.[120]

The district court noted that "St. Luke's and Saltzer genuinely intended to move toward a better health care system, and expressed its belief that the merger would 'improve patient outcomes' if left intact."[121] Despite those benefits, the district court ultimately enjoined the merger based on the merged entity's resulting market share.[122] An appeal followed.

The Ninth Circuit first discussed the relevant markets. While the parties did not dispute that the adult primary care physician ("PCP") market was the relevant product market,[123] they disagreed on the geographic market.[124] Ultimately, the Ninth Circuit approved the geographic market found by the district court—Nampa County, Idaho—and concluded that the plaintiffs had demonstrated that consumers in that market would continue to utilize St. Luke's even in the event of a price increase.[125]

Regarding the merger's competitive impact, St. Luke's did not challenge the district court's findings that the merger would lead to a significant increase in the Herfindahl-

118 *Id.* at 781–82.

119 *Id.* at 782.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.* at 784.

124 *Id.*

125 *Id.* at 784–85.

Hirschman Index (a measure of market concentration).[126] The Ninth Circuit affirmed the finding that "St. Luke's would likely use its post-merger power to negotiate higher reimbursement rates from insurers for PCP services."[127] It also found, however, that the district court's holding as to whether St. Luke's would raise prices in the "hospital-based ancillary services market" was not supported by the record.[128] Regardless, the Ninth Circuit found that the plaintiffs had proven their prima facie case that the proposed merger would substantially lessen competition.[129]

Turning to St. Luke's rebuttal, the Ninth Circuit first considered whether post-merger efficiencies could be used to justify a merger.[130] It noted that, while some circuit courts had acknowledged the viability of such a defense, none of them had found that efficiencies had offset a prima facie case.[131] The court stated that it was "skeptical about the efficiencies defense in general and about its scope in particular."[132] Still, the Ninth Circuit assumed that, "because § 7 of the Clayton Act only prohibits those mergers whose effect 'may be substantially to lessen competition,' . . . a defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition."[133]

The court nonetheless rejected the efficiencies defense proffered by St. Luke's. Importantly, the Ninth Circuit stated that the merger could not be justified on the ground that it "would allow St. Luke's to better serve patients";[134] rather, the merger must "increase competition or decrease prices."[135] In that regard, the Ninth Circuit acknowledged that the district

126 *Id.* at 786.

127 *Id.*

128 *Id.* at 787.

129 *Id.* at 787–88.

130 *Id.* at 789–92.

131 *Id.* at 789.

132 *Id.* at 790.

133 *Id.* (citing 15 U.S.C. § 18) (citation omitted).

134 *Id.* at 791.

135 *Id.*

court had found that the merger would "likely [have a] "beneficial effect . . . on patient care."[136] But the Ninth Circuit noted that the district court also found that "reimbursement rates for PCP services likely would increase."[137]

The Ninth Circuit also agreed with the district court that the claimed efficiencies of transitioning to integrated care and establishing a shared electronic record were not "merger-specific."[138] Even if, however, the proposed remedies were merger-specific, the efficiencies defense "would nonetheless fail."[139] Importantly for the legal cognizability of qualitative justifications, the Ninth Circuit found that, "[a]t most, the district court concluded that St. Luke's might provide better service to patients after the merger. That is a laudable goal, but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations."[140]

The *St. Luke's* court effectively decided that, in evaluating the merger of health care providers in a given community, the court was not legally permitted to consider as part of its competitive analysis the qualitative impact of the merger on health care in that community. The Ninth Circuit affirmed the district court's decision that higher "reimbursement rates for PCP services" could be considered in evaluating the merger, but improvements in patient care could not.[141]

By focusing solely on quantitative metrics, the court declined to consider whether the merger, quite literally, would improve the welfare of consumers in the relevant market—the quality of healthcare available to those consumers. The Ninth Circuit also did not recognize that the projected increase in reimbursement rates post-merger would occur at the same time as a change in the quality of the services would occur. Whether that price increase would remain, net of the increase in quality, was not addressed.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.* at 791–92.

140 *Id.* at 792.

141 *Id.* at 791–92.

VII. CONCLUSION

In the cases discussed above, with the exception of *Brown University*, the courts have generally eschewed qualitative justifications for a challenged restraint in favor of focusing on the quantitative impact on price or units of output. That course seems to reflect a skepticism of the validity of qualitative justifications for restraints with negative price or unit-output effects, which in turn appears to arise from a narrow, quantitative understanding of output and a preference for that which is empirically verifiable.

We suggest that such an understanding of output is unduly restrictive and reductive. The rule of reason as articulated by Judge Taft in an era less enamored of quantitative analysis and empirical verification would assess (1) the relationship of the qualitative justification for the restraint to the legitimate purpose of the enterprise; (2) the evidence in support of the qualitative justification; and (3) the degree of ancillarity of the restraint to that justification. If the restraint is claimed to cause, or to have caused, a negative price effect, the evidence in support of the claimed effect should be assessed as should the comparability of the pre- and post-restraint prices given the change in quality that accompanied the restraint.