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Amateurism and the NCAA: How a Changing Market Has Turned Caps on Athletic Scholarships into an Antitrust Violation

Daniel Laws
University of Richmond

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INTRODUCTION

When asked about why student-athletes should receive compensation, Jay Bilas, an ESPN analyst, responded with a metaphor:

> [I]f your kid is the star of *Home Alone*, and they say "Look, we are just going to pay for expenses. And if they do a really good job, maybe when they're older . . . they can get paid then." You would say, "No, no—this is not the school play. This is a multi-billion dollar business."[1]

The college athletics industry is worth $16 billion, and it only continues to grow as the number of collegiate students and student-athletes increases.[2] The governing body of collegiate athletics, the National Collegiate Athletic Association ("NCAA"), prides itself on the amateur status of its athletes.[3] To preserve its athletes' amateurism, the NCAA mandates that its member institutions agree not to compensate student-athletes with athletic scholarships that are above the university's cost of attendance.[4] Typically, this type of horizontal agreement—one between competitors that artificially caps the amount a worker can earn—violates section 1 of the Sherman Act as an unreasonable trade

1. Maurice Peebles, *7 Common Sense Reasons Why College Athletes Should be Paid (According to Jay Bilas)*, COMPLEX (Dec. 3, 2015), http://www.complex.com/sports/2015/12/jay-bilas-interview/.

2. *See* U.S. CENSUS BUREAU, CPS HISTORICAL TIME SERIES TABLES ON SCHOOL ENROLLMENT fig. A-7 (2015), https://www.census.gov/hhes/school/data/cps/historical/FigureA-7_2015.pdf; Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower*, BLOOMBERG BUSINESSWEEK (Feb. 27, 2014, 7:25 PM), http://www.bloomberg. com/ news/articles/2014-02-27/in-fake-classes-scandal-unc-fails-its-athletes-whistle-blower.

3. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2009–10 NCAA DIVISION I MANUAL, OPERATING BYLAWS 12 (2009), http://www.ncaapublications.com/productdownloads/D110.pdf.

4. *See id.* at 172.

restraint.[5] The NCAA, however, is permitted to continue capping athletic scholarships, and thus preserving the amateurism of its athletes, because the Ninth Circuit has determined that the procompetitive effects of scholarship caps outweigh the anticompetitive effects.[6] The time has come to recognize that the injustice of withholding due compensation from athletes who are generating billions of dollars in revenue for universities outweighs the NCAA's interest in preserving amateurism.

Currently, in *In re National Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation* ("*Jenkins v. NCAA*"), a class of current and former NCAA football and basketball players are directly challenging the NCAA's caps on athletic scholarships.[7] *Jenkins v. NCAA* provides the Northern District of California an opportunity to reevaluate its previous decisions and recognize that the preservation of amateurism is no longer essential or necessary to the success of collegiate athletics.[8] Because the preservation of amateurism no longer has strong procompetitive effects, the court should find that the anticompetitive effects of caps on athletic scholarships, which exist to preserve amateurism, outweigh the procompetitive effects.[9] Thus, caps on athletic scholarships violate the Sherman Act as unreasonable restraints on trade.[10] Without caps on athletic scholarships, a free market system would govern the recruitment of student-athletes.[11] Student-athletes and many third parties would prefer a free market system because it would pit universities against each other when bidding for the services of an athlete, resulting in student-athletes finally receiving fair compensation.[12]

This comment will first provide a brief overview of relevant antitrust law, including the tests used to assess potential violations

5. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 99 (1984).

6. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074–75, 1079 (9th Cir. 2015).

7. Second Amended Complaint at 2, *In re* Nat'l Collegiate Athletic Ass'n (NCAA) Athletic Grant-In-Aid Cap Antitrust Litig., No. 4:14-md-02541-CW (N.D. Cal. Feb. 13, 2015) [hereinafter Second Amended Complaint, *Jenkins v. NCAA*].

8. *See id.* at 1, 28.

9. *See, e.g.*, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 999–1001 (N.D. Cal. 2014) (holding that amateurism does not justify the rigid compensation restrictions imposed by the NCAA).

10. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 28.

11. *See id.*

12. *See id.*

of section 1 of the Sherman Act. Next, it will discuss the background and relevant antitrust litigation involving the NCAA and student-athletes' attempts to receive compensation. Finally, because of increasing revenues and the decreasing importance of amateurism, this comment will propose that the courts alter their reasoning when conducting a Rule of Reason analysis and require the NCAA to remove caps on scholarships.

I. RELEVANT ANTITRUST LAW

Antitrust law is designed to promote trade and prevent restraints of free competition.[13] Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[14] A section 1 violation has three elements: (1) an agreement, which (2) unreasonably restrains competition, and (3) affects interstate commerce.[15] While the first element of a section 1 offense can often be the most difficult to prove,[16] it is not usually disputed in NCAA litigation because the NCAA's horizontal agreements are "documented and published in the NCAA Division I Manual (the NCAA's rule book) and the rulebooks of each of the Power Conferences."[17] In fact, both elements one and three are often not in dispute during litigation involving the NCAA, because, in addition to the horizontal agreements being published in the NCAA's rule books, collegiate athletics unquestionably involve a substantial volume of interstate trade and commerce, including billions of dollars in collective annual expenditures.[18]

Thus, courts are generally focused solely on the second element of a section 1 offense. To a certain extent, all contracts restrain trade, so to determine if an agreement *unreasonably* restrains trade, the court can apply one of two standards: (1) a per se

13. Apex Hosiery Co. v. Leader, 310 U.S. 469, 493, 493 n.15 (1940).

14. 15 U.S.C. § 1 (2012).

15. *See, e.g.*, Lee v. Life Ins. Co. of N. Am., 829 F. Supp. 529, 535 (D.R.I. 1993), *aff'd*, 23 F.3d 14 (1st Cir. 1994) ("[T]o state a valid claim under § 1 of the Sherman Act, a plaintiff must allege three elements: (1) the existence of a contract, combination or conspiracy; (2) that the agreement unreasonably restrained trade under the *per se* or rule of reason analysis; and (3) that the restraint affected interstate commerce.").

16. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761–62 (1984).

17. Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 8.

18. *See id.* at 7–8.

standard or (2) a Rule of Reason standard.[19] Despite their differences, both standards are focused on the same purpose: to judge "the competitive significance of [a trade] restraint."[20]

Per se violations are less common and include "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable . . . ."[21] Under a per se analysis, if the plaintiff can show that the alleged conduct falls into a certain category, there is an antitrust violation merely because the conduct occurred.[22] Essentially, per se violations are trade practices that are "unlawful in and of themselves," and include price fixing, division of markets, group boycotts, and tying arrangements.[23] Although horizontal price fixing practices are normally considered illegal per se, courts do not assess NCAA horizontal price fixing schemes under a per se standard because the NCAA is involved in "an industry in which horizontal restraints on competition are essential if the product is to be available at all."[24] This determination allows the courts to assess antitrust litigation involving the NCAA under the less stringent Rule of Reason standard.[25]

As previously stated, the prevailing standard of analysis for section 1 violations of the Sherman Act, and the standard most commonly applied by the courts in cases involving the NCAA, is the Rule of Reason standard.[26] The court uses the Rule of Reason, a totality of the circumstances test, to determine whether a trade practice is in fact anticompetitive and, thus, unreasonably restrains trade.[27] As Justice Brandeis stated, "[t]he true test . . . is whether the restraint imposed . . . merely regulates and . . . promotes competition or whether it . . . may suppress or even destroy

19. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103 (1984).

20. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

21. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

22. *See id.*

23. *Id.*

24. *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 100–01.

25. *See* Joy Blanchard, *Flag on the Play: A Review of Antitrust Challenges to the NCAA. Could the New College Football Playoff Be Next?*, 15 VA. SPORTS & ENT. L.J. 1, 5 (2015).

26. *See* Cameron D. Ginder, *NCAA and the Rule of Reason: Analyzing Improved Education Quality as a Procompetitive Justification*, 57 WM. & MARY L. REV. 675, 679 (2015).

27. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 5 (2006) (only applying per se liability to agreements that are "so plainly anticompetitive").

competition."[28] Thus, by using a totality of the circumstances test, courts can analyze and consider factors such as, "facts peculiar to the business," "the nature of the restraint," and "the reason for adopting the particular remedy" when determining the extent of control exercised by a defendant and whether a market has been suppressed by a given restraint.[29] The steps to prove a prima facie section 1 violation under the Rule of Reason analysis are (1) "the plaintiff must prove the anticompetitive effect of the restraint," (2) "the defendant then may present evidence to show that the procompetitive effects of the restraint outweigh the anticompetitive effects of the rule," and, if the defendant has met the burden, (3) "the plaintiff may show that the procompetitive effects may be achieved in a less restrictive manner."[30] This final step of the Rule of Reason examines "whether comparable benefits could be achieved through a substantially less restrictive alternative."[31] "[T]he issue is whether the restriction actually implemented is 'fairly necessary' in the circumstances of the particular case, or whether the restriction 'exceed[s] the outer limits of restraint reasonably necessary to protect the defendant.'"[32]

The anticompetitive horizontal agreements that the NCAA has entered into "are neither secret, nor in dispute,"[33] so, although it is usually difficult to prove, there is little question that the NCAA has engaged in an agreement with competitors to restrain trade. Thus, the central question in NCAA antitrust litigation is whether the procompetitive effects of horizontal agreements outweigh the anticompetitive effects of the trade restraint.

II. OVERVIEW OF RELEVANT NCAA CASE LAW

A. NCAA v. Board of Regents of the University of Oklahoma

Modern antitrust issues involving the NCAA began with *NCAA v. Board of Regents of the University of Oklahoma*.[34] In 1977, the

28. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

29. *Id.*

30. Blanchard, *supra* note 25, at 4 (quoting Stephanie M. Greene, *Regulating the NCAA: Making Calls under the Sherman Act and Title IX*, 52 ME. L. REV. 82, 86 (2000)).

31. United States v. Brown Univ., 5 F.3d 658, 679 (3rd Cir. 1993).

32. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1248–49 (3rd Cir. 1975) (citations omitted).

33. Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 8.

34. 468 U.S. 85 (1984).

NCAA changed its approach to television plans.[35] Previously, the NCAA's "Television Committee" oversaw negotiations with broadcasting companies based on the assumption that television had an adverse effect on college football attendance.[36] But, in 1977, the NCAA adopted the "principles of negotiation" for future television negotiations.[37] The new plan removed the Television Committee's influence over the process.[38] The result was a four-year television contract between the American Broadcasting Company ("ABC") and the NCAA.[39] The contract limited the total number of games that could be televised and games in which any one team could appear on television.[40]

Major football programs, angered that the television plan limited their exposure and their ability to negotiate television deals independently, formed the College Football Association ("CFA") "to promote the interests of major football playing schools within the NCAA structure."[41] The CFA advocated for a stronger say in the formulation of the television contracts and developed its own independent television plan with the National Broadcasting Company ("NBC").[42] In response, the NCAA announced it would take disciplinary action against "any CFA member that complied with the CFA-NBC contract."[43] This disciplinary action would affect all sports offered by the CFA's universities, not just football.[44] In response, the CFA obtained a preliminary injunction preventing the NCAA from initiating any disciplinary actions or stopping the CFA from fulfilling its contractual obligation to NBC.[45] The NCAA then sued, hoping to establish its practices as valid procompetitive restraints and quash the injunction.[46] The NCAA argued that the television contract was a valid horizontal agreement because its procompetitive effects outweighed its negative effects.[47] More specifically, it argued that the television contract

35. *Id.* at 90–91.
36. *See id.* at 90.
37. *Id.* at 91.
38. *See id.* at 90–91.
39. *Id.* at 91.
40. *Id.* at 94.
41. *Id.* at 89.
42. *Id.* at 94–95.
43. *Id.* at 95.
44. *Id.*
45. *Id.*
46. *See id.*
47. *See id.* at 97–98.

increased ticket sales and maintained a competitive balance among amateur athletic teams, and therefore, the television contract ultimately helped college football more than it restricted it.[48]

The district court and court of appeals disagreed with the NCAA and determined that it was a "classic cartel," that was violating the Sherman Act by fixing the amount each school could receive from a broadcast and how many times they could appear on television.[49] Simply put, the television contract's limitation on price and output was not offset by the NCAA's procompetitive justifications.[50] The NCAA's argument was found to be akin to an argument that "competition will destroy the market," which is inconsistent with the purpose of the Sherman Act.[51]

The Supreme Court agreed with the district and appellate courts.[52] The Court applied the Rule of Reason analysis to determine that the limiting of price and exposure was an unreasonable restraint on trade.[53] While the Court recognized that the NCAA requires "ample latitude" to maintain the revered tradition of amateurism in college sports and "most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . and therefore procompetitive . . . , curtailing output and blunting the ability of member institutions to respond to consumer preference" restricts rather than enhances collegiate athletics.[54]

With the ability to form independent television contracts, college athletics exploded into a lucrative industry.[55] Better performance on the field and large fan bases made a university more attractive to a television network, which, in turn, brought in more money to the university.[56] Thus, universities began focusing more

48. *See id.*

49. *Id.* at 95–97.

50. *See id.* at 120.

51. *Id.* at 97.

52. *Id.* at 120.

53. *See id.* at 113.

54. *Id.* at 117, 120.

55. *See* Jon Solomon, *NCAA Supreme Court Ruling Felt At* O'Bannon *Trial 30 Years Later*, CBS SPORTS (June 26, 2014), http://www.cbssports.com/college-football/news/ncaa-supreme-court-ruling-felt-at-obannon-trial-30-years-later/.

56. *See* Vadim Kogan & Stephen A. Greyser, *Conflicts of College Conference Realignment: Pursuing Revenue, Preserving Tradition, and Assessing the Future* 1 (Harv. Bus. Sch., Working Paper No. 14-073, 2014), http://www.hbs.edu/faculty/Publication%20Files/14-073_ea70abf6-d99c-4529-96b2-e8bef262a4e6.pdf (pointing out that, for universities, there are many economic benefits to joining a strong conference, including play against better competition and large TV contracts).

on bringing in the best recruits to improve their on-field product.[57] However, because of the caps on athletic scholarships, athletic departments had to find other ways to attract recruits rather than simply providing larger compensation packages than their competitors.[58] This led to drastic increases in coaches' salaries and spending on athletic facilities as universities began competing in an "arms race" to provide the best non-compensatory benefits to student-athletes joining their athletic programs.[59] This system naturally benefitted larger universities who were able to utilize their larger fan bases, number of donors, and television revenue to fund the new facilities and coaches.[60]

The decision also allowed for individual universities to bid against each other for the right to appear on national television.[61] This created a system that encouraged universities to band together and pool their negotiating power against broadcasting companies to maximize their exposure and revenue.[62] This created "haves" and "have-nots" within the college athletics market.[63] The universities with large fan bases and commercialized athletic departments banded together to form "power" conferences.[64] These conferences packaged together their large universities to in-

57. *See* Nicole R. Letawsky et al., *Factors Influencing the College Selection Process of Student-Athletes: Are Their Factors Similar to Non-Athletes*, 37 C. STUDENT J. 604, 605 (2003); *see also* KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, COLLEGE 101: A PRIMER ON MONEY, ATHLETICS, AND HIGHER EDUCATION IN THE 21ST CENTURY 16–17 (2009), http://www.knightcommission.org/images/pdfs/cs101_ch_4.pdf (noting the drastically increased spending by athletic departments since 1995, and that many commentators consider it a recruiting expense) [hereinafter KNIGHT COMM'N].

58. *See, e.g.*, KNIGHT COMM'N, *supra* note 57 (noting that an "amenities race" in collegiate athletics is intended to attract big name recruits); ADAM HOFFER ET AL., THE NCAA ATHLETICS ARMS RACE: THEORY AND EVIDENCE 2, 16 (2014), http://busecon.wvu.edu/phd_economics/pdf/14-29.pdf (noting that the substantial resources invested in paying coaches and maintaining facilities are used to attract recruits, and on-field success leads to increased television contracts, alumni donations, and applications to the university).

59. *See* HOFFER ET AL., *supra* note 58, at 16.

60. *See id.* at 2.

61. *See* HOWARD P. CHUDACOFF, CHANGING THE PLAYBOOK: HOW POWER, PROFIT, AND POLITICS TRANSFORMED COLLEGE SPORTS 52–53 (2015).

62. *See* Kogan & Greyser, *supra* note 56, at 1, 9–10.

63. Scott Hirko & Kyle V. Sweitzer, *The Business Model of Intercollegiate Sports: The Haves and Have-*Nots, *in* INTRODUCTION TO INTERCOLLEGIATE ATHLETICS 147, 148 (Eddie Comeaux ed., 2015); *see, e.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, 2004–2010 NCAA DIVISION I INTERCOLLEGIATE ATHLETIC PROGRAMS REPORT: REVENUES & EXPENSES 8 (2011), http://www.ncaapublications.com/productdownloads/2010RevExp.pdf (noting that "the [G]ap between the 'profitable' programs and the remainder continued to grow").

64. *See* Hirko & Sweitzer, *supra* note 63 at 154; Brett McMurphy, *Power Five Coaches Polled on Games*, ESPN (Aug. 7, 2014), http://www.espn.com/college-football/story/_/id/11320309/majority-power-five-coaches-want-power-five-only-schedules.

crease leverage at the negotiating table, which resulted in even more lucrative television contracts and revenue.[65] Thus, these "haves" were able to further differentiate themselves from the "have-nots," who were unable to pool together enough negotiating power to form the same lucrative television contracts the "haves" secured.[66]

Some credit this decision with both establishing the Rule of Reason as the dominant standard with which to determine if NCAA trade restraints are unreasonable, and for starting an "arms race" amongst the NCAA's member institutions to provide the best non-compensatory benefits to recruits.[67] This in turn created the current system of "haves" and "have-nots," as schools were forced to find unique ways to differentiate themselves from the competition, rather than simply provide increased compensation packages to recruits.[68]

B. White v. NCAA

In 2006, former football and basketball student-athletes brought a class action suit against the NCAA alleging that grant-in-aid ("GIA") caps on athletic scholarships "imposed a lower standard of living and significant hardships on many student athletes."[69] The former student-athletes sought a removal of the GIA cap, and argued that a university's desire to reduce costs does not justify a cap on athletic scholarships.[70] Thus, the GIA scholarship cap was a horizontal agreement that should be considered an unreasonable restraint on trade and a violation of the Sherman Act.[71] The plaintiffs believed that, without the GIA cap, there would be "competitive forces" centered on athletic financial aid packages and not just coaches and athletic facilities.[72] This would

65. *See* Hirko & Sweitzer, *supra* note 63, at 154.

66. *See id.* at 152–53.

67. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100-01 (1984); Hirko & Sweitzer, *supra* note 63, at 147.

68. *See* Hirko & Sweitzer, *supra* note 63, at 148, 156–58.

69. Second Amended Complaint at 3, 6–7, White v. Nat'l Collegiate Athletic Ass'n, No. CV 06-0999 RGK (MANx) (C.D. Cal. Sept. 8, 2006) [hereinafter Second Amended Complaint, *White v. NCAA*].

70. *Id.* at 4, 29.

71. *Id.* at 22, 25.

72. *Id.* at 23–24.

lead to more generous scholarships as universities competed with each other for the services of student-athletes.[73]

However, the parties in *White* reached an out-of-court settlement,[74] so the court never answered the question of whether scholarship caps were an unreasonable restraint on trade and, accordingly, a violation of antitrust law. Parties settle for any number of reasons, and while the possibility of treble damages was looming over the NCAA, so was "the potential loss of control over the direction of its grant-in-aid program."[75] Ultimately, the $218 million settlement[76] quickly expired and, without a decision from the court prohibiting the use of the GIA scholarship cap, the NCAA quickly returned to its previous practice of capping scholarships below the full cost of attendance ("COA").[77]

C. *The College Athletes Players Association*

College athletes who bring lawsuits against the NCAA challenging caps on scholarships generally do so because they want the right to receive compensation above the established scholarship cap.[78] With that goal in mind, rather than going through the traditional court system, eighty-five players from the Northwestern football team, who were on full grant-in-aid scholarships, filed a petition with the National Labor Relations Board ("NLRB") to be classified as employees of Northwestern.[79]

Instead of challenging the NCAA under the Sherman Act, the plaintiffs in *Northwestern University* were interested in the right to form a labor union.[80] As a private university, the athletes at

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73. *Id.* at 24.

74. Ron Zapata, *NCAA, Athletes End Antitrust Suit With $18.9M Deal*, LAW360 (Jan. 30, 2008), http://www.law360.com/articles/45673/ncaa-athletes-end-antitrust-suit-with-18-9m-deal.

75. Thomas A. Baker III et al., *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 96 (2011).

76. Zapata, *supra* note 74.

77. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 23.

78. *See, e.g.*, Second Amended Complaint, *White v. NCAA*, *supra* note 69, at 3–4, 6–7 (current and former student-athletes challenging scholarship caps, which "imposed a lower standard of living and significant hardships on many student athletes").

79. *See* Northwestern Univ., 362 N.L.R.B. 167, 1–2 (2015).

80. *See* John Wolohan, *College Athletes Players Association v. Northwestern University*, LAWINSPORT (Apr. 25 2014), http://www.lawinsport.com/articles/regulation-a-governance/item/college-athletes-players-association-v-northwestern-university.

Northwestern were uniquely positioned to do this,[81] and, similar to professional athletes, the football players wished to form a union to gain the right to collectively bargain with their employer.[82] Through an eventual collective bargaining agreement, the athletes wanted, among other things, scholarships that covered the full COA, assistance with degree completion, and better medical coverage.[83]

After initially being classified as employees and granted the right to unionize, an NLRB Review Board decided to take a second look at the case.[84] While the NLRB Review Board did not ultimately reverse the initial Board's decision, it effectively did so by refusing to exercise jurisdiction in the case.[85] The ultimate goal of the NLRB is to promote uniformity, and by allowing one athletic team at one university to unionize, the NLRB Review Board determined it would be working against that goal.[86] Thus, because the initial Board's decision would promote instability, the Review Board held that exercising jurisdiction was not reasonable, and deference to the NCAA was appropriate.[87] The convoluted structure and complex issues associated with the NCAA contributed to the NLRB Review Board's decision to not issue a binding decision over it.[88] From the football players' perspective, however, the NLRB Review Board's decision had the same effect as denying their petition to be classified as employees because they were still denied the right to unionize.[89]

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81. *See Northwestern Univ.*, 362 N.L.R.B. 167, at 5.

82. *See* Wolohan, *supra* note 80.

83. *See What We're Doing*, COLL. ATHLETES PLAYERS ASSOC., http://www.collegeathletespa.org/what (last visited Apr. 5, 2017).

84. *See Northwestern Univ.*, 362 N.L.R.B. 167, at 1.

85. *Id.*

86. *Id.* at 5.

87. *Id.*

88. *See id.*; *see also* Brian Kurtz, *NLRB Takes a Knee in Northwestern University Case*, 26 No. 3 ILL. EMP. L. LETTER 3 (2015) (pointing out that a ruling by the NLRB classifying student-athletes as employees would create "two tiers of competitors" within college athletics because of the difference between public and private universities); Sharon Terlep, *Inside the Doors of the NCAA*, WALL ST. J. (Oct. 24 2014, 5:53 PM), http://www.wsj.com/articles/inside-the-doors-of-the-ncaa-1414187475 (noting that the NCAA's convoluted structure contributes to its ineffective and insular nature).

89. *See* Michael McCann, *Breaking Down Implications of NLRB Ruling on Northwestern Players Union*, SPORTS ILLUSTRATED (Aug. 17, 2015), http://www.si.com/college-football/2015/08/17/northwestern-football-players-union-nlrb-ruling-analysis.

Although the NLRB only has jurisdiction over private employers, its decision could have set off a chain reaction.[90] If Northwestern student-athletes were classified as employees and allowed to unionize, then athletes at other private universities would have the precedent necessary to file their own suits.[91] Inevitably, public universities would not be far behind in order to ensure the competitiveness of their athletic teams. Unfortunately, some state legislatures have expressly stated that student-athletes enrolled in their state's public universities are not employees of their schools.[92] This entrenchment of the current status quo by state legislatures is not likely to change.[93]

D. O'Bannon v. National Collegiate Athletic Association

As Rick Reilly of ESPN stated, "the NCAA has very clear rules: Everybody and their gastroenterologists can make money off" of student-athletes, except the athletes themselves.[94] Until recently, this included video game makers, who were using student-athletes' likenesses to make video games more realistic.[95] In 2013, the plaintiffs in a consolidated case involving current and former NCAA football and basketball players were granted certification to bring a class-action suit challenging the use of their likenesses in NCAA-sanctioned video games.[96] Rather than simply seeking to end the practice, the plaintiffs sought to receive compensation for the use of their likenesses, and thus, challenged the NCAA regulations that prevented student-athletes from receiving compensation above the scholarship cap.[97] They argued "that the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their [names, images, and likenesses], were an illegal restraint of trade under Section 1 of the Sherman Act."[98]

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90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.* (noting how student-athletes' status depends largely upon the state's labor laws).

94. Rick Reilly, *Not a Good Sign*, ESPN (Aug. 14, 2013), http://www.espn.com/college-football/story/_/id/9567169/rick-reilly-ncaa-autographs.

95. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055, 1067 (9th Cir. 2015).

96. *Id.* at 1055–56.

97. *Id.* at 1055.

98. *Id.*

Among other arguments, the NCAA contended that the regulations capping scholarships served the legitimate procompetitive purposes of preserving amateurism and promoting the integration of academics and athletics.[99] The NCAA believed that preserving amateurism has always been a core principle of college athletics and "is a key driver of college sports' popularity with consumers and fans."[100] Thus, the NCAA argued that if student-athletes were able to receive compensation above their scholarships and lose amateur status, it would lose the appeal of its product and schools would not be able to afford to offer the range of athletic programs that they currently do.[101]

The district court agreed with the plaintiffs.[102] It questioned the NCAA's "longstanding commitment to amateurism" because the NCAA does not consistently adhere to a single definition of amateurism.[103] The NCAA's "malleable" definition of amateurism simply did "not justify the rigid prohibition on compensating student-athletes."[104] Although the district court found that amateurism is not the "*primary* driver of consumer demand for college sports" and "consumers are primarily attracted to college sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country," it recognized that amateurism "plays some role in preserving 'the popularity of the NCAA's product.'"[105] The district court seemed to say that amateurism no longer has the strong procompetitive effect that it once did, and, thus, concluded that student-athletes could receive scholarships covering the full COA and a small additional amount of deferred cash compensation up to $5000 per year.[106]

The Ninth Circuit largely agreed with the district court, but made some key distinctions.[107] While the Ninth Circuit concluded that NCAA regulations designed to preserve amateurism are not presumptively valid, it determined that "there is a concrete pro-

99. *See id.* at 1058–59.
100. *Id.* at 1058.
101. *See id.* at 1072–73, 1073 n.16.
102. *See id.* at 1056.
103. *Id.* at 1058.
104. *Id.* at 1058, 1082.
105. *Id.* at 1059 (quoting O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 977–78, 1005 (N.D. Cal. 2014)).
106. *See id.* at 1060–61.
107. *See id.* at 1079.

competitive effect the NCAA's commitment to amateurism."[108] The Ninth Circuit held that the district court "underestimated the NCAA's commitment to amateurism," and, after conducting its own Rule of Reason analysis, affirmed that scholarships should be increased to COA, but the additional $5000 per year in cash compensation was unwarranted, and improperly implicated the NCAA's interest in preserving amateurism.[109] The court also concluded that scholarship caps largely have no effect on the integration of academics and athletics.[110] Thus, while the NCAA has an interest in integrating academics and athletics, repealing the scholarship cap would not implicate that concern.[111] Interestingly, the court did not find that compensation above the scholarship cap was improper as a matter of law, but rather that the district court's conclusion that student-athletes could receive an additional $5000 per year was simply unfounded.[112] This leaves the possibility open that a student-athlete compensation package could be "'virtually as effective' for that market as being [an] amateur," which would satisfy the court's concerns.[113] For simplicity, the rest of this comment will refer to the district court's decision in *O'Bannon* as *"O'Bannon I"* and the appellate court's decision in *O'Bannon* as *"O'Bannon II."*

E. Jenkins v. NCAA

Jenkins v. NCAA is unique because it is still pending, but raises many of the same questions regarding the NCAA's stance on amateurism as the previous cases discussed.[114] The *Jenkins v. NCAA* plaintiffs attempt to answer the court's concerns from *O'Bannon II.* Similar to the *O'Bannon* plaintiffs, the *Jenkins v. NCAA* plaintiffs in are current and former NCAA football and basketball players who are questioning the NCAA regulations that place a cap on the amount of athletic scholarship a student-athlete can earn.[115] They claim that these scholarship caps act as

108. *Id.* at 1073.
109. *Id.* at 1073–74, 1079
110. *See id.* at 1072–73.
111. *See id.* at 1072, 1075.
112. *See id.* at 1078–79.
113. *See id.* at 1076 (quoting O'Bannon v. Nat'l Collegiate Athlete Ass'n, 7 F. Supp. 3d 955, 1005 (N.D. Cal. 2014)).
114. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 18.
115. *See id.* at 2.

perpetual horizontal price-fixing agreements that are an unreasonable restraint on trade and, therefore, a violation of the Sherman Act.[116] The plaintiffs argue that the scholarship cap restraint is unreasonable because preserving amateurism no longer serves the strong procompetitive purpose that it once did.[117] Fans of college athletics care far more about their connection to the local university and the performance of the team than the amateur status of the athletes.[118] The *Jenkins v. NCAA* plaintiffs ask for a permanent injunction to prevent the NCAA from continuing to enforce scholarship caps.[119] They claim that a permanent injunction would force the NCAA's institutions to engage in a free market system where "schools would compete in recruiting student-athletes by providing more generous compensation."[120] The plaintiffs' argument is based on the idea that student-athletes, encouraged by increasing public support, will continue to challenge scholarship caps until they are eventually repealed.[121]

After the court's decision in *O'Bannon II*, the NCAA moved for a judgment on the pleadings. The NCAA believed that the Ninth Circuit's decision in *O'Bannon II* foreclosed "offering [student-athletes] cash sums untethered to educational expenses."[122] The *Jenkins v. NCAA* court disagreed.[123] Although the case is still pending, in an order denying the motion for judgment on the pleadings, the district court interpreted *O'Bannon II* as limiting the types of relief that plaintiffs may seek, rather than foreclosing all types of relief the *Jenkins v. NCAA* plaintiffs could receive.[124] Thus, in the district court's interpretation, *O'Bannon II* only foreclosed one type of relief: "cash compensation untethered to educational expenses."[125] The two key questions for commentators become whether the district court's interpretation of *O'Bannon II* is correct and, if so, whether there is a way to compensate student-

116. *See id.*

117. *See id.* at 1.

118. *See O'Bannon*, 802 F.3d at 1059; *O'Bannon*, 7 F. Supp. at 978.

119. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 2.

120. *In re* Nat'l Collegiate Athletic Ass'n (NCAA) Athletic Grant-In-Aid Cap Antitrust Litigation [Jenkins v. NCAA], No. 14-md-02541-CW, slip op. at 3 (N.D. Cal. Aug. 5, 2016) (order denying motion for judgment on the pleadings).

121. *Cf. O'Bannon*, 802 F.3d at 1079.

122. *Jenkins v. NCAA*, slip op. at 5 (order denying motion for judgment on the pleadings) (quoting *O'Bannon*, 802 F.3d at 1078).

123. *Id.*

124. *Id.*

125. *Id.*

athletes above COA scholarships while keeping that compensation tethered to educational expenses.

III. HOW THE COLLEGE SPORTS MARKET HAS GROWN TO CAUSE THE ANTICOMPETITIVE EFFECTS OF SCHOLARSHIP CAPS TO OUTWEIGH THE PROCOMPETITIVE EFFECTS

Anytime scholarships are challenged under antitrust law, the NCAA's interest in preserving amateurism comes under close scrutiny because, invariably, the court's view of amateurism determines whether caps on athletic scholarships are found to be an unreasonable restraint on trade. Truly, when scholarship caps are challenged, the crux of the court's Rule of Reason analysis revolves around whether amateurism's procompetitive effects outweigh its negative effects.[126]

Based simply on precedent, *Jenkins v. NCAA*, currently being litigated, is not likely to succeed.[127] The plaintiffs seek relief that is untethered to educational expenses, which is foreclosed by the district court's current interpretation of *O'Bannon II*.[128] However, *Jenkins v. NCAA* may simply have come before its time. Rather than being an outlier, the district court's decision and logic in *O'Bannon I* could be a sign of things to come. The college athletics industry continues to grow, and, as the industry continues to make billions of dollars off athletes who receive comparatively limited and insignificant compensation, the public will continue to increase the pressure it puts on the courts and on the NCAA to provide the athletes with better compensation.[129] Simply put, as the money continues to increase, it becomes harder and harder to justify withholding it from the athletes who generate the revenue.[130] Most importantly, though, is that recent studies have shown that the fans care far more about their connection to a local university and the university's performance on the field than

126. *See O'Bannon*, 802 F.3d at 1053.

127. *See id.* at 1075, 1079 (holding that the procompetitive effects of amateurism outweigh the anticompetitive effects, thus the NCAA regulations precluding student-athletes from receiving compensation above their athletic scholarships are not an unreasonable restraint on trade).

128. *Jenkins v. NCAA*, slip op. at 5 (order denying motion for judgment, on the pleadings).

129. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7 at 19; *O'Bannon*, 802 F.3d at 1079.

130. *See* MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 216–18 (1st ed. 2000).

whether the athletes are amateurs.[131] This is a recent and essential development in collegiate athletics because it invalidates the court's underlying reasoning for upholding scholarship caps.[132] If amateurism is no longer the driving force behind the success of college athletics, the court needs to adjust its Rule of Reason analysis to account for the changing market. In determining how the court should change its analysis, one must first understand how it currently views the procompetitive and anticompetitive effects of scholarships caps.

A. *The Procompetitive Effects of Scholarship Caps and the Court's Overemphasis on Amateurism*

Although courts recognize that the NCAA has an interest in the integration of athletics and academics, amateurism has always been the driving procompetitive effect of scholarship caps.[133] Fortunately for the NCAA, both historically and recently, courts have agreed and have found that caps on scholarships, which exist to preserve amateurism, are not an unreasonable restraint on trade because their procompetitive effects outweigh their anticompetitive effects.[134] Only the district court in *O'Bannon I* has found that "any aspect of the NCAA's amateurism rules violate the antitrust laws."[135] A Rule of Reason analysis often requires a court to closely consider qualitative factors that are difficult to compare.[136] For example, *Jenkins v. NCAA* asks the court to compare the fans' reasons for watching collegiate athletics—the reasons for the industry's success—with the athletes' interest in being able to receive fair compensation.[137] It is easy for the NCAA to point to amateurism to explain its success because it differenti-

131. *See, e.g.*, *O'Bannon*, 802 F.3d at 1059; O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 978 (N.D. Cal. 2014); Boyun Woo et al., *Testing Models of Motives and Points of Attachment Among Spectators in College Football*, 18 SPORT MARKETING Q. 1, 39–40 (2009) (recognizing vicarious achievement and team identification as among the primary motivators of sport consumption).

132. *See O'Bannon*, 802 F.3d at 1073.

133. *See id.*

134. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 119–20 (1984); *O'Bannon*, 802 F.3d at 1079.

135. *O'Bannon*, 802 F. 3d at 1053.

136. *See* Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 A.B.A. CIV. PRAC. & PROC. COMMITTEE'S YOUNG LAW. ADVISORY PANEL: PERSPECTIVES ANTITRUST 1, 2–3 (2013), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf.

137. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 1, 18, 21.

ates the NCAA from other sports leagues.[138] Thus, it makes sense for the court, which can avoid the difficulty of weighing qualitative factors, to accept the NCAA's argument and not disrupt the status quo.[139] It allows courts to conclude that if student-athletes were to become paid professionals, the NCAA's product would no longer be as successful, so it is in everyone's best interest to preserve amateurism with scholarship caps.[140]

Because the NCAA maintains that amateurism is essential and the driving success behind its product, despite recent studies, public outcry, and increasing revenues, one would assume it has always held this stance, but it has not.[141] During oral argument for *Board of Regents*, NCAA's counsel stated that it was not using amateurism as a procompetitive justification because the NCAA "might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs."[142] Although the NCAA has since changed its stance to argue that amateurism is procompetitive, it is important to note that even the NCAA once acknowledged that its product would still thrive and "might be able to get more viewers" if the amateurism regulations were removed.[143]

What is more important to note, however, is that the NCAA's definition of amateurism is "malleable."[144] This is important because it calls into question the NCAA's supposed "longstanding commitment to amateurism," which is one of the factors that the court believes supports the NCAA's position when conducting a Rule of Reason analysis.[145] In addition to being "malleable," the NCAA's definition of amateurism has frequently changed over time in "significant and contradictory ways," and has been incon-

138. *See, e.g.*, *O'Bannon*, 802 F.3d at 1058 ("The NCAA argued to the district court that restrictions on student-athlete compensation are 'necessary to preserve the amateur tradition and identity of college sports.'").

139. *See* Fundakowski, *supra* note 136, at 2–3.

140. *See, e.g.*, *O'Bannon*, 802 F.3d at 1074 (describing the college football market as "a particular brand of football" that is different and "more popular than professional sports to which it might otherwise be comparable").

141. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 999 (N.D. Cal. 2014) (citing Oral Argument at 29:48, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (2006) (No. 83-271), https://www.oyez.org/cases/1983/83-271).

142. *Id.*

143. *Id.*

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

145. *Id.* at 1053, 1058–59.

sistently applied by the NCAA.[146] For example, tennis recruits are allowed to receive prize money for their participation and success in tournaments for up to $10,000 in excess of their expenses before enrolling in college.[147] Because collegiate tennis involves many international players who compete professionally in tournaments to win prize money prior to enrolling at a university, if the NCAA were to preclude all tennis players who received prize money before attending college, it would severely limit the number and quality of tennis recruits available.[148] Thus, the NCAA altered its definition of amateurism to maintain the quality of collegiate tennis.[149] However, if the NCAA was truly committed to the "core principle[]" of amateurism, then it would disqualify any tennis recruit who received prize money prior to enrollment.[150] Instead, the NCAA changes the application and definition of amateurism based on the sport in question to serve its own interests and maximize profits.[151]

B. *The Anticompetitive Effects of Scholarship Caps and the Difficulty in Weighing Qualitative Factors*

The main anticompetitive effect of scholarship caps and preserving amateurism is that they fix the amount that schools can pay to attract recruits.[152] Essentially, courts must weigh a recruit's interest in receiving fair compensation and the injustice of exploiting teenagers for billions of dollars with the NCAA's loss of a unique product offering.[153] Unlike the NCAA's ability to point to its unique product as the foundation of its success, there is no clear way for plaintiffs to comparably emphasize the injustice of the situation or the importance of student-athletes receiving fair compensation. This makes public opinion polls and increasing industry revenues important to the court's conclusions, because there is little other evidence plaintiffs can use to demonstrate the

146. *See id.* at 1058.

147. *See id.* at 1058–59.

148. *See* Joe Drape, *Foreign Pros in College Tennis: On Top and Under Scrutiny*, N.Y. TIMES (Apr. 11, 2016), http://www.nytimes.com/2006/04/11/sports/tennis/foreign-pros-in-college-tennis-on-top-and-under-scrutiny.html.

149. *See id.*

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

151. *See id.;* Drape, *supra* note 148.

152. *See O'Bannon*, 802 F.3d at 1070.

153. *See id.* at 1057–58; Fundakowski, *supra* note 136, at 2 (describing how courts have to balance procompetitive and anticompetitive effects).

insignificance of amateurism and the incredibly small piece of the pie that student-athletes currently receive.[154]

The question courts have yet to answer, regarding the anti-competitive effects of scholarship caps, is what must change to indicate to courts that college athletics would still thrive despite professionally paid athletes. What must change for the anticompetitive effects of scholarship caps to outweigh the procompetitive effects? Do revenues need to grow to a certain amount, or do public opinion polls need to show a greater focus on other reasons for collegiate athletics' success? Fortunately for courts, they may not need to answer these questions because the NCAA has already freely admitted that its product would still thrive without amateur athletes; so, really, we are just waiting on the courts to catch up.[155]

C. *The Alternative: The Free-Market*

Because of the rising and lucrative revenues generated by collegiate athletics, the NCAA's "malleable" definition of amateurism, the NCAA's inconsistently applied definition of amateurism, and the declining importance of amateurism to its fan base, it is time for courts to find that the anticompetitive effects of scholarship caps and preserving amateurism outweigh the procompetitive effects.[156] Courts should recognize that amateurism is no longer essential to the NCAA's product and use *Jenkins v. NCAA* as the opportunity to end the practice of scholarship caps.[157] If scholarship caps were found to be more anticompetitive than pro-

154. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014) (relying on evidence that suggests what drives consumer demand for college athletics is not the restrictions on compensation); NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES: 2004–2013 NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 8, 42 (2014), http://www.ncaapublications.com/productdownloads/D1REVEXP2013.pdf (evidencing increasing revenues for the NCAA) [hereinafter NCAA REVENUES AND EXPENSES REPORT 2014].

155. *See O'Bannon*, 7 F. Supp. 3d at 999 (citing Oral Argument at 29:48, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (2006) (No. 83-271), https://www.oyez.org/cases/1983/83-271).

156. *O'Bannon*, 802 F.3d at 1058–59; *O'Bannon*, 7 F. Supp. 3d at 978. This part of the comment draws on the arguments presented in an undergraduate economics thesis exploring the role of amateurism and the impact of the free market on college athletics. *See generally* Robert Scott Lemons, Amateurism and College Athletics (Apr. 28, 2014) (unpublished B.A. thesis, Stanford University), https://economics.stanford.edu/sites/default/files/publications/robertlemonshonorsthesis-may2014.pdf.

157. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 2.

competitive, then courts would not need to take the next step and consider less restrictive alternatives to scholarship caps because the court could simply grant the *Jenkins v. NCAA* plaintiffs' requested relief and impose a free market system on college athletics.[158]

The transition from amateurism to the free market would affect all of the stakeholders involved in college athletics, of which there are many.[159] A free market would most likely flip the current "arms race," which is focused on coaches and facilities, to an "arms race" focused on the players themselves.[160] This means that a free-market system would most positively affect the student-athletes and many third parties, and it would most negatively affect coaches, the NCAA, and the NCAA's member universities.[161] Rather than the current "arms race," to provide the best coaching and facilities to recruits, the "arms race" would focus around the recruits themselves.[162] This, inevitably, would increase compensation for student-athletes, increase expenses for the NCAA and its member universities, and decrease compensation for coaches.[163]

Interestingly enough, the negative impact of transitioning to a free market, such as increased expenses and decreased profits for the universities, would be partially alleviated by overall market growth and increased contributions by alumni donors, corporate advertisers, and professional leagues.[164] For example, the National Football League ("NFL"), the most popular professional football

158. *See O'Bannon*, 802 F.3d at 1060–61.

159. *See, e.g.*, Dave Berri, *How About a Free Market for College Athletes?*, FREAKONOMICS (Mar. 22, 2013, 9:36 AM), http://freakonomics.com/2013/03/22/how-about-a-free-market-for-college-athletes/ (discussing coaches, athletic directors, and administrators as examples of stakeholders).

160. *See, e.g.*, *id.* (noting that "if we paid more to the players, coaches like Crean would likely get less," and "if the NCAA adopts a free labor market, more of the revenues our watching is generating will actually go to the people we are watching").

161. *See* Anthony W. Miller, *NCAA Division I Athletics: Amateurism and Exploitation*, THE SPORT J. (Jan. 3, 2012), http://thesportjournal.org/article/ncaa-division-i-athletics-amateurism-and-exploitation/; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Dec. 30, 2011), http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html.

162. *See* Nocera, *supra* note 161.

163. *See* Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play*, 65 NOTRE DAME L. REV. 206, 247 (1990); Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), https://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html.

164. *See* Allen R. Sanderson & John T. Siegfried, *The Case for Paying College Athletes*, 29 J. ECON. PERSP. 115, 119-21 (2015) (discussing the potential of private alumni donations, advertising demand, and the profitability of college athletics generally).

league in America, benefits from the development of student-athletes at the collegiate level because it, in turn, raises the level of play and competitiveness of the NFL.[165] Without scholarship caps, the NFL would be free to subsidize particular student-athletes while they are in school or impose salary classes for rookies based on how long an athlete remained in school.[166] Both of these options would encourage student-athletes to stay in school and continue to develop their athletic abilities before becoming professionals.[167] Additionally, overall market growth would likely occur because excess demand would be satisfied while prices and product quality would increase.[168] Most obviously, college towns' involvement would greatly increase.[169] Large athletic departments generate tremendous revenue for the surrounding areas,[170] and, without scholarship caps, local businesses and towns would have stronger incentives and a greater ability to get involved with the success of their team and the recruitment of new players. So, in the end, a transition to a free market may have a negative impact on the parties currently benefitting from the NCAA's "arms race," such as coaches and universities, but, ultimately, the increased costs would be partially mitigated by increased involvement of third parties.[171]

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165. *See* Joel Maxcy, *Economics of the NFL Player Entry Draft System*, *in* THE ECONOMICS OF THE NATIONAL FOOTBALL LEAGUE 173, 185 (Kevin G. Quinn ed., 2012).

166. *See* Sanderson & Siegfried, *supra* note 164, at 129 (exploring potential effects of subsidizing college athletics).

167. Steve Murphy & Johnathan Pace, *A Plan for Compensating Student-Athletes*, 1994 BYU EDUC. & L.J. 167, 178 (1994).

168. Andy Schwarz, *Let the Market Solve the College Sports Problem*, NEW REPUBLIC (Sept. 3, 2015), https://newrepublic.com/article/122725/let-free-market-solve-college-sports-problem (recognizing that opening the market would increase quality and quantity of the product because there is currently excess demand that is not being met).

169. *See* Sean Gregory, *It's Time to Pay College Athletes*, TIME (Sept. 16, 2013), http://content.time.com/time/subscriber/article/0,33009,2151167,00.html.

170. *See, e.g.*, TIMOTHY A. DUY, THE ECONOMIC IMPACT OF THE UNIVERSITY OF OREGON ATHLETIC DEPARTMENT FY 2011-12 1 (Dec. 2012) ("[T]he University of Oregon Athletic Department supported $140.5 million of economic activity in Oregon."); Patrick Brown, *Survey Shows Major Impact of UT Athletics*, TIMES FREE PRESS (June 8, 2016), http://www.timesfreepress.com/news/sports/college/story/2016/jun/08/survey-shows-major-economic-impact-ut-athleti/369965/ (explaining how "Tennessee athletics generated nearly $464 million in overall economic impact for the state and more than $618 million for Knoxville" in the 2014–15 fiscal year).

171. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 111, 119 (1984); *see also* Lemons, *supra* note 156, at 111 (listing third parties such as "student-athletes, boosters, shoe companies, and other corporations with advertising interests" that would benefit from a free market and others such as "coaches, athletic directors, [and] college administrators" that may be hurt by a free market).

The biggest benefit of a free market, however, would be its self-regulation.[172] Rather than having to concern itself with complex regulations and difficult enforcement, the NCAA could allow the market to sort out abuses itself.[173] Although, there would be an adjustment period as universities figure out how to best allocate their resources to attract top recruits.[174] For example, top-ranked high school recruits, from any sport, often do not perform as expected, and schools would have to account for the possibility of a recruit failing to live up to expectations when bidding for their services.[175] This is why the self-regulation of the free-market is essential. Rather than the NCAA having to create regulations to ensure the efficient use of resources by universities and boosters, it can allow schools to value recruits themselves, knowing that the market will eventually account for any inefficiency between the cost of recruiting an athlete and their performance on the field.[176] For example, if a university overvalues a particular recruit who fails to live up to the university's on-field expectations, the university could adjust its cost-benefit analysis to avoid similar situations in the future.[177] The ability of the free market to self-regulate and naturally find the most efficient processes will prevent wild and inefficient spending by athletic departments and reduce the amount the NCAA currently spends on monitoring and enforcing recruiting regulations.

Most commonly, opponents of a transfer to the free market believe a competitive imbalance would occur that would drive away

172. *But see* Matthew Mitten & Stephen F. Ross, *Regulate, Don't Litigate, Change in College Sports*, INSIDE HIGHER ED. U.C. (June 10, 2014), https://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-law suits-essay (proposing "an open and transparent system of federal regulation combined with antitrust immunity" while noting that financial self-sufficiency rules would give more flexibility to universities to achieve their individualized academic and athletic missions).

173. Lemons, *supra* note 156, at 112 (citing Interview with Rodney Gilmore, American College Football Analyst, ESPN (Aug. 28, 2013)); Patrick Hruby, *The Free Market Case Against the NCAA Chokehold on College Sports*, WASH. TIMES (Mar. 30, 2012), http://www.washingtontimes.com/news/2012/mar/30/the-free-market-case-against-the-ncaa-chokehold-on/.

174. *See* Nocera, *supra* note 161 (discussing how schools would be able to pay athletes, but they would have to figure out how to trim other expenses).

175. *See, e.g.*, Daniel Christian, *How Do Top High School Basketball Recruits Pan Out?*, JAXGELLER, https://jaxgeller.com/hs-bball-trajectory/ (last visited Apr. 5, 2017) (explaining how many "can't miss" basketball recruits do not live up to expectations).

176. *See Lemons*, *supra* note 156, at 112 (citing Interview with Rodney Gilmore, American College Football Analyst, ESPN (Aug. 28, 2013)).

177. *See id.*

fans.[178] However, the current system already promotes classes of "haves" and "have-nots."[179] Thus, there would probably be little change from how the current system already operates.[180] For example, at present, the universities with large fan bases and commercialized athletic departments attract the best players by providing the best coaching, facilities, future development, and national exposure.[181] Under a free market system, universities with large fan bases and commercialized athletic departments would continue to attract the best athletes, but by outbidding their opponents rather than providing the most attractive non-compensatory benefits.[182] The current system may not be ideal, but transitioning to a free market system would not make it any worse.

CONCLUSION

In the words of former NCAA Executive Director Walter Byers: "Collegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice."[183] The current interpretation of *O'Bannon II* is incorrect because the courts overemphasize the importance of amateurism to the success of college athletics, and, because the district court's current interpretation of *O'Bannon II* is incorrect, it is not necessary to consider whether acceptable compensation packages can be formed that are still tethered to educational expenses.[184] Instead, courts should follow the district court's original determination and ruling in *O'Bannon I*.[185] The district court's original ruling is correct because, while amateurism may be the main procompetitive effect of scholarship caps, the college sports industry has grown to the point where the procompetitive effects of amateurism and scholarship caps no longer

178. Gregory, *supra* note 169.

179. *See* Hirko & Sweitzer, *supra* note 63, at 148.

180. Gregory, *supra* note 169.

181. *See* Hirko & Sweitzer, *supra* note 63, at 148.

182. *See* Gregory, *supra* note 169.

183. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 376 (1995).

184. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015); *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litigation, No. 14-md-02541-CW, slip op. at 5 (N.D. Cal. Aug. 5, 2016) (order denying motion for judgment on the pleadings).

185. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d at 955, 977–78 (N.D. Cal. 2014).

outweigh the anticompetitive effect of withholding fair compensation to the athletes.[186] Thus, the court should view *Jenkins v. NCAA* as an opportunity to correct its previous interpretations and find that caps on athletic scholarships are impermissible horizontal agreements that are in violation of the Sherman Act.[187] Without the scholarship caps, the NCAA's member universities would be forced to engage in the free market for the services of student-athletes.[188] A free market system, in addition to having no effect on the system's current competitive balance, would not damage the NCAA's success because fans no longer prioritize the amateur status of the athletes, the overall market would grow, third parties would increase their involvement, and student-athletes would, finally, receive the compensation they rightfully deserve.

Daniel Laws *

186. *See id.*; Solomon, *supra* note 55; NCAA REVENUES AND EXPENSES REPORT 2014, *supra* note 154, at 8.

187. *See O'Bannon*, 7 F. Supp. 3d at 1001 (finding that "consumer demand for FBS football and Division I basketball-related products is not driven by the restrictions on student-athlete compensation but instead by other factors, such as school loyalty and geography.").

188. *See* Second Amended Complaint, *Jenkins v. NCAA*, *supra* note 7, at 28.

* J.D. Candidate 2018, University of Richmond School of Law. B.B.A., 2011, College of William & Mary.

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