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The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor

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INTRODUCTION

College football and men's college basketball generate hundreds of millions of dollars each year.¹ The National Collegiate Athletic Association (NCAA) makes hundreds of millions of dollars² and

¹ See, e.g., William B. Gould IV, Glenn M. Wong & Eric Weitz, *Full Court Press: Northwestern University, A New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 8–9 (2015).

² See *id.* at 9 (stating that the NCAA's revenues reached over \$900 million in 2012–13). In the spring of 2016, the NCAA signed an eight-year, \$8.8 billion extension on top of a previously agreed upon \$10.8 billion deal with CBS Sports and Turner Broadcasting System

compensates its executives handsomely.³ Conferences and universities profit from their sports programs.⁴ Some coaches receive multimillion dollar contracts to coach and the opportunity to earn significantly through endorsements.⁵

The astronomical amount of money generated by college athletics is built on the backs of college athletes, who are forbidden under current NCAA rules from earning compensation in addition to their scholarships—i.e., college athletes cannot earn compensation derived from their athletic skills through playing their sport (beyond the scholarship amount) or endorsements.⁶ College athletes produce the excitement and revenue of college athletics by performing, at times, incredible physical feats under enormous pressure and scrutiny that millions of people tune in to see. No one comes to see Nick Saban (the

Inc. to broadcast the men's college basketball tournament through 2032. *CBS Sports, Turner Broadcasting NCAA Reach 14-Year Agreement*, NCAA (Apr. 22, 2010), <http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement>; *CBS, Turner Sign \$8.8 Billion Extension on NCAA Tournament Broadcast*, HUFFINGTON POST (Apr. 12, 2016, 5:27 PM), http://www.huffingtonpost.com/entry/cbs-turner-sign-88-billion-extension-on-ncaa-tournament-broadcast_us_570d6470e4b0836057a2bb8c.

³ See, e.g., Steve Berkowitz, *Emmert Made \$1.7 million, According to NCAA Tax Return*, USA TODAY (July 14, 2013, 1:16 PM), <http://www.usatoday.com/story/sports/college/2013/07/10/ncaa-mark-emmert-salary-million-tax-return/2505667> (reporting President Mark Emmert made over \$1.2 million in base salary alone, plus almost \$500,000 more from deferred compensation and other sources of income during 2011); Libby Sander, *Pay for Top 14 NCAA Executives Totaled Nearly \$6-Million Last Year*, THE CHRON. OF HIGHER EDUC. (Sept. 9, 2010), <http://chronicle.com/article/Pay-for-Top-14-NCAA-Executives/124358> (reporting that, in 2009, thirteen NCAA executives each received six-figure salaries ranging from \$270,000 to over \$600,000, while the former NCAA President Myles Brand received over \$1 million).

⁴ See generally Gould IV, Wong & Weitz, *supra* note 1, at 8–13 (reflecting, for example, that the significant revenues of the NCAA amount to over \$900 million).

⁵ Lance Davis, *The 5 Highest-paid College Football Coaches*, BANKRATE, <http://www.bankrate.com/lite/celebrity-money/highest-paid-college-football-coaches-2.aspx> (last updated Aug. 17, 2016) (reporting Alabama head football coach earns over \$7 million per year); see Aileen Graef, *College Basketball Coaches Rake it in While Their Players Get Nothing*, UNITED PRESS INT'L (Mar. 20, 2015, 1:39 PM), http://www.upi.com/Sports_News/College-Basketball/2015/03/20/College-basketball-coaches-rake-it-in-while-their-players-get-nothing/2621426865542 (indicating Duke Blue Devils' basketball coach, Mike Krzyzewski, makes \$9.7 million per year).

⁶ See NCAA 2015–2016 DIV. I MANUAL, bylaw 12.1.2 (2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> [hereinafter NCAA BYLAWS] (providing that a college athlete becomes ineligible if one “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport”).

Alabama University head football coach)⁷ throw a pass or Mike Krzyzewski (head coach of Duke University's men's basketball team)⁸ make a three-pointer. All the while, college athletes risk serious injury and their long-term health, particularly in football, which is simply a sport of controlled violence.⁹ Indeed, Chronic Traumatic Encephalopathy (CTE), a life-threatening condition stemming from concussions, has been diagnosed in a number of deceased football players.¹⁰ Yet, athletes in major college sports are deprived of earning money for playing and licensing the rights to their names, images, and likenesses.¹¹ The incredible inequities flowing from this situation shock the conscience.¹²

⁷ Nick Saban, ROLLTIDE.COM, <http://rolltide.com/coaches.aspx?rc=545&path=football> (last visited Nov. 9, 2016).

⁸ *Men's Basketball Coaches*, GODUKE.COM, http://www.goduke.com/SportSelect.dbml?&DB_OEM_ID=4200&SPID=1845&SPSID=22725 (last visited Nov. 9, 2016).

⁹ I suffered two concussions and separated my shoulder three times in high school playing football. My college football career ended abruptly during my senior season when I ruptured a tendon in my ring finger at practice that required season-ending surgery or, if I had chosen to play the rest of the season, the loss of use of that finger.

¹⁰ Sam Mellinger, *Doctors Couldn't Find What was Wrong with Michael Keck, but Football Star Knew It Would Kill Him*, THE KAN. CITY STAR (Nov. 21, 2015, 9:52 PM), <http://www.kansascity.com/sports/spt-columns-blogs/sam-mellinger/article45850180.html> (chronicling the death of a 25-year-old who suffered from CTE after playing football in high school and only one full year in college).

¹¹ See NCAA BYLAWS, *supra* note 6, at bylaw 12.1.2 (prohibiting a college athlete from using "his or her athletics skill [directly or indirectly] for pay in any form in that sport); NCAA BYLAWS, *supra* note 6, at bylaw 12.5.2.1(a) (forbidding a college athlete from "[a]ccept[ing] any remuneration for or permit[ing] the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind").

¹² See Amy Christian McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 498 (2008) (arguing the rule that limits athlete's compensation to the costs of tuition, books, room, and board constitutes price-fixing, which is actionable under antitrust laws); Stephen L. Ukeiley, *No Salary, No Union, No Collective Bargaining: Scholarship Athletes are Employer's Dream Come True*, 6 SETON HALL J. SPORT L. 167, 169–72 (1996) (discussing that while coaches get millions of dollars in signing bonuses and millions of dollars from endorsement deals for making their players wear Nikes, college athletes receive nothing in compensation); Kathryn Young, Note, *Deconstructing the Façade of Amateurism: Antitrust and Intellectual Property Arguments in Favor of Compensating Athletes*, 12 VA. SPORTS AND ENT. L.J. 338, 343–47 (2013) (arguing the NCAA practices of fixing prices for scholarships and alleging that profiting from merchandise is not an economic activity is contrary to common usage and ultimately violates antitrust laws); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (describing the noble principles of the NCAA as cynical hoaxes used by universities to exploit their athletes and stating "the tragedy at the heart of college sports is not that some college athletes are getting paid, but that more of them are not").

The NCAA places no cap on how much college coaches, athletic directors, or NCAA employees can earn. For example, the four head coaches who participated in the 2016 college football playoff earned between over \$3 million and \$7 million in salaries—amounts which do not even include potential bonuses.¹³ College athletes, on the other hand, cannot earn compensation in excess of their scholarships,¹⁴ and these scholarships fall short of covering even their full expenses at colleges that use the traditional grant-in-aid scholarships, which cover tuition, room, books, and board. The NCAA and major conferences recognized and conceded this shortfall when they adopted “autonomy legislation”¹⁵ that allowed major conferences to cover the gap between grant-in-aid scholarships and the full cost of attendance (that can include transportation to and from school, miscellaneous personal expenses, administrative fees), which can range between \$2000 and \$5000.¹⁶

¹³ Jon Solomon, *How 2015 College Football Playoff Teams Make and Spend Money*, CBSSPORTS.COM (Dec. 29, 2015), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25429334/how-college-football-playoff-teams-make-and-spend-money>.

¹⁴ See, e.g., NCAA BYLAWS, *supra* note 6, at bylaw 12.01.4 (providing that a grant-in-aid cannot exceed the costs of tuition and fees, room and board, books, and other expenses related to the attendance of the institution); *id.* at bylaw 12.1.2.1.1 (prohibiting student athletes from receiving any type of direct or indirect salary, gratuity or comparable compensation); *id.* at bylaw 12.01.4 (stating that a student-athlete may not be awarded financial aid that exceeds the cost of attendance that is normally incurred by students at that institution).

¹⁵ In 2014, the NCAA passed legislation allowing the Power Five conferences, which include the Atlantic Coast Conference (ACC), Big 12 Conference, Big 10 Conference, Pac-12 Conference, and the Southeastern Conference (SEC), to pass rules or make changes to existing rules regarding their athletes in certain areas of autonomy. NCAA BYLAWS, *supra* note 6, at bylaw 5.02.1.1. The areas of autonomy include, among others, college athlete “loans to purchase career-related insurance products (e.g., disability, loss-of-value),” career-planning events and advisors for athletes, financial aid, “awards, benefits and expenses for enrolled student-athletes and their families and friends,” academic support, meals and nutrition, and time demands on a college athlete. NCAA BYLAWS, *supra* note 6, at bylaw 5.3.2.1.2. Schools outside of the Power Five conferences may decide to follow any autonomy legislation passed by the Power Five conferences, but those non-Power Five conference schools are not required to do so. NCAA BYLAWS, *supra* note 6, at bylaw 5.3.2.1.2.2.

¹⁶ Brian Bennet, *NCAA Board Votes to Allow Autonomy*, ESPN (Aug. 8 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (stating “the full cost-of-attendance stipends . . . could be worth between \$2,000 and \$5,000 per player”); Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes’ Viewpoints Dominate Business Session Discussions* (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> (discussing the rule adopted

Coaches can also make substantial sums through endorsements either in addition to, or as a part of, their coaching salaries.¹⁷ For example, Ohio State University head football coach Urban Meyer made \$1.4 million from a deal with Nike and Ohio State and an additional \$1.85 million from, among other things, radio and television shows.¹⁸ Players, on the other hand, cannot enter into endorsement deals, but they can go to bed hungry despite being on a supposedly full scholarship. Shabazz Napier, awarded the most valuable player of the NCAA Basketball Tournament's Final Four in 2014, revealed that some nights he went to bed starving because the meal plans provided for scholarship athletes are not always enough.¹⁹ Representative Matthew Lesser, a Connecticut legislator, said of Napier: "He says he's going to bed hungry at a time when millions of dollars are being made off of him. It's obscene . . . This isn't a Connecticut problem. This is an NCAA problem, and I want to make sure we're putting pressure on them to treat athletes well."²⁰

After the star basketball player's revealing comments, the NCAA approved unlimited meal plans for college athletes, but keeping the athletes who create the product on the field well-fed is simply a wise investment as opposed to a magnanimous action.²¹ Also, feeding the

through autonomy that allows schools to provide scholarships that cover the full cost of attendance).

¹⁷ Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) [hereinafter Bilas Interview] (arguing that coaches and assistant coaches can make millions of dollars, and that players should also be allowed to earn in a free market system) (on file with author).

¹⁸ Associated Press, *Urban Meyer's Contract Revealed*, ESPN (June 18, 2012), http://espn.go.com/college-football/story/_/id/8067358/urban-meyer-contract-ohio-state-buckeyes-outlines-violation-reporting.

¹⁹ Sara Ganim, *UConn Guard on Unions: I go to Bed 'Starving'*, CNN (Apr. 8, 2014, 1:26 PM), <http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/index.html>.

²⁰ *Id.* Mr. Napier's story regarding a lack of funds for food is nothing new. Scholarship football players at Rice that lived off-campus received a stipend. I lived off-campus my junior year and received a stipend of \$385. The monthly stipend not only needed to pay for lunch during the week—with about twenty such lunches during a month—but it also needed to cover rent and utilities. After paying rent and utilities, I was fortunate if I still had \$40 to pay for the twenty lunches during the month, which would be \$2 dollars per lunch. The stipend failed to come close to covering my expenses, including food. As a result, I lived on campus the other three years where lunch during the week, the dorms, and utilities were covered by my scholarship.

²¹ Stephen Hobbs, *Approved NCAA Rule Allowing Unlimited Meals and Snacks to Affect Cal Athletes*, THE DAILY CALIFORNIAN (Apr. 25, 2014), <http://www.dailycal.org/2014/04/24/approved-ncaa-rule-allowing-unlimited-meals-snacks-affect-cal-athletes>; Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA

athletes or paying for their full cost of attendance amounts to paying for expenses, which falls well short of addressing the true issue: whether college athletes should receive compensation above their scholarship amounts based on the billions of dollars they generate through playing sports.

Coaches can also earn indirect compensation. For instance, boosters paid off Nick Saban's \$3 million mansion to entice him to stay at Alabama.²² Meanwhile, as an alumnus, I could not buy a Rice college basketball player who interned at my law firm a five-dollar Subway sandwich while she was at work because doing so would violate NCAA rules.²³ As a precaution, I even had to inform others in my firm that they could not pay for her lunch because doing so might constitute an NCAA violation. Although I could provide a meal for a Rice athlete at my home, I first had to report how many athletes would attend, where the food would come from, the date of the dinner, and the attendees' names.²⁴ Finally, I had to submit that form to the Rice NCAA compliance office.²⁵ The convoluted NCAA rules allow boosters to pay off a football coach's mansion, but they prevented me from buying a sandwich for a college athlete who interned at my law firm.

Many receive lavish compensation packages in this business of major college sports, but once everyone else is paid, those who have been paid argue that no money remains to pay the college athletes.²⁶

(Apr. 15, 2014, 4:25 PM), <http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules>.

²² Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN (Oct. 27, 2014), http://espn.go.com/college-football/story/_/id/11772033/alabama-crimson-tide-boosters-pay-coach-nick-saban-home.

²³ See NCAA BYLAWS, *supra* note 6, at bylaw 16.11.1.5 (stating that a college athlete or the entire team may receive an occasional meal from a representative of athletics interests on infrequent and special occasions so long as the meal, which can be catered, is provided at the individual's home or on campus).

²⁴ *Id.* at bylaw 16.11.1.5 (stating that a college athlete or the entire team may receive an occasional meal from a representative of athletics interests on infrequent and special occasions so long as the meal, which can be catered, is provided at the individual's home or on campus); *Occasional Meal Form*, TULANE UNIV., http://grfx.cstv.com/photos/schools/tul/genrel/auto_pdf/2014-15/misc_non_event/occasional-meal-form.pdf (last visited Nov. 9, 2016); *Occasional Meals*, UNIV. OF NOTRE DAME, <http://ncaacompliance.nd.edu/documents/OccasionalMeals.pdf> (last visited Nov. 9, 2016).

²⁵ See, e.g., NCAA BYLAWS, *supra* note 6, at bylaw 2.8 (stating that each institution shall monitor and comply with all applicable rules and regulations of the NCAA).

²⁶ See, e.g., Gould IV, Wong & Weitz, *supra* note 1; Graef, *supra* note 5; Steve Berkowitz, *NCAA Paid Mark Emmert \$1.9M in 2014, Tax Return Shows*, USA TODAY (June 23, 2016, 3:16 PM), <http://www.usatoday.com/story/sports/college/2016/06/23/ncaa>

The notion that college athletes should not receive compensation beyond their scholarships hangs on a loose thread woven on the nostalgic idea that college athletes are amateurs and should not be compensated because that could somehow taint the games.²⁷ This premise is a fallacy because college athletes are already compensated for playing sports—they receive tuition, room, books, and board, which are forms of compensation. It also ignores the economic reality of what major college football and men's basketball has evolved into—professional sports.²⁸

The proper question to ask is, should college athletes be able to receive more compensation because of the revenues they generate? The free market approach and equity dictate that the answer should unequivocally be yes. College athletes remain the firsthand suppliers of a product that the public is consuming in droves.²⁹ They should be compensated for providing those arduous services.³⁰ College athletes

-tax-return-mark-emmert-jim-isch/86287914 (detailing how much NCAA executives were compensated in 2014).

²⁷ See David J. Berri, *Paying NCAA Athletes*, 26 MARQ. SPORTS L. REV. 479, 482–83 (2016) (stating that the principle of amateurism is intended to promote competitive balance); Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 559 (2009) (stating that “[a]mateuism is assumed to be good . . . [and the] notion of amateurism is characterized by nostalgia for a time when sport was played for pure love”); Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1, 2 (2000) (discussing the NCAA’s aim to maintain amateurism).

²⁸ Bilas Interview, *supra* note 17 (“[I]t’s a million dollar business and financial decisions are made all the time and everybody [except the athletes] operates as [though it is] a free market system.”).

²⁹ *College Sports (NCAA)—Statistics & Facts*, STATISTA, <http://www.statista.com/topics/1436/college-sports-ncaa> (last visited Oct. 28, 2016) (approximating 49 million people attended college football games [Division I, II, and III] in 2012, 54 million people watched at least one college basketball game on TV in 2014, and 29 million people attended at least one college sports game in 2014); Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, ESPN (Apr. 16, 2016), http://espn.go.com/college-football/story/_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game (stating attendance at the Ohio State University’s 2016 spring practice football game exceeded 100,000 people); see *Every SEC Spring Game to be Televised*, SEC SPORTS (Mar. 23, 2016), <http://www.secsports.com/article/15048848> (reporting that all Southeastern Conference football teams will have their spring football games nationally televised); see also Derek Volner, *ESPN3 to Stream Six ACC College Football Spring Games*, ESPN MEDIAZONE (Mar. 23, 2016), <http://espnmediazone.com/us/press-releases/2016/03/espn3-to-stream-six-acc-college-football-spring-games> (showing that ESPN3 streamed the spring games for Duke, Kansas, Clemson, Wake Forest, Florida State, Miami, Stephen F. Austin State University, and Georgia Tech).

³⁰ Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 129 (2012) (arguing universities are unjustly enriched when they

should also be able to license their own names, images, and likenesses. Instead, they are treated differently than every other college student.³¹

Jay Bilas, a former Duke University standout basketball player, Duke assistant coach, and Duke University School of Law graduate, now works as an analyst with ESPN and serves as Of Counsel with the Charlotte law firm of Moore & Van Allen. Bilas states, “[t]here is no other student that is required to be an amateur in their chosen field while they’re in school. So every other student can make as much money as they want in their chosen endeavor, and it doesn’t affect their academic standing.”³² For example, a student musician can earn thousands of dollars performing at off-campus events without suffering any negative consequences, such as losing eligibility to participate in university musical performances, even if the person paying the student musician is affiliated with the student’s university.³³ Bilas believes “[t]here is no legitimate reason why an athlete should be [treated] any different[ly].”³⁴

Opponents of college athletes receiving compensation above their scholarships argue that they will “cash-in” when they play professional sports.³⁵ College athletics provide these athletes with training, the exposure they need to reach the professional ranks, and also the only

use college athletes’ images and likenesses for gain without compensating them); see Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA’s Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 775 (2015) (stating that the average amount of time that college athletes spend on athletic activities is more than forty hours per week).

³¹ See Karen Crouse, *When an Olympian Goes to College, Riches Stay Out of Reach*, N.Y. TIMES (Apr. 16, 2016), http://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html?_r=2; Bilas Interview, *supra* note 17 (stating that “every other student can make as much money as they want in their chosen endeavor and it doesn’t affect their academic standing” and “[t]here is no legitimate reason why an athlete should be any different”).

³² Bilas Interview, *supra* note 17.

³³ See Crouse, *supra* note 31 (discussing how music students can earn compensation for performances, including money from individuals with ties to the university, which is encouraged).

³⁴ *Id.*; see Karen Crouse, *When an Olympian Goes to College, Riches Stay Out of Reach*, N.Y. TIMES (Apr. 16, 2016), http://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html?_r=2 (revealing that some graduate student musicians “earned as much as \$20,000 a year performing freelance engagements, or with area orchestras and chamber ensembles, or both”).

³⁵ See, e.g., Kieran McCauley, *College Athletes Shouldn’t Be Paid*, DAILY LOCAL NEWS (Apr. 28, 2015, 5:28 PM), <http://www.dailylocal.com/article/DL/20150428/SPORTS/150429826> (arguing that “the players who are so good and entertain us in college will eventually get paid” in the pros, while scholarships are sufficient for the other players).

viable avenue for that career advancement. The vast majority of college athletes, however, fail to become professional athletes. In fact, only a little more than one percent of all college athletes in football and men's basketball even get drafted by a team in the NFL or NBA, respectively, and even fewer make it onto a team.³⁶ And for the small percentage of players who actually do make a team, the average length of an NFL player's career spans slightly more than three years, while the average length of an NBA player totals fewer than five.³⁷ Although the overwhelming majority of college athletes will not play a sport professionally, the NCAA deprives them of the opportunity to earn compensation while playing in college, even though they generate billions of dollars. That is why the NCAA and college conferences cling tightly to an amateurism rule—to keep the money for themselves.

The NCAA also deprives college athletes of the opportunity to use their names, images, and likenesses to earn money during their collegiate career when those assets possess substantial value. If that prohibition were lifted, an outstanding college player could potentially receive an endorsement deal from McDonald's while in college. Then, even if he fails to make a professional team and McDonald's declines to extend his endorsement deal, he will still have had the opportunity to capitalize on his athletic accomplishments during college by accepting endorsement deals while in college. Empires like Nike and Adidas would have welcomed the opportunity to market and sell products with Cam Newton and Marcus Mariota while they were in college.³⁸ Children, fans, and alumni adore and follow the careers of college athletes. If their favorite players could endorse a shoe or food, then those admirers would buy those products. College athletes could also sell their autographs and signed memorabilia in a regulated manner (e.g., every Thursday immediately after practice they could sign items and receive a substantial portion of the profits from the sale of both the

³⁶ *Probability of Competing in Sports Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last visited Oct. 28, 2016).

³⁷ Cork Gaines, *Chart: The Average NBA Player Will Make a lot More in His Career than the Other Major Sport*, BUSINESS INSIDER (Oct. 10, 2013, 4:24 PM), <http://www.businessinsider.com/chart-the-average-nba-player-will-make-lot-more-in-his-career-than-the-other-major-sports-2013-10>.

³⁸ See Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 850–51 n.49 (2014) (asserting that Johnny Manziel could earn \$3500 from a single tweet).

autographs and memorabilia) as opposed to being reduced to signing items in a seedy parking lot or hotel room.³⁹

Child actors, singers, and performers are able to sell their services and unique talents because their work generates millions of dollars. For example, *Home Alone* movies starring child actor Macaulay Culkin generated an estimated \$834 million, and Justin Bieber concerts grossed over \$223 million.⁴⁰ The law in the United States, which is predicated on capitalist, free market principles, allows individuals to earn money based on the fruits they generate.⁴¹ The archaic NCAA rules prohibit college athletes from earning compensation above their scholarship, which oppresses college athletes by depriving them of the opportunity to earn money based on their incredible abilities.

This Article provides a unique perspective on why college athletes should be allowed to earn more than they already do, both in the form of compensation for playing on a college team as well as compensation from endorsements. My participation in college sports provides me with insight that is not otherwise readily available to others who write in this area. At Rice University, I experienced firsthand the demands of being a college athlete, lettering in football all four years while earning degrees in Political Science and Policy Studies. I garnered success as a scholar athlete, winning numerous honors including the Top Student Athlete for Rice Football during my junior year. This Article includes my experiences and perspective, sometimes in the form of confessions, to provide the reader with insight from a Division I scholarship athlete.

I also possess insight about college athletics based on my service as a board member of the “R” Association, which is an organization

³⁹ Brett McMurphy, *Todd Gurley Signing Details Emerge*, ESPN GO (Dec. 2, 2014), http://espn.go.com/blog/sec/post/_id/94756/todd-gurley-signing-details-emerge (discussing former college football standout Todd Gurley and the incident where he was suspended for signing memorabilia in a parking lot in exchange for \$400, which led to his four-game suspension at the University of Georgia).

⁴⁰ See Tom Gerencer, *Justin Bieber Net Worth*, MONEYNATION (July 27, 2016), <http://moneynation.com/justin-bieber-net-worth> (showing Bieber concert tours have grossed over \$223 million); *Home Alone*, BOX OFFICE MOJO, <http://www.boxoffice Mojo.com/movies/?id=homealone.htm> (last visited Oct. 28, 2016) (indicating *Home Alone* grossed over \$476 million worldwide); *Home Alone 2: Lost in New York*, BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=homealone2.htm> (last visited Oct. 28, 2016) (demonstrating *Home Alone 2* grossed over \$358 million worldwide).

⁴¹ See William McGurn, *Playing the Music of Capitalism*, WALL STREET J. (July 10, 2015), <http://www.wsj.com/articles/playing-the-music-of-capitalism-1436568716> (discussing the capitalist economy and indicating that individuals in this system will be rewarded for their hard work and enterprise).

composed of former Rice athletes that promotes the success of current and former Rice athletes.⁴² The “R” Association Board meets with the Athletic Director of Rice on occasion and interacts with alumni and current athletes.

College athletics has grown into a multi-billion-dollar business, yet the NCAA and athletic conferences prohibit college athletes from earning compensation above the scholarships they currently receive, many of which are inadequate. Antitrust law provides a legal mechanism that should recognize that such a prohibition both violates our free market economy and also subjugates college athletes to the role of exploited providers of services without proper compensation. College athletes should be able to earn money based on playing sports for their colleges and universities, as well as for licensing the rights to their names, images, and likenesses through endorsements.

Part I identifies the various constituents who are reaping the rewards generated by college athletes, including the NCAA, conferences, schools, coaches, athletic directors, and builders of extravagant athletic facilities. Part II discusses the free market approach that courts should employ to pay college athletes above their scholarships and to allow college athletes to endorse products. Part III discusses the counterarguments to compensating college athletes more than their scholarships. One of those counterarguments involves the “autonomy legislation,” which gives the Power Five conferences the power to make their own rules in certain areas, including on compensation. As later described, “autonomy” provides inadequate relief and serves as nothing more than a stop-gap, allowing universities and colleges to compensate college athletes only up to the full cost of attendance.⁴³ Part IV discusses the free market approach to compensating college athletes and the potential consequences of doing so.

This Article concludes that college athletes should be entitled to earn compensation for playing major college sports, including the ability to profit from endorsing products.

⁴² *What is R Association?*, RICE OWLS, <http://www.riceowls.com/sports/r-assoc/spec-rel/r-assoc-about.html> (last visited Nov. 9, 2016).

⁴³ Bilas Interview, *supra* note 17.

I

COLLEGE FOOTBALL AND MEN'S BASKETBALL GENERATE BILLIONS
OF DOLLARS

The NCAA, conferences, schools, coaches, and athletic directors earn substantial amounts from men's basketball and football, yet the NCAA forbids college athletes, who provide the product on the field and the court, from earning compensation above their scholarships. This Part discusses the revenues and benefits received by these constituents, as well as by the college athletes themselves.

A. The NCAA Profits

The NCAA is an unincorporated, not-for-profit organization that runs college athletics on a national level.⁴⁴ It includes more than 1200 member institutions and oversees all collegiate athletic competitions, including men's basketball and football.⁴⁵ The NCAA consists of three separate divisions for athletic competition—Division I, Division II, and Division III.⁴⁶ In 1978, the NCAA divided Division I college football programs into Division I-A and Division I-AA.⁴⁷ In 2006, the NCAA renamed Division I-A as the Football Bowl Subdivision (FBS) and Division I-AA as the Football Championship Subdivision (FCS).⁴⁸ Division I, which includes the FBS, represents the “highest level of intercollegiate athletics sanctioned by the NCAA.”⁴⁹ The schools in Division I “generally have the largest student bodies, manage the largest athletic budgets and offer the most generous number of scholarships.”⁵⁰

⁴⁴ NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF THE YEARS ENDED AUGUST 31, 2014 AND 2013, SUPPLEMENTARY INFORMATION FOR THE YEAR ENDED AUGUST 31, 2015, AND INDEPENDENT AUDITORS' REPORT, NCAA 7 (2014), https://www.ncaa.org/sites/default/files/2014-15NCAA_Financial_Statement.pdf.

⁴⁵ *Id.*

⁴⁶ *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Oct. 28, 2016).

⁴⁷ JOSEPH N. CRAWLEY, *IN THE ARENA: THE NCAA'S FIRST CENTURY* 43 (2006).

⁴⁸ Steve Wieberg, *NCAA to Rename College Football Subdivisions*, USA TODAY (Aug. 3, 2006, 9:59 PM), http://usatoday30.usatoday.com/sports/college/football/2006-08-03-ncaa-subdivisions_x.htm.

⁴⁹ Gould IV, Wong & Weitz, *supra* note 1, at 7.

⁵⁰ *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> (last visited Oct. 28, 2016).

The NCAA's revenues totaled "over \$900 million in 2012–13 . . . coming primarily from television and marketing rights related to the NCAA men's basketball tournament."⁵¹ The total expenses equaled a little over \$850 million.⁵² The NCAA also maintains reserves "to guard and protect the future interests of its membership," which in 2013 amounted to over \$400 million.⁵³ The NCAA reported "over \$589 million in unrestricted net assets during the 2013 fiscal year."⁵⁴

Most of the NCAA's revenues are distributed to Division I institutions, with a majority of that money distributed to the conferences and some given directly to institutions.⁵⁵ A large portion of the revenue distribution to Division I institutions "is based on success in the men's basketball championship."⁵⁶ As a result of their teams' success in the tournament, the Power Five conferences typically receive greater revenue distributions than the smaller conferences.⁵⁷ During the 2012–13 season, for example, "[t]he Power Five conferences received between \$14.5 and \$28.7 million from the NCAA basketball fund while the distributions to other conferences ranged

⁵¹ See Gould IV, Wong & Weitz, *supra* note 1, at 9 (reflecting the revenues brought in by television and marketing).

⁵² *Id.* at 10.

⁵³ See *id.* at 11.

⁵⁴ *Id.*

⁵⁵ *Id.* at 12. The six primary areas where the NCAA allocates money to its member institutions include the following: (1) basketball fund for performance in the NCAA tournament—\$180.5 million expected in 2013—and multibillion dollar revenues from television contracts—\$10.8 billion contract with CBS and Turner Sports to televise the men's tournament; (2) academic support programs for Division I athletes—\$22.4 million; (3) conference grants to "enhance officiating programs, compliance and enforcement, diversity, and drug and gambling education"—\$251,097 in 2009–10—distributed for each conference; (4) grants-in-aid support that the NCAA distributes to schools based on how many scholarships the school awarded the previous school year—\$111 million total given to Division I schools, with a school "that awarded 80.48 scholarships receiv[ing] \$30,006" and a school "that awarded 242.44 scholarships receiv[ing] \$675,725"; (5) sports sponsorships that the NCAA allocates to Division I schools "based on the number of varsity sports each school sponsored"—more than \$55 million went to Division I schools; and (6) student assistance fund for "special assistance and student-athlete opportunity funds, which are designed to assist student-athletes who have exhausted their NCAA eligibility or are no longer able to participate in sports because of medical reasons"—nearly \$40 million. Mark Schlabach, *NCAA: Where Does the Money Go?*, ESPN, (July 12, 2011), http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money.

⁵⁶ Gould IV, Wong & Weitz, *supra* note 1, at 11.

⁵⁷ *Id.*; see *supra* note 15 and accompanying text (noting that the NCAA previously passed legislation allowing five conferences, including the ACC, Big 12 Conference, Big 10 Conference, Pac-12 Conference, and the SEC, which are collectively referred to as the Power Five conferences, to pass rules or make changes to existing rules regarding their athletes in certain areas of autonomy).

from \$1.4 to \$8.1 million.”⁵⁸ Two non-Power Five conferences, the Metro Atlantic Conference and the Atlantic-10 Conference, received just over \$2 million and \$8 million, respectively, from the 2012–13 season NCAA basketball fund.⁵⁹

The NCAA expenses also include “\$41,875,827 (five percent of total expenses) for management and general expenses,” which presumably includes executive compensation.⁶⁰ NCAA executives profit greatly.⁶¹ The President of the NCAA reportedly made \$1.9 million in 2014, and a number of other NCAA executives reportedly made over \$4 million each.⁶²

The NCAA receives a great deal of money generated by major college sports that would not arise without the labor provided by college athletes.⁶³ It is noteworthy that a large amount of distributions are made based on athletic success; they are not typically provided based on graduation rates or on academic performance of the schools and their athletes.⁶⁴ This seems counterintuitive given the NCAA’s purported primary goal of education for its athletes. The NCAA also allows the scheduling of football and basketball games on weekdays, including Monday through Thursday,⁶⁵ which seems counterproductive if the NCAA truly wants college athletes to study during the week while staying fresh for class and practice.

B. Conferences and Universities Profit

Conferences and schools, particularly in the Power Five conferences, enjoy exorbitant revenues from major college sports (i.e., football and men’s college basketball).⁶⁶ During the 2012–13 academic

⁵⁸ *Id.* at 11–12.

⁵⁹ *Id.* at 12.

⁶⁰ *See id.* at 11.

⁶¹ *See* Berkowitz, *supra* note 26.

⁶² *Id.*

⁶³ *See* Gould IV, Wong & Weitz, *supra* note 1, at 9 (reflecting the revenues brought in by television and marketing, including the multibillion dollar deal between the NCAA and CBS/Turner Sports to broadcast the men’s basketball tournament).

⁶⁴ *See* 2015–16 DIVISION I REVENUE DISTRIBUTION PLAN, NCAA (2016), http://www.ncaa.org/sites/default/files/2015-16DI_Revenue_Distribution_PlanFinal_20160622.pdf.

⁶⁵ *See* 2016 College Football Schedule, FBSCHEDULES, <http://www.fbschedules.com/college-football-schedule/> (last visited Nov. 9, 2016); 2015–16 Men’s College Basketball TV Schedule, USA TODAY SPORTS (Oct. 29, 2015, 5:56 PM), <http://www.usatoday.com/story/sports/ncaab/2015/10/29/2015-16-mens-college-basketball-tv-schedule/74829074/>.

⁶⁶ *See* Gould IV, Wong & Weitz, *supra* note 1, at 8–9 (discussing that the NCAA’s revenues are often distributed to conferences); *see also* Chris Smith, *The Most Valuable*

year, for example, the SEC “reported \$314.5 million in overall revenue.”⁶⁷ The SEC derives revenue from “televised football, bowl games, the SEC football championship, televised basketball, the SEC men’s basketball tournament, NCAA championships and a supplemental surplus distribution.”⁶⁸ SEC revenues included, for example, a \$55 million per year television deal with CBS, “a \$2.25 billion, 15-year deal (\$150 million per year, annualized)” with ESPN to create the SEC television network, and “over \$15.2 million in distributions” from the 2012–13 NCAA basketball fund.⁶⁹ In May 2014, the SEC announced a record distribution of \$292.8 million, with each institution set to receive roughly \$20.9 million.⁷⁰ The \$292.8 million figure “represent[ed] over 90% of the SEC’s total revenues, and d[id] not include bowl game payouts (\$16.8 million per participant) and NCAA academic enhancement funding (\$1 million pool) directed to individual institutions.”⁷¹ Money earned from bowl game payouts in 2013 totaled over \$52 million for the SEC.⁷²

In addition to financial benefits, universities and colleges also receive recognition and publicity because of their men’s basketball and football teams. Exposure and success in college sports can lead to increased giving from donors, boosters, and alumni, as well as an increase in the quantity and quality of students that schools attract.⁷³

Conferences in College Sports 2014, FORBES (Apr. 15, 2014, 2:49 PM), <http://www.forbes.com/sites/chrisssmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/#160ff408145c> (reporting that the Power 5 conferences collected a combined \$311 million from bowl games and tournament payouts in 2014, while smaller conferences collected anywhere from \$22 to \$72 million).

⁶⁷ Gould IV, Wong & Weitz, *supra* note 1, at 13.

⁶⁸ *Id.* at 12.

⁶⁹ Gould IV, Wong & Weitz, *supra* note 1, at 13.

⁷⁰ *Id.* Similarly, “[i]n May 2014, the Big 12 announced a record distribution of \$220 million in revenue to member institutions.” *Id.* at 14.

⁷¹ *Id.* at 13–14.

⁷² *Id.* at 15. In 2013, the football programs that generated the most revenue included Texas, Michigan, and Alabama, raking in \$104.5 million, \$85 million, and \$81.9 million, respectively. Cork Gaines, *The 25 Schools That Make the Most Money in College Football*, BUSINESS INSIDER (Jan. 16, 2013, 3:38 PM), <http://www.businessinsider.com/the-25-schools-that-make-the-most-money-in-college-football-2013-1?op=1>.

⁷³ See generally Sean Silverthorne, *The Flutie Effect: How Athletic Success Boosts College Applications*, FORBES (Apr. 29, 2013, 9:48 AM), <http://www.forbes.com/sites/hbsworkingknowledge/2013/04/29/the-flutie-effect-how-athletic-success-boosts-college-applications> (describing the phenomenon known as the “Flutie Effect”).

C. Coaches and Athletic Directors Profit, and Facilities Improve

Coaches of men's college basketball and football can earn millions of dollars in salary.⁷⁴ In 2015, Urban Meyer made \$4,536,640, Nick Saban earned \$7,160,187 that same year, and Kevin Sumlin (Texas A&M University's head football coach) made \$5,006,000.⁷⁵ Former University of Connecticut men's basketball coach Jim Calhoun earned \$1.6 million per year in his five-year contract signed in 2009.⁷⁶ Calhoun spoke infamously about his significant salary, stating that his program "turn[s] over twelve million dollars to the University of Connecticut."⁷⁷ When asked how much of his own salary he would give back to the school, Calhoun, as the highest salaried public employee in Connecticut during a recession, responded, "not a dime."⁷⁸ Coaches believe that they earn their salaries.⁷⁹ As a player, I know that my coaches consistently worked 100-hour weeks during the season, a normal commitment for college coaches.⁸⁰ College coaches

⁷⁴ Cf. *NCAA Salaries: NCAA Coaches*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach> (last visited Oct. 28, 2016) (giving examples such as John Calipari, the head coach for Kentucky's basketball team, who is receiving \$6,009,000 in salary pay alone).

⁷⁵ *NCAA Salaries: NCAA Coaches*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/coach> (last visited Oct. 28, 2016).

⁷⁶ See Scott Cacciola, *Last Stand for UConn's Calhoun?*, WALL STREET J. (Apr. 28, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704471204575210401099496076> (stating Coach Calhoun received a contract for \$9.1 million spread out over the course of six years).

⁷⁷ 10titansfan10, *Jim Calhoun Owns Reporter (Ken Krayske)*, YOUTUBE (Feb. 21, 2009) <https://www.youtube.com/watch?v=xokthY5zuPU>.

⁷⁸ *Id.*

⁷⁹ Coaches believe they are worth those salaries based on the teams they put on the field/floor through recruiting, the intense preparation they provide their teams in order to compete through scouting other teams and game-planning, and the revenue generated by their programs. See, e.g., Monte Burke, *Opinion, College Coaches Deserve Their Pay*, WALL STREET J. (Aug. 30, 2015), <http://www.wsj.com/articles/college-coaches-deserve-their-pay-1440975551> (discussing how Nick Saban helped increase the revenues generated at Alabama); Andrew Zimbalist, *College Coaches' Salaries and Higher Education*, HUFFINGTON POST (Dec. 31, 2014), http://www.huffingtonpost.com/andrew-zimbalist/college-coaches-salaries-_1_b_6400256.html (acknowledging a college "coach's salary reflects the value of the athletes he brings to the school" through recruiting); Erik Sherman, *College Basketball Coaches and Their Slam Dunk Salaries*, FORTUNE (Mar. 21, 2015), <http://fortune.com/2015/03/21/college-basketball-coaches-and-their-slam-dunk-salaries/> (stating that "experienced and winning coaches get CEO-sized compensation").

⁸⁰ Amy Daughters, *Why We Would Never Be a College Football Head Coach*, BLEACHER REP. (May 5, 2013), <http://bleacherreport.com/articles/1629795-why-we-would-never-be-a-college-football-head-coach> (stating that, on average, college football coaches work 100 hours a week during the season).

can also earn a great deal doing television, radio, footwear, and apparel endorsements, thereby supplementing their incomes handsomely.⁸¹

In addition to coaches, athletic directors can also receive a hefty remuneration, with some making over a million dollars annually.⁸² In a report by *USA Today* in 2013, all the reported athletic director salaries ranged from six to seven figures.⁸³ Athletic Director Paul Krebs of New Mexico, a non-Power Five conference school, made \$408,391 in salary with a maximum potential bonus of \$70,000 based on the performance of the athletic department.⁸⁴ A Power Five conference Athletic Director, Jeremy Foley of Florida, made \$1,233,250 in salary with a potential bonus of \$50,000.⁸⁵

Athletic departments also spend millions on facilities to attract the top college athletes.⁸⁶ The NCAA places no limit on how much a school can spend on its facilities.⁸⁷ In the fall of 2015, Kansas State finished its new football facility that cost \$68 million.⁸⁸ Extravagant spending on sports facilities is not limited to Power Five conference schools. Even Rice University is investing over \$30 million in building a sports facility.⁸⁹ These grandiose facilities, including Rice's,

⁸¹ See Erik Brady, Steve Berkowitz & Christopher Schnaars, *College Football Salaries: How Georgia's Mark Richt Makes Millions*, USA TODAY (July 2, 2015, 12:45 PM), <http://www.usatoday.com/story/sports/ncaaf/2014/11/19/mark-richt-georgia-college-football-coaches-salaries-compensation/19246795>.

⁸² *Athletic Director Salary Database: 2013 Athletic Directors' Salaries*, USA TODAY (Mar. 6, 2013, 6:11 PM), <http://www.usatoday.com/story/sports/college/2013/03/06/athletic-director-salary-database-methodology/1968783>.

⁸³ *Id.* (showing Alabama's Athletic Director, for example, has a school salary of \$600,500).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Bilas Interview, *supra* note 17.

⁸⁷ See, e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 978–79 (N.D. Cal. 2014) (noting that colleges and universities “are able to spend freely” in certain areas, including training facilities, and the “NCAA does not do anything to rein in [this] spending.”); Bilas Interview, *supra* note 17 (recognizing that there is no cap on what universities and colleges can spend on facilities).

⁸⁸ See *K-State Football Announces Plans for Next Bill Snyder Family Stadium Project: Next Phase Will Enclose Wildcats' Football Facility*, CJONLINE (Sept. 9, 2015, 10:19 AM), <http://cjonline.com/sports/catzone/2015-09-09/k-state-football-announces-plans-next-bill-snyder-family-stadium-project> (“K-State had the grand opening of the \$68 million . . . [c]omplex last week, and the next phase of the stadium improvements has a \$15 million price tag.”).

⁸⁹ *Rice Holds Ceremonial Groundbreaking for New Brian Patterson Sports Performance Center: Opens in 2016*, RICE OWLS (Mar. 10, 2015), <http://www.riceowls.com/genrel/031015aab.html>.

typically include gaudy locker rooms.⁹⁰ The University of Alabama's football locker room flaunts amenities such as video arcade games, pool tables, two 30-foot-long hot tubs, and televisions throughout the facility, including in the pool area.⁹¹

To the extent these facilities and locker rooms serve as recruiting tools for college athletes, they also serve as forms of indirect compensation that the schools cannot pay directly because of NCAA rules.⁹² Indirect pay as a means of recruitment demonstrates that the players' market values are higher than the scholarship amounts.⁹³

Improving football and basketball facilities also demonstrates to Power Five conferences that the school making those improvements maintains a commitment to major college athletics. A school on the outside of those major conferences may seek an invitation to a Power Five conference to share in the revenues generated from television deals, bowl games, and NCAA tournament success. Schools may claim that the new facilities are for the college athletes, which is true to a certain extent. Schools though, also want a piece of the bigger pie from major college sports, which in turn motivates athletic departments and schools to build these facilities.

⁹⁰ See *id.* (stating the two-story structure will house a weight room, a home-team locker room, coaching and staff offices, an auditorium that will seat 150 people, a football team lounge, and areas for training and sports medicine that include hydrotherapy, plunge pools, and exam rooms).

⁹¹ See *University of Alabama's \$9m Facility Is like Something out of MTV Cribs*, THE 42 (July 22, 2013, 9:47 PM), <http://www.the42.ie/university-of-alabamas-9m-facility-is-like-something-out-mtv-cribs-1004290-Jul2013> (stating that these "shiny new facilities [are] a huge recruiting tool" and by pulling in "\$82 million in football revenue," the University of Alabama can afford it).

⁹² Cf. Solomon, *supra* note 13 (showing the amount the four College Playoff teams spent on recruiting in 2015: Alabama spent \$1.3 million; Oklahoma spent \$881,000; Clemson spent \$694,000; and Michigan State spent \$648,000. The table also provides, via *CBS Sports*, *USA Today*, and the *Portland Business Journal*, information concerning how each 2015 Playoff team receives/spends its money on: Total Operating Athletic Revenue, Sports/Scholarship Athletes, Annual Debt for Athletic Facilities, Approximate Cost of Attendance (Stipend to Players), Football Ticket Sales, Donations to Athletic Department, Direct Institutional Support, Student Fee Revenue, NCAA/Conference Payouts, Broadcast, TV, Radio, and Internet Rights, Football Camp Revenue, Nike 2015–16 Contract value, Total Operating Athletic Expenses, Football Coach Pay in 2015–16, Football Assistant Coaches Pay, Football Support Staff Pay, Football Recruiting Expenses, Athletic Department Medical Expenses/Insurance); see also NCAA BYLAWS, *supra* note 6, at bylaw 13.

⁹³ See Mark Koba, *What a College Athlete Is Worth on the Open Market*, CNBC (Apr. 12, 2014, 9:02 AM), <http://www.cnbc.com/2014/04/12/whats-a-college-athlete-worth-in-pay-on-the-open-market.html> (indicating that the bidding war for athletes would likely be in the millions).

Although most athletic departments report higher expenses than revenues, the massive revenues provide for the coaches' lofty salaries and the facilities' high costs. During "2013, FBS athletic programs generated median revenues of \$41,897,000, independent of allocated sources," while "[t]he median of total expenses for FBS athletics departments in 2013 was \$62,227,000," with "total expenses exceed[ing] generated revenues by \$11,623,000."⁹⁴ Most of the revenues came "from ticket sales (26 percent), contributions from alumni and others (25 percent), and distributions from the NCAA and each institutions' respective conference (24 percent)."⁹⁵ In 2013, 103 FBS athletics programs in total "reported negative net generated revenues (expenses exceeded generated revenue)," while "[o]nly 20 programs reported positive net generated revenues (generated revenue exceeded expenses)."⁹⁶ However, a \$23 million gap existed "between profitable programs and others, illustrating the larger variation between athletic budgets in the FBS."⁹⁷ Moreover, "[c]olleges are generally not-for-profit, and therefore, excess funds tend to get spent (since an owner can't claim these profits)," meaning there is an incentive to spend all of the money coming into the program.⁹⁸

The Power Five conference school revenues are "five times greater than the revenues of these mid-major institutions," which stem primarily from the extraordinary differences in ticket sales, rights, and licensing.⁹⁹ The annual ticket revenue for the athletic department at the University of Texas, for example, brings in almost one hundred times the revenue of the athletic department at Troy University.¹⁰⁰

Almost every college sports program, other than football and men's basketball, produces losses for the athletic department.¹⁰¹ Many small schools schedule football games with opponents from larger schools. The smaller schools play opponents at the larger school's home field,

⁹⁴ Gould IV, Wong & Weitz, *supra* note 1, at 16–17.

⁹⁵ *Id.* at 16.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.*

⁹⁸ 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>.

⁹⁹ Gould IV, Wong & Weitz, *supra* note 1, at 21.

¹⁰⁰ *Id.* at 20–21.

¹⁰¹ Randy Chua, *How Much Revenue Do College Sports Produce?*, INVESTOPEDIA (Nov. 15, 2011, 2:00 AM), <http://www.investopedia.com/financial-edge/1111/how-much-revenue-do-college-sports-produce.aspx>.

and the teams split the revenue from the ticket sales.¹⁰² This benefits the larger schools because they can schedule a team that might be less challenging to defeat than other teams in their own conference or comparable conferences.¹⁰³ The smaller programs benefit because they generate a great deal of money for their programs and their schools' other sports.¹⁰⁴

Confession: I Actually Believed My Rice Football Team Could Beat Ohio State

I recall being told that our football program was the only program that made money, and that our program helped substantially to pay for Rice's other athletic programs, despite the on-field success of our other athletic programs—particularly baseball, which was ranked nationally.

Rice football generated revenue, in large part, due to the games we scheduled against larger schools. Prior to playing in these contests, I viewed these matchups as an opportunity to play against the best competition and raise the profile of our football program. After playing in these match-ups and serving as a sacrificial lamb in front of tens of thousands of people, the only thing I accomplished was losing an incredible amount of pride. For example, we went to the "Horseshoe" in 1996 and held Ohio State University to seventy points, while scoring a stellar seven points on the home team. Once I later became aware of why teams like Rice play Ohio State—to generate money to support the school's entire athletic department—I understood what exploitation of the college athlete meant.¹⁰⁵

Athletic departments pay themselves and the coaches, spend millions of dollars on facilities, finance unprofitable sports with the earnings generated by football and men's basketball teams, and then assert two disingenuous claims: first, the athletic department was not profitable;

¹⁰² Alex Mayyasi, *The \$1 Million Reason College Football Season Starts with Blowouts*, PRICEONOMICS (Aug. 27, 2013), <https://priceonomics.com/the-s1-million-reason-college-football-season> (discussing the logistics of a smaller school playing a larger school so they can split the revenue from those games).

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ We were twenty-six or twenty-seven point underdogs in that Ohio State game in 1996, and we felt disrespected by the odds-makers. Apparently, the odds-makers respected us a lot more than they should have.

and, second, if college athletes could theoretically receive compensation, there is no money remaining for them.¹⁰⁶

D. The NCAA Forbids College Athletes from Profiting Based on the Sport They Play and Use of Their Names, Images, and Likenesses

The NCAA promulgates and enforces rules for all of its participants. Those rules include NCAA Bylaw 12.1.2, which states that a college athlete becomes ineligible if one “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport.”¹⁰⁷ NCAA Bylaw 12.5.2.1 prohibits a college athlete from earning compensation through endorsing commercial products.¹⁰⁸ Thus, college athletes cannot receive compensation for playing or for selling their names, images, or likenesses.¹⁰⁹

College athletes receive scholarships for tuition, room, board, and books. However, “[t]he full cost of attendance is generally between \$2000 and \$5000 per year more than the value of the respective school’s athletic scholarship because it accounts for various miscellaneous expenses.”¹¹⁰ The full cost of attendance fees at Bowling Green, for example, “include[] a tuition fee, miscellaneous personal expenses, transportation, loan origination fee and administrative fees.”¹¹¹ Some college athletes qualify for Pell grants, which help provide an actual full scholarship, while others do not qualify.¹¹² For example, I did not qualify for a Pell grant, but I needed

¹⁰⁶ See ANDY SCHWARZ, EXCUSES NOT REASONS: 13 MYTHS ABOUT (NOT) PAYING COLLEGE ATHLETES 50–54 (2011), <http://sportsgeekonomics.tumblr.com/myths> (click on PDF link); Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Apr. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/>.

¹⁰⁷ NCAA BYLAWS, *supra* note 6, at bylaw 12.1.2(a).

¹⁰⁸ *Id.* at bylaw 12.5.2(1)(a) (forbidding a college athlete from “[a]ccept[ing] any remuneration for or permit[ing] the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind”).

¹⁰⁹ See *id.* at bylaw 15.1 (receiving financial aid that exceeds the cost of attendance renders a player ineligible). Predictably, though, the NCAA’s own rules allow the NCAA to use a college athlete’s name or picture to “promote NCAA championships or other NCAA events, activities or programs.” *Id.* at bylaw 12.5.1.1.1.

¹¹⁰ Eric Prisbell, *What is Full Cost of Attendance for NCAA Athletes?*, USA TODAY (Aug. 17, 2014, 5:06 PM), <http://www.usatoday.com/story/sports/college/2014/08/17/ncaa-full-cost-of-attendance/14200387>.

¹¹¹ *Id.*

¹¹² See Travis L. Packer, *College Cost Reduction and Access Act: A Good Step, But Only a Step*, 12 N.C. BANKING INST. 221, 225–27 (2008) (discussing the mechanics of Pell grants); O’Bannon v. NCAA, 802 F.3d 1049, 1078 n.4 (9th Cir. 2015) (recognizing the

to travel from my home state of Colorado to Houston, Texas. The school did not pay for me to fly or drive home, and when I stayed in Houston during two summers to train with the team and take an upper level economics class, I needed to find a job to pay for my living expenses and meals.

The autonomy legislation allows schools to fill the gap between the grant-in-aid scholarship that most schools provide and the full cost of attendance scholarship that would cover the additional \$2000 to \$5000 of costs discussed above. Nevertheless, simply paying for all of the athlete's college expenses fails to compensate players fairly at major college programs who generate billions of dollars of revenue.

Some argue that college athletes already receive enough compensation through their scholarships, and college athletes also receive a clear pathway to professional sports.¹¹³ This argument accurately depicts a college athlete's *desire* to become a professional athlete. Despite athletes knowing the odds are stacked against them with regard to becoming professionals, most athletes still believe that they fall into the minute percentage of athletes that will reach the NFL or the NBA.¹¹⁴ Some of that optimism bias might be based on the fact that Division I college athletes already represent a select number of athletes who made an elite cut. That is, only one percent of high school basketball players eventually compete at Division I schools, and just 2.5% of high school football athletes play at Division I schools.¹¹⁵ In any event, an athlete must believe that he can overcome all odds to reach his goals, which helps motivate an athlete to train hard every day and focus on his sport.

The argument about a college athlete receiving a clear path to the professional ranks, however, fails to address the *reality* that very few

NCAA allows college athletes to receive Pell grants, even above their cost of attendance scholarship amounts, and Pell grants are available to athletes and non-athletes alike).

¹¹³ See, e.g., McCauley, *supra* note 35 (arguing athletes' scholarships are sufficient compensation for their athletic services and that "the players who are so good and entertain us in college will eventually get paid" in the pros).

¹¹⁴ NCAA, DIVISION I RESULTS FROM THE NCAA GOALS STUDY ON THE STUDENT-ATHLETE EXPERIENCE 30 (2011), http://www.ncaa.org/sites/default/files/DI_GOALS_FARRA_final_1.pdf (reporting data from a 2010 study that showed seventy-six percent of the Division I men's college basketball players and fifty-eight percent of the FBS players responding to a survey thought that it was "at least 'somewhat likely'" that they would become a professional and/or Olympic athlete in their sport).

¹¹⁵ NCAA, NCAA RESEARCH: ESTIMATED PROBABILITY OF COMPETING IN COLLEGE ATHLETICS, http://www.ncaa.org/sites/default/files/2015%20Probability%20Chart%20Web%20PDF_draft5.pdf (last updated Apr. 13, 2015).

college athletes become professional athletes. The percentage of college players who are drafted by an NFL or NBA team slightly exceeds just one percent.¹¹⁶ If one is drafted by an NFL or NBA team, that does not even ensure that the draftee will make the team. Even for those who somehow do make a team in the NFL or NBA, the average career is approximately three years and five years, respectively.¹¹⁷ Despite one's success at the high school and collegiate levels, it remains highly unlikely that a college athlete will play professionally. And if he does, it is likely that his career as a professional athlete will be short-lived. The chance to reach one's professional sport via a college athletics scholarship represents as much a form of compensation as does winning the lottery when one acquires a lottery ticket.

Confession: I Truly Thought I Was Going to Play Professional Football

Even as a 5'6," 150-pound freshman entering Rice, I wanted to—and believed that I could—reach the NFL. I earned all-state honors in high school, and I was eventually inducted into my high school's athletic hall of fame for football. I was recruited by several schools, but my final choice came down to Rice—which offered me a full grant-in-aid scholarship—or Harvard. I eventually chose to play at Rice over Harvard because Rice awards full athletic scholarships while Harvard does not, and Rice plays in the highest division of college football (which was previously Division I and is now the FBS), while Harvard does not. I made the leap from high school to Division I football, and I felt elite. I believed my professional football career would follow my career at Rice.

My career at Rice, though, included mostly playing backup cornerback and kick returner, starting only a few games total (one at cornerback and a few at kick returner). I also played special teams, but I was no star. Years after playing, I must confess that my chances of being drafted by the United States Army heavily outweighed my chances of being drafted by an NFL team.

Most college athletes will not reach the professional ranks of their sports, but they should be able to earn compensation for generating huge revenues for their colleges. Athletes should also be able to receive payment by licensing their names, images, and likenesses during college when those commodities possess marketable value. College

¹¹⁶ *Id.*

¹¹⁷ Gaines, *supra* note 37.

athletes dedicate so much of their time, energy, and effort to sports that they should be compensated for those efforts. Even though they are also students, sports come first for college athletes.

The *Northwestern* case involved Northwestern University football players seeking to form a union to protect their interests.¹¹⁸ *Northwestern* included evidence from college athletes where they detailed the amount of time they spent dedicated to football and academics.¹¹⁹ College athletes dedicated the following time, on average, to football: fifty to sixty hours per week during training camp prior to school; forty to fifty hours per week during the season; and twelve to twenty-five hours per week during the spring semester.¹²⁰ These college athletes dedicated twenty hours per week to academics in each semester.¹²¹ A study done by the NCAA in 2011 provided similar results, showing college athletes spent about forty-five hours per week for their sport and nearly thirty hours per week toward their academics.¹²²

There is a remarkable duality to college athletes, as the NCAA's phrase "student-athlete" suggests, because of the incredible amount of time and energy necessary to succeed in either endeavor, let alone both.¹²³ Athletics and academics are connected in that a scholarship athlete cannot play football unless he is academically eligible, and he

¹¹⁸ See Nw. Univ., No. 13-RC-121359, 2014–15 N.L.R.B. Dec. (CCH) ¶ 15,781 (Mar. 26, 2014). On appeal, the full NLRB declined to exercise jurisdiction over this matter, commenting that it maintains jurisdiction over only private entities, while many of the schools competing in the Big Ten conference against Northwestern are public entities. See Nw. Univ., 362 N.L.R.B. No. 167, at 3 (2015). The full Board did not address the issue of whether college athletes are employees or primarily athletes. *Id.*

¹¹⁹ See Nw. Univ., No. 13-RC-121359, 2014–15 N.L.R.B. Dec. (CCH) ¶ 15,781 (Mar. 26, 2014).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² NCAA, *supra* note 115; see also Lynn O'Shaughnessy, *Do College Athletes Have Time to Be Students?*, CBS MONEY WATCH (Feb. 18, 2011, 10:56 AM), <http://www.cbsnews.com/news/do-college-athletes-have-time-to-be-students>.

¹²³ Professors Robert and Amy McCormick denounce the term "student-athlete" as a myth. They argue that college athletes are employees under the National Labor Relations Act and entitled to that act's protections. Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 95–97 (2006). The McCormicks contend that the "NCAA utilized the term 'student-athlete' to cloak the actual relationship between the parties. Indeed, the term itself was born of the NCAA's swift and alarmed reaction to a judicial determination in 1953 that . . . certain college athletes were employees and entitled to statutory benefits under state law." *Id.* at 83.

may not have been given the opportunity to go to that school but for his athletic prowess. Nevertheless, the ability to succeed in either realm is hindered by the other. Maintaining high grades while playing a sport is extremely difficult, as is training for, and participating in, one's sport while having to attend class and study. Even if a college athlete strives to attend law school or medical school after playing college sports, he must make sure he complies with all of his athletic duties to ensure that he graduates.¹²⁴ The *Northwestern* case demonstrates that when athletics collide with academics, athletics come first—at least in terms of the time dedicated to each.

Confession: Going to College on an Athletic Scholarship is Anything but a Free Ride

Playing football at Rice opened doors for me, and I enjoyed the comradery with my teammates and the excitement of the games. Nonetheless, the demands placed on scholarship athletes—the struggle with the conflict between athletics and academics, and the sentiment that college sports is a business—make being a scholarship athlete extremely difficult.

As a scholarship athlete, if I did not fulfill my athletic obligations to the football team—attending meetings, practices, mandatory workouts, and games—then I could not attend Rice University. It was extremely difficult to try to succeed academically while playing football, and the conflict between athletics and academics began almost as soon I arrived on campus.

As a Freshman, one of the first meetings we had with our upperclassmen football teammates included a discussion about prioritization of academics and athletics. An upperclassman said that academics are number one, while holding up two fingers to indicate academics are actually number two. He then said that football is number two, this time holding up just his index finger to show that football should be our number one priority. I wanted to receive a great education, which is one of the reasons I went to Rice, but I also wanted to play professionally. The conflict between athletics and academics began with that first meeting and continued throughout my college career.

I endured a schedule similar to that described above in the Northwestern case. Before the fall semester began, we persevered through two-a-day practices in the fall in Houston. Two-a-day

¹²⁴ *Id.* at 128 n.241 (“[C]ollege athletes may lose their athletic scholarships if they fail to perform their athletic services.”).

practices involve two long practices (each an hour and a half to two hours) in the same day. Playing at Rice meant practicing in 100-degree heat with over ninety percent humidity during those two-a-days, oftentimes with our helmets and full pads. Coaches mandated that all players recorded their weight immediately before and after practice. Some large linemen would lose twenty pounds in one two-hour practice and would require an I.V. to restore fluids.

Once school started, we lifted weights in the morning during the season, which required waking up around 5:30 or 6:00 a.m. depending on one's lifting group. After lifting in the morning, we ate at mandatory training table (meals prepared by on-campus restaurants or local restaurants and typically served on-campus for college athletes) for breakfast from around 7:00 a.m. to 8:45 a.m. We then attended classes, which started around 9:00 a.m. and ended around 1:50 p.m., depending on one's particular schedule. We ate lunch at noon to 12:50 p.m. If time allowed in between classes, some of my teammates watched film of upcoming opponents, lifted weights some more, studied, or napped. We then headed to the stadium around 2:30 or 2:45 p.m. to dress for practice (i.e., get our ankles taped and put on our practice gear) and attend meetings (where we analyzed film of our previous game or practice, as well as film of our next opponent, and we learned and examined game plans and strategies for the upcoming game). After meetings, we practiced until around 6:30 p.m., and then we went to mandatory training table from approximately 7:00 p.m. to 8:30 or 9:00 p.m. After training table and before going to sleep at night, I sometimes watched film of opponents to prepare for the game.

On Fridays, I travelled with the football team during most of the day if the opponent was located outside of Texas. When traveling, the football team typically visited the opponent's stadium on Friday afternoon for a walk-through, ate dinner and had a meeting at night. The next day, we ate breakfast in the morning, and played the game the next day in the afternoon or at night. If the game was played at the opponent's stadium, our team might not reach home until late Saturday night or early Sunday morning. Even if the football team played at home, the football team stayed in a hotel close to the stadium on Friday night until the game on Saturday, and the players reported to the hotel around 5:00 p.m. on Friday.

In the spring, we typically lifted in the morning and performed intense conditioning and lifting in the afternoon. We also practiced three weeks during spring football where we competed for a starting

position, and those few weeks mirrored a typical day during the season in the fall. Devoting an incredible amount of time to football made it difficult to find time to study.

Not only did the daily schedule create an inherent conflict between athletics and academics, but the physical rigors of college football also made competing academically even more difficult. For example, cornerbacks usually did a drill for ten minutes a day that involved shedding (i.e. facing and overcoming) a blocker. We would stand toe-to-toe with a fellow defensive back who was acting like a wide receiver trying to block us. I would initiate contact with my helmet to his helmet, simultaneously grab his jersey, then extend my arms and throw him out of the way to simulate how one deals with a blocker. Whether I was the “hitter” or “hittee” in this daily drill, ramming or receiving a hit to my head for ten minutes did not leave me in the best physical or mental state to study at 9:00 p.m. once all of my football duties were completed.¹²⁵

In college, the coaches’ livelihoods depend on how players perform. When athletes fail to perform in college and the team loses, coaches can get fired. A coach can remind his players that if they do not perform on the field, then the coach’s sons and daughters may no longer attend that private school or have food to eat if the coach loses his job. Perhaps this is not the best way to motivate an eighteen or nineteen-year-old, but it should become fairly obvious to college athletes, as it did to me, that this is much more than just a game, especially to the coaches.

The rigor of being a college athlete at Rice was so difficult that I often marveled at the “free time” that I felt like I had while I was in law school at Duke University. I came home from my first day of classes in law school and incredulously found myself with nothing to do but study, as opposed to college where meetings, practice, and a mandatory training table awaited after classes.

Given the incredible demands and pressure that college athletes face and the revenue they generate from playing major college sports, courts should adopt a free market approach to allow college athletes to reap the financial benefits they deserve.

¹²⁵ The rest of football practice was physically draining as well. I was trying to make it to the NFL, and earn as much playing time as I could by performing in meetings and practice, which also made the process emotionally draining.

II

THE FREE MARKET APPROACH SHOULD APPLY IN MAJOR COLLEGE
SPORTS VIA ANTITRUST LAW

Major college sports operate as a business in a free market system for everyone involved, except the athletes.¹²⁶ Jay Bilas argues that “players should not be restricted[;] . . . they should be allowed to participate in this college sports market openly and get their fair market value like every other person is allowed to do, including every other student.”¹²⁷ The NCAA and its members could institute a salary cap or profit sharing system through collective bargaining.¹²⁸ If not, then “the players should be allowed to bargain for their fair market value[s] individually in the marketplace That includes endorsements and that includes getting what they want or what they can bargain for from a school.”¹²⁹ Furthermore, “there’s no requirement that coaches be paid, and no requirement that coaches be paid millions of dollars. If a school wants to pay less, they can. If a school wants to pay more, they can [t]here is no cap on what they can spend on facilities or how they can travel, [including the use of] . . . private travel—it’s all up to each school to make their own decisions.”¹³⁰ Each school should similarly decide whether it wants to compensate its players or not.¹³¹

This Part discusses the free market approach and antitrust law that should enable the creation of a free market system for college athletes. This Part also discusses the applicable antitrust law and cases, then applies the relevant law to college athlete compensation above their scholarships for playing and for the use of their names, images, and likenesses.

A. The Free Market Approach

A capitalist economy employs free markets that promote competition.¹³² Competition creates “the best prices, highest quality, most choices, and best opportunity for innovation.”¹³³ In 1890

¹²⁶ Bilas Interview, *supra* note 17.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Matthew J. Gustin, *The O’Bannon Court Got It Wrong: The Case Against Paying NCAA Student-Athletes*, 42 W. STATE U.L. REV. 137, 147 (2015).

¹³³ *Id.*

Congress passed the Sherman Antitrust Act to prevent monopolies and to preserve competition through free markets.¹³⁴

The plaintiffs in *Jenkins v. NCAA*, a case pending in the Northern District of California,¹³⁵ seek the free market model advocated by Bilas and others.¹³⁶ In *Jenkins*, attorney Jeffrey Kessler, known for securing free agency for players in the NFL,¹³⁷ filed a class action complaint on behalf of several college football and men's basketball players against the NCAA and the Power Five conferences.¹³⁸ The named plaintiffs include "four current top-tier college football and men's basketball players," and the class includes all similarly situated college athletes.¹³⁹ The complaint alleges that the plaintiffs "are exploited by Defendants and their member institutions under false claims of amateurism."¹⁴⁰

The complaint further alleges that the defendants "entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services."¹⁴¹ The *Jenkins* complaint employs an antitrust approach to advocate market value compensation for college athletes.¹⁴²

¹³⁴ See *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Nov. 9, 2016).

¹³⁵ *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 24 F. Supp. 3d 1366 (J.P.M.L. 2014) (transferring the case from the District of New Jersey to the Northern District of California by a multidistrict litigation panel because of the other antitrust cases against the NCAA that were already pending in the Northern District of California).

¹³⁶ See, e.g., Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2363–64 (2014) (advocating for a free market system to compensate college athletes); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 208 (1990); Andy Schwarz & Dan Rascher, *Opposing View: College Sports Should Work as a Free Market*, USA TODAY (Jan. 12, 2012, 11:33 PM), <http://usatoday30.usatoday.com/news/opinion/story/2012-01-12/college-football-free-market/52524448/1>.

¹³⁷ Aaron Vehling, *Titans of The Plaintiffs Bar: Jeffrey Kessler*, LAW 360 (Oct. 16, 2014, 2:01 PM), <http://www.law360.com/articles/586308/titans-of-the-plaintiffs-bar-jeffrey-kessler>.

¹³⁸ Complaint and Jury Demand-Class Action Seeking Injunction and Individual Damages, *Jenkins v. NCAA*, No. 3:33-av-0001 (D.N.J. Mar. 17, 2014) [hereinafter Complaint].

¹³⁹ *Id.* at 2–3.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Id.*

¹⁴² *Id.* (asserting that the "restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, and should now be struck down and enjoined").

B. The Sherman Act and Relevant Antitrust Law

Section 1 of the Sherman Act makes it illegal to form any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”¹⁴³ As every contract restrains trade to some extent, “the Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’”¹⁴⁴

To prevail on a claim under this section, a plaintiff must show “(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and, (3) that the restraint affected interstate commerce.”¹⁴⁵

1. NCAA v. Board of Regents of the University of Oklahoma and the Rule of Reason Analysis

In the seminal 1984 case of *National Collegiate Athletic Association (NCAA) v. Board of Regents of the University of Oklahoma (Board of Regents)*, the United States Supreme Court applied antitrust law to the NCAA and major college sports.¹⁴⁶ The Supreme Court held against the NCAA,¹⁴⁷ when previously the courts “took a hands-off approach when it came to the NCAA, and were dismissive of the alleged violations of antitrust laws pertaining to the NCAA’s noncommercial objectives.”¹⁴⁸

Board of Regents involved the NCAA’s rules for televising college football games.¹⁴⁹ The rules capped both the total number of college games that could be televised each year as well as the number of games that any particular school’s team could appear on television.¹⁵⁰ Schools also needed approval from the NCAA to enter into an agreement with

¹⁴³ 15 U.S.C. § 1 (2012).

¹⁴⁴ *Law v. NCAA (NCAA)*, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984)); *see also* *Standard Oil Co. v. United States*, 221 U.S. 1, 52–60 (1911).

¹⁴⁵ *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (quoting *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996)).

¹⁴⁶ 468 U.S. 85 (1984).

¹⁴⁷ *Id.* at 120.

¹⁴⁸ Andrew B. Carrabis, *Strange Bedfellows: How the NCAA and EA Sports May Have Violated Antitrust and Right of Publicity Laws to Make a Profit at the Exploitation of Intercollegiate Amateurism*, 15 BARRY L. REV. 17, 24 (2010).

¹⁴⁹ *Bd. of Regents*, 468 U.S. at 88.

¹⁵⁰ *Id.* at 94.

the television networks to broadcast the games.¹⁵¹ The University of Oklahoma and the University of Georgia sued the NCAA arguing that these restrictions constituted illegal restraints of trade under Section 1 of the Sherman Act.¹⁵²

The United States Supreme Court acknowledged that the NCAA's television rules represented two types of agreements that are typically considered *per se* unlawful¹⁵³ when addressing horizontal competitors in the same market: (1) a price-fixing agreement (because the NCAA television rules designated a "minimum aggregate price" that networks were required to pay the schools, which prevented price negotiation between the networks and the schools), and (2) output limitation (because the rules "restrain[ed] the quantity of television rights available for sale").¹⁵⁴ The Court concluded, however, that application of the *per se* rule would be "inappropriate" because college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁵⁵ The NCAA product is competition itself—competition between member institution teams—that requires rules that apply to all member institutions to ensure that competition.¹⁵⁶ As a result, the Court determined that a rule of reason analysis applied.¹⁵⁷

A rule of reason analysis involves a burden-shifting test where the plaintiff "bears the initial burden of showing that an agreement had a substantially adverse effect on competition."¹⁵⁸ A plaintiff can show the "anticompetitive effect [of a challenged restriction] indirectly by

¹⁵¹ *Id.* at 106.

¹⁵² *Id.* at 88.

¹⁵³ The *per se* rule condemns practices that "are entirely void of redeeming competitive rationales." *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998). "Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of antitrust law." *Id.* "Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied 'when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *Id.* at 1017 (quoting *Bd. of Regents*, 468 U.S. at 100–01). An analysis of the particular market context is thus not required in this situation.

¹⁵⁴ *Bd. of Regents*, 468 U.S. at 99–100.

¹⁵⁵ *Id.* at 100–01.

¹⁵⁶ *See id.* at 88.

¹⁵⁷ *Id.* at 103.

¹⁵⁸ *See Law*, 134 F.3d at 1019 (citing *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996); *Orson Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993)).

proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.”¹⁵⁹ If the plaintiff demonstrates an anticompetitive effect, then a heavy burden shifts to the defendant to establish a procompetitive justification of the challenged restraint for the deviation from the free market.¹⁶⁰ The defendant must provide only legitimate procompetitive justifications that, on balance, actually show “the challenged restraint enhances competition.”¹⁶¹ For example, “mere profitability or cost savings have not qualified as a defense under the antitrust laws.”¹⁶²

If the defendant satisfies its burden, then the plaintiff “must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”¹⁶³ Once each of “these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.”¹⁶⁴

Courts also sometimes use a quick-look approach under the rule of reason.¹⁶⁵ If the challenged restraint involves an obvious anticompetitive effect, such as an agreement not to compete in terms of price (price-fixing) or output, then “the court is justified in proceeding

¹⁵⁹ *Law*, 134 F.3d at 1019 (citing *Orson*, 79 F.3d at 1367; *Brown Univ.*, 5 F.3d at 668–69; *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir.1991)); see, e.g., *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business”).

¹⁶⁰ See *Bd. of Regents*, 468 U.S. at 113. Legitimate procompetitive objectives include “lowering transaction costs, and facilitating other output-promoting transactions,” as well as “increasing output, creating operating efficiencies . . . enhancing product or service quality, and widening consumer choice.” Moyer, *supra* note 30, at 784–85 (quoting ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY 207–08* (2d ed. 2008)).

¹⁶¹ *Bd. of Regents*, 468 U.S. at 104.

¹⁶² *Law*, 134 F.3d at 1023. Procompetitive justifications require actual evidence, while “[s]peculative, unsubstantiated, or uncertain claims of efficiency generally will be deemed insufficient to refute evidence of anticompetitive effects.” Moyer, *supra* note 30, at 786 (quoting Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012)).

¹⁶³ *Law*, 134 F.3d at 1019; see *Clorox*, 117 F.3d at 56; *Hairston*, 101 F.3d at 1319; *Orson*, 79 F.3d at 1368; *Brown Univ.*, 5 F.3d at 669.

¹⁶⁴ *Law*, 134 F.3d at 1019.

¹⁶⁵ *Id.* at 1020.

directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a ‘quick look’ rule of reason.”¹⁶⁶

In applying the rule of reason, the *Board of Regents* Court found that the NCAA’s television rules restrained price and output that resulted in significant anticompetitive effects.¹⁶⁷ As the district court found, “if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA’s output restriction has the effect of raising the price the networks pay for television rights.”¹⁶⁸ Also, “by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.”¹⁶⁹ Because each school needed approval by the NCAA to enter into television agreements, they were required to abide by the NCAA’s television rules, which deprived each school of its “freedom to compete.”¹⁷⁰

The Supreme Court then found that the restrictive television rules failed to serve a procompetitive justification.¹⁷¹ The Court also found that the NCAA’s television rules were “not even arguably tailored to serve” the purported procompetitive justification of maintaining competitive balance amongst the college teams.¹⁷² The NCAA television rules failed to “regulate the amount of money that any college [could] spend on its football program, nor the way in which the colleges [could] use the revenues that are generated by their football programs,” but “simply impose[d] a restriction on one source of revenue that is more important to some colleges than to others.”¹⁷³ The Supreme Court also placed great significance on the “District Court’s . . . well-supported finding that many more games would be televised in a free market than under the NCAA plan,” which demonstrated that the NCAA’s television rules did “not . . . serve any such legitimate

¹⁶⁶ *Id.*

¹⁶⁷ *Bd. of Regents*, 468 U.S. at 113.

¹⁶⁸ *Id.* at 105.

¹⁶⁹ *Id.* at 106.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 119.

¹⁷² *Id.*

¹⁷³ *Id.*

purpose.”¹⁷⁴ Thus, the Court held that the NCAA’s television rules violated the Sherman Act and struck them down.¹⁷⁵

The *Board of Regents’* finding that college football would be much more prevalent on television without the NCAA’s rules turned out to be an incredible understatement. College football is now shown on multiple channels throughout the entire day on Saturdays in the fall.¹⁷⁶ College football even appears on live television (at different times throughout the season) on weekdays.¹⁷⁷ The individual schools and conferences compete fiercely for television rights and make significant revenues from those deals. For example, Notre Dame holds an exclusive deal with NBC for its home games while the University of Texas enjoys its very own Longhorn Network, with each school reportedly making \$15 million annually on these television deals.¹⁷⁸

2. *O’Bannon v. NCAA*

The *O’Bannon v. NCAA* case provides some guidance here as it analyzed the NCAA’s compensation rules—i.e., the NCAA’s rules prohibiting college athletes from receiving compensation—through antitrust analysis. Also, although the plaintiffs in *O’Bannon* sought

¹⁷⁴ *Id.* at 119–20.

¹⁷⁵ *Id.* at 120.

¹⁷⁶ See *College Football Schedules*, CBSSPORTS.COM, <http://www.cbssports.com/collegefootball/schedules> (last visited Nov. 9, 2016) (providing stats for every college football team, including the TV station on which the game appeared); *FBS (I-A) Schedule—2015*, ESPN.COM, http://espn.go.com/college-football/schedule/_/seasontype/2 (last visited Nov. 9, 2016) (showing the results of over 100 college teams that played on the first week of the 2015 season); *2015 College Football TV schedule*, USA TODAY (Dec. 18, 2015, 1:41 PM), <http://www.usatoday.com/story/sports/ncaaf/2015/06/02/college-football-tv-guide-schedule-fbs-2015/26525745/> (showing the 2015 bowl schedule, including the channels for each game, featuring ESPN, CBS, and ABC).

¹⁷⁷ *2015 College Football Schedule: FBS (I-A), Week 1*, FOXSPORTS, <http://www.foxsports.com/college-football/schedule?season=2015&seasonType=1&week=1&group=-3> (last visited Oct. 28, 2016) (providing the details for the first week of the 2015 College Football season, specifically showing that a game was played every day from Thursday through Monday).

¹⁷⁸ *NBC’s Notre Dame Deal Extended*, ESPN (Apr. 18, 2013), http://espn.go.com/college-football/story/_/id/9186897/nbc-extends-notre-dame-fighting-irish-football-deal-2025 (showing the financial details between Notre Dame and NBC’s contract); Steven Godfrey, *Longhorn Network Doomed? Texas’ TV Money Stacking Up Fine Against SEC’s*, SBNATION.COM (June 5, 2015, 12:29 PM), <http://www.sbnation.com/college-football/2015/6/5/8733131/texas-longhorn-network-money-revenue> (explaining the financial details regarding the Longhorn Network); Clay Travis, *Every SEC School Will Make More TV Money Than Texas, Notre Dame*, FOXSPORTS (July 23, 2014, 10:57 AM), <http://www.foxsports.com/college-football/outkick-the-coverage/every-sec-school-will-make-more-tv-money-than-texas-notre-dame-072314>.

relief for group licensing in videogames, live game telecasts, re-broadcasts, and archival game footage,¹⁷⁹ the arguments are quite similar to individual college athletes licensing their names, images, and likenesses as discussed in this Article. In *O'Bannon*, plaintiffs challenged the Defendant NCAA's set of rules that preclude FBS football players and Division I men's basketball players from receiving any compensation beyond the fixed value of their scholarships, specifically for the use of their names, images, and likenesses.¹⁸⁰

The district court held that the NCAA's compensation rules constituted unlawful restraints of trade under the Sherman Act and permanently enjoined the NCAA from preventing its member schools from providing full cost of attendance scholarships.¹⁸¹ The district court also ruled that the NCAA could not prohibit its members schools from setting aside \$5000 per athlete per year that would be put in trust while the athlete was in school and become available to him after graduation.¹⁸² A three-judge panel of the Ninth Circuit affirmed the district court's order regarding the NCAA's violation of the Sherman Act and the allowance of full cost of attendance scholarships; but, it vacated the portion of the permanent injunction that required the NCAA to permit member schools to pay athletes deferred compensation up to \$5000 per year because those expenses were "untethered to educational expenses."¹⁸³

Per *Board of Regents*, both the district court and Ninth Circuit applied the rule of reason analysis in *O'Bannon*.¹⁸⁴ Beginning with plaintiffs' initial burden, the district court found, and the Ninth Circuit agreed, that the NCAA's rules prohibiting compensation to college athletes for the use of their names, images, and likenesses constituted a significant anticompetitive effect on the college education market—a market where "colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and

¹⁷⁹ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

¹⁸⁰ *See id.*

¹⁸¹ *See id.* at 1007–08.

¹⁸² *Id.* at 1008.

¹⁸³ *O'Bannon v. NCAA*, 802 F.3d 1049, 1078–79 (9th Cir. 2015). Plaintiffs' request for the Ninth Circuit to rehear the appeal en banc was denied. Order Denying Rehearing En Banc, *O'Bannon v. NCAA*, No.14-16601 (9th Cir. 2015). The United States Supreme Court later denied both the plaintiffs' petition and also the NCAA's petition to review the Ninth Circuit's ruling. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied* 85 U.S.L.W. 3139, No. 15-1388 (Oct. 3, 2016) (denying NCAA's petition for writ of certiorari).

¹⁸⁴ *See O'Bannon*, 802 F.3d at 1070 ("Like the district court," the Ninth Circuit applied the rule of reason).

facilities.”¹⁸⁵ But for the NCAA’s rules, colleges and universities would compete with each other to obtain the services of college athletes, which would include paying the college athletes for their names, images, and likenesses.¹⁸⁶ As a result, the NCAA’s prohibition amounts to price-fixing because the schools agree to pay nothing for the use of the college athletes’ names, images, and likenesses.¹⁸⁷ Also, “[a]bsent the NCAA’s compensation rules, video game makers would negotiate with student-athletes for the right to use their [names, images, and likenesses].”¹⁸⁸ Thus, the NCAA’s compensation rules constitute a significant anticompetitive restraint.¹⁸⁹

As the plaintiffs satisfied their initial burden under the rule of reason analysis, the *O’Bannon* courts focused on the defendant’s burden to show procompetitive justifications for their restriction on college athlete compensation.¹⁹⁰ In the district court, the NCAA advanced four purported procompetitive justifications—amateurism, integrating athletics and education, maintaining competitive equity, and increasing output—each of which are addressed below. The district court accepted the first two justifications, but found that the compensation rules “play a limited role in integrating student-athletes with their schools’ academic communities.”¹⁹¹ The Ninth Circuit also accepted the first two procompetitive justifications, namely “integrating academics with athletics,” and “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism,” and did not address the other two justifications because the NCAA failed to show that the district court’s findings on those justifications were clearly in error.¹⁹²

Turning to the last part of the rule of reason analysis, the district court identified two less restrictive alternatives: “(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their

¹⁸⁵ *O’Bannon*, 802 F.3d at 1070.

¹⁸⁶ *See id.* at 1052–53.

¹⁸⁷ *Id.* at 1069.

¹⁸⁸ *Id.* at 1067.

¹⁸⁹ *Id.* at 1072.

¹⁹⁰ *See O’Bannon*, 802 F.3d at 1072–74.

¹⁹¹ *Id.*

¹⁹² *Id.* at 1073.

[names, images, and likenesses].”¹⁹³ The Ninth Circuit held “that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative, but that it clearly erred when it found that allowing students to be paid compensation for their [names, images, and likenesses] is virtually as effective as the NCAA’s current amateur-status rule.”¹⁹⁴ The Ninth Circuit refused to allow college athletes to receive compensation above the full cost of attendance, reasoning that compensation tied to college athletes’ educational expenses is vastly different from compensation for college athletes “untethered” to educational expenses.¹⁹⁵

In *O’Bannon*, the district court and Ninth Circuit analyzed the procompetitive justifications of the antitrust analysis in detail. That analysis is described below.

a. Amateurism

In *O’Bannon*, the district court heavily criticized the NCAA’s use of amateurism as a procompetitive justification.¹⁹⁶ Judge Wilken of the Northern District of California found that “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways.”¹⁹⁷ Judge Wilken noted that the NCAA’s “current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.”¹⁹⁸ Judge Wilken provided specific instances of inconsistency as she attacked the NCAA’s purported amateurism principle:

A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell grant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell grant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts.¹⁹⁹

¹⁹³ *Id.* at 1074.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1078.

¹⁹⁶ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 999–1005 (N.D. Cal. 2014).

¹⁹⁷ *Id.* at 1000.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

The district court concluded “[s]uch inconsistencies are not indicative of “core principles.”²⁰⁰

The district court mentioned, nevertheless, that “some restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball,” but it found there were less restrictive means to achieve this procompetitive justification.²⁰¹

To bolster its case in *O’Bannon*, the NCAA commissioned a study to attempt to show that Americans generally oppose paying college athletes.²⁰² As an initial matter, the district court determined that the NCAA’s study was unpersuasive because, among other reasons, “the survey’s initial question skewed the results by priming respondents to think about *illicit* payments to student-athletes rather than the possibility of allowing athletes to be paid.”²⁰³ Moreover, that study is belied by the fact that similar surveys (one regarding major league baseball player salaries and the other concerning professional athletes in the Olympics) conducted in the past about consumer behavior turned out to be false. Dr. Daniel Rascher, testifying as an expert witness for the plaintiffs, explained that despite consumers surveyed opposing both the impending rise in baseball players’ salaries in the 1970’s and also professional athletes eventually competing in the Olympics, viewership actually increased once the players’ salaries rose and professional athletes started to compete in the Olympics.²⁰⁴

The Ninth Circuit, nevertheless, concluded “that there is a concrete procompetitive effect in the NCAA’s commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers.”²⁰⁵ The Ninth Circuit also emphasized that “not paying student-athletes is *precisely what makes them amateurs.*”²⁰⁶

²⁰⁰ *Id.* Thus, the NCAA apparently deems taxpayer funded aid, such as Pell grants, to college athletes acceptable, but not wealth generated by the athlete’s hard work and success. *See id.*; *O’Bannon*, 802 F.3d at 1078 n.4 (recognizing the NCAA allows college athletes to receive Pell grants, even above their cost of attendance scholarship amounts).

²⁰¹ *Id.* (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984) and recognizing that “maximiz[ing] consumer demand for the product’ is a legitimate procompetitive justification”).

²⁰² *O’Bannon v. NCAA*, 802 F.3d 1049, 1059 (9th Cir. 2015).

²⁰³ *Id.*

²⁰⁴ *O’Bannon*, 7 F. Supp. 3d at 1000; *see also O’Bannon*, 802 F.3d at 1081 (Thomas, J., concurring in part and dissenting in part).

²⁰⁵ *O’Bannon*, 802 F.3d at 1073.

²⁰⁶ *Id.* at 1076.

The court quoted *Board of Regents*, arguing that amateurism allows the “market for college football” to remain “distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league [football].’”²⁰⁷

b. Integrating Athletics and Academics

Unfortunately, the Ninth Circuit also accepted as procompetitive the justification that athletics and academics need to remain integrated. Specifically, compensation rules “prohibiting student-athletes from being paid large sums of money not available to ordinary students . . . prevent the creation of a social ‘wedge’ between student-athletes and the rest of the student body.”²⁰⁸ The Ninth Circuit also accepted the district court’s finding, though, that the compensation rules “play a limited role in integrating student-athletes with their schools’ academic communities.”²⁰⁹

c. Competitive Equity or Balance

The next purported procompetitive justification advanced by the NCAA in *O’Bannon* entailed maintaining competitive equity; this justification failed.²¹⁰ The district court’s ruling noted, “[l]ittle evidence supports the claim that NCAA regulations help level the playing field. At best, they appear to have had a very limited effect, and at worst they have served to strengthen the position of the dominant teams.”²¹¹ Schools engage in an arms race by “invest[ing] more heavily in their recruiting efforts, athletic facilities, dorms, coaching, and other amenities designed to attract the top student-athletes.”²¹² This “‘arms race,’ has likely negated whatever equalizing effect the NCAA’s restraints on student-athlete compensation might have once had on competitive balance.”²¹³ Thus, this procompetitive justification failed in the district court, and the Ninth Circuit accepted the district court’s finding.

²⁰⁷ *Id.* at 1076–77.

²⁰⁸ *Id.* at 1060.

²⁰⁹ *Id.* at 1072.

²¹⁰ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014); *O’Bannon*, 802 F.3d at 1072.

²¹¹ *O’Bannon*, 7 F. Supp. 3d at 1002.

²¹² *Id.*

²¹³ *Id.*

d. Increasing Output

Finally, the NCAA argued that increasing output constituted a legitimate procompetitive justification, but this argument failed in *O'Bannon* as well. The purported increased output justification provides that “restrictions on student-athlete compensation increase the number of opportunities for schools and student-athletes to participate in Division I sports, which ultimately increases the number of FBS football and Division I basketball games played.”²¹⁴ The district court correctly rejected this purported justification for a number of reasons.²¹⁵ First, schools do not choose to compete in the NCAA because of a “philosophical commitment to amateurism.”²¹⁶ The autonomy achieved by the Power Five conferences “suggest[s] that many current Division I schools are committed neither to the NCAA’s current restrictions on student-athlete compensation nor to the idea that all Division I schools must award scholarships of the same value.”²¹⁷

Second, the NCAA’s current rules do not “enable some schools to participate in Division I that otherwise could not afford to do so.”²¹⁸ For example, “[n]either the NCAA nor its member conferences require high-revenue schools to subsidize FBS football or Division I basketball teams at lower-revenue schools. Thus, to the extent schools achieve any cost savings by not paying their student-athletes, there is no evidence that those cost savings are being used to fund additional teams or scholarships.”²¹⁹ As a result, “[s]chools that cannot afford to re-allocate any portion of their athletic budget for this purpose would not be forced to do so.”²²⁰ An athletic program that could not afford to pay college athletes, need not do so, and there is no indication that such a program would leave Division I or the FBS.²²¹ Many schools pay their coaches large salaries and incur increasing expenses to ramp up training facilities for college athletes, which indicates that these schools would be able to share a limited amount of revenue generated by licensing with college athletes.²²² Increased output also failed as an

²¹⁴ *Id.* at 1003–04.

²¹⁵ *Id.* at 1004.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*; see Bilas Interview, *supra* note 17.

²²¹ *O'Bannon*, 7 F. Supp. 3d at 1004.

²²² *Id.*

alleged procompetitive justification in the district court, and the Ninth Circuit did not disturb that sound finding.²²³

3. *Law v. NCAA*

In *O'Bannon*, the Ninth Circuit found that the NCAA's rules governing what compensation college athletes can receive from schools relates to the NCAA's product of college football and basketball because "the labor of student-athletes is an integral and essential component of the NCAA's 'product.'"²²⁴ The Ninth Circuit reasoned that the NCAA's compensation rules for athletes are similar to its rules relating to coaches' compensation, citing *Law v. NCAA*.²²⁵ *Law v. NCAA* provides an instructive antitrust analysis for college athlete compensation as *Law* dealt with the NCAA's arbitrary compensation cap on assistant, entry-level coaches' salaries.²²⁶ In *Law*, plaintiffs were college assistant coaches who claimed that the NCAA rule capping their compensation at \$16,000 restrained trade in a "labor market for coaching services."²²⁷ The court in *Law* agreed and struck down the restriction.²²⁸

The court found that the NCAA's rule capping the salaries (Cap Rule) constituted an agreement to lower these coaches' salaries artificially.²²⁹ The court also found an anticompetitive effect because the Cap Rule reduced the part-time coaches' salaries, over \$60,000 annually in some cases, by limiting compensation to entry-level coaches to \$16,000 per year.²³⁰ The NCAA did not "dispute that the cost-reduction . . . effectively reduced restricted-earnings coaches' salaries."²³¹ Because the Cap Rule artificially lowered the price of coaching services, no further evidence or analysis was required to find market power to set prices, and the court, therefore, employed the quick-look approach.²³²

²²³ *See id.* at 982.

²²⁴ *O'Bannon v. NCAA*, 802 F.3d 1049, 1066 (9th Cir. 2015).

²²⁵ *Id.*

²²⁶ *Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) (citing *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)).

²²⁷ *Law*, 134 F.3d at 1015.

²²⁸ *Id.* at 1024.

²²⁹ *Id.* at 1022.

²³⁰ *Id.* at 1014.

²³¹ *Id.* at 1020.

²³² *Id.*

In *Board of Regents* (discussed in Part II.B.1 *supra*), the Supreme Court recognized that certain horizontal restraints in college sports are those necessary to produce competitive intercollegiate sports.²³³ In *Law*, the court rejected the NCAA's procompetitive objectives for the salary limits, including its purported objectives to reduce costs and maintain competitive equity.²³⁴ In rejecting the cost-reduction justification, the court stated that cost-cutting by itself is not a valid procompetitive justification.²³⁵

The *Law* court stated that “[r]educing costs for member institutions, without more, does not justify the anticompetitive effects” of the Cap Rule.²³⁶ The court did not need to consider whether cost reductions may have been required to “save” intercollegiate athletics and whether such an objective served as a legitimate procompetitive end because the NCAA present[ed] no evidence that limits on restricted-earning coaches' salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball.²³⁷

According to the court, the Cap Rule failed to equalize the overall amount of money Division I schools are permitted to spend on their basketball programs. There is no reason to think that the money saved by a school on the salary of a restricted-earnings coach will not be put into another aspect of the school's basketball program, such as equipment or even another coach's salary, thereby increasing inequity in that area.²³⁸

The court in *Law* stated that the Cap Rule served as “nothing more than a cost-cutting measure and . . . the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance.”²³⁹ The court found that the Cap Rule was not directed towards competitive balance and held that the

²³³ *Id.* at 1021 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 117 (1984)).

²³⁴ *See Law*, 134 F.3d at 1021–24 (“Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises.”).

²³⁵ *Id.* at 1022.

²³⁶ *Id.* at 1023.

²³⁷ *Id.*

²³⁸ *Id.* at 1023 (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 118–19 (1984)).

²³⁹ *Law*, 134 F.3d at 1024.

Cap Rule violated the Sherman Act.²⁴⁰ Therefore, the NCAA cannot place a cap on college coaches' salaries.

4. Application of the Rule of Reason Analysis to College Athlete Compensation for Playing

This Part applies the rule of reason analysis to compensation for college athletes beyond their scholarships. Here, the *Jenkins* complaint demonstrates how college athletes satisfy their initial burden to show that the NCAA and member institutions' capping the compensation for all college athletes at the grant-in-aid level, or the full cost of attendance, results in a significant anticompetitive effect.²⁴¹ As an initial matter, the cap on college athlete compensation represents horizontal price-fixing by the NCAA and its member institutions, which would allow a quick-look analysis that skips to the defendants' heavy burden.²⁴²

Even under a full-blown rule of reason analysis, the NCAA's restriction on college athlete compensation clearly produces significant anticompetitive effects. The *Jenkins* complaint defines the relevant markets as the "market for . . . [FBS] football player services" and the "market for NCAA Division I men's basketball player services."²⁴³ The complaint argues that "FBS and D-I men's basketball programs would clearly compete economically with one another for player services if not for NCAA and Power Conference restrictions."²⁴⁴ College programs already compete for player services in what many term an "arms race," where programs spend millions of dollars on "expanded stadiums and arenas, luxury locker rooms and training facilities, high-end dorms, and specialized tutoring centers" to attract top athletes.²⁴⁵ The competition between schools for athlete services would "provide fair compensation to these athletes for the billions of dollars in revenue that they help generate."²⁴⁶

The NCAA and the Power Five conferences impose restraints that "limit[] the remuneration that the [d]efendants' member institutions

²⁴⁰ *Id.*

²⁴¹ See Complaint, *supra* note 138, ¶¶ 40, 42–43.

²⁴² See *id.*; *Law*, 134 F.3d at 1020 (allowing courts to use the quick-look rule of reason analysis when price-fixing is shown).

²⁴³ Complaint, *supra* note 138, ¶ 18.

²⁴⁴ *Id.* at 26.

²⁴⁵ *Id.*; see *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014); Bilas Interview, *supra* note 17.

²⁴⁶ Complaint, *supra* note 138, ¶ 26.

may provide to [student-athletes, and these restraints] constitute an anticompetitive, horizontal agreement among competitors to fix artificially the remuneration for the services of the members of each class in violation of Section 1 of the Sherman Act.”²⁴⁷ As the NCAA rules denying compensation for college athletes above their scholarships are anticompetitive, thus satisfying the first step in the antitrust analysis, the analysis turns to procompetitive justifications and then less restrictive means.

The procompetitive benefits the NCAA and the Power Five conferences will argue include amateurism, integrating athletics and education, maintaining competitive equity, and increasing output, just as the NCAA did in *O’Bannon*.²⁴⁸ The NCAA and its member institutions may also argue that reducing costs serves as a procompetitive justification for the challenged restraint. The purported justifications of maintaining competitive equity and increasing output should fail for the same reasons they did in the *O’Bannon* case. The amateurism and integration of athletics and academics justifications, although discussed above as well, are addressed further below, as is the potential argument regarding reducing costs. Each of these purported justifications should also fail.

a. Amateurism

The amateurism argument relies on the unsound premise that paying college athletes would result in less consumer demand. Chief Judge Thomas of the Ninth Circuit, in his partial concurrence and partial dissent in *O’Bannon*, acknowledged “that consumer demand typically does not decrease when athletes are permitted to receive payment, and that this general principle holds true across a wide variety of sports and competitive formats.”²⁴⁹

Moreover, Jay Bilas argues that if the NCAA “felt like people would stop watching [college athletics if athletes were paid], then it would certainly have an effect with all the professional baseball players that are playing college football and college basketball. That has no impact whatsoever”²⁵⁰ Bilas is referring to the fact that college athletes can play professionally in the minor leagues in baseball *and* earn

²⁴⁷ *Id.* at 39.

²⁴⁸ See generally *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

²⁴⁹ *Id.* at 1081 (Thomas, J., concurring in part and dissenting in part).

²⁵⁰ Bilas Interview, *supra* note 17.

money there while in college, yet they are still eligible to play a *different* sport in college, such as football or basketball, with impunity.²⁵¹

Furthermore, the purported procompetitive justification that paying college athletes would decrease consumer demand flies directly in the face of common sense. People watch college football in droves because of their affiliation with a school or the town, city, or region in which they grew up or live.²⁵² Chris Plonsky, the Athletic Director for Women's Athletics at the University of Texas in Austin, and the NCAA's own witness in *O'Bannon*, summed up the reality of consumer demand and college athletics, "I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university."²⁵³ Moreover, casual sports fans and the general public might tune in even more to see if these college players are worth the money they are paid or if the quality of the games improves.

Confession: I Still Hate Tigers

I witnessed consumer demand of college football firsthand when I played football at Rice. For example, when my Rice team played against the LSU Tigers in Baton Rouge in 1995, fans lined up for half a mile on the road to the stadium to "greet" our team for our walkthrough an entire day before its homecoming game. The fans shouted at us and waved signs saying, among other things, "Tigers Eat Rice for Dinner." Those fans were right—LSU beat my Rice team 52 to 7. If college athletes received compensation above their

²⁵¹ See Lisa K. Levine, *Jeremy Bloom v. National Collegiate Athletic Association and the University of Colorado: All Sports Are Created Equal; Some Are Just More Equal than Others*, 56 CASE W. RES. L. REV. 721, 725 (2006) (stating that the NCAA allows college athletes "to compete as professionals in one sport while retaining their amateur status in another sport").

²⁵² *O'Bannon*, 802 F.3d at 1082 (Thomas, J., concurring in part and dissenting in part). As mentioned above, ESPN even broadcasts spring practice football games given the high demand for college football, and over 100,000 attended Ohio State University's spring practice game. See Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, ESPN (Apr. 16, 2016), http://espn.go.com/college-football/story/_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game; *Every SEC Spring Game to Be Televised*, SEC SPORTS (Mar. 23, 2016), <http://www.secsports.com/article/15048848> (reporting that Alabama, Auburn, and Mississippi State was broadcasted by ESPN or ESPNU); see also Derek Volner, *ESPN3 to Stream Six ACC College Football Spring Games*, ESPN MEDIA ZONE (Mar. 23, 2016); <http://espnmediazone.com/us/press-releases/2016/03/espn3-to-stream-six-acc-college-football-spring-games/> (showing that ESPN3 streamed the spring games for Duke, Kansas, Clemson, Wake Forest, Florida State, Miami, Stephen F. Austin, and Georgia Tech).

²⁵³ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014).

*scholarships, those same obsessed fans would still be waiting well before the game to “greet” LSU’s next opponent with the same fervor as they always have. Instead of a decrease in consumer demand from those crazed college football fans, most of them would likely donate their life savings to pay for athletes to play at their schools, which some boosters and alumni do covertly already.*²⁵⁴

Bilas and others contend that there is nothing amateur about college athletics—“it’s professional in every way,” as everyone except the athletes is receiving substantial profits and compensation.²⁵⁵ When the NCAA wants to point the courts’ and the public’s attention away from the billions of dollars generated from college athletics, the NCAA hides behind amateurism. Although the Ninth Circuit in *O’Bannon* accepted the justification that amateurism is procompetitive, the next court addressing the issue of college athlete compensation should not.

b. Integrating Athletics and Academics

In *O’Bannon*, the Ninth Circuit also accepted that integrating athletics and academics serves as a procompetitive justification. The argument for this justification provides “prohibiting student-athletes from being paid large sums of money not available to ordinary students . . . prevent[s] the creation of a social ‘wedge’ between student-athletes and the rest of the student body.”²⁵⁶ This “wedge” argument defies reality. A wedge already exists between college athletes and the rest of the student body.²⁵⁷

²⁵⁴ See, e.g., David Ubben, *Pay-for-Play—the Truth Behind the Myths*, ESPN (July 15, 2011), <http://sports.espn.go.com/ncaa/news/story?id=6735469> (acknowledging boosters were caught giving “extra benefits” to football players, and noting some of these benefits are alleged to be in the tens to hundreds of thousands of dollars).

²⁵⁵ Bilas Interview, *supra* note 17; see McCormick & McCormick, *supra* note 12, at 496–97 (stating the NCAA is a \$60 billion industry); see also Mitten & Ross, *supra* note 38, at 846–47 (discussing the multibillion dollar industry of major college sports); Matthew J. Mitten, et. al., *Targeted Reform of Commercialized Athletics*, 47 SAN DIEGO L. REV. 779, 787–88 (2010) (discussing the costs of paying for athletes’ scholarships, paying coaches and recruiting staff, and the millions of dollars that are generated from gate receipts, broadcast revenues, and sponsorships).

²⁵⁶ *O’Bannon*, 802 F.3d at 1060.

²⁵⁷ George Koonce, a former Green Bay Packer and college football player at East Carolina, discussed in his doctoral dissertation how college football players can become isolated and segregated from the rest of the student body based on, among other things, separate housing from other students and the amount of time required for football players to participate in sports. See George Earl Koonce, Jr., *Role Transition of National Football League Retired Athletes: A Grounded Theory Approach*, 23 MARQ. SPORTS L. REV. 249, 263–67 (2013).

Students who are not athletes become conditioned, likely beginning in high school, to believe that athletes receive special benefits and privileges that other students do not. In college, those real and perceived benefits include free tutoring, free athletic apparel from the team, free trips to play games, impermissible gifts from alumni and boosters, and perhaps improper assistance from professors.²⁵⁸ The segregation of athletes from the rest of the student body through institutions such as training table and separate study facilities also contributes to the existence of this wedge.²⁵⁹

Another factor that contributes to this wedge is poverty: many athletes live below the poverty line while poverty is less prevalent in the overall student body.²⁶⁰ Paying athletes would diminish this wedge, not contribute to it. Even though a wedge between athletes and non-athletes exists, there is no indication this wedge would increase if college athletes received compensation because “there are professional athletes playing college sports right now.”²⁶¹ Bilas summarizes the argument cogently as follows:

You have professional baseball players that are playing football and basketball [in college], and because that’s legal, because you can make money playing and accept compensation in a different sport and still be amateur in another, nobody is suggesting that somehow those professionals have compromised their education or are somehow separated from their teammates or the general student population by virtue of the fact that they’re professional athletes and they’ve made a lot of money, whether they be Olympic athletes or

²⁵⁸ See Steve Delsohn, *UNC’s McCants: ‘Just Show Up, Play,’* ESPN, http://espn.go.com/espn/otl/story/_/id/11036924/former-north-carolina-basketball-star-rashad-mccants-says-took-sham-classes (last updated Oct. 22, 2014) (relaying the story of Rashad McCants, a former University of North Carolina basketball player who said “he took bogus classes designed to keep athletes academically eligible”). When I played at Rice, football players were strongly encouraged to take classes before 2:00 p.m. because of our afternoon and evening schedules with meetings, practice, and training table. Because we had limited classes that we could take, football players registered first for classes. Students that were not athletes knew that football players registered first, but they did not know why and assumed we were simply receiving special treatment. I did not realize the hostility that some students harbored because of this at first, but I later became aware of it.

²⁵⁹ McCormick & McCormick, *supra* note 123, at 100–01 (indicating there are academic-support facilities where football players are required to participate in ten hours of mandatory study hall time per week).

²⁶⁰ See McCormick & McCormick, *supra* note 12, at 507 (mentioning many college athletes live below the poverty line while the NCAA and its members reap billions of dollars in revenues).

²⁶¹ Bilas Interview, *supra* note 17.

playing major league baseball, minor league baseball, whatever it is.²⁶²

Paying college athletes would not create any more of wedge than already exists. Therefore, the next court addressing the issue of whether integrating athletics and academics constitutes an acceptable procompetitive justification for college athlete compensation above their scholarships should reject this weak wedge argument.

c. Reducing Costs

Another purported procompetitive justification might include reducing member institutions' costs, which could relate to the cost of paying college athlete salaries or the transaction costs to negotiate college athlete compensation. These cost arguments should fail as well.

Taking these in turn, schools may argue that paying college athletes will increase their costs. The court in *Law*, however, already stated that reducing costs for member schools (to pay higher salaries for coaches in that case) does not constitute a legally cognizable procompetitive objective,²⁶³ meaning that the NCAA and schools would lose on this argument that the increase in costs of paying college athletes is procompetitive.

The argument that paying college athletes will increase transaction costs because the parties will need to negotiate should also fail. Universities, some of which employ thousands of people, including administrators, professors, and staff, adjust or negotiate contracts with employees every year.²⁶⁴ Experienced representatives of college athletes will be able to negotiate expeditiously with member institutions to reach agreement on the approximately twenty two football players each year (eighty-five football scholarships total are allowed for each FBS team) and three or four basketball players each year (fifteen basketball scholarships total are allowed for each Division

²⁶² *Id.*

²⁶³ *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998).

²⁶⁴ See, e.g., *Negotiating Academic Job Offers*, UNIV. OF NEB., http://www.unl.edu/grad_studies/current/news/negotiating-academic-job-offers (last visited Nov. 9, 2016) (providing tips and suggestions on how to negotiate an employment contract with a university); see also Patricia Rogers & Sarah Drake, *UT is Austin's Largest Employer*, AUSTIN BUS. JOURNAL (Jun 8, 2012, 2:27 PM), <http://www.bizjournals.com/austin/news/2012/06/08/ut-is-austins-largest-employer.html> (indicating the University of Texas employed 21,626 people in 2012).

I basketball team).²⁶⁵ Just as universities figure out how to compensate all their employees, they will also figure out how to compensate approximately twenty-five new college athletes each year without substantial transaction costs.²⁶⁶ This procompetitive justification of cost should not be accepted either.

If one of the purported procompetitive justifications is somehow accepted for capping athlete compensation at the scholarship amount, particularly that consumer demand will decrease if college athletes receive compensation and are no longer amateurs, then it will be difficult to show that the anticompetitive restraint could be accomplished in less restrictive means. That justification, as shown in *O'Bannon*, presumably precludes any payment of college athletes above their scholarship amounts beyond the full cost of attendance.²⁶⁷ A less restrictive means, however, could include the NCAA allowing schools to hold the compensation in trust for each athlete until his eligibility expires. This would prevent the athlete from receiving money during college, which might help maintain the façade of amateurism. Education would not suffer provided that academic requirements to play and, thus, to receive compensation, continued to serve as a condition to playing.²⁶⁸ Requiring that a college athlete meet the necessary academic requirements to remain eligible to play and receive compensation “might even strengthen student-athletes’ incentives to focus on schoolwork.”²⁶⁹

Also, it must be noted that the reasoning behind the Ninth Circuit’s holding that a payment of \$5000 per year in deferred compensation was improper—because it was not tethered to educational expenses—ignores the economic reality of major college athletics.²⁷⁰ The Ninth Circuit, in effect, argued that college athlete benefits should be tethered to higher education instead of the multibillion dollar business of major

²⁶⁵ See *College Football Scholarships*, COLLEGESCHOLARSHIPS.ORG, <http://www.collegescholarships.org/scholarships/sports/football.htm> (last visited Oct. 28, 2016) (stating that each school in Division I can give a total of eighty-five scholarships for football); *Basketball Scholarships for Men and Women*, COLLEGESCHOLARSHIPS.ORG, <http://www.collegescholarships.org/scholarships/sports/basketball.htm> (last visited Oct. 28, 2016) (stating that each school in Division I can give fifteen scholarships for men’s basketball).

²⁶⁶ See Rogers & Drake, *supra* note 264 (indicating the University of Texas at Austin employed 21,626 people in 2012).

²⁶⁷ See *O’Bannon v. NCAA*, 802 F.3d at 1049, 1053 (9th Cir. 2015).

²⁶⁸ See *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1003 (N.D. Cal. 2014).

²⁶⁹ *Id.*

²⁷⁰ See *O’Bannon*, 802 F.3d at 1078.

college athletics when the salaries and bonuses of every other actor in college athletics, such as coaches, athletic directors, and NCAA executives, are completely untethered to the educational expenses of college athletes. The court, in effect, serves to perpetuate the differential treatment between all of those involved in college athletes who earn considerable compensation (coaches, athletic directors, NCAA executives) and college athletes, who actually provide the product on the field or court, but are limited in what they can earn for their efforts.

*5. Application of the Rule of Reason Analysis to College Athlete Compensation from Name, Image, and Likeness*²⁷¹

This Part applies the rule of reason analysis to compensation for college athletes relating to their names, images and likenesses. Here, the NCAA and member institutions' restriction on college athletes earning based on their names, images, and likenesses results in a significant anticompetitive effect.

The relevant market includes the national market available for endorsing products.²⁷² Within this market, several submarkets exist that are based on the actual product being sold, which could include shoes, food, cars, or any merchandise that could be linked to college athletes.²⁷³ A regional and local market also exists for these and similar products. Another national market exists for selling autographs and memorabilia, as do regional and local markets. Absent NCAA restrictions on college athlete compensation, individual FBS football and Division I basketball players would be able to license their names, images, and likenesses to merchandisers in these markets.²⁷⁴

²⁷¹ This argument is premised on the notion that college athletes possess a right of publicity. Numerous legal scholars conclude that college athletes do possess that right. *See generally* Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 GEO. L.J. 185 (2012) (arguing the right of publicity is a right that should be inalienable, and college athletes should not be allowed to relinquish their rights of publicity to the NCAA); Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1082–89 (2010) (contending a college athlete's identity extends beyond his name, and includes his likeness and even his jersey number and arguing the NCAA and EA Sports are gaining commercially from the wrongful use of college athletes' likenesses).

²⁷² *See O'Bannon*, 7 F. Supp. 3d at 968 (discussing the two national markets that are allegedly restrained by the NCAA).

²⁷³ *See id.* (indicating the two national markets can be divided into submarkets because each market involves different sellers, buyers, and products).

²⁷⁴ *See id.*

The sellers in this market would be the athletes. Based on the NCAA's unreasonable restraint, individual college athletes are precluded from competing against one another to license their individual names, images, and likenesses.²⁷⁵

The NCAA restraint also prohibits competition among buyers of these college athletes' rights.²⁷⁶ Certainly, Nike and Adidas would compete with each other to earn the rights for a high-profile college athlete to endorse their products. If Nike and Adidas each believed that it could sell more shoes or clothing because Ben Simmons (the former freshman star of LSU's men's basketball team and the number one pick in the 2016 NBA draft²⁷⁷) endorsed its product, then those companies would compete furiously to obtain those rights from Ben Simmons.

NCAA rules, therefore, constitute a blanket prohibition against college athletes from earning income for their names, images, and likenesses, hinder competition among buyers and sellers in these markets, and clearly result in anticompetitive effects.²⁷⁸

The procompetitive justifications that the NCAA and member institutions might put forth would be similar to, and identical in parts to, the ones made in the preceding Part on athlete compensation for their athletic services. Those should fail here for the same reasons they should fail above. The NCAA might argue that the product on the field may be hindered if college athletes fail to make practice or stay eligible because they were doing too many commercials or signings. The college athlete, though, would need to agree that he would not be eligible to license his name, image, or likeness if he failed to attend practice or meet academic requirements. Also, this potential issue is self-correcting because if a player performs worse on the field or court, no one will want to pay for his name, image, or likeness; he would have a greater incentive to play even better in games.

Thus, even if a procompetitive justification could be found, requiring a student to meet academic eligibility requirements and participate in practice and games—as a prerequisite to being eligible to

²⁷⁵ See, e.g., Rothman, *supra* note 271, at 188 (indicating the NCAA precludes players from “making endorsements or appearing in commercials, posters, or other merchandizing”).

²⁷⁶ See, e.g., *O'Bannon*, 7 F. Supp. 3d at 997.

²⁷⁷ Ohm Youngmisuk, *Sixers Take LSU's Ben Simmons with No. 1 Overall Pick*, ESPN (June 24, 2016), http://www.espn.com/nba/draft2016/story/_/id/16458660/2016-nba-draft-philadelphia-76ers-take-ben-simmons-no-1-overall-pick.

²⁷⁸ See Neil Gibson, *NCAA Scholarship Restrictions as Anticompetitive Measures: The One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny*, 3 WM. & MARY BUS. L. REV. 203, 209 (2012).

license his name, image, or likeness—would be less restrictive than the blanket prohibition that now exists. Also, placing guidelines or time restrictions on when commercials or signings could take place would be less restrictive than the process now, which completely forbids any endorsements by college athletes.

III

RESPONDING TO ARGUMENTS AGAINST COLLEGE ATHLETES RECEIVING PAYMENT OR LICENSING THEIR NAMES, IMAGES, AND LIKENESSES

This Article already addressed several major arguments against compensating college athletes, including amateurism. This Part discusses several other major arguments against paying college athletes.

A. College Athletes Already Receive Compensation for What They Do

Some argue that college athletes already receive a free education with their tuition, room, and board fully paid for by the university that grants them a scholarship.²⁷⁹ College athletes also receive free tutoring.²⁸⁰ College athletes receive exposure to professional teams and

²⁷⁹ See McCauley, *supra* note 35; Horace Mitchell, *Students Are Not Professional Athletes*, US NEWS (Jan. 6, 2014, 8:00 AM), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid> (arguing college athletes should not be paid since they are able to receive scholarships “to pay tuition, fees, room and board, and other allowable expenses”).

²⁸⁰ Pete Thamel, *Athletes Get New College Pitch: Check Out Our Tutoring Center*, N.Y. TIMES (Nov. 4, 2006), http://www.nytimes.com/2006/11/04/sports/ncaafootball/04ncaa.html?pagewanted=all&_r=0 (“All of the nation’s more than 100 major college athletic departments employ some type of academic support program. So do some Ivy League colleges and other smaller institutions. The National Collegiate Athletic Association said Division I athletic departments spend at least \$150 million annually on such programs.”); see also Josephine (Jo) R. Potuto, et al., *What’s in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 900–01 (2014) (discussing how college athletes also may receive tutoring and academic counselors, team apparel, including shoes, and access to exclusive academic services facilities). One might argue that college athletes may also receive an advantage in job searching and admission to graduate schools because some employers or schools may prefer college athletes because they tend to be disciplined, excellent time managers, and adept at overcoming challenges. Even if all of those assumptions are true, tennis players, golfers, and swimmers also reap the benefits from those assumptions, but their sports do not generate millions of dollars as football or men’s basketball programs do. See SCHWARZ, *supra* note 106, at 50–54; McCormick & McCormick, *supra* note 123, at 98 (stating that football and men’s basketball are considered revenue-generating sports). The revenue generated by

enjoy the opportunity to play the sport they love in front of millions of people. Responses to part of this argument can be found in Part I *supra*, but this argument fails because it disregards the market that would exist to compensate college athletes if the NCAA's restrictions were removed. In other words, the issue should not be whether college athletes already receive compensation for playing football, but whether, in a free market, universities and colleges would compensate college athletes above their scholarship amounts if they were competing for their services. The answer is clearly yes. We already have alumni and boosters paying college athletes to play for their respective schools in violation of NCAA rules.²⁸¹ Based on the amount of revenue and publicity college athletes generate for the schools, FBS and Division I schools would fiercely compete to recruit and compensate their athletes.²⁸²

Similarly, third parties would compete and pay for the rights to use a college athlete's name, image, or likeness if they believed an endorsement from a high-profile athlete would help sell their product.²⁸³ In a free market, the fact that a college athlete already received a scholarship for tuition, room, board, and books would not prevent Nike or McDonald's from compensating a college athlete to endorse its products to increase its bottom line.

B. Team Dynamics Will Falter

Opponents also argue that college athletes could not handle fellow teammates making different amounts of money through either payment for playing or through endorsements.²⁸⁴ There would be "fights in the locker room" and a "separation of athletes."²⁸⁵ Jay Bilas argues that these assertions are "total nonsense."²⁸⁶ He states, "[i]t's patently absurd that there would be fights in the locker room if the best player made more money than the last player on the team or when the quarterback makes more than the person who snaps him the football,

football and men's basketball programs typically pay for the other sports programs at a school. See SCHWARZ, *supra* note 106, at 50–54.

²⁸¹ See, e.g., Ubben, *supra* note 254.

²⁸² See McCauley, *supra* note 35.

²⁸³ E.g., Darren Rovell, *Johnny Manziel Signs with Nike*, ESPN (Mar. 6, 2014), http://espn.go.com/nfl/story/_/id/10564858/johnny-manziel-signs-multi-year-endorsement-contract-nike (discussing how Nike signed Manziel to an endorsement deal within a few months after his college eligibility expired and even before he was drafted in the NFL).

²⁸⁴ See SCHWARZ, *supra* note 106, at 50–54; Bilas Interview, *supra* note 17.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

just as there aren't fights in the locker room among coaches when the head coach makes more money than the assistants."²⁸⁷

In my experience, athletes view sports as a meritocracy. An athlete knows that if he is the best player on the team, then he will play, regardless of who his parents are or how much money his family contributes to the school. At the college level, coaches need their best players to play to protect their own jobs. Athletes understand that whoever produces on the field or the court will receive the accolades—e.g., being named all-American, all-conference, player of the week, most valuable player on the team. College athletes typically received similar accolades in high school, while most of their teammates in high school did not. Athletes can accept other athletes' success because athletes typically believe that success is earned.

Bilas sarcastically contends that, if we want to treat all athletes alike, then every athlete would play the same amount of minutes in the games, everyone would rotate as starters throughout the season, everyone (including walk-ons) would talk to the media ("media that we've sold these players to"), and everyone would be on the cover of a magazine, not just the stars of the team.²⁸⁸ Bilas suggests that participation trophies would be in order, while all-American honors would not be appropriate in such a model.²⁸⁹

Confession: The Passage of Time Brings Clarity

If some of my teammates had received endorsement deals from national, regional, or local companies (such as a local restaurant or furniture store), while I had not, then I would have felt just fine, because those players were the ones who were bringing in the few fans that came to our games anyway. If my teammates earned all-conference or all-American honors, then they would have deserved whatever endorsements they could have received. I confess that I was not nearly as good a player in college as I thought I was at that time. The passage of time brings clarity, but even college athletes with a skewed view of reality recognize when other college athletes perform better than themselves.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

C. The NCAA, or Even Congress, Will Reform Itself

Some argue that the NCAA needs to change the rules, and that argument might be based on the changes it has already made. The NCAA did allow schools to provide travel vouchers for the families of players in the FBS playoffs.²⁹⁰ The NCAA does send a large portion of the money it receives back to the programs, although the players themselves do not receive any of that money personally.²⁹¹ The NCAA also stopped exploiting college athletes to a limited extent when it discontinued the sale of college athletes' jerseys on its Web site.²⁹²

The changes the NCAA makes, however, are typically precipitated by pending lawsuits or public embarrassment.²⁹³ For example, Jay Bilas performed a search on the NCAA's Web site that sold jerseys.²⁹⁴ Although the players' names do not appear on the jerseys themselves, when Bilas typed in certain college athlete names, including Johnny Manziel and Jadeveon Clowney, the site took him to their respective schools and respective jersey numbers.²⁹⁵ Once Bilas exposed the NCAA's exploitation of college athletes through profits generated from selling their jerseys, the NCAA announced that it "would stop selling individual jerseys and other team-related memorabilia on its Web site, calling the practice a 'mistake' and admitting others might view it as hypocritical."²⁹⁶

As discussed above, NCAA autonomy legislation falls short of allowing a college athlete to realize the compensation he could attain because the autonomy rules only allow a school to offer compensation up to the full cost of attendance.²⁹⁷

Holding their breath waiting for the benevolence and wisdom of the NCAA to devise a system that takes money out of its own hands and

²⁹⁰ *NCAA Paying for Parents to Get to Final Four, but Will This Pilot Program Become Permanent?*, DAILY NEWS (Apr. 1, 2015, 11:54 AM), <http://www.nydailynews.com/sports/college/ncaa-paying-parents-final-indianapolis-article-1.2169548> (explaining the NCAA paid "for the parents or guardians of Ohio State and Oregon players to travel to Arlington, Texas for the national championship game").

²⁹¹ See *The NCAA Budget: Where the Money Goes*, NCAA (Oct. 15, 2013), <http://www.ncaa.org/health-and-safety/sport-science-institute/ncaa-budget-where-money-goes>.

²⁹² Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013), http://www.espn.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ See e.g., *id.*

²⁹⁶ *Id.*

²⁹⁷ See, e.g., Bennet, *supra* note 16; Bilas Interview, *supra* note 17.

its member institutions, while reallocating that money to college athletes, will leave college athletes gasping for air.

A 2015 law review article chronicled the lawsuits college athletes have brought against the NCAA over the years.²⁹⁸ The article demonstrates, among other things, the NCAA's resolve to battle in courts any efforts to reallocate money to athletes.²⁹⁹ Professors Matt Mitten and Stephen F. Ross acknowledged in their latest article that the NCAA cannot be trusted to regulate itself, particularly when its own interests might be subverted.³⁰⁰

Similarly, waiting for Congress to solve this issue will likely result in the same inaction and disappointment as would waiting for the NCAA to remedy these inequities for college athletes. The polarization of the political parties in this country makes it seem unlikely that Congress could agree on anything, including whether college athletes should be compensated, if it ever decided to address this issue in earnest in the first place. Some members of Congress might, for example, advocate for the prohibition against athlete payments by granting the NCAA an antitrust exemption.³⁰¹

Some argue that antitrust law does not serve as the best avenue to address the issue of college athlete compensation.³⁰² When Congress passed the Sherman Act in 1890, it probably did not intend to regulate college sports through that Act, but Congress also probably did not envision that college sports would evolve into a multibillion dollar industry in which colleges, coaches, NCAA executives, and athletic directors receive millions of dollars while the athletes do not.

IV

THE FREE MARKET SYSTEM COMPENSATING COLLEGE ATHLETES

Many people conflate the issue of the logistics of paying college athletes with the primary question of whether college athletes should

²⁹⁸ Michael H. LeRoy, *Courts and the Future of "Athletic Labor" in College Sports*, 57 ARIZ. L. REV. 475, 483 (2015) (noting college athletes, even if they win in trial court, typically lose on appeal).

²⁹⁹ *Id.*

³⁰⁰ See Mitten & Ross, *supra* note 38, at 859–60 (discussing the NCAA's disregard for the welfare of college athletes and its policies that tend to exploit them).

³⁰¹ See Jon Solomon, *Can Congress (yes, Congress) Help NCAA Find Solutions?*, CBSSPORTS (Aug. 18, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24666147/can-congress-yes-congress-help-ncaa-find-solutions> (explaining Congress could grant the NCAA an exemption).

³⁰² See Mitten & Ross, *supra* note 38, at 861–62.

be paid in order to prevent the latter from being answered in the affirmative. If one agrees that college athletes should be compensated, then certainly a procedure for paying them can be created and employed. The free market approach provides an example of how college athletes can be compensated.

A. *Compensation for Playing*

Jay Bilas and the *Jenkins* case seek a true free market to compensate college athletes.³⁰³ In a free market, a school and its potential athlete would negotiate the length of the scholarship, its amount, and its terms.³⁰⁴ Bilas correctly points out that the parties would engage in arms-length negotiations to protect the school's interests and the athlete's interests, which is "the way it happens in every business context in America, except for college athletics."³⁰⁵ Athletes would likely seek multiyear scholarships (two to four years), an amount per year that the college would be willing to pay, and an independent review of academic performance to ensure that the athlete is not being removed from the school for disappointing athletic performance.³⁰⁶ The school would likely seek a non-compete clause in the contract to prevent the player from turning professional or playing "somewhere else during the term of the contract," as well as a "behavioral clause and an academic performance clause."³⁰⁷ The behavioral clause and academic performance clause would ensure that college athletes are conducting themselves in a manner that comports with the athletic program's and university's standards while remaining in good academic standing.³⁰⁸

Bilas does not oppose a salary cap, which this Article argues would be essential for any system that involved the payment of college athletes.³⁰⁹ If Alabama boosters are willing to pay its head football coach's mortgage on a \$3 million mansion, then those same boosters may not perceive money as an object in trying to secure a college

³⁰³ Bilas Interview, *supra* note 17.

³⁰⁴ *See id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *See id.*

³⁰⁹ *See id.* The cap should be determined by collective bargaining between the NCAA, its member institutions, and representatives of the college athletes (e.g., perhaps lawyers who represent or have represented athletes in cases, such as Jeffrey Kessler in the *Jenkins* action or Michael Hausfeld from the *O'Bannon* litigation, could negotiate on behalf of the athletes).

athlete's services to play for Alabama.³¹⁰ Under a rule of reason analysis, a salary cap would be anticompetitive because it would prohibit universities from providing compensation to college athletes beyond a certain amount, but it would help maintain competitive balance, thus constituting an acceptable procompetitive justification. Without a salary cap, Alabama, for example, might pay each of its scholarship athletes \$500,000 a year. A salary cap, which the NFL and NBA employ, would represent a less restrictive means to maintain a competitive balance despite the restraint on the compensation of college athletes.³¹¹

Provided there is a salary cap, each school could budget the amount it is willing to pay college athletes. For example, if the salary cap for football is \$3 million per year per team, then a school's budget might include a reduction in either the coaches' salaries or the amount of money spent on facilities, or both (or some other expense), depending on what each school's budget entails. Under this system, teams like Rice may have a better chance to procure the services of four to five-star college athletes who typically would not even consider playing at Rice instead of Alabama, Notre Dame, or Florida State.³¹² Bilas argues that a small school may not be able to afford the University of Texas'

³¹⁰ One may argue that compensating athletes might be difficult to enforce because of potential improper payments to college athletes, but that already happens today when athletes cannot receive any money for playing. See Ubben, *supra* note 254.

³¹¹ Revenues include all revenue streams, including "ticket sales, revenue from luxury box suites and premium seating, local and national broadcasting (TV/radio/Internet) royalties, concessions, parking, local advertising, stadium leasing, and merchandising," and in the NFL, the salary cap is based on a percentage of the total revenues generated by the teams. See Al Lackner, *NFL Salary Cap FAQ*, ASKTHECOMMISH.COM, THE FANTASY ADVISORS, <http://www.askthecommish.com/SalaryCap/Faq.aspx> (last visited Oct. 28, 2016); NFL COLLECTIVE BARGAINING AGREEMENT, NFL PLAYERS ASSOCIATION 81 (Aug. 4, 2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>. The NBA's salary cap is determined in a similar fashion (according to its collective bargaining agreement between the league and the NBA Players Association) by using the income generated by the league and its team, which is referred to as the basketball related income that includes, among other things, "gate receipts, broadcast rights, program and concession sales, parking, and [p]roceeds from team sponsorships and team promotions." Larry Coon, *NBA Salary Cap FAQ* (July 3, 2016), <http://www.cbafaq.com/salarycap.htm#Q12>.

³¹² See Bilas Interview, *supra* note 17. High school recruits are typically rated on a scale of two to five by recruiting services, with a rating of five reserved for rare talents that are the most sought after recruits. See Jeff Nusser, *Rivals, Scout, ESPN, 247: Star Rating Systems Explained*, COUGAR CTR. (Jan. 31, 2016), <http://www.cougcenter.com/wsu-football-recruiting/2013/2/5/3956800/rivals-scout-espn-247-star-rating-system-national-signing-day>.

best player, but it might be able to outbid Texas for its fourth best player.³¹³ The small school has “no shot right now to get [UT’s] fourth best player in the current system. But if [the small school is] allowed to pay, [then it has] a reasonable shot to get that player or someone like him [. . .] that would normally be on somebody else’s roster.”³¹⁴ A free market approach would make the smaller schools more competitive by allowing them to focus their resources on procuring talent.³¹⁵ The current system simply allows the rich to get richer.³¹⁶

One potential argument against the free market system is that payment for athletes would be based on potential rather than performance. For example, if the highest rated high school quarterback enters into a contract with a university to play, his salary will be based on his potential to succeed in college, rather than how he performs in college. Even though he is highly rated, he may fail in college football because he cannot read college defenses or the speed of the game is too fast, for example. In a free market system, however, universities and athletes can fashion a contract however they want, including using a contract with a smaller base salary that is incentive-laden based on performance. For instance, the highly-rated high school quarterback might agree to a contract with a \$20,000 base salary with the following incentives: \$10,000 for starting every game in a season; \$15,000 each for leading the conference in either passing yards, passing touchdowns, or passing efficiency (with a potential for \$45,000 if he leads the conference in all three categories); and \$20,000 for being named conference offensive player of the year. The free market system would allow colleges and athletes to negotiate performance-based contracts to avoid predicating college athlete salary on potential alone.

B. Compensation for Endorsements

The NCAA and its member institutions could regulate college athlete endorsement deals and signings (of autographs and memorabilia) by prescribing certain times and places when the commercials, photo shoots, and signings would take place (e.g., Thursday after practice in the football offices, or Sundays).³¹⁷ The

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ Although not central to this Article, I will address Title IX briefly. As an initial matter, Title IX involves resources and opportunities provided by universities and colleges to its athletes, not compensation from third parties, the latter of which would be at issue in a

NCAA could also regulate the manner in which companies contact college athletes. For example, each company that wanted the Notre Dame quarterback to endorse its products might be required to submit its company information and proposal to the football office, who would then contact the college athlete, a pro bono attorney, or agent that would help the college athlete reach a deal with the company. Lawyers and agents would theoretically be lining up around the block to work for free in the hope that they could represent the athlete in professional sports in the future. The school could also vet these lawyers and agents. Alternatively, lawyers and agents could receive compensation for their efforts in securing and finalizing any deals made on behalf of a college athlete.

Professor Gabe Feldman, the Director of the Tulane Sports Law Program and the Associate Provost for NCAA Compliance, supports compensation for athletes based on commercial deals. Professor Feldman proposed a general framework for college athletes to license their names, images, and likenesses in a White Paper presented to the Knight Commission.³¹⁸ The Knight Commission is an organization that provides recommendations to the NCAA (a number of which the NCAA adopts) to ensure college athletic programs operate within the educational goals and missions of universities. In his White Paper, Professor Feldman argues that “[o]pening up a well-regulated market for non-game related [name, image, and likeness] payments can also help close the black market that has sprouted up to work around the

commercial or endorsement deal between a college athlete and a third party company. See Nicolas A. Novy, “*The Emperor Has No Clothes*”: *The NCAA’s Last Chance as the Middle Man in College Athletics*, 21 *SPORTS LAW J.* 227, 251–52 (2014). Also, third parties might choose to enter into endorsement deals with male or female athletes depending on the third party’s product, audience, and the particular athlete. In other words, female athletes would not be precluded from entering into endorsement deals if college athletes were allowed to do so. Thus, Title IX is not implicated in college athlete compensation for endorsement deals as discussed in this Article. *Id.* With regard to college athlete compensation for playing football or men’s basketball, Title IX would be implicated. See Robert Grimmert-Norris, Comment, *Roadblocks: Examining Title IX & The Fair Compensation of Division I Intercollegiate Student-Athletes*, 34 *ST. LOUIS U. PUB. L. REV.* 435, 439–40 (2015) (discussing the objectives of Title IX, implying that since Title IX states no person shall be excluded from participation based on sex, paying male athletes alone would bring this scenario under Title IX). Antitrust economist Andrew Schwarz argues that Title IX does not preclude compensation for college athletes playing football or men’s basketball. For more information, see SCHWARZ, *supra* note 106, at 50–54.

³¹⁸ GABE FELDMAN, WHITE PAPER: THE NCAA AND “NON-GAME RELATED” STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS, KNIGHT COMM’N ON INTERCOLLEGIATE ATHLETICS (2016), http://www.knightcommission.org/images/pdfs/feldman_nil_white_paper_may_2016.pdf.

restrictions.”³¹⁹ He argues that “[t]he current restrictions create an incentive and temptation for student-athletes to violate the rules and receive under-the-table benefits from boosters, agents, third parties, and others.”³²⁰

The general framework of Professor Feldman’s proposal allows college athletes to license their names, images, and likenesses for “non-game related³²¹ commercial purposes, [such as] endorsements, product licensing, personal appearances, books, movies, television or radio shows, or providing autographs,” subject to approval by an oversight committee.³²² The oversight committee would be comprised of “representatives from the NCAA, conferences, athletic departments, faculty, current and former student-athletes, and individuals with expertise in NIL-related markets.”³²³

C. Advantages of Compensating College Athletes

The advantages, both direct and indirect, stemming from compensating college athletes above their scholarship amount are plentiful. First, allowing college athletes to receive compensation for the revenues they generate and their names, images, or likenesses satisfies notions of equity and falls in line with antitrust law. Second, as noted by the Ninth Circuit in *O’Bannon*, “athletes might well be more likely to attend college, and stay there longer, if they knew that they were earning some amount of NIL income while they were in school.”³²⁴ A free market system allowing a college athlete, who may come from a disadvantaged background or a lower socioeconomic status, to contract to stay two to four years would benefit the college athlete because he could earn money to help his family.³²⁵ Jay Bilas

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* (stating that the “proposal does not include ‘game-related’ uses of NIL, [which] include any broadcast, re-broadcast, photo, promotion, or any products derived from the broadcast of the underlying athletic competition (e.g., highlight reels, historical footage, etc.)”).

³²² *Id.*

³²³ *Id.* Among the considerations the committee should use to determine whether to approve a commercial deal of college athletes are the appropriateness of the compensation for the college athletes, the “[a]ppropriateness of required activities,” the college athletes’ time commitment for the deal, and the “[c]haracter and integrity of the third party” involved with the deal. *Id.*

³²⁴ *O’Bannon v. NCAA*, 802 F.3d 1049, 1073 (9th Cir. 2015).

³²⁵ Bilas Interview, *supra* note 17.

agrees that most players would stay in school longer because they are being treated fairly and securing a deal at the front end of college.³²⁶

If a college athlete stayed longer in school because he was receiving compensation, then he could also benefit educationally.³²⁷ He would earn more credits toward his degree and have the potential to graduate depending on how long he stayed.

As for basketball, which currently has the “one-and-done” rule that allows college athletes to declare for the NBA draft after only one year of college, teams comprised of second, third, and fourth-year college athletes would also likely make the quality of the college game better because college athletes could develop at the school and benefit from two or three years in the same system.³²⁸ It might also make the NBA product better because the league would then be getting more developed, more mature players.³²⁹

Staying in college longer allows college athletes the potential to mature as individuals, which will likely make them more successful in interpersonal relationships and in any profession they choose. Bilas agrees about the myriad of benefits that everyone, particularly the college athletes would receive, adding, “[t]here is no down side to this except the reallocation of money. That some people who are getting this money now would not get it in the new system.”³³⁰

A free market system also allows a university to choose not to pay college athletes above scholarship amounts, or to pay only a select few of their athletes, as opposed to the entire team, and still maintain a football or men’s basketball program. If schools like Rice University chose not to pay any of its football players, or only a few, there would likely be plenty of athletes like me who would still prefer to play for Rice on a full scholarship, without a salary, than not to play Division I football at all.

One consequence of paying college athletes might involve some universities and colleges withdrawing from Division I and FBS competition because of the further over-commercialization of college sports. Notre Dame President Rev. John I. Jenkins has said that if college athletes received payment for playing, “Notre Dame will leave the profitable industrial complex that is elite college football, boosters

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

be damned, and explore the creation of a conference with like-minded universities.”³³¹ The University of Chicago, once a dominant football team and charter member of the Big Ten, withdrew from college athletics because of the conflict between academics and the commercialization of college sports.³³²

If schools do not want to be a part of this new system that allows college athletes to receive compensation above their scholarships, then they need not compete in Division I or the FBS, but that will preclude them from substantial revenues and publicity. Notre Dame maintains multimillion dollar deals with NBC and Under Armour.³³³ It is uncertain whether Notre Dame, or schools with similar lucrative deals that are generating vast revenue, would actually withdraw from major college sports, but schools seem quite content with the college sports economic system in place now, which generates billions of dollars of revenue for everyone involved—except college athletes.

CONCLUSION

College sports will not crumble if resources are reallocated in this multibillion dollar business to provide college athletes with compensation above their scholarship amounts. College athletes who are popular based on their performances on highly-rated televised games, as well as regular appearances on *SportsCenter* highlight reels, should also be able to license their names, images, and likenesses to earn money. The NCAA’s rules that deprive college athletes, some of whom live in abject poverty, of the opportunity to earn money for themselves and their families based on what a free market would allow, are not only inequitable, but they also directly conflict with this country’s antitrust laws and capitalist economy.

³³¹ Dan Barry, *Notre Dame President Stands Firm Amid Shifts in College Athletics*, N.Y. TIMES (Sept. 10, 2015), <http://www.nytimes.com/2015/09/11/sports/ncaafootball/notre-dame-president-stands-firm-amid-shifts-in-college-athletics.html>.

³³² Complaint, *supra* note 138, ¶ 1.

³³³ See Marc Tracy, *Notre Dame and Under Armour Seek Win-Win with Apparel Deal*, N.Y. TIMES (Sept. 11, 2014), <http://www.nytimes.com/2014/09/12/sports/football/notre-dame-and-under-armour-seek-win-win-with-apparel-deal.html> (announcing the Notre Dame and Under Armour deal to be worth a reported \$90 million over 10 years); *NBC’s Notre Dame Deal Extended*, ESPN (Apr. 18, 2013), http://espn.go.com/college-football/story/_/id/9186897/nbc-extends-notre-dame-fighting-irish-football-deal-2025 (describing the 10-year extension between Notre Dame and NBC as being worth \$15 million annually).