

The Next Labor Market in College Sports

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The 1956 publication of Simon Rottenberg's *The Baseball Players' Labor Market*¹ began the serious academic study of sports. This insightful article is brimming with ideas and spurred a generation of economic analysis.² It is also a startlingly prescient, if un-cited, prelude to Ronald Coase's subsequent work that gained great traction in the legal academy.³ Coase's article became the most cited journal article in the history of legal scholarship⁴ and earned its author the Nobel Prize in Economics.⁵ Rottenberg's paper, however,

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¹ Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), available at <http://www.vanderbilt.edu/econ/faculty/Vrooman/rottenberg.pdf>.

² Allen R. Sanderson & John J. Siegfried, *Simon Rottenberg and Baseball, Then and Now: A 50th Anniversary Retrospective* (Vanderbilt Univ. Dep't of Econ., Working Paper No. 06-W06, 2006), available at <http://www.vanderbilt.edu/econ/wparchive/workpaper/vu06-w06.pdf>.

³ Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁴ Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012).

⁵ The prize in economics awarded in memory of Alfred Nobel is not technically one of the Nobel Prizes, but is awarded by the same foundation and announced simultaneously with the Nobel Prizes. See *Ronald H. Coase—Facts*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1991/coase-facts.html (last visited

has been largely ignored outside of the small world of sports economics. Remarkably, it has even been overlooked in the study of sports law: ignored by the very scholars that Rottenberg sought to address when he applied his explosive thesis to the arcane and prosaic baseball labor market.

Rottenberg's thesis provides a subtextual challenge to any significant question of sports law and should be part of every discussion. In summary, Rottenberg argues a form of the invariance principle⁶: that the specific rule of law will not affect the actual behavior of the people subject to that rule of law. Rottenberg postulated, with reference to the market for baseball players, that the players would come to play on the teams that valued them the most,⁷ regardless of team revenues⁸ and regardless of the rules of the labor market.⁹ Obviously, the invariance principle provides an important comment on the long historical debate over player free agency and the

Feb. 13, 2014) (listing Coase as the 1991 recipient of the "Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel").

⁶ Rottenberg, *supra* note 1, at 254–58; *see also* WLADIMIR ANDREFF & STEFAN SZYMANSKI, HANDBOOK ON THE ECONOMICS OF SPORT I (2006) (naming Rottenberg as the "founding father" of the economics of sports for his famous invariance principle).

⁷ Rottenberg, *supra* note 1, at 256 (analyzing how a player is sold to another team for a higher price because the player is worth more to the team that buys him rather than the team that sells him, distributing players "so that they are put to their most 'productive' use").

⁸ *Id.* at 254 (rejecting the theory that high-revenue teams would contract all the best players, which would lead to very unequal teams, because such a process would "be checked by the law of diminishing returns, operating concurrently with each team's strategic avoidance of diseconomies of scale").

⁹ *Id.* at 258 (concluding that the free labor market, or *any* alternative, would produce similar results where all teams must be "nearly equal" for each individual team to prosper); *see also* Sanderson & Siegfried, *supra* note 2, at 604 ("With fifty years of hindsight and subsequent research, Rottenberg's logic and observations stand up remarkably well . . . competition in baseball appears to be as vigorous today as debates about it.").

concomitant demise of baseball's "reserve system"¹⁰ and should have been a significant touchstone in that discussion.¹¹

It should also supply an important comment on the impending changes in collegiate sports.¹² Like the historic labor market in

¹⁰ See *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 532 F.2d 615, 632 (8th Cir. 1976) (affirming the "Seitz Decision," an arbitration decision in favor of the MLB Players Association, which declared two pitchers free agents and essentially ended the reserve system); see also Darren Rovell, *The Early Days of Free Agency*, ESPN.COM (Dec. 2, 2000, 5:03 PM), <http://static.espn.go.com/mlb/s/2000/1121/893718.html> (recounting the "Seitz Decision" and the beginning of free agency in baseball); see generally LEE LOWENFISH & TONY LUPIEN, *THE IMPERFECT DIAMOND: THE STORY BEHIND BASEBALL'S RESERVE SYSTEM AND THE MEN WHO FOUGHT TO CHANGE IT* (1980) (portraying baseball's tumultuous history between labor and management).

¹¹ Under baseball's "reserve system," which first appeared in player contracts in 1887, teams could exercise exclusive contract rights over a player for the player's entire career. The clause checked player salaries and prevented big market teams from monopolizing the game's best players. The system would withstand several antitrust challenges, the most famous by Philadelphia Phillies outfielder Curt Flood. See *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding that baseball's reserve system was exempt from federal antitrust laws). Yet the players would finally break the system in 1975, when an arbitration panel ruled that the reserve clause bound a player to a team for only one year after his contract expired. The decision would lead to the players and owners reaching the 1976 Basic Agreement, which resulted in the following compromise: teams could reserve players with fewer than six years of service; after six years they would become free agents. See Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present and Future of Major League Baseball*, 9 SETON HALL J. SPORT L. 339 (1999) (providing a historical overview of the legal challenges brought against the reserve system, including the *Flood* litigation, the 1975 arbitration decision striking down the clause, and the 1976 Basic Agreement); HAROLD SEYMOUR, *BASEBALL: THE EARLY YEARS*, 104–15 (Oxford Univ. Press 1960) (describing the owners' desire during the early years of baseball to keep labor costs down, and how their realization that competition among themselves for players was causing salaries to rise led to them implementing the reserve clause); *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Mar. 13, 2014) (summarizing former Major League Baseball Players Association executive director Marvin Miller's role in bringing an end to the reserve clause); Jennifer K. Ashcraft & Craig Depken II, *The Introduction of the Reserve Clause in Major League Baseball: Evidence of its Impact on Select Player Salaries During the 1880s*, at 1, 19 (Int'l Ass'n of Sports Economists & N. Am. Ass'n of Sports Economists, Working Paper No. 0710, 2007), available at <http://belkcollegeofbusiness.uncc.edu/cdepken/P/rc18.pdf> (examining the reserve clause's impact on player salaries and finding that after it was implemented in 1887, it decreased player salaries by ten percent and decreased the premiums players received when changing teams by fifty percent).

¹² See Dennis Dodd, *Paying Athletes Figures to be Key Issue at Annual NCAA Convention*, CBSSPORTS.COM (Jan. 15, 2014, 10:07 AM), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/24409747/compensating-athletes-figures-to-be-key-issue-at-annual-ncaa-convention> (terming the advent of compensation as the biggest event in the NCAA's 108-year history. Between the threat of sixty-five schools from the five biggest conferences leaving the NCAA for realignment, and congressional or judicial regulation, it has become evident that "revenue from a national multi-billion dollar

baseball, the contemporary market for labor in college athletics is regulated by a series of restrictions on compensation and movement.¹³ These restrictions appear in danger of imminent demise,¹⁴ auguring for a new era of comparatively free player

amateur athletic enterprise [will be shared] with the partners who helped make that money. The players.”); *see also* Joe Nocera, *Let’s Start Paying College Athletes*, N.Y. TIMES, Jan. 1, 2012, available at http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0 (setting forth a modest plan to pay college student-athletes, while also comparing the debate to baseball free agency and the Olympic’s abandonment of amateurism, both of which improved the respective platforms. The results in college sports would be the same: “College sports will become more honest once players are paid, and more honorable . . . Yes, it’s true: paying players will change college sports. They will be better, too.”); *see generally* Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW J. 25 (1996) (discussing the history of the NCAA and amateurism, compensation and antitrust laws, compensation alternatives, and the effects on athletic programs); *but see* Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid Up To \$125,000 Per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <http://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/> (“Colleges are already compensating their student athletes with tuition, room, board, coaching, nutritional support, and physical trainers that can exceed \$100,000 per year in value. Student athletes are already paid and the current system is pretty close to as fair as we are going to get. Paying a few of them more will not improve college sports.”), *and* Associated Press, *NCAA President: Not a Good Idea*, ESPN.COM (Sept. 17, 2013, 12:50 PM), http://espn.go.com/college-sports/story/_/id/9682086/ncaa-budge-paying-college-athletes (highlighting the NCAA President’s remarks that while the structure of the NCAA may change, amateur college student-athletes will not turn into professionals. Also, the large number of small schools that oppose paying players, along with the larger schools’ unwillingness to leave “March Madness” and the NCAA championships, prevents this radical change.).

¹³ *See Remaining Eligible: Amateurism*, NCAA.ORG, <http://www.ncaa.org/remaining-eligible-amateurism> (last visited Feb. 16, 2014) (listing factors that would prevent an athlete from being considered an amateur, and thus, the athlete would be ineligible to play in the NCAA: “Contracts with professional teams . . . [s]alary for participating in athletics . . . [p]rize money above actual and necessary expenses . . . [p]lay with professionals . . . [t]ryouts, practice, or competition with a professional team . . . [b]enefits from an agent or prospective agent . . . [a]greement to be represented by an agent . . . [and] [d]elayed initial full-time collegiate enrollment to participate in organized sports competition . . .”); *see also* NCAA, TRANSFER 101: BASIC INFORMATION YOU NEED TO KNOW ABOUT TRANSFERRING TO AN NCAA COLLEGE 12 (2013-14), available at <http://www.ncaa-publications.com/p-4327-ncaa-transfer-guide-2013-14.aspx> (laying out the complex analysis surrounding a player’s eligibility when transferring schools where the basic rule is “[an athlete] must spend one academic year in residence at [a] new school before [the athlete is] eligible to compete”).

¹⁴ *See supra* note 11; *see also* Greg Bishop, *Want To Play at a Different College? O.K., But Not There or There*, N.Y. TIMES, June 8, 2013, at A1, available at http://www.nytimes.com/2013/06/08/sports/ncaafootball/college-coaches-use-transfer-rules-to-limit-athletes-options.html?pagewanted=all&_r=0 (telling the story of Wes Lunt, a former Oklahoma State quarterback, who “had nearly 40 transfer options blocked by his former coach” as a show of “gamesmanship and punishment”).

movement incentivized by some form of compensation. Aside from the normative question as to whether or not college student-athletes should be paid, the question that Rottenberg raises is whether the dawn of salaried student-athletes will result in a noticeable change in the composition of teams or play on the field.

This Article argues that compensating players will not lead to a fundamental change in college sports. The teams and programs that win the most games currently will continue to win, or at least will not lose because of the advent of player compensation. Student-athletes who in the past would have attended non-elite schools will not choose differently on account of the availability of potentially greater compensation elsewhere. The top programs will continue to attract the finest coaching talent, and will continue to fund college athletics as before.¹⁵ In short, the future of college sports will look very similar to its present. The demise of the amateur ideal, however undesirable on other grounds, will not likely change the nature of collegiate athletic competition.

I

THE INVARIANCE PRINCIPLE AND THE BASEBALL LABOR MARKET

Rottenberg found the structure of professional baseball “interesting because of some unusual characteristics”¹⁶ of its labor market and the organization of the industry. Unlike tacit anti-pirating agreements that one might find in other labor markets,¹⁷ baseball had enacted an explicit set of rules that created a monopsony,¹⁸ in which players

¹⁵ See, e.g., *Division I Schools Spend More on Athletes Than Education*, USA TODAY (July 14, 2013, 1:31 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/01/15/division-i-colleges-spend-more-on-athletes-than-education/1837721/> (revealing that NCAA Division I universities “spend as much as six times more per athlete than they spend to educate students,” which for the ninety-seven public schools which compete in the top-tier Football Bowl Subdivision is \$92,000 per athlete compared to \$14,000 per full-time student), and Sean Gregory, *College Sports Spending Is Insane*, TIME (Dec. 4, 2013), <http://keepingscore.blogs.time.com/2013/12/04/college-sports-spending-is-insane/> (listing Ohio State as the top football spending school, where in 2011, the university spent \$380,757 per scholarship football player. The Southeastern Conference is the top spending conference, spending \$176,429 per athlete and \$259,251 per scholarship football player); see generally *Athletic & Academic Spending Database for NCAA Division I*, KNIGHT COMM’N, <http://spendingdatabase.knightcommission.org/> (last visited Feb. 16, 2014) (providing a searchable database tracking athletic and academic spending).

¹⁶ Rottenberg, *supra* note 1, at 242.

¹⁷ *Id.*

¹⁸ *Id.* at 252; but see Sanderson & Siegfried, *supra* note 2, at 604 (discussing the dramatic shift in the baseball player’s labor market since 1956).

could sell their labor only to a single potential buyer, specifically the team that first signed the player or otherwise held his rights. In addition, in what he termed an aspect “unique” to professional competitive sports,¹⁹ each competitor in the industry must be of “approximately equal size” if they are to be successful.²⁰ Unlike other industries, the ultimate goal of any particular franchise was not to drive its competitor firms out of the market. Competitive balance, wherein equally matched teams could engage in a contest with an uncertain outcome, was required for the success of the league.²¹ Teams essentially were cooperating producers of a joint good, namely the game contest and the seasonal competition.²²

This description of competitive baseball, and impliedly competitive sports at all levels, animated a large economic literature on the “uncertainty-of-outcome” hypothesis²³ that debates the proper measure of competitive balance and its correlation with a successful

¹⁹ Rottenberg, *supra* note 1, at 242.

²⁰ *See id.* at 242, 254–55.

²¹ *Id.* at 254–55.

²² *Id.* (“Two teams opposed to each other in play are like two firms producing a single product. The product is the game, weighted by the revenues derived from its play.”).

²³ Rottenberg summarizes his “uncertainty-of-outcome” theory in footnote twenty-one of his article: “[T]he ‘tighter’ the competition, the larger the attendance.” Rottenberg, *supra* note 1, at 246 n.21. For articles that have applied or discussed Rottenberg’s “uncertainty-of-outcome” hypothesis, see the following: Dennis Coates & Brad R. Humphreys, *Game Attendance and Outcome Uncertainty in the National Hockey League* 14 (Int’l Ass’n of Sports Economists & N. Am. Ass’n of Sports Economists, Working Paper No. 1114, 2012) [hereinafter *Outcome Uncertainty*] (examining NHL attendance from the 2005–2006 to 2009–2010 season and finding that “[r]ather than simply preferring to see games where the outcome is highly uncertain . . . fans prefer to attend games the home team is expected to win, . . . other things equal”); Daniel A. Rascher & John Paul G. Solmes, *Do Fans Want Close Contests? A Test of the Uncertainty of Outcome Hypothesis in the National Basketball Association*, 2 INT’L J. SPORTS FIN. 130, 137 (2007) (concluding that fan attendance at home games is optimized when the outcome is uncertain, but the home team is still favored to win); Rodney Fort, *The Golden Anniversary of “The Baseball Players’ Labor Market,”* 6 J. SPORTS ECON. 347, 348 (2005) (providing a review of Rottenberg’s seminal article fifty years after its publication, and concluding that the article’s importance makes Rottenberg “the father of sports economics”); David Frost & Robert Simmons, *Outcome Uncertainty and Attendance Demand in Sport: The Case of English Soccer*, 51 J. ROYAL STAT. SOC’Y (THE STATISTICIAN) 229, 239 (2002) (collecting data on English professional soccer league matches played between October 1997 and May 1998, and concluding that uncertainty-of-outcome increases attendance for an individual match, but that improving competitive balance throughout the league would not necessarily increase attendance); Glenn Knowles et al., *The Demand for Major League Baseball: A Test of the Uncertainty of Outcome Hypothesis*, 36 AM. ECONOMIST 72, 77 (1992) (testing the uncertainty-of-outcome hypothesis against the 1988 baseball season and finding that competitive balance increases attendance, with attendance being maximized when the home team is slightly favored).

sports league.²⁴ It also sparked a host of solutions to the problem of competitive imbalance.²⁵ Leagues seeking to create or ensure competitive balance enacted various measures to induce parity, including revenue sharing,²⁶ salary caps,²⁷ luxury taxes,²⁸ imbalanced

²⁴ See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 521 (2011) (linking “competitive balance” and “uncertainty of outcome.” When there is a greater balance of competition within a league, the outcome of the games within the league become less predictable. While there are good and bad teams in every league, “the overall success of a league requires that teams be relatively evenly matched in terms of playing ability.” The less predictable the outcomes, the greater the interest in the games. For example, “[i]f the Super Bowl champion was obvious before the season began, that would significantly undercut the interest in NFL regular season and playoff games.”); Glenn Knowles et al., *supra* note 23, at 77–78 (concluding from the research conducted that the uncertainty of a game’s outcome was a “significant determinant of attendance . . . indicat[ing] that competitive balance is important in MLB.” League attendance is maximized when home teams are considered slight favorites, but all of the teams in the league are relatively equal in skill and ability.); Michael Lewis, *Individual Team Incentives and Managing Competitive Balance in Sports Leagues: An Empirical Analysis of Major League Baseball*, 45 J. MARKETING. RES. 535, 536 (2008) (citing Walter Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964), and Rodney Fort & James Quirk, *Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. ECON. LITERATURE 1265 (1995) (reviewing the literary history and debate regarding Rottenberg’s “uncertainty of outcome hypothesis”); Glenn Knowles et al., *Baseball Attendance and Outcome Uncertainty: Reply*, 39 AM. ECONOMIST 88 (1995) (conceding that conclusions regarding uncertainty-of-outcome are based on probabilities, for “[i]t is impossible to directly test for the hypothesis that fans have a strong preference for certainty, since no such observations exist . . . [concluding that] the uncertainty of outcome is a significant determinant of attendance at major league baseball games”). See generally Frost & Simmons, *supra* note 23 (analyzing uncertainty-of-outcome in the National Hockey League), and CRAIG A. DEPKEN, II & DENNIS P. WILSON, *THE UNCERTAINTY OF OUTCOME HYPOTHESIS IN DIVISION IA COLLEGE FOOTBALL* (2010) (unpublished), available at <http://belkcollegeofbusiness.uncc.edu/cdepken/P/UOH12.pdf> (analyzing uncertainty-of-outcome in Division I NCAA College Football).

²⁵ Major League Baseball until recently had enacted the fewest “parity-producing” rules. It did not require teams to abide by a salary cap. It did not specify a maximum salary. Because its franchises depended so much on local attendance revenue and local television contracts for their revenue, it did not have a strong system for revenue sharing among teams, apart from the national broadcast revenues. Despite comparatively few parity rules, baseball has always featured substantial competitive balance. Even the worst teams in the league consistently win four out of ten games; the best win six out of ten. Other professional sports, albeit with a shorter schedule, do exhibit much greater competitive disparity, despite having a plethora of parity-inducing rules. The game of baseball inherently produces competitive balance, perhaps because luck on batted balls plays such a large role in game outcomes.

²⁶ See Justin R. Hunt, *To Share or Not To Share: Revenue Sharing Structures in Professional Sports*, 13 TEX. REV. ENT. & SPORTS L. 139, 139 (2012) (“Every league [NFL, MLB, NBA, and NHL] acknowledges that the purpose of a revenue sharing agreement is to allow a closer range of payroll spending that might otherwise not be accomplished, preventing large market teams from controlling the allocation of high-priced free agents.”).

schedules,²⁹ drafting newcomers in reverse order of finish,³⁰ and various waiver and release systems³¹ designed to allow movement of marginal players to help supply weaker teams.

²⁷ See, e.g., *2013 NFL Salary Cap Increases to \$123 Million*, USA TODAY (Feb. 28, 2013, 10:15 PM), <http://www.usatoday.com/story/sports/nfl/2013/02/28/2013-nfl-salary-cap-increases-to-123-million/1955515/> (detailing changes to the NFL collective bargaining agreement, where the main labor dispute was “how to divide the more than \$9 billion in annual league revenues, a figure that will keep rising, particularly once the NFL’s new television contracts kick in for the 2014 season”); see also Thomas C. Pincher, *Baseball’s Antitrust Exemption Repealed: An Analysis of the Effect on Salary Cap and Salary Taxation Provisions*, 7 SETON HALL J. SPORT L. 5, 37–43 (1997) (explaining salary cap provisions and providing relevant case law).

²⁸ E.g., Eric Pincus, *Lakers Limited by Luxury Taxes*, L.A. TIMES (Aug. 8, 2013), <http://articles.latimes.com/2013/aug/08/sports/la-sp-lakers-finances-20130809> (“Each year the NBA sets a spending limit that triggers the luxury tax. In eight of the last ten seasons, the Lakers have willingly crossed that line. The penalty has been a dollar-for-dollar tax, costing the Lakers a cumulative \$113.7 million since the 2002–03 season.”), and Associated Press, *Yankees Hit With \$28M Luxury Tax*, ESPN.COM (Dec. 18, 2013, 5:00 AM), http://espn.go.com/mlb/story/_/id/10154043/new-york-yankees-hit-28m-luxury-tax.

²⁹ See, e.g., Peter Schmuck, *Baseball’s Unbalanced Schedules Don’t Lead to Fair Play*, BALTIMORE SUN (Mar. 7, 2010), http://articles.baltimoresun.com/2010-03-07/sports/bal-sp.schmuck07mar07_1_major-league-baseball-schedule-andy-macphail (arguing against unbalanced schedules, where the Baltimore Orioles, for example, have to play the New York Yankees and Boston Red Sox a disproportionate amount of games per year), and Danny Knobler, *MLB May Go to a More Unbalanced (And More Unfair?) Schedule*, CBSSPORTS.COM (June 6, 2012, 1:34 PM), <http://www.cbssports.com/mlb/writer/danny-knobler/19280228/mlb-may-go-to-a-more-unbalanced-and-more-unfair-schedule> (discussing the difficulties with MLB scheduling); see generally Liam J.A. Lenten, *The Extent to Which Unbalanced Schedules Cause Distortions in Sports League Tables*, 28 ECON. MODELLING 451 (2011).

³⁰ See Aaron Gordon, *The Myth of Competitive Balance*, SPORTS ON EARTH (Aug. 8, 2013), <http://www.sportsonearth.com/article/56193798/> (“Similarly, reverse-order drafts are often—but not unanimously—believed to increase competitive balance, although to what degree is often contested. This is because—unlike revenue sharing which simply shuffles money around—drafts reallocate talent.”); e.g., *Complete Order of First Round of 2011 NFL Draft Determined*, NAT’L FOOTBALL LEAGUE (Aug. 15, 2012, 8:36 PM), <http://www.nfl.com/news/story/09000d5d81d6b708/article/complete-order-of-first-round-of-2011-nfl-draft-determined> (laying out the procedures for determining the order of the NFL draft).

³¹ See Brian McFarland, *How Does the NFL’s Waiver System Work?*, RUSSELL ST. REP. (Aug. 24, 2013), <http://russellstreetreport.com/how-does-the-nfls-waiver-system-work-2/> (explaining the NFL’s waiver system, where a player can be “waived” by a team, which gives any other team twenty-four hours to “claim” the player. If multiple teams claim the player, the worst team-according to record-receives the player. After this twenty-four hour period expires, the unclaimed player becomes a free agent); see, e.g., Mike Florio, *Waivers System Now Applies to All Players*, NBC SPORTS (Oct. 30, 2013, 8:59 AM), <http://profootballtalk.nbcsports.com/2013/10/30/waivers-system-now-applies-to-all-players/> (providing examples of how players can end up with a team for whom they do not wish to play after being claimed on waivers).

Although many of the “parity” rules of Major League Baseball and other professional sports leagues remained unrealized at the time Rottenberg wrote, he did presciently discuss various methods by which professional baseball had tried or might attempt to create competitive balance.

Foremost on the list was baseball’s infamous “reserve system.”³² Baseball had for decades sought to maintain competitive balance by making its player contracts automatically renewable at the discretion of the team.³³ It also precluded players who had played to the completion of their un-renewed contract from playing with other teams,³⁴ enforcing this obvious limit on the freedom of labor by disqualifying any team that signed such a player from eligibility to participate in the league.³⁵ Baseball also gained a monopoly on the players’ services and on each team’s schedule, precluding players or

³² Rottenberg, *supra* note 1, at 245–46.

³³ *Id.*; see generally Ed Edmonds, *Arthur Soden’s Legacy: The Origins and Early History of Baseball’s Reserve System*, 5 ALB. GOV’T L. REV. 38 (2012) (detailing the long history of baseball’s reserve system).

³⁴ For the stories of two athletes who resorted to litigation in an effort to escape their contract commitments, see Anthony Cotton, *The Courting of Danny Ainge*, SPORTS ILLUSTRATED (Oct. 1981), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1124867/1/index.html>. The article provides an overview of Danny Ainge’s struggle to terminate his contract with the Toronto Blue Jays so that he could play in the NBA for the Boston Celtics. After losing a jury trial on the issue, Ainge would eventually reach the NBA, become an NBA all-star, and win two NBA championships. Ainge was named the Boston Celtics president of basketball operations in 2003, and he still holds this position as of 2014. See Roger I. Abrams, *Sports Arbitration and Enforcing Promises: Brian Shaw and Labor Arbitration*, 20 MARQ. SPORTS L. REV. 223 (2009). The article tells the story of Brian Shaw’s journey from the NBA to the Italian Basketball League and back to the NBA. Shaw played one year for the Celtics, left to go play in Italy, and then signed another contract to come back to play for the Celtics. Shortly after signing his new contract with the Celtics, he wanted to escape the contract to capitalize on free agency the following year. Shaw lost in arbitration and the United States Court of Appeals for the First Circuit ultimately affirmed that decision. *Boston Celtics Ltd. Partnership v. Shaw*, 908 F.2d 1041 (1st Cir. 1990). Shaw went on to win three NBA championships and as of the 2013–2014 season was the head coach of the NBA’s Denver Nuggets.

³⁵ Rottenberg, *supra* note 1, at 245–46; see also Richard L. Irwin, *A Historical Review of Litigation in Baseball*, 1 MARQ. SPORTS. L.J. 283, 287 (1991) (citing *Philadelphia Ball Club v. Lajoie*, 51 A. 973 (Pa. 1902)) (enforcing the reserve clause because Lajoie’s skills were of a “unique” or “peculiar” nature, which would cause the Philadelphia Phillies irreparable harm); see also Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 403 (1993) (citing *Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972) and *Central New York Basketball Club v. Barnett*, 181 N.E.2d 506 (Ohio Ct. C.P. 1961)) (“Since the *Lajoie* decision, a number of other courts have enforced restrictive covenants against players who sought to switch teams (or leagues) between seasons or even, in some cases, after sitting out a season.”).

teams from competing in extra-league contests.³⁶ Finally, each baseball franchise, including many in the minor leagues, was entitled to specify a “reserve list” of players, whose number could extend beyond the current major league roster and with whom rival teams could not contract.³⁷ The need for the reserve system, Rottenberg stated, was to assure an equal distribution of playing talent among opposing teams in order to create the requisite “uncertainty of outcome” to entice consumers to pay admission to the game.³⁸ Without the reserve clause, or impliedly some other mechanism to ensure fair dispersal of the better players among several teams, then, reciting an argument very familiar to the contemporary baseball fan, “the rich clubs would outbid the poor for talent, taking all the competent players for themselves and leaving only the incompetent for the other teams.”³⁹

Yet even under the reserve system, Rottenberg argued, despite its draconian limitations on the movement of labor, the richer teams prevailed.⁴⁰ They could offer higher prices to other teams for the purchase of player contracts, for example in the way the New York Yankees purchased the contract of baseball’s then reigning home-run leader Babe Ruth from the Boston franchise.⁴¹ In the free agent period at the start of the player’s career, before the institution of the

³⁶ See Avraham J. Sommer, *The National Pastime of the American Judiciary: Reexamining the Strength of Major League Baseball’s Antitrust Exemption Following the Passage of the Curt Flood Act and the Supreme Court’s Ruling in American Needle, Inc. v. NFL*, 19 SPORTS LAW. J. 325, 327 (2012) (“The Reserve System was composed of two clauses in player contracts that restricted player mobility. First, the Reserve Clause prohibited a ballplayer from playing for another team during the term of his contract and in the succeeding year. Second, the Option Clause enabled management to unilaterally renew a player’s contract for one year following the inability of the parties to reach an agreement. The concurrent existence of these two clauses resulted in the perpetual renewal of an individual player’s contract at the whim of team ownership. The Reserve System effectively controlled player costs by eliminating the market for player services.”).

³⁷ See ALBERT THEODORE POWERS, *THE BUSINESS OF BASEBALL* 17–19 (2003) (discussing how the reserve system “controlled owners’ costs by eliminating competition for players’ services.” A reserve list could extend to cover eleven of the fourteen players on each team.).

³⁸ Rottenberg, *supra* note 1, at 246.

³⁹ *Id.*

⁴⁰ *Id.* at 247 (pointing to the New York Yankees “fortune” and overwhelming success when compared to other teams. For example, “[i]n the period 1920–51 the New York Yankees led the American League in eighteen years, and the Chicago White Sox in none.”).

⁴¹ *Id.* at 245, 253; see also ALLAN WOOD, *BABE RUTH AND THE 1918 RED SOX* 220 (2000) (explaining the three options that a player had: (1) have a club bid for his services, (2) make the best out of the situation with the reserving club, or (3) retire).

entry draft, the richer teams could offer higher salaries and higher prospects for lifetime earnings, both from playoff shares and from contract renewals.⁴² By investing more heavily in their minor league teams and their coaching salaries, the richer teams could provide themselves with a larger pool of competent substitutes to maintain their competitive edge.⁴³ In short, “the teams that were prepared to outbid others for players [had] not been frustrated by the [reserve] rule.”⁴⁴

Rottenberg’s next thought jumps off the page. “It will also be shown that a market in which freedom is limited by the reserve rule cannot be expected to equalize the distribution of players among teams more than a market in which there is perfect freedom.”⁴⁵ This apparently offhand remark at the end of the discussion about the reserve system creates the electricity for the last few pages of the article. It turns out that none of the extant means of ensuring competitive balance will equalize the distribution of players any better than would an unrestricted labor market.

For example, baseball’s incipient waiver system allowed teams to draft unprotected players from competitor teams upon the payment of a stipulated fee, in effect a forced sale at a predetermined price.⁴⁶ Order of drafting was conducted in reverse order of the final standings from the previous season,⁴⁷ thus attempting to supply better players to weaker teams. Instead of benefitting losing teams, however, the cheap sale price would induce the better teams to sell or trade eligible players worth more than the stipulated price prior to the waiver period, thus extracting full value.⁴⁸ This trade, of course, would not necessarily be completed with a losing team, but instead

⁴² Rottenberg, *supra* note 1, at 244.

⁴³ *See id.* at 243.

⁴⁴ *Id.* at 247.

⁴⁵ *Id.* at 247–48.

⁴⁶ *Id.* at 248.

⁴⁷ *Id.* at 248–49. This order of drafting remains the same in the modern “First-Year Player Draft.” *First-Year Player Draft FAQ*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/faq.jsp> (last visited Feb. 16, 2014) (“Major League clubs select in reverse order of their records at the close of the preceding season, without regard to League. . . . Additional selections are also awarded to Clubs that lost certain types of Major League free agent players after the previous season.”).

⁴⁸ Rottenberg, *supra* note 1, at 249 (explaining how if a minor league team had three players each worth \$40,000, the team would simply sell all of the players at full value *before* the draft to avoid losing value for the one player who would have been drafted).

the player would go to the highest bidder.⁴⁹ In the end, the players subject to the waiver and draft process would be those whose worth was properly reflected in the draft price.⁵⁰ Losing teams would find no bargains in the waiver draft that would increase the collective value of their rosters.

A free market in baseball labor would not change its distribution. In Rottenberg's view,⁵¹ what would prohibit wealthier teams from acquiring all or most of the useful baseball talent is the law of diminishing returns,⁵² along with diseconomies of scale.⁵³ The latter consideration is apparent to anyone familiar with the game. At some point, a team can have too many good players. Coaches can mentor only so many players; only one player can take the field at shortstop; only a few pitchers can be awarded with the significant role of the starter. Some players have to come off the bench or remain in the minor league. High-quality players relegated to inferior roles will want to move to teams where their contributions can be more valuable. The law of diminishing returns amplifies this tendency. Employing high-salaried stars in inferior roles, or even theoretically as backups relegated to the minor leagues, effectively reduces team revenue. Each win costs more; the marginal revenue from wins diminishes,⁵⁴ until it is exceeded by the marginal cost of adding another player. In short, it will not pay to increase the "factor"—the quality of players on one team—without limit. At some point, Rottenberg writes, a "first star player" is worth more to the inferior

⁴⁹ *Id.* ("[The team] sells, of course, to the highest bidder, without regard to the previous season's rank position of the bidding teams.").

⁵⁰ *Id.* (concluding that the valuable players would be sold before the draft, and the players actually drafted were only worth the draft price. Thus, the *only* bargain in the draft would be the result of a market miscalculation.).

⁵¹ *Id.* at 254.

⁵² *Id.*; see also Peter Kreher, *Antitrust Theory, College Sports, and Interleague Rulemaking: A New Critique of the NCAA's Amateurism Rules*, 6 VA. SPORTS & ENT. L.J. 51, 84 n.184 (2006) ("Sport, like many other industries, suffers from diminishing marginal returns. Thus, the more talent a team accumulates, the less valuable each new talented player is. That player, however, retains his high value to less talented teams. In a competitive market, this forces teams to internalize the cost of stockpiling talent.").

⁵³ Rottenberg, *supra* note 1, at 254.

⁵⁴ See, e.g., *MLB Cost Per Win (By Season): 2013 MLB Season*, SPORTING CHARTS, <http://www.sportingcharts.com/mlb/stats/mlb-cost-per-win-by-season/2013/> (last visited Feb. 16, 2014) (comparing the New York Yankees payroll, which cost \$2,692,182 per win, yet the team missed the playoffs; and the Houston Astros payroll, which cost only \$432,600 per win for the league's worst record. The World Series Champions, the Boston Red Sox, spent \$1,553,149 per win; while the Oakland Athletics won 96 games at \$631,922 per win.).

team than he would be as the “third star [player]” on the rich team.⁵⁵ “At this point, [the inferior team] is in a position to bid players away” from the superior team.⁵⁶ The superior team’s “behavior is not a function of its bank balance.”⁵⁷

II

THE LABOR MARKET IN COLLEGE SPORTS

Although it is a mistake to characterize the university as a monopsonist,⁵⁸ college sports do feature competitors that are roughly “equal in size.” Universities differ in student population⁵⁹ and financial endowment,⁶⁰ but for athletic purposes they are grouped by the NCAA into divisions.⁶¹ Divisions are determined according to the school’s financial commitment to athletics. Within divisions, teams are equalized by limiting the number of financial grants⁶² and by

⁵⁵ Rottenberg, *supra* note 1, at 255.

⁵⁶ *Id.*

⁵⁷ *Id.* (explaining that selling a “third star player” can be a beneficial strategy regardless of financial position).

⁵⁸ See Richard B. McKenzie & E. Thomas Sullivan, *Does the NCAA Exploit College Athletes? An Economics and Legal Reinterpretation*, 32 THE ANTITRUST BULL. 373 (1987).

⁵⁹ Delece Smith-Barrow, *10 Universities With the Largest Undergraduate Populations*, U.S. NEWS & WORLD REP. (Dec. 3, 2013), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2013/12/03/10-universities-with-the-largest-undergraduate-populations> (listing different university populations, including the largest population at DeVry University and the smallest population at College of St. Joseph in Vermont).

⁶⁰ NACUBO, 2013-NACUBO COMMONFUND STUDY OF ENDOWMENT RESULTS, TABLE: ALL U.S. AND CANADIAN INSTITUTIONS, 2012 to 2013 (2014), *available at* <http://www.nacubo.org/Documents/Endowment%20Files/2013NCSEEndowmentMarketValuesRevisedJan232014.pdf>. The National Association of College and University Business Officers performs a study every year on American and Canadian university endowments. In 2013, there were 849 universities on the list. Harvard University had the largest financial endowment, totaling \$32 billion. By contrast, Southern Virginia University accounted for the lowest financial endowment of \$714,000.

⁶¹ NCAA, 2013-14 NCAA DIVISION I MANUAL § 20.01.2 (2013) [hereinafter NCAA MANUAL], *available at* <http://www.ncaapublications.com/productdownloads/D114.pdf> (“Each active and provisional member institution and member conference is designated as a member of Division I, Division II or Division III for certain legislative and competitive purposes.”).

⁶² *Id.* § 15.5.4 (permitting Division I baseball a total of 11.7 full scholarships per year); *see also id.* § 15.5.3.1.1 (permitting Men’s Tennis 4.5 full scholarships each year); *id.* § 15.5.5.2 (permitting Women’s Basketball 15 full scholarships per year); *id.* 15.5.5.1 (permitting Men’s Basketball 13 full scholarships per year).

restricting team size.⁶³ Teams are also constrained in the methods of recruiting players,⁶⁴ limitations on transfers of student-athletes,⁶⁵ limits on the size of coaching staffs,⁶⁶ and roster size.⁶⁷

In effect, college student-athletes are compensated. Most high-level student-athletes receive a full college scholarship. The typical athletic scholarship includes tuition, which at higher-end schools can surpass \$40,000 per year.⁶⁸ An athletic scholarship also includes free lodging, often in athlete-only dorms, or otherwise in the university's best dorms or apartments.⁶⁹ The athletes get free meals, typically at the highest level of today's college meal plans. Free books⁷⁰ and waived student fees⁷¹ are included as well. The total estimated cost to attend an elite college now adds up to over \$50,000 per year.⁷² Individual student-athletes may not place that high of a value on the full scholarship; nonetheless, the market value of the compensation is in

⁶³ *Id.* § 15.5.3.1.1 (granting Men's Soccer a maximum of 9.9 scholarships every year); *see id.* (permitting Men's Golf a maximum of 4.5 scholarships to grant players every year).

⁶⁴ *Id.* § 13.1.3 (discussing the rule on telephone calls coaches can make to players).

⁶⁵ *Id.* § 14.5.5.1 (requiring student-athletes attending a four-year college who transfer to another college to complete one full academic year before they are eligible to participate in sports at the new institution).

⁶⁶ *Id.* § 11.7.2 (limiting Football Bowl Subdivision (FBS) programs to one head coach, nine assistant coaches, and four graduate assistant coaches); *see also id.* § 11.7.4 (limiting Men's and Women's Soccer to three coaches each, Men's and Women's Basketball to four coaches each, and Men's and Women's Volleyball to three coaches each).

⁶⁷ *Id.* § 17.2.8.3 (rule stating that a Division I baseball team is limited to a maximum of thirty-five players).

⁶⁸ *National University Rankings*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities/data> (last visited Mar. 20, 2014) (showing that tuition and fees for the top ten universities in the United States are at least \$40,000).

⁶⁹ Rustin Dodd, *Upscale Athlete Housing is the Next Weapon in College Sports' Arms Race*, KANSAS CITY STAR (Jan. 18, 2014), <http://www.kansascity.com/2014/01/18/4761752/upscale-athlete-housing-is-the.html> (discussing multimillion-dollar dorms built for athletes at prominent Division I universities and how these will provide an extra incentive to recruits).

⁷⁰ *How Do Athletics Scholarships Work?*, NCAA.ORG, <http://www.ncaa.org/about/resources/media-center/how-do-athletics-scholarships-work> (last visited Mar. 20, 2014) ("Full scholarships cover tuition and fees, room, board and required course-related books.").

⁷¹ *Id.*

⁷² *Ranking America's Top Colleges 2013*, FORBES (July 24, 2013, 9:46 AM), available at <http://www.forbes.com/sites/carolinehoward/2013/07/24/ranking-americas-top-colleges-2013/> (listing the price to attend a top-thirty university in the United States, which costs between \$51,337 (University of Virginia) to \$62,245 (University of Chicago)).

the range of \$200,000⁷³ over a college career, all tax-free. That is real value for an eighteen-year-old whose next best job would in most cases start near the minimum wage.⁷⁴

Student-athletes also receive a college degree, or at least a good chance at one,⁷⁵ which translates into a lifetime of superior earnings.⁷⁶ Particularly for those athletes whose academic potential is modest, a degree from a quality university represents a significant enhancement to expected earnings.⁷⁷ These students also receive top-level coaching and training facilities, a consequential benefit to serious athletes. Finally, for those in one of the two major college sports, football and basketball, college athletics affords them a chance at exposure and stardom.⁷⁸ Exposure on the playing field can give athletes some measure of local or national fame, resulting in immense

⁷³ *How Do Athletic Scholarships Work*, *supra* note 70 (discussing how full scholarships at out-of-state, public schools average \$25,000 a year, while full scholarships at private universities average \$35,000 a year).

⁷⁴ Of course, student-athletes who receive grants-in-aid might, if none were offered, attend college and do so with the benefit of financial assistance. The value of the athletic scholarship in any individual case should be reduced by the amount a particular student would have received from a scholarship based on some criterion other than athletic prowess.

⁷⁵ Michelle Brutlag Hosick, *Division I Student-Athletes Show Progress in Graduation Success Rate*, NCAA.COM (Oct. 24, 2013, 6:46 PM), <http://www.ncaa.com/news/ncaa/article/2013-10-24/division-i-student-athletes-show-progress-graduation-success-rate> (discussing how the overall graduation rate for student-athletes is sixty-five percent.); *see id.* (discussing athletes at the Division I level who entered college in 2006 and earned a degree); *id.* (discussing how seventy-one percent of FBS student-athletes graduated).

⁷⁶ ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, *THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS* 6 (2011), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/collegepayoff-summary.pdf> (indicating those who obtain a Bachelor's degree will earn eighty-three percent more over their lifetime than someone with a high school diploma). *See id.* at 6 (discussing how on average, a worker with a Bachelor's degree will earn \$2.4 million over a lifetime, whereas a worker with a high school diploma will earn \$1.5 million over a lifetime).

⁷⁷ 2013-2014 Payscale COLLEGE SALARY REPORT, Payscale, <http://www.payscale.com/college-salary-report-2014/full-list-of-schools> (last visited Mar. 13, 2014) (displaying a study comparing earnings for graduates in most universities in the United States. For instance, Stanford University graduates earn an average starting salary of \$61,300. Northern Kentucky University graduates earn an average starting salary of \$42,300.).

⁷⁸ Kristi Dosh, *A Comparison: Conference Television Deals*, ESPN.COM (Mar. 19, 2013, 5:15 PM), http://espn.go.com/blog/playbook/dollars/post/_/id/3163/a-comparison-conference-television-deals (discussing comparisons between conferences and the value of television contracts); *see also* Chris Smith, *A BCS Playoff TV Contract Will be Worth More Than \$1 Billion*, FORBES (Apr. 27, 2012, 1:49 PM), <http://www.forbes.com/sites/chris-smith/2012/04/27/a-bcs-playoff-tv-contract-will-be-worth-more-than-1-billion/> (discussing how the value of televised college football has rapidly increased).

college fun and improved post-college job prospects. More significantly, stardom gives them a tangible chance at the athlete's biggest prize, a lucrative and glamorous post-college career in professional sports.⁷⁹ That is a valuable lottery ticket, one so prized that thousands of youth will train countless hours pursuing the dream. Schools that feed athletes to the pros advertise this substantial job benefit to potential recruits.⁸⁰

Despite this attractive financial package, apparently the grant-in-aid fails to cover the full cost of attendance, which would include a little spending money.⁸¹ Restrictions on outside income and other types of financial aid,⁸² however, in effect make the grant-in-aid and its surrounding perquisites the sum total of the athlete's compensation.⁸³ Despite the ubiquitous focus on the full athletic scholarship, most high-level student-athletes are not on full scholarship. Instead, most athletes who play "non-revenue" sports

⁷⁹ *How Do Athletic Scholarships Work*, *supra* note 72 (discussing how very few NCAA student-athletes eventually play professional sports); *see id.* (discussing how many football players (1.7%), baseball players (11.6%), and women's basketball players (0.9%) will eventually turn professional).

⁸⁰ Stacey Meyer, *Unequal Bargaining Power: Making the National Letter of Intent More Equitable*, 15 MARQ. SPORTS L. REV. 227, 227 (2004) (explaining that during the process of recruiting athletes, "[t]he coach promises them the world: that over the next four of five years they will become a star, be ready for the pros, or get into the academic program they want").

⁸¹ RAMOGI HUMA & ELLEN J. STAUROWSKY, *THE \$6 BILLION HEIST: ROBBING COLLEGE ATHLETES UNDER THE GUISE OF AMATEURISM* 12 (2012) [hereinafter HUMA], available at http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf ("College athletes on full scholarship do not receive a 'free ride.' For the 2011-2012 academic year, the average annual scholarship shortfall (out of pocket expenses) for each Football Bowl Series (FBS) "full" scholarship athlete was \$3,285.").

⁸² The courts have upheld NCAA restrictions on the total aid, from any source, that may be provided to a student-athlete. *Wiley v. Nat'l Collegiate Athletic Ass'n*, 612 F.2d 473, 477 (10th Cir. 1979) (upholding an NCAA rule that prevented a student-athlete from receiving a basic education opportunity grant as well as an athletic scholarship).

⁸³ Since 1992, student-athletes are allowed to "receive a Pell Grant in combination with other institutional financial aid, provided the overall grant does not exceed the value of a full grant-in-aid plus \$1700." NCAA MANUAL, *supra* note 61, § 15.2.4.1. In 2004, the NCAA again revised its by-laws to allow students to receive the full value of the grant-in-aid plus a Pell Grant. *Id.* § 15.1. Prior to 1992, student-athletes could receive a Pell Grant, but the NCAA required that the proceeds of the grant be paid directly to the school's athletic department. Letter from Richard C. Stiener, Dir. of U.S. Gen. Accounting Office of Special Investigations, to Senator Stan Nunn, Chairman of the Permanent Subcommittee on Investigations (Jan. 10, 1995), available at <http://www.gao.gov/products/OSI-95-13R>. The proceeds of the grant in excess of \$1700 were paid directly to the school's athletic department. *Id.*

divide a limited number of scholarships among team members.⁸⁴ Were more athletes to be compensated, or the same number were to receive greater compensation, Title IX requirements⁸⁵ would likely mandate that certain female athletes be compensated commensurately.⁸⁶ Many commentators have described the NCAA's

⁸⁴ The NCAA distinguishes between "head count" sports, where every athlete who receives financial aid is granted a full scholarship, and "equivalency" sports, where a coach may divide scholarships into partial allotments. For instance, baseball is an "equivalency" sport. Although the NCAA permits Division I baseball a total of 11.7 full scholarships per year, scholarships can only be divided among twenty-seven players. In contrast, Football Bowl Subdivision is a "head count" sport. The NCAA restricts FBS programs to twenty-five full scholarships per year.

⁸⁵ Title IX prohibits gender discrimination by educational institutions that receive federal funding. 20 U.S.C. § 1681(a) (2014). Regulations promulgated under Title IX ensure that this prohibition applies to college athletics, requiring "equal athletic opportunity for members of both sexes." 34 C.F.R. §§ 106.41(a), (c) (2014). Section 106.41(c) provides a non-exhaustive list of ten factors that are used to determine whether an institution is providing equal athletic opportunities. 34 C.F.R. § 106.41(c). These ten factors form the basis for Title IX litigation in collegiate athletics and result in two distinct types of claims: (1) effective accommodation; and (2) equal treatment. *See, e.g., Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 92 (2d Cir. 2012). The Ninth Circuit gave the following explanation of these two claims: "Effective accommodations claims . . . concern the opportunity to participate in athletics, while equal treatment claims allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics." *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010). *See the following cases for a historical overview of Title IX litigation: Biediger*, 691 F.3d at 108 (holding that a 3.6% disparity between the percentage of women enrolled at Quinnipiac University and the percentage of women on varsity sports teams violated Title IX by failing to provide "proportionate athletic participation opportunities," and therefore affirming the district court's order enjoining Quinnipiac from eliminating its women's volleyball team); *Neal v. Bd. of Trustees*, 198 F.3d 763, 765 (9th Cir. 1999) (reversing the district court and holding that a university does not violate Title IX when it reduces male roster spots in an effort to reach proportionate participation between male and female athletes); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832–35 (10th Cir. 1993) (agreeing with the district court that Colorado State University failed to fully accommodate female athletes when it cut women's softball and affirming the lower court's order to reinstate the sport); *Cohen v. Brown Univ.*, 991 F.2d 888, 906–07 (1st Cir. 1993) (affirming the district court's preliminary injunction ordering Brown University to reinstate women's gymnastics and volleyball because of Brown's failure to meet the effective accommodation requirement); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 583–84 (W.D. Penn. 1992) (finding that Indiana University of Pennsylvania "discriminated against women athletes on the basis of gender" and ordering it to restore its women's gymnastics and field hockey teams).

⁸⁶ Mechelle Voepel, *Title IX a Pay-For-Play Roadblock*, ESPN.COM (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics ("In regard to the concept of 'pay-for-play,' Title IX is generally seen as a substantial roadblock" that likely offers "no viable end-around Title IX to allow schools to pay only those athletes who are profitable in sports, which generally are football and men's basketball."). *Contrast with* Ellen J. Staurowsky, "A Radical Proposal": *Title IX Has No Role in College Sport Pay-For-Play Discussions*, 22 MARQ. SPORTS L. REV. 575, 592 (2012) (arguing that if athletic scholarships represent a form of

limitation on compensation as a form of exploitation.⁸⁷ Undoubtedly, individual colleges earn rent on their most popular, highest-performing athletes. If athletes insisted on receiving their full worth, the highest performers would be more likely to receive it, provided the colleges were not obliged to pay full value for average, middling athletes. Some athletes have to be exploited, in the sense of earning less than their full value, to account for the substantial losses incurred in failed attempts at recruiting,⁸⁸ or in the award of lucrative scholarships to athletes who turn out to be poor performers.⁸⁹ In theory, the college's return on investment in athletics should be no higher than its return on capital in other ventures; otherwise, capital would flow from other uses into further investments in sports. The labor market does clear. Many young athletes compete strenuously for college athletic scholarships.⁹⁰

pay for the work of athletes in televised, commercial sport entertainment, Title IX may not apply: "The arguments for and against athletic scholarships have never been sex-specific but are grounded in an understanding of what an athletic scholarship represents, which is pay-for-play. In light of conversations about pay-for-play and whether Title IX applies, this should be an important consideration within the conversation. If the NCAA, in its scholarship structure, has been getting away with denying revenue-generating athletes employment status for all of these years, Title IX holds no jurisdiction.").

⁸⁷ Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 207–08 (1990) (proposes that the NCAA's amateurism rules constitute antitrust violations: "the technical and inflexible restrictions on amateurism have resulted in inevitable rules violations which breed disrespect for educational institutions and damage societal values."); *see also* HUMA, *supra* note 81, at 3 (arguing that the NCAA rules will deny FBS football and men's basketball college student-athletes at least \$6.2 billion that they otherwise would have received in a fair market. Under the current rules, football players stand to receive around seventeen percent of their fair market value, whereas men's basketball players stand to receive eight percent of theirs); Jason Whitlock, *Greedy NCAA Still Exploiting Athletes*, FOX SPORTS (Mar. 30, 2011, 6:50 PM), <http://msn.foxsports.com/collegebasketball/story/ncaa-amateur-concept-is-a-sham-that-exploits-players-032911> (discussing the NCAA's hypocrisy in upholding the "amateurism myth" for college student-athletes while "everyone else profits").

⁸⁸ Mitch Sherman, *Balancing the Recruiting Budget*, ESPN.COM (June 12, 2012), http://espn.go.com/college-sports/recruiting/football/story/_/id/8041461/the-cost-recruiting (discussing the amount that major Division I football programs spend on recruiting each year); *see id.* (showing that the University of Tennessee spent close to \$1.5 million on football recruiting in 2011).

⁸⁹ *How Do Athletic Scholarships Work*, *supra* note 70 (discussing how many athletic scholarships are granted for one academic year and then annually renewed, meaning that coaches have the option to not renew a scholarship for a poor performer).

⁹⁰ *Id.* (discussing how very few high school athletes earn athletic scholarships; according to the NCAA, less than two percent of high school athletes are awarded collegiate athletic scholarships).

The rules of amateurism limit the ability of student-athletes to obtain professional assistance in determining their value.⁹¹ Where any other student may consult with a professional career coach or lawyer, athletes are prohibited, outside of carefully limited opportunities,⁹² from employing assistance to assess their true value.⁹³ This restriction appears unconscionable, yet many institutions that work with youths similarly restrict access to lawyers or other professional advisors in situations where adults would be at liberty to do so. These restrictions are designed to preclude adversarial relationships, and reflect the status of the university or other institution as acting in an essentially parental role.

Student-athletes are also not permitted to test the professional market without compromising their eligibility.⁹⁴ This restriction precludes a student who may wish to offer cheap or free labor to enhance career prospects as a professional athlete. Unlike other students, who are free to intern with firms in their field or profession without penalty or reprisal, student-athletes may not spend their off-seasons working as an athlete in their collegiate sport.⁹⁵ In effect, they cannot work part-time during the academic year, as any income

⁹¹ NCAA MANUAL, *supra* note 61, § 12.3.1 (stipulating that athletes who agree to be represented by an agent are deemed ineligible from playing intercollegiate sports).

⁹² *Id.* § 12.3.2 (allowing an athlete to seek legal counsel concerning a proposed professional sports contract, but the lawyer is not permitted to be present during the actual negotiation).

⁹³ *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009), *settlement reached and Order vacated*. In *Oliver*, the NCAA declared a student-athlete ineligible for having his attorney present during negotiations with professional team. *Id.* at 23. The student asked the court to declare Bylaw 12.3.2 invalid and sought a permanent injunction to allow him to continue collegiate athletic career. *Id.* at 24. The court held that it is impossible to allow student-athletes to hire lawyers and then attempt to control what the lawyer can do for the client. *Id.* at 31. The court also held that NCAA Bylaw 12.3.2 is arbitrary and capricious, allowing for "exploitation of the student-athlete 'by professional and commercial enterprises,' in contravention of the positive intentions of the defendant." *Id.* at 32. This Order was vacated when the NCAA settled with *Oliver* for \$250,000. NCAA Bylaw 12.3.2 is still in effect.

⁹⁴ *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992) (explaining that Division I football player entered the draft with one season of eligibility left, therefore becoming ineligible to play collegiate football. He was not drafted and sued the NCAA for an injunction permitting him to regain his eligibility. The court dismissed the case, holding that the NCAA's "no-draft" and "no-agent" rules did not violate the Sherman Act); *see also* *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990) (holding that NCAA eligibility rules are not subject to antitrust laws and the rules did not violate the Sherman Act).

⁹⁵ *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197, 1199 (9th Cir. 1976) (upholding the NCAA rule that bans a student-athlete from participating in a collegiate sport if that student-athlete has contracted to participate in that sport professionally).

earned by the athlete would be counted against the value of the scholarship.⁹⁶ College student-athletes are also restricted in their use of future earnings. Unlike a music major who could borrow against her future earnings as a professional musician, student-athletes may not borrow against their future income stream.

The most powerful argument in favor of compensating college student-athletes observes that players in basketball and football generate millions of dollars for their respective universities.⁹⁷ Yet many factors contribute to producing the sellout crowds and television contracts, including stadium design, concessions, alumni associations, and state pride.⁹⁸ Thus, athletes alone do not generate the revenue.⁹⁹ With that said, the athletes are the entertainers on the stage, and in other fields, usually, the on-stage performers receive the largest compensation.¹⁰⁰ Yet, ascribing the lion's share of the total revenue to the athletes begs the question of which athletes actually produced the revenue. A winning athletic program will attract the finest players each year in part because the athletes from previous seasons created the athletic powerhouse. Stars who enroll can be assured that their teammates will also be high-level players who can complement them, and that they will play in a highly-competitive league in front of a national audience. It is the school name and tradition, a product of the efforts of past teams, coaches and others

⁹⁶ NCAA MANUAL, *supra* note 61, § 15.2.6.

⁹⁷ Tyson Hartnett, *Why College Athletes Should Be Paid*, HUFFINGTON POST (Oct. 21, 2013, 7:41 PM), http://www.huffingtonpost.com/tyson-hartnett/college-athletes-should-be-paid_b_4133847.html (noting that college basketball and football programs generate revenue for the university); *see also* Christian Dennie, *White Out Full Grant-In-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97, 100–01 (2007) (noting that universities have used student-athletes' names, images, and likenesses to sell products, including videogames, DVDs, memorabilia, and trading cards).

⁹⁸ Yun Seok Choi et al., *Motivational Factors Influencing Sport Spectator Involvement at NCAA Division II Basketball Games*, 3 J. FOR STUD. SPORTS & ATHLETES EDUC. 265, 270–71, 279 (2009), *available at* http://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1034&context=coe_khs.

⁹⁹ Additionally, professional teams also generate revenue from their history and the strength of their programs. The fact that leading professional franchises maintain a steady revenue despite high player turnover is a testament to the high ongoing value of the franchise. Despite this limitation, professional teams are able to find a value for their players, even for the marginal ones. Colleges could use the recruiting process to find that value as well, although putatively that determination would be more costly and subject to greater uncertainty.

¹⁰⁰ Eliana Dockterman, *Hollywood A-Listers Are Way Overpaid, Study Says*, TIME ENT. (Nov. 13, 2013), <http://entertainment.time.com/2013/11/13/hollywood-a-listers-are-way-overpaid-study-says>.

that contribute to that opportunity for the next top high school athlete and assure the continuation of the revenue stream.¹⁰¹

Nonetheless, it would be difficult to determine which players produced the revenue and set a price accordingly. Basketball and football are quintessential team sports, where wins are the product of the joint efforts of teammates. In technical terms, there is a high complementarity of inputs.¹⁰² A star quarterback is worth little without effective blockers and receivers who can get open. Likewise, a quality running game enhances the quarterback's performance indirectly. As a result, in the very sports that comprise the revenue sports in college,¹⁰³ it is very difficult to determine how much each player, even star players, matter to the product, at the margin, over a replacement player.¹⁰⁴ With that said, star student-athletes are hugely significant in producing wins and revenue, and professional teams in these sports do arrive at a price for players. But, the idea that "fairness" demands that a team's revenue be distributed to the players

¹⁰¹ In 2012, nine of the top ten revenue-generating Division I athletic programs were ranked in the top fifteen of all-time most wins in either Men's Basketball or College Football. *USA Today Sports' College Athletic Finances*, USA TODAY (May 14, 2012), <http://usatoday30.usatoday.com/sports/college/story/2012-05-14/ncaa-college-athletics-finances-database/54955804/1>; NAT'L COLLEGIATE ATHLETIC ASS'N, 2012-2013 NCAA MEN'S BASKETBALL DIVISION I RECORDS, ALL-TIME WINNINGEST TEAMS, BY VICTORIES 66 (2013), available at http://fs.ncaa.org/Docs/stats/football_records/2012/fbs.pdf; NAT'L COLLEGIATE ATHLETIC ASS'N, 2012 NCAA FOOTBALL RECORDS-FBS INDIVIDUAL RECORDS, ALL-TIME WON-LOST RECORDS, BY PERCENTAGE 64 (2013), available at http://fs.ncaa.org/Docs/stats/m_basketball_RB/2013/2013%2001%20Div.%20I%2010-16.pdf.

¹⁰² Complementary inputs refers to the notion that a team's performance is a product of multiple efforts, including teammates and coaches. BRAD R. HUMPHREYS & DENNIS R. HOWARD, *THE BUSINESS OF SPORTS: PERSPECTIVES ON THE SPORTS INDUSTRY* 166 (2008); see also Roger Noll, *Sports Economics at Fifty* 31 (Stan. Inst. for Econ. Pol'y Res., Discussion Paper No. 06-11, 2006), available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/06-11.pdf> (noting that Walter Neale and Simon Rottenberg contended that teams are complementary inputs with respect to games and championships).

¹⁰³ Cork Gaines, *These 20 Programs Are The Biggest Money Makers In College Sports*, BUS. INSIDER (Jan. 4, 2012, 2:30 PM), <http://www.businessinsider.com/these-20-college-sports-programs-are-the-biggest-moneymakers-2012-1?op=1>.

¹⁰⁴ Wins in baseball, by contrast, appear to be much less a joint product (less complementarity of inputs). Therefore, if a pro team were to hire the league's best first baseman, best second baseman, and so on, the odds are high it will have a very successful team. In other words, the teams with the highest payrolls in Major League Baseball usually are the best teams. Shahriar Hasan, *Can Money Buy Success?: A Study of Team Payroll and Performance in the MLB*, J. GLOBAL BUS. MGMT. 1 (2008), available at <http://www.jgbm.org/page/20%20Shahriar%20Hasan%20.pdf>. In basketball, where teamwork is much more important, the size of the team's payroll is not a good predictor of win totals. *HoopsHype Salaries*, HOOPSHYPE (Mar. 13, 2014), <http://hoopshype.com/salaries.htm>.

is a bit too simple;¹⁰⁵ it avoids the multiple inputs that produce revenue, and also begs the question about exactly what contribution a particular player makes to that revenue. Arguably, a lock-step system¹⁰⁶ that distributes some portion of the revenue to the players equally would address equity concerns. Perhaps, that is precisely the system currently employed.

If student-athletes were paid a competitive price for their services, it is not clear that their compensation would increase. Proponents of the compensation argument point to the millions of dollars earned from college sports and assume that eliminating the NCAA prohibition against paying athletes would enrich the comparatively impoverished student-athlete.¹⁰⁷ To be fair, some athletes would earn a substantial salary, such as the star athlete in a major revenue sport such as basketball. Colleges would bid against each other, and perhaps even the professional leagues, for the players' services. But the star college student-athlete today already in effect receives a substantial salary: in the near future, he will be eligible for a professional-level income stream. Although not permitted explicitly, it appears that the star student-athlete can borrow against that potential future income while in college, especially once the season ends and threats of disqualification become superfluous. So the star can already capitalize on his income potential; the fact that the source of the income is his future professional team and not his one-year alma mater makes no financial difference.¹⁰⁸

¹⁰⁵ Harvard Law Review Association, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1314 (1992) (arguing that the ban on compensation to student-athletes should be lifted to allow them to receive a larger share of the annual revenues from *their* efforts); see also Ramogi Huma, *A Fair Day's Pay For a Fair Day's Work*, Opinion, U.S. NEWS (Apr. 1, 2013, 5:47 PM), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/a-fair-days-pay-for-a-fair-days-work>.

¹⁰⁶ A lock-step compensation model pays all individuals of equivalent experience the same rate, irrespective of an individual's performance. Brian Sullivan & Laurence D. Connor, *Managing the Large Law Firm*, 64 MICH. B.J. 1200, 1203 (1985). Applying this principle to sports, all entry-level athletes would be paid equally, and as the athletes gained experience, they would receive equal increases in compensation.

¹⁰⁷ Goldman, *supra* note 87, at 211–12 (arguing that the NCAA operates a cartel that exploits student-athletes, who are compensated less than their fair market value); Jamilah King, *How Scholarships Leave Student-Athletes Powerless in the NCAA Game*, COLORLINES (Mar. 23, 2012, 10:08 AM), http://colorlines.com/archives/2012/03/ncaa_scholarships_rules.html (noting that the poorest student-athletes in football and basketball generated revenues of \$30 million in 2009–10, while living up to \$5000 below the poverty line).

¹⁰⁸ Some professionally-qualified star athletes return to college for an additional year rather than turn professional. These athletes have impliedly determined that the value of

The rest of the student-athletes, however, whose dreams of college stardom do not materialize, are protected from the non-renewal of their scholarship. The rules of the NCAA and of most schools combine to limit scholarship termination to cases of academic failure, attendance problems, drug abuse, and the like.¹⁰⁹ As a result, as long as they adhere to team and university rules, these athletes will get to pursue their degrees and the lifetime income those degrees entail.¹¹⁰ Coaches can do little about malingerers or others whose talent they misjudged in awarding them a scholarship.¹¹¹ College sidelines are full of scholarship athletes whom coaches would love to cut. In an environment in which yearly salary, not scholarships, constitutes the primary means of compensation, coaches might not be as restricted by rules to maintain pay grades. Coaches might over-promise recruits, only to cut their pay when athletic performance does not meet expectations. Certainly, reputational fears would slow most college coaches from “bait-and-switch” recruiting; nonetheless, establishing a relationship between the student-athlete and the school that resembles an employment relationship would probably render the player more vulnerable to the vagaries of at-will employment, with the college coach as the boss.

A scholarship package¹¹² that approximates \$50,000 per year in value¹¹³ clearly does cap certain players’ earnings; at the same time,

one more year in college is more valuable than any tangible present-day compensation. See McKenzie & Sullivan, *supra* note 58, at 380–81.

¹⁰⁹ NCAA MANUAL, *supra* note 61, § 15.3.4 (noting that the student-athlete’s scholarship is protected from termination for athletic performance for the duration of the scholarship period, which is established in the financial aid agreement between the university and the athlete); Dave Galehouse & Ray Lauenstein, *The Lowdown on Athletic Scholarships*, NEXTSTEPU, <http://www.nextstepu.com/the-lowdown-on-athletic-scholarships.art#Uv7gwfaYaP8> (last visited Feb. 16, 2014).

¹¹⁰ Indeed, a recent study by the National College Players’ Association showed that for the 2008-09 season, roughly eighty percent of student-athletes in Division I Men’s basketball have their athletic scholarships renewed. Goldman, *supra* note 87, at 212. Although non-star athletes will not earn salaries from professional sports, roughly eighty percent of these athletes, of whom many may not be able to afford college otherwise, will enjoy the use of their degree for the rest of their lives.

¹¹¹ Behagen v. Intercollegiate Conference of Faculty Representatives, 346 F. Supp. 602, 607 (D.C. Minn. 1972) (upholding a preliminary injunction to prevent school from dismissing student-athletes during the period of their scholarship without proper procedural requirements).

¹¹² Full scholarships cover tuition and fees, room and board, and required course-related books. *How Do Athletics Scholarships Work?*, *supra* note 70.

¹¹³ See Jerry Carino, *Athletes, Administrators Debate Scholarship Stipends*, USA TODAY (Sept. 28, 2013, 11:24 PM), <http://www.usatoday.com/story/sports/college/2013>

it probably over-compensates other players. Consequently, it is more accurate to describe the current labor market for college student-athletes as featuring a single, mandatory price rather than a maximum price. It is tantamount to a lock-step pay system, one that is utilized by many employers and unions in setting salaries. Lock-step pay systems tend to be preferred because they help to insulate the employees from the caprice and vindictiveness of the boss. Some student-athletes might prefer the lock-step system. The current pay rate appears sufficient to clear the market of suitors.¹¹⁴

If colleges are compelled to pay athletes in cash rather than with scholarships, the total cost could be substantial. A scholarship is an ideal form of compensation for the school. Its market value, ostensibly the stated tuition, substantially exceeds its marginal cost to the school of an additional student.¹¹⁵ An athlete likely values his education and other athletic opportunities more than the marginal cost to the school, but less than the stated tuition. If payments were allowed in lieu of a scholarship, athletes whose marginal revenue product were lower than the stated tuition, but greater than the marginal cost to the university, would still likely receive a scholarship as part of their compensation package.¹¹⁶

III

STUDENT-ATHLETES WHO ARE PAID

It appears likely that, in the near future, there will be some increase in the compensation of college student-athletes.¹¹⁷ That increase

/09/28/athletes-administrators-debate-ncaa-scholarship-stipends/2890117 (reporting that the broad belief is that the value of an athletic scholarship is roughly \$50,000).

¹¹⁴ The fact that the market clears does not justify the price collusion. Even though no harmful output reduction would happen, the absolute quality of the players engaging in the sport would likely diminish, as athletes would choose away from the sport.

¹¹⁵ Victor A. Matheson et al., *The Bottom Line: Accounting for Revenues and Expenditures in Intercollegiate Athletics* 11 (N. Am. Ass'n of Sports Economists, Working Paper No. 11-01, 2011), available at http://college.holycross.edu/RePEc/spe/Matheson/OConnor_CollegeAccounting.pdf (noting that the cost of an athletic scholarship to an offering university could be near zero if the student-athlete is enrolled in courses at below capacity).

¹¹⁶ Salary and scholarships could be blended in a total compensation package, much like academic scholarships. The cost of scholarships to a university must also include the reservation price, which is the potential value that is used up once the scholarship is awarded and cannot be awarded again. In cost accounting terms, scholarships may be cheap, but to a coach they are precious.

¹¹⁷ See Erin Cronk, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes For the Use of Their Names, Images, and Likenesses*, 34 U. LA VERNE L. REV. 135, 142–43 (2013) (highlighting that public opinion has shifted in favor of

could take one of several forms. Colleges appear to have reached the maximum of “in-kind” compensation for students in the major revenue sports: nearly every good for which the school itself is the vendor, including education, lodging, board, and books, is routinely part of the “full-ride” grant-in-aid.¹¹⁸ Additional compensation could take one of two forms, alone or in combination.

The first form of compensation could be a lessening of the NCAA’s prohibition on an athlete receiving “extra pay or extra benefits,” thus allowing athletes to exploit their status as a scholarship athlete.¹¹⁹ Extra compensation could come from sources outside the university, such as loans against future earnings, salary for past performance,¹²⁰ commercial exploitation of an athlete’s right of publicity in advertising or other public appearances,¹²¹ or receipt of direct payments for future professional performance.¹²² This form of compensation, at issue in ongoing litigation,¹²³ would free athletes to exploit their status for financial gain.¹²⁴ It has the advantage of not

compensating student-athletes); Ed Graney, *Paying Student-Athletes Gaining Momentum*, LAS VEGAS REV. J. (Sept. 24, 2013, 9:46 PM), <http://www.reviewjournal.com/columns-blogs/ed-graney/paying-student-athletes-gaining-momentum> (reporting that the momentum to compensate student-athletes is at an all-time high).

¹¹⁸ See *supra* note 33.

¹¹⁹ NCAA MANUAL, *supra* note 61, §§ 12, 16 (“Extra pay includes ‘any expenses received . . . in excess of actual and necessary travel and meal expenses and apparel or equipment . . . for practice and game competition’ and Article 16 bans ‘extra benefits.’”).

¹²⁰ Colo. Seminary (Univ. of Denver) v. NCAA, 417 F. Supp. 885, 897–98 (D. Colo. 1976) (rejecting ineligible student-athletes’ argument that they should be deemed eligible despite having received compensation from outside groups for expenses).

¹²¹ See generally *In re NCAA Student-Athlete Name & Likeness Licensing Litig. v. Nat’l Collegiate Athletic Ass’n*, 724 F.3d 1268 (9th Cir. 2013).

¹²² See Josh Luchs & James Dale, *Pro Sports Can Pay College Athletes If Schools Won’t*, BUS. INSIDER (Apr. 12, 2012, 9:07 AM), <http://www.businessinsider.com/pro-sports-can-pay-college-athletes-if-schools-wont-2012-4>.

¹²³ In 2009, former UCLA basketball player Ed O’Bannon filed suit against the NCAA and the Collegiate Licensing Company, claiming that the NCAA failed to compensate him for the use of his name, image, and likeness on several merchandise. This suit was consolidated into what is now termed *In re Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010). In November 2013, O’Bannon was permitted to amend the complaint to add more plaintiffs.

¹²⁴ The O’Bannon lawsuit demands that the NCAA begin to compensate student-athletes for its use of their image and likeness, which the NCAA uses in television broadcasts, video games, and merchandise sales. Currently, in order to become eligible, a student-athlete must sign away his right to compensation. The form is known as the Form 08-3a Student Athlete Statement. For commentary on the lawsuit and its potential impact on the NCAA and its athletes, see Mark Koba, *The Lawsuit That Could Reshape College Sports*, CNBC.COM, (Dec. 21, 2013, 1:00 PM), <http://www.cnbc.com/id/101285999/page/1> (predicting that because of the lawsuit, the NCAA’s ability to use a student-athlete’s image without compensation is likely to come to an end); Steve Berkowitz, *Plaintiff*

presenting a direct cost to the university, apart from foregone income if the university wished to exploit the athlete's right of publicity itself.¹²⁵ It also has the advantage of roughly calibrating an athlete's "extra benefits" according to an athlete's role on the team and importance to the team's success. Star quarterbacks would be able to earn more than unnoticed offensive lineman. Less positively, allowing student-athletes to capitalize on their future earning potential and otherwise exploit their present notoriety might lead to the type of self-indulgent "showboating" for which the professional game is distinctive. Student-athletes engaged in such blatant commercial and branding activities would undoubtedly diminish the traditional amateur college sports product.¹²⁶

Compensation of student-athletes could also happen in the form of direct, cash stipends.¹²⁷ These could be lock-step for all four years, or

Fillings in O'Bannon Suit Reveal Target Issues, USA TODAY (Jan. 14, 2014, 12:27 AM), <http://www.usatoday.com/story/sports/college/2014/01/14/ncaa-ed-obannon-name-and-likeness-suit/4469295/> (identifying the following key issues in the case: (1) whether game broadcasts are commercial speech and thus entitled to First Amendment protection, (2) whether ending compensation limits for football and men's basketball players would have an adverse impact on women's and other men's sports, and (3) the compensation ban's role, if any, in helping to integrate athletes into a college's academic environment); Marc Edelman, *Why the NCAA Could Lose the O'Bannon Lawsuit*, FORBES (Oct. 29, 2013, 8:30 AM), <http://www.forbes.com/sites/marcedelman/2013/10/29/why-the-ncaa-could-lose-the-obannon-lawsuit/> (suggesting the court could rule the NCAA's "no pay" rule violates anti-trust law because it is plausible for the court to find that (1) the NCAA exercises "market power" over student-athletes, (2) the NCAA suppresses market competition, and (3) there are less restrictive ways the NCAA could encourage competition).

¹²⁵ Universities have used student-athletes' names, images, and likenesses to sell products, including videogames, DVDs, memorabilia, and trading cards. Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst For Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 48 (2012). Recently, Texas A & M made roughly \$72 million in branded merchandise sales relating to its football program and Heisman winner, Johnny Manziel. Scoop Jackson, *The Myth of Parity*, ESPN.COM (Sept. 12, 2013, 5:25 PM), http://espn.go.com/college-sports/story/_/id/9666004/pay-play-answer-college-athletics (alleging that Texas A&M made roughly \$72 million in branded merchandise sales relating to its football program and Heisman winner, Johnny Manziel). Beyond the individual teams, the NCAA itself stands to profit from student-athletes' names. Peter Berkes, *Official NCAA Store set up to Profit off Player Names*, SBNATION (Aug. 6, 2013, 2:49 PM), <http://www.sbnation.com/college-football/2013/8/6/4594858/official-ncaa-store-set-up-to-profit-off-player-names>.

¹²⁶ See *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) ("The NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.").

¹²⁷ Robert John Givens, "Capitamateuralism": *An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 227 (2013); Cronk, *supra* note 117, at 143 (noting that former

based on seniority. The stipend payment could alternatively be geared to position, playing time, or coach's discretion, set at the time of recruitment or re-determined each academic year. In most non-revenue "equivalency" sports,¹²⁸ although compensation is in-kind, the amount of the compensation is established according to this model. Scholarships for individual members of the men's golf team, for instance, are routinely increased, reduced, or eliminated at the end of the spring season, at the discretion of the coaches and usually according to the player's performance and the overall needs of the team's recruiting. Making such determinations for a cash-based compensation scheme in a revenue sport would be substantially the same. Any compensation scheme that allowed the coach or university to vary the salary according to the athlete's value to the team would have the advantage of incentivizing optimal efforts from the athlete. It would have the obvious disadvantage of further unbalancing the coach-player relationship.

Whichever form of compensation happens, it is unlikely that this change alone will alter the current labor market in college sports. In other words, the wealthier football and basketball programs are unlikely to acquire a greater number of the best players than they do already. Currently, all student-athletes in certain sports are offered "full-ride" athletic scholarships that are roughly commensurate with those offered at other universities.¹²⁹ As a result, in seeking athletic

Nebraska State Senator Ernie Chambers proposed legislation that would provide a stipend for student-athletes to cover additional expenses). Recently, the NCAA has considered offering a stipend in addition to athletic scholarships. In late 2011, the NCAA board approved a \$2000 stipend, but delayed implementation in January 2012 after colleges criticized the move. *NCAA President Emmert Fights for Student-Athletes' Right to More Funds*, NCAA.COM (Dec. 6, 2012, 4:10 PM), <http://www.ncaa.com/news/ncaa/article/2012-12-05/ncaa-president-emmert-fights-student-athletes-right-more-funds>. Since that time, NCAA President Mark Emmert has reaffirmed a commitment to the stipend. Bernie Wilson, *Power Conferences Get Autonomy Nod in Straw Vote*, REPUBLICAN AM. (Jan. 17, 2014, 10:01 PM), <http://www.rep-am.com/articles/2014/01/21/sports/college/778656.txt>.

¹²⁸ The NCAA classifies all college sports into one of two categories for purposes of athletic scholarships: head count and equivalency sports. A head count sport may result in a full-ride athletic scholarship. Head count sports include Division I football; men's basketball; and women's basketball, gymnastics, tennis, and volleyball. An equivalency sport may result in a partial athletic scholarship. Equivalency sports are all non-head count sports, and they are also known as non-revenue sports. Scott R. Rosner, *The Growth of NCAA Women's Rowing: A Financial, Ethical, and Legal Analysis*, 11 SETON HALL J. SPORT L. 297, 316 n.167 (2001).

¹²⁹ The NCAA requires that no financial aid shall exceed the cost of attendance, which includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance. NCAA MANUAL, *supra* note 61, §§ 15.01.6, 15.02.2 (capping the allowable benefits that may be offered to a student-

recruits, universities compete along other dimensions. Athletes will choose a school based on the success of its sports program in scheduling high-level competition, participating in the most competitive leagues, and earning national television broadcasts, especially appearances in the seasonal national championship tournaments.¹³⁰ The quality of the coaching staff also matters, as players can improve their performance and increase their chances of a professional career.¹³¹ Other factors, such as the quality of the academic program, practice facilities, dorm room and meal plan, likely also play a role. Most importantly, recruits respond to the recruiter who is best able to earn the trust of the athlete and portray the school as a place that suits the athlete's desires. Unable to pay the student, schools will, instead, pay the person who is best skilled at recruiting the student.¹³² In short, top programs today deploy the financial advantage that results from a winning program to hire the best coaches, build impressive practice facilities,¹³³ and provide a

athlete, thus a "full ride" student-athlete will receive the same level of benefits regardless of where they go to school, except for variances in the cost of attending a particular university). Thus, all full-ride scholarships will offer every student-athlete the same level of coverage, except for variances in the cost of attending a particular university.

¹³⁰ For example, the heart of college basketball is March Madness. One study showed that an athlete's performance in the March Madness tournament can improve that athlete's draft in the NBA by over four slots. The same study noted that an athlete's strong performance during March Madness is a good indicator of how that athlete will perform in the NBA. Lester Picker, *Hiring Decisions for High-Value Employees: Evidence from March Madness Performance*, THE NBER DIGEST 5-6 (July 2012), available at <http://www.nber.org/digest/jul12/jul12.pdf> (noting that a student-athlete who performs well in the March Madness basketball tournament may improve his draft prospects in the NBA by over four slots, and also noting that an athlete's performance in March Madness can be a good indicator of the athlete's future performance in the NBA).

¹³¹ There is a correlation between the highest-paid college basketball coaches and the success of the team's players. The salaries of the three highest-paid coaches are: (1) Mike Krzyzewski, Duke—\$7.2 million; (2) John Calipari, Kentucky—\$5.4 million; and (3) Rick Pitino, Louisville—\$5.0 million. These three teams were the NCAA champions three of the last four years. Cork Gaines, *Here Are the Salaries For the Highest-Paid College Basketball Coaches*, BUS. INSIDER (Dec. 7, 2013, 1:57 PM), <http://www.businessinsider.com/here-are-the-salaries-for-the-highest-paid-college-basketball-coaches-2013-12?op=1>.

¹³² The ten most highly sought high school basketball players from 2013 signed with one of four schools: Kentucky, Kansas, Duke, and Florida. The average salary of the head coaches at these schools is \$5,325,000, and these coaches comprise four of the six highest-paid coaches in college basketball. *Recruiting Database*, RECRUITING NATION BASKETBALL, ESPN.COM, http://espn.go.com/college-sports/basketball/recruiting/rankings/_/class/2013 (last visited Feb. 15, 2014).

¹³³ Oregon football has built the most lavish practice facility in college football. "The college football facilities arms race is officially over, with Oregon unveiling its \$68-million Football Performance Center to the world this week. The six-story complex . . . contains 145,000 square feet of space for Ducks players, coaches and administrators

comfortable life for their student-athletes. Should universities be allowed, under some form of a free market, to offer salaries directly to athletic recruits, universities will deploy their financial advantages commensurately.

A change along these lines would likely, however, occasion transfers of money. Currently, coaches earn the lion's share of salaries that are paid from athletic revenues.¹³⁴ Because athletes cannot be paid, the coaches who recruit them are given the salaries that would otherwise be allocated to the athletes. If the athletes were compensated more directly, student-athletes would be enriched, likely at a cost to athletic administrators, coaches, and the various athletic facilities that, heretofore, were funded to recruit athletes. Athletes considering recruiting offers would weigh the value of the offered cash stipend in light of the other benefits of the job, such as practice facilities or dormitory accommodations, much like any job recruit will assess the total compensation of a position to include both salary and benefits. Although proponents of the view that student-athletes should be paid ground their claims in terms of justice, invoking notions of involuntary servitude,¹³⁵ it is more likely that athletes today take their compensation in forms other than money. Shifting that compensation to direct payments will not likely increase the total compensation and benefits universities currently bestow on scholarship athletes.

Even under a quasi-professional system of paying student-athletes, universities with theoretically unlimited resources and a very high demand for winning outcomes would be unlikely to procure better players than they do currently. As Rottenberg instructs, a team's behavior is not a function of its bank balance.¹³⁶ Star athletes complement each other's play: great quarterbacks perform better with great pass receivers. Yet the law of diminishing returns suggests a useful limit to the number of great players, a point beyond which each

outfitted in black glass and jutting angles that more resemble a Silicon Valley start-up or modern art museum than a locker room." Dan Greenspan, *Oregon Unveils Eye-Popping New Football Performance Center*, NFL (July 31, 2013, 12:58 PM), <http://www.nfl.com/news/story/0ap1000000224020/article/oregon-unveils-eyepopping-new-football-performance-center>.

¹³⁴ *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (noting that efforts to restrict the salary of coaches have not survived antitrust scrutiny).

¹³⁵ See John K. Tokarz, *Involuntary Servants: The NCAA's Abridgement of Student-Athletes' Economic Rights in Perpetuity Violates the Thirteenth Amendment*, 2010 WIS. L. REV. 1501, 1508 (2010) (arguing that the NCAA's exploitation of student-athletes violates the Thirteenth Amendment's prohibition of involuntary servitude).

¹³⁶ Rottenberg, *supra* note 1, at 255.

additional superior athlete is worth marginally less to the team. Other teams, in need of star performers, would outbid the comparatively indifferent wealthy team. In addition, diseconomies of scale would play a role. Although roster limitations might provide a categorical solution to a problem with a diseconomy of scale, so does the game itself. Playing time and positions are limited, and an excess of star players could present management problems. Even wealthy teams will be inclined to recruit some players who will serve happily in reduced, bench roles.

If student-athletes are allowed, in the future, to extract extra pay or extra benefits from their college sports performance, the ability to transfer freely among schools will be very important to their earnings. The current rule,¹³⁷ which requires transferring athletes to remain inactive for one academic year,¹³⁸ would present a substantial impediment to the operation of a free market for labor. Even student-athletes who “drop out” remain subject to this restriction.¹³⁹ Much like the elimination of baseball’s reserve clause generated escalating salaries,¹⁴⁰ curtailing impediments to the free transfer of college athletic labor would induce universities to bid against each other for desirable student-athletes.

In one significant aspect, a rule allowing the direct compensation of athletes could have a welfare effect that might change the pool of athletes. For example, the more the collegiate sports industry moves toward a professional model, the more its athletes might be required

¹³⁷ NCAA MANUAL, *supra* note 61, § 14.5.1.

¹³⁸ *English v. NCAA*, 439 So. 2d 1218, 1224 (C.A. La., 4th Cir. 1983) (upholding the NCAA transfer rule).

¹³⁹ *Cf. McHale v. Cornell Univ.*, 620 F.Supp. 67 (N.D.N.Y. 1985). Under the NCAA bylaws, a student who transfers must sit out one year. NCAA MANUAL, *supra* note 61, § 14.5.1. A student transfers from a collegiate institution if the student was “officially registered and enrolled in a minimum, full-time program of studies in any . . . semester of an academic year,” “attended a class,” “reported for a regular squad practice . . . prior to the beginning of any quarter or semester,” “participated in practice,” or “received institutional financial aid while attending a summer term.” *Id.* § 14.5.2. A transfer student from a four-year institution is not eligible to participate until he or she sits for one year, but an exception is provided if that student-athlete meets certain criteria, including having not participated in the sport for more than fourteen days in the last two years. *Id.* §§ 14.5.5.2, 14.5.5.2.7.

¹⁴⁰ Jennifer K. Ashcraft & Craig A. Depken, II, *The Introduction of the Reserve Clause in Major League Baseball: Evidence of its Impact on Select Player Salaries During the 1880s*, INT’L ASS’N OF SPORTS ECONOMISTS (Apr. 2007), available at http://college.holyross.edu/RePEc/spe/AshcraftDepken_ReserveClause.pdf.

to pay for the costs of their training.¹⁴¹ Generally, colleges do not invest heavily in the training of student-athletes who participate in the equivalency sports; they do, however, invest heavily in training players for revenue-producing teams.¹⁴² If the rent from those teams is transferred to the players in the form of compensation, then the revenue and non-revenue sports will produce identical returns on capital. Sports whose athletes must cover their own costs of training tend to disfavor the comparatively poor and to favor athletes from middle and upper class families.¹⁴³

IV

THE UNLIKELY DEMISE OF THE AMATEUR ATHLETE

In the major college sports, the supply of labor is very elastic to price. Many competent players devote a substantial part of their youth practicing and improving their athletic prowess. Expenditures on sports-related instruction and improvement are at a historic highpoint. Young players devote themselves to games out of passion, for improved performance in high school, or for the chance at a college scholarship with its marginal opportunity at a professional career.

If schools were allowed to compete for recruits with the offer of direct stipends, presumably some athletes would settle for no stipend at all. They might even be willing to perform without the aid of a tuition waiver or other scholarship entirely.¹⁴⁴ Undoubtedly, if all student-athletes were in essence “free agents,” able to transfer without limitation and free to renegotiate their school stipend on a yearly

¹⁴¹ This question requires a fuller account. Currently, the costs of training college-level athletes are shared. The athlete gains skills and improves his conditioning throughout his scholastic career; the college team provides the specific training to make the player useful within the particular team’s strategy and game plan. Arguably, were players compensated more generously, colleges would not diminish their specific training. On the other hand, if student-athletes had unrestricted freedom of movement, colleges might diminish their specific training to reflect their inability to maintain possession of their labor. See Gary S. Becker, *HUMAN CAPITAL* 11–29 (1964).

¹⁴² See Adam Rittenberg, *BIG Revenue Can’t Buy BCS Titles*, ESPN.COM (Oct. 2, 2013), http://espn.go.com/college-football/story/_/id/9754072/big-ten-football-bringing-big-revenue-no-national-championships-sight.

¹⁴³ See Jeffrey Standen, *The Demise of the African-American Baseball Player*, 18 LEWIS & CLARK L. REV. (forthcoming 2014).

¹⁴⁴ A free market along these lines would require the NCAA to terminate its distinction between equivalency sports and “head count” sports. In the latter, athletes must receive a full scholarship. The men’s head count sports are football (85 scholarships) and basketball (13 scholarships). The women’s head count sports are basketball (15 scholarships), volleyball (12 scholarships), gymnastics (12 scholarships), and tennis (8 scholarships).

basis, the price of labor for many student-athletes would diminish. Some student-athletes would earn increased salaries; others would be relegated to diminished compensation. In this free labor market, the revenue or “head count” sports would begin to resemble the equivalency sports. For the typical equivalency sport, just one or two of the team members have a full scholarship; a few others will share fractions of a scholarship; and the remainder, often the majority of the team, earn no scholarship at all. These latter, non-scholarship student-athletes fulfill every amateur ideal.¹⁴⁵ They play for the love of the sport, sacrificing countless hours¹⁴⁶ and sublimating their jealousy over their lack of a scholarship to ensure the team fields a full roster. Instead of sullen athletes on full scholarships who unhappily sit on the bench while their classmates play, every non-scholarship team member chooses to remain on the team despite his status. If the introduction of compensation into the revenue sports results in an increase of athletes without a compensation package, then paradoxically, a compensation scheme could reintroduce true amateurs to those teams.

Players who are willing to sell their services for no wages or scholarship support are not truly going uncompensated. They may derive a very large psychic benefit from participating in the sport. By remaining on the team, they maintain a chance to contribute to the team, either during the game contests or during practice. They also might believe they will in time excel and thereby improve their chances for a scholarship,¹⁴⁷ other payment, or even for a professional career. Experience will diminish uncertainty and increase knowledge,¹⁴⁸ however, and the players will recalculate the probabilities they assign to the occurrence of events. As they find they have miscalculated, they will withdraw from the market, freeing roster positions on the team for the next class of recruits. All amateurs

¹⁴⁵ NCAA MANUAL, *supra* note 61, § 2.9. The NCAA has defined amateur ideal as an expectation that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived . . . [and] student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.*

¹⁴⁶ See Cody Goodwin, *Zoeller Uses Non-Scholarship Status as Motivation to Play Better*, DAILY IOWAN (May 1, 2013, 5:00 AM), <http://www.dailyiowan.com/2013/05/01/Sports/33105.html>.

¹⁴⁷ At the University of Kentucky, where recruiting classes consistently rank at the top, Jarrod Polson, a non-scholarship athlete, earned a scholarship by his second year.

¹⁴⁸ Simon Rottenberg, *The Baseball Players’ Labor Market*, 64 J. POL. ECON. 242, 251 (1956).

should regularly compare their love of the game and its attendant opportunities with the opportunity costs of the other school and social activities that team participation precludes. Decoupling athletic participation from the need to maintain eligibility for a college scholarship will allow student-athletes to make that calculation more clearly.¹⁴⁹

For those student-athletes fortunate enough to earn a salary for their athletic performance, they will likely be compensated close to full value. Star players attract fans, ensure winning seasons, increase chances at post-season success, and lure other strong players to the university. Much like the “winner-take-all” compensation featured in many professional sports,¹⁵⁰ the university will pay for the star and will seek to make up for his salary by earning substantial rent from the league-average players who go with little or no compensation. The NCAA and its member universities have long profited from the relatively cheap labor provided by student-athletes. Under a free market compensation scheme in which the star players earned the lion’s share of the rewards, that exploitation would continue, albeit with the rents shared by some of the players themselves.

If the compensation were provided in lock-step, then proceeds would be shared more equally among the student-athletes. Nonetheless, the star performers would receive the lion’s share of whatever other compensation remained at the discretion of the university. The stars would receive the more intense coaching, valuable playing time and exposure to professional scouts, and other benefits. No matter the form of compensation, schools will seek to attract and retain their best performers.

¹⁴⁹ A student who quits the team forfeits his scholarship. *Taylor v. Wake Forest University*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that a student who quit the team forfeited his scholarship); *Begley v. Mercer University*, 367 F.Supp. 908, 910 (E.D. Tenn. 1973) (upholding the dismissal of a student-athlete by the university after the university discovered the athlete failed to comply with the grade point average eligibility requirements of the NCAA).

¹⁵⁰ A winner-take-all labor market is the notion that a few people, who are vital to the success of a sports team, are commensurately rewarded. WILLIAM A. MCEACHERN, *ECONOMICS: A CONTEMPORARY INTRODUCTION* 267 (2012) (noting that “LeBron James has been credited with filling once-empty seats and boosting the value of his team by \$160 million”). It is no surprise, for example, that back-to-back NBA champions the Miami Heat also enlist three of the top-ten highest-paid NBA stars: LeBron James, Dwyane Wade, and Chris Bosh. *NBA Player Salaries- 2013–2014*, ESPN.COM, <http://espn.go.com/nba/salaries> (last visited Feb. 16, 2014).

CONCLUSION

The advent of compensation for college student-athletes will certainly enrich certain students while redirecting university expenditures. It will also hasten the demise of the amateur ideal, although strangely it might increase the number of student-athletes in the revenue sports who actually model that ideal. What it will not likely do, however, is be the catalyst for a change in the composition of team rosters. The successful programs will likely remain as such; the inferior programs will have no greater obstacle to improvement.

Today, college student-athletes are compensated with NCAA-approved grants-in-aid. A change in the form or amount of compensation is unlikely to alter the composition or quality of the teams.