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The Blue Devil's In the Details: How A Free Market Approach To Compensating College Athletes Would Work

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Cover Page Footnote
The author would like to thank sports law professor and scholar Glenn Wong, Distinguished Professor of Practice (Sports Law) at Arizona State Law School and Director of its Sports Law and Business Program, and sports law professor and scholar, Walt Champion, the George Foreman Professor of Law at Thurgood Marshall School of Law, for providing invaluable insight and comments on an earlier draft. The author would also like to thank the faculty members of Thurgood Marshall School of Law, who attended the author’s presentation of this article as a part of the Southern Central Association of Law Schools (SCALS) Faculty Speaker Series, for their hospitality and feedback. The author would also like to thank sports law professor Don E. Gibson and his Amateur Sports Law class at Arizona State Law School for an engaging and stimulating discussion about this article. This article would not have been possible without the work of the author’s current and former research assistants: Cali Franks, Rene Burnias, Lourdes Vela, Martha Salas, Savannah Files, Shaunte Collins, Harry Church, Paige Andabaker, and Austin Laws (St. Mary’s University School of Law J.D. Candidates). The views expressed in this article are those of the author, and any mistakes, errors, or omissions are solely attributable to the author.

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The Blue Devil’s In The Details: How A Free Market Approach To Compensating College Athletes Would Work

David A. Grenardo*

Abstract

Everyone involved in the business of major college athletics, except the athletes, receives compensation based on a free market system. The National Collegiate Athletic Association’s (NCAA) cap on athlete compensation

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1. The title comes partly from the phrase, “[T]he devil is in the details,” which means the details of an endeavor can be extremely problematic. The Devil is in the Details, Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/us/the devil is in the details (last visited Oct. 8, 2018). The title also includes a reference to Duke University’s mascot, the Blue Devil, which is named after French soldiers in World War I who wore a “distinctive blue uniform with flowing cape and [a] jaunty beret.” The Story of the Blue Devil, GoDuke, http://www.goduke.com/ViewArticle.dhtml?ATCLID=242333 (last visited Oct. 8, 2018) [https://perma.cc/5B72-UBHJ]. The title befits the Article, as the author graduated from Duke University School of Law and the Duke men’s basketball program remains one of the most successful and lucrative programs in the country. This Article proposes that men’s college basketball players and football players should be allowed to earn compensation for playing.

* Professor of Law, St. Mary’s University School of Law; Rice University, B.A.; Duke University School of Law, J.D. Professor Grenardo was a four-year letterman for the Rice University football team. The author would like to thank sports law professor and scholar Glenn Wong, Distinguished Professor of Practice (Sports Law) at Arizona State Law School and Director of its Sports Law and Business Program, and sports law professor and scholar, Walt Champion, the George Foreman Professor of Law at Thurgood Marshall School of Law, for providing invaluable insight and comments on an earlier draft. The author would also like to thank the faculty members of Thurgood Marshall School of Law, who attended the author’s presentation of this article as part of the Southern Central Association of Law Schools (SCALS) Faculty Speaker Series, for their hospitality and feedback. The author would also like to thank sports law professor Don E. Gibson and his Amateur Sports Law class at Arizona State Law School for an engaging and stimulating discussion about this article. This article would not have been possible without the work of the author’s current and former research assistants: Cali Franks, Rene Burnias, Loundes Vela, Martha Salas, Savannah Files, Shantae Collins, Harry Church, Paige Andabaker, and Austin Laws (St. Mary’s University School of Law J.D. Candidates). The views expressed in this article are those of the author, and any mistakes, errors, or omissions are solely attributable to the author.

203
violates antitrust law, and athletes should be allowed to earn their free mar-
ket value as everyone else does in this country. This Article provides a de-
tailed approach to compensating college athletes under a free market model,
which includes a salary cap, the terms of a proposed standard player’s con-
tract, a discussion of who can represent players, and payment simulations
for football and basketball teams. A free market approach would not only
be feasible, but it would likely improve the product on the field and the
court, as well as the lives of those college athletes who provide the labor for
major college athletics, which is currently an $11 billion-a-year industry.
TABLE OF CONTENTS

I. INTRODUCTION .....................................................................................................................206

II. THE NCAA’S PROHIBITION ON ATHLETES EARNING SALARIES VIOLATES ANTITRUST LAW ..............................................................212
   A. The NCAA Forbids College Athletes from Profiting Based on the Sport They Play .................................................................212
   B. Courts Apply Antitrust Law Via the Sherman Act to Major College Athletics ..............................................................................214
   C. O’Bannon Found an Antitrust Violation But Fell Short ..................217
   D. The NCAA’s Prohibition on Athlete Compensation Violates Antitrust Law as Jenkins Currently Seeks ....................................221

III. A DETAILED EXAMINATION OF A FREE MARKET APPROACH IN
     MAJOR COLLEGE SPORTS ......................................................................................................223
   A. College Athletes Are Employees ..............................................................224
   B. Hard Salary Cap .........................................................................................226
      1. Football Salary Cap: $3 Million ..............................................................229
      2. Men’s College Basketball Salary Cap: $500,000 ..................232
   C. Standard Player’s Contract ........................................................................233
      1. Essential Terms for Universities and Colleges ......................234
      2. Essential Terms for Athletes .........................................................235
      3. Essential Terms for Both Parties ...................................................235
   D. Free Market Simulations ...........................................................................238
      1. Football ..................................................................................................238
      2. Basketball .............................................................................................243
   E. Determining Who Can Represent College Athletes ..................246
   F. Advantages of a Free Market Model .....................................................248

IV. COUNTER-ARGUMENTS TO THE FREE MARKET MODEL .................251
   A. Title IX Prevents Paying Only Football and Men’s College Basketball Players .................................................................252
   B. The Free Market Model Calculations Should Include Scholarship Values .......................................................................................253

V. CONCLUSION .....................................................................................................................253

APPENDIX A ...........................................................................................................................254
APPENDIX B ...........................................................................................................................265

205
I. INTRODUCTION

"[T]he labor of student-athletes is an integral and essential component of the NCAA’s ‘product,’ and a rule setting the price of that labor goes to the heart of the NCAA’s business."2 The Ninth Circuit made this obvious proclaimation in the O’Bannon litigation and determined the NCAA’s rule on compensation for college athletes violated antitrust law, but then it set an artificial and inappropriate limit on what compensation college athletes can earn.3

In O’Bannon, plaintiffs included college football players and men’s basketball players who sought compensation for the use of their names, images, and likenesses in, among other things, video games.4 After determining the NCAA’s rule on compensation for college athletes constituted an antitrust violation, the district court granted two permanent injunctions wherein the NCAA could not prevent its member institutions from providing college athletes with (1) full cost of attendance scholarships and (2) up to $5,000 in shared revenue after graduation.5 Three judges on the Ninth Circuit (hereinafter the “Ninth Circuit”), after upholding the district court’s ruling that the NCAA’s compensation rules violated antitrust law, affirmed the district

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2. O’Bannon v. NCAA, 802 F.3d 1049, 1066 (9th Cir. 2015).
3. Id. at 1079; infra note 5 and accompanying text.
4. See O’Bannon, 802 F.3d at 1052 (9th Cir. 2015) (“For more than a century, the [NCAA] has prescribed rules governing the eligibility of athletes... Those rules prohibit student-athletes from being paid for the use of their names, images, and likenesses...”).
5. The district court concluded that the NCAA’s rules constituted an unreasonable restraint on trade in violation of the Sherman Act. O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), aff’d in part and vacated in part, 802 F.3d 1049 (9th Cir. 2015). “Consistent with the less restrictive alternatives found, the Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likeness in addition to a full grant-in-aid.” Id. at 1007–08. Traditional grant-in-aid scholarships cover tuition, room, books, and board. Id. at 971. Full cost of attendance scholarships cover the gap between grant-in-aid scholarships and the full cost of attendance that can include, among other things, transportation to and from school, miscellaneous personal expenses, and administrative fees, the total of which can range between $2,000 and $5,000 per athlete. See Michelle B. Hosick, Autonomy Schools Adopt Cost of Attendance Scholarships, NCAA (Jan. 18, 2015, 6:58 AM), http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-of-attendance-scholarships [https://perma.cc/SM68-MPZ9] (discussing the rule adopted through autonomy that allows schools to provide scholarships that cover the full cost of attendance); see also Brian Bennett, NCAA Board Votes to Allow Autonomy, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences [https://perma.cc/M4GK-DHRM] (stating “the full cost-of-attendance stipends... could be worth between $2,000 and $5,000 per player”).

206
court’s order permitting full cost of attendance scholarships, but it vacated the other injunction granting the NCAA’s member institutions the ability to compensate its athletes with deferred compensation up to $5,000 per year. The Ninth Circuit reasoned that the $5,000 was “untethered to educational expenses” and, therefore, impermissible. Thus, the Ninth Circuit allowed college athletes to earn compensation up to the full cost of attendance but prohibited compensation above that line because amounts above that line are “untethered to educational expenses.”

No one else involved with college athletics—besides college athletes—faces limits on what they can earn based on how closely their compensation is tied to education. The Ninth Circuit’s holding acknowledges that the NCAA’s rules prohibiting compensation constitute an antitrust violation, but it fails to level the playing field for all of the stakeholders participating in the multibillion-dollar business of college athletics. Coaches, athletic department personnel, broadcasters, NCAA executives, and everyone else involved reap the full rewards except the college athletes who provide the product on the field and the court.

Major college athletics, which include the revenue-generating sports of college football and men’s basketball, have become an $11 billion-a-year industry. College coaches make millions of dollars, many in salary alone,

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6. O’Bannon, 802 F.3d at 1079.
7. Id. at 1078. Plaintiffs’ request for the Ninth Circuit to rehear the appeal en banc was denied. See O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015), petition for reh’g en banc denied, Nos. 14–16601, 14–17068 (9th Cir. 2015) (order denying rehearing en banc).
8. O’Bannon, 802 F.3d at 1078.
9. See id. at 1066.
along with compensation for bonuses and endorsements. For example, Coach John Calipari, head coach of the University of Kentucky’s men’s basketball team, received a salary of $7,140,000 for the 2016–2017 season. Nick Saban, head coach of the University of Alabama’s football team, enjoyed a salary and compensation from the university of $11,132,000 for the 2017 season. Jimbo Fisher signed a $75 million contract to coach Texas A&M over a ten-year period. College football coaches received over $12 million in bonuses for the 2015 season, while men’s basketball coaches also receive exorbitant bonuses, based primarily on the success of their teams. Moreover, the former head coach of the Ohio State football team, Urban Meyer, received $2,201,450 from Ohio State’s endowment deal with Nike and television appearances on behalf of the team. Even assistant


15. 2017 NCAAF Coaches’ Salaries, supra note 13.


17. Steven Berkowitz & Christopher Schnaars, College Football Coaches Piling Up More Cash Through Bonuses, USA TODAY (Oct. 8, 2015, 12:42 PM), https://www.usatoday.com/story/sports /ncaal/2015/10/08/coaches-bonuses-gary-pinkel/73553784/ (discussing the $12.4 million total for bonuses paid in 2015); see also College Football Coaches Salaries and Contracts, NEWSDAY, https://projects.newsday.com/databases/long-island/college-football-coaches-salaries- contracts/?where=conference=American%20Athletic&order=college_DESC&offset=0 (last visited Nov. 16, 2018) [https://perma.cc/CG3R-MAPC] (including 108 public schools’ “basic salary details along with the incentives and perks for each of these coaches”). For example, Utah State’s Matt Wells received $5,000 for his team’s win over in-state rival BYU; P.J. Fleck’s, the former head coach of Western Michigan, bonus totaled $21,750 from his players’ individual all-Mid-American Conference team and academic honors; Boise State’s Bryan Harsin, in addition to the bonuses called for in his contract—which totaled $95,000 and covered the Broncos’ appearance in the Fiesta Bowl—received an additional $87,875 “for his success last season,” according to a statement by his athletics department spokesman Max Corbet. Id.


coaches in men’s college basketball and football receive extremely high salaries, several in the seven-figure range with many in the six-figure range. 20

Likewise, some athletic directors receive salaries and bonuses above $1 million. 21 Numerous NCAA executives receive six-figure salaries as well. 22 Schools also spend millions of dollars on facilities to attract college athletes, when the schools should be paying the college athletes themselves. 23

The incredible amount of revenue generated by major college athletics led to the perplexing question faced by the University of Nebraska’s athletic department: what to do with an additional payout of $47 million “thanks to [the University’s] first year of full revenue sharing and a new television contract” in the Big Ten Conference? 24 Many commentators, both legal and otherwise, possess the same answer to that difficult quandary faced by the University of Nebraska’s athletic department and athletic departments all around the country—pay the athletes. 25 This Article sets forth a detailed approach to compensating college athletes under the free market system. An argument against paying college athletes has always been that it would be too difficult and complicated to compensate college athletes. This argument is absurd, as the United States economy is based on a free market system where people earn what the market will bear. Universities employ hundreds

or thousands of individuals, including administrators, professors, and staff, all of whom are paid according to what the market dictates.26 In major college athletics, everyone besides the athletes is compensated under the free market system, and no cap, artificial or otherwise, restricts how much a coach, athletic department administrator, NCAA executive, or broadcasting personality can make.27 Athletes, given that they are creating the product that generates the money for everyone else, while placing their long-term health on the line (particularly in football),28 should also be allowed to receive compensation for their efforts under a free market system.29

Athletes are treated unlike everyone else at the university, including other students. Student musicians, for example, can earn thousands of dollars performing off campus at events affiliated with alumni or boosters without losing the ability to perform in school events.30 The NCAA’s current rules prohibit college athletes from earning compensation based on playing

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their sport. Jay Bilas, a lawyer and current ESPN basketball analyst, who played basketball and later served as an assistant coach at Duke University (and also graduated from Duke University School of Law), argues “players should not be restricted[;] . . . they should be allowed to participate in [the] college sports market openly and get their fair market value like every other person is allowed to do[,] including every other student.”

This Article acknowledges that a college education itself possesses value. Nevertheless, the value of that education does not erase the facts that college athletics have become a multibillion-dollar industry and that universities have the ability to pay college athletes under a free market system if the NCAA’s compensation limit was removed. This Article provides a detailed approach to compensating college athletes under a free market model. The approach includes a salary cap, the terms necessary for standard players’ contracts, and a determination of who can represent players.

Part II briefly discusses why the NCAA rules prohibiting compensation violate antitrust law. Part III examines the free market approach in a detailed manner, which includes, among other things, a discussion on salary cap, the terms of a proposed standard player’s contract, and a payment simulation for football and basketball teams. Part IV addresses the counterarguments to the approach and responses thereto. This Article provides the most detailed and in-depth description of how a free market model would work while concluding that a free market system to compensate college athletes is both appropriate under antitrust law and viable.

32. Telephone Interview with Jay Bilas, J.D., ESPN Analyst, Of Counsel, Moore & Van Allen (July 24, 2015) [hereinafter “Bilas Interview”] (on file with author).
35. See infra Part II.
36. See infra Part III.
37. See infra Part IV.
II. THE NCAA’S PROHIBITION ON ATHLETES EARNING SALARIES VIOLATES ANTITRUST LAW

A. The NCAA Forbids College Athletes from Profiting Based on the Sport They Play

The National Collegiate Athletic Association (“NCAA”), an unincorporated association comprised of individual member schools, regulates intercollegiate athletics in the United States.\(^{39}\) It includes over 1,200 member institutions across three divisions: Division I, Division II, and Division III.\(^{40}\) Division I, in which member schools offer full scholarships to their athletes, involves “the highest level of competition in most sports.”\(^{41}\) Division II utilizes a partial-scholarship model,\(^{42}\) and it competes at a lower-caliber level than Division I.\(^{43}\) Division III, which does not include scholarships for its athletes, serves as the lowest level of competition amongst the three divisions.\(^{44}\) The NCAA further divides Division I football into the Football Bowl Subdivision (FBS), formally known as Division I-A, which includes the most competitive teams in Division I football, and the Football Championship Subdivision (FCS), previously known as Division I-AA, which includes lesser Division I football teams.\(^{45}\) Division I schools, including the FBS,\(^{46}\) normally include schools with the largest student bodies, the most robust athletic budgets, and the greatest number of athletic scholarships awarded.\(^{47}\)

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\(^{43}\) Mitten, *supra* note 41, at 107.

\(^{44}\) *Id.*

\(^{45}\) *Divisional Differences and the History of Multidivision Classification*, *supra* note 40.


The NCAA sets forth and enforces the rules for its member schools and athletes.48 Chief among those rules, particularly for purposes of this Article, is the NCAA’s rule that prohibits college athletes from earning pay in their respective college sport.49 Namely, NCAA Bylaw 12.1.2 provides that a college athlete becomes ineligible if the athlete “[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport.”50 The NCAA rules also prohibit a college athlete from earning compensation for endorsing commercial products.51

College athletes in Division I athletics may receive a grant-in-aid scholarship, which covers tuition, room, books, and board.52 A grant-in-aid scholarship fails to cover the full cost of attendance for an athlete, which amounts to “between $2,000 and $5,000 per year more than” the grant-in-aid scholarship.53 The full cost of attendance can “include[] a tuition fee, miscellaneous personal expenses, transportation, loan origination fee and administrative fees.”54 Some college athletes qualify for Pell Grants, which help provide an actual full scholarship, while others do not qualify.55

Recent legislation called “autonomy legislation” allows Division I schools to pay athletes the costs athletes incur beyond grant-in-aid scholarships with full cost of attendance scholarships.56 In any event, the NCAA still prohibits college athletes from receiving compensation beyond the full

49. Amateurism, supra note 31.
50. NCAA DIVISION I MANUAL, supra note 10, § 12.1.2.
51. Id. § 12.5.2.1(a) (forbidding a college athlete from “[a] ccept[ing] any remuneration for or permit[ing] the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind”).
52. Id. § 15.02.5 (“A full grant-in-aid is financial aid that consists of tuition and fees, room and board, books and other expenses related to attendance at the institution . . . .”).
54. Id.
55. See Travis L. Packer, College Cost Reduction and Access Act: A Good Step, but Only a Step, 12 N.C. BANKING INST. 221, 225–27 (2008) (discussing the mechanics of Pell Grants); O’Bannon v. NCAA, 802 F.3d 1049, 1078 n.24 (9th Cir. 2015) (recognizing the NCAA allows college athletes to receive Pell Grants, even above their cost of attendance scholarship amounts, and noting that Pell Grants are available to athletes and non-athletes alike).
cost of attendance.57

B. Courts Apply Antitrust Law Via the Sherman Act to Major College Athletics

The Sherman Act, passed by Congress in 1890, prevents monopolies and seeks to preserve competition through free markets.58 Section 1 of the Sherman Act prohibits any “contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”59 As every contract limits or restrains trade to a certain extent, “the Supreme Court has limited the restrictions contained in section 1 to bar only ‘unreasonable restraints of trade.’”60

A plaintiff prevails on an antitrust violation claim under Section 1 of the Sherman Act if he demonstrates “(1) . . . there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a [R]ule of [R]ason analysis; and (3) that the restraint affected interstate commerce.”61

Rule of Reason analysis involves a burden-shifting test where the plaintiff must first demonstrate “that an agreement had a substantially adverse effect on competition.”62 A plaintiff can show the “anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.”63 If the plaintiff satisfies that burden, then the defendant must prove that the restraint on trade that creates

60. Law v. NCAA, 134 F.3d 1010, 1016 (10th Cir. 1998) (citing NCAA v. Bd. of Regents, 468 U.S. 85, 98 (1984)).
61. Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996) (citing Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991)).
62. Law, 134 F.3d at 1019.
63. Id.; see also Forner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 503 (1969) (defining “market power” as “the ability of a single seller to raise price and restrict output”); Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012) (defining “market power” as “the ability to raise prices significantly without going out of business”).

214
the anticompetitive effect is based on an actual and legitimate procompetitive justification.\textsuperscript{64} Thus, the defendant carries the heavy burden of proving that the "the challenged restraint enhances competition."\textsuperscript{65} Notably, "mere profitability or cost savings have not qualified as a defense under the antitrust laws."\textsuperscript{66} If the defendant's burden is satisfied, then the plaintiff "must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner."\textsuperscript{67} If all of the burdens are met, then "the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is . . . reasonable."\textsuperscript{68} In other words, "the fact[-]finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."\textsuperscript{69} The primary question under Rule of Reason analysis is whether "the restraint . . . clearly tends to harm competition (as, for example, by raising prices to consumers or reducing output, product quality, or innovation), or . . . [does the restraint] actually facilitate more effective competition or at least leave competition unaffected?"\textsuperscript{70}


\textsuperscript{65} Id. of Regents, 468 U.S. at 104.

\textsuperscript{66} Law, 134 F.3d at 1023. Procompetitive justifications require actual evidence, while speculative, unsubstantiated, or uncertain claims are generally deemed insufficient to refute evidence of anticompetitive effects. Andrew L. Gavil, Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice, 85 S. Cal. L. Rev. 733, 774–75 (2012) (analyzing the Rule of Reason test).

\textsuperscript{67} Law, 134 F.3d at 1019; see United States v. Brown Univ., 5 F.3d 658, 669 (3d Cir. 1993); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 56 (2d Cir. 1997); Hairston v. Pac. 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996); Orson Inc. v. Miramax Film Corp., 79 F.3d 1358, 1368 (3d Cir. 1996).

\textsuperscript{68} Law, 134 F.3d at 1019. Courts sometimes use the quick-look approach under the Rule of Reason. Id. at 1020. The quick-look approach applies when the challenged restraint involves an obvious anticompetitive effect, such as an agreement not to compete in terms of price (e.g., price-fixing) or output. Id. If that is the case, then "the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' analysis. Id.


In the seminal case of Board of Regents, the United States Supreme Court applied a Rule of Reason analysis to major college athletics, which courts continue to do today. In that case, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association sued the NCAA based on the NCAA’s former restrictions in the 1980’s regarding televising college football games. The NCAA’s restrictions included the following: (1) a limit on the total number of games that could be televised; (2) a limit on the total number of each school’s games that could be televised; (3) a fixed price that the networks would pay for particular telecasts; and (4) a requirement that all contracts between television networks and universities receive approval by the NCAA. Under a Rule of Reason analysis, the Supreme Court found for plaintiffs and struck down the NCAA’s rules on television restrictions as anticompetitive without any pro-competitive justifications in violation of antitrust law.

Despite finding an antitrust violation by the NCAA, the Supreme Court demonstrated incredible deference to the NCAA in its ability to regulate and oversee college athletics, stating that the NCAA must establish:

[R]ules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.

The Supreme Court noted that college football is a product and represents a particular brand of football that includes an academic tradition where “athletes must not be paid, must be required to attend class, and the like.”

The Supreme Court further argued, “[T]he NCAA plays a vital role in ena-
bling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.\textsuperscript{78} Courts continue to show a great deal of deference to the NCAA, and that extreme deference to the NCAA played a role in the \textit{O’Bannon}\textsuperscript{79} case that limited the amount of compensation athletes can earn.\textsuperscript{80}

\section*{C. \textit{O’Bannon} \textit{Found an Antitrust Violation But Fell Short}}

The plaintiffs in \textit{O’Bannon} included current and former college football players and Division I men’s basketball players who sought damages from the NCAA based on the licensing of their names, images, and likenesses (NILs) in videogames, archived game footage, live game broadcasts, and re-broadcasts.\textsuperscript{81} The district court held the NCAA’s compensation rules violated antitrust law under the Sherman Act.\textsuperscript{82} The district court’s two permanent injunctions precluded the NCAA from preventing its member institutions from providing full cost of attendance scholarships and from compensating their athletes up to $5,000 based on shared revenue the athletes could collect after graduation.\textsuperscript{83} The Ninth Circuit, in affirming the district court’s holding that the NCAA’s rules violated antitrust law, upheld the first permanent injunction allowing member institutions the ability to provide athletes full cost of attendance scholarships, but it vacated the second permanent injunction allowing $5,000 for athletes in deferred compensation, opining that the $5,000 compensation was “untethered to educational expenses.”\textsuperscript{84}

Under the Rule of Reason, both the district court and the Ninth Circuit found the plaintiffs demonstrated that the NCAA’s prohibition on athletes receiving compensation for the use of their NILs constituted a significant an-

\begin{enumerate}
\item Id.
\item O’Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
\item Id., at 1056; see also \textit{Bd. of Regents}, 468 U.S. at 86 (giving deference to the NCAA); Agnew v. NCAA, 683 F.3d 328, 347-48 (7th Cir. 2012) (affirming the district court’s dismissal of the plaintiffs case because they failed to find “a relevant market for student-athlete labor”); Rock v. NCAA, 928 F. Supp. 2d 1010, 1018-22 (S.D. Ind. 2013) (holding “[p]laintiff’s proposed market is impermissibly narrow” and “not legally cognizable”); Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (showing deference to the NCAA’s rulemaking activity since “the NCAA’s action does not constitute an unreasonable restraint under the Sherman Act”).
\item O’Bannon v. NCAA, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014), \textit{aff’d in part and vacated in part}, 802 F.3d 1049 (9th Cir. 2015).
\item Id.
\item Id. at 989.
\item O’Bannon, 802 F.3d at 1078.
\end{enumerate}
ticompetitive effect on the relevant market. The courts identified the relevant market as the college education market where “colleges compete for the services of athletic recruits by offering them scholarships and various amenities, such as coaching and facilities.” Sans the NCAA prohibition, contend the courts, NCAA’s member institutions would compete with each other by paying the college athletes for NILs as a part of obtaining the services of college athletes; instead, the prohibition allows member institutions to price-fx the amount they will pay college athletes for their NILs, and they set that amount at zero. Video game manufacturers would also negotiate and compensate college athletes for the use of their NILs but for the NCAA’s compensation prohibition.

The district court and the Ninth Circuit, however, relied on the concept of amateurism to find a procompetitive justification for the restraint of trade at issue, namely the NCAA’s prohibition on compensation. The NCAA’s amateurism argument can be summed up succinctly: if universities pay college athletes, then they are not amateurs anymore, and less people will watch because it will change and diminish the product. The NCAA relied on a study it commissioned to try to show that consumers would watch less college athletics if the players received payment.

The NCAA’s study suffered from several fatal flaws. One, “the survey’s initial question skewed the results by priming respondents to think about illicit payments to student-athletes rather than the possibility of allowing athletes to be paid.” Two, the study looked at future behavior of con-

85. See id. at 1070–72; O’Bannon, 7 F. Supp. 3d at 985–88.
86. O’Bannon, 802 F.3d at 1070.
87. Id. at 1072.
88. Id. at 1067.
89. The courts also examined the NCAA’s three other purported procompetitive justifications: (1) integrating athletics and education, (2) maintaining competitive equity, and (3) increasing output. See id. at 1058–60; O’Bannon, 7 F. Supp. 3d at 999–1007. The courts accepted the first of these remaining three justifications, but the district court determined that the compensation rules “play a limited role in integrating student-athletes with their schools’ academic communities,” and the Ninth Circuit did not dispute that finding. O’Bannon, 802 F.3d at 1072. The district court rejected the other two purported justifications, and the Ninth Circuit did not disturb those findings either. See O’Bannon, 7 F. Supp. 3d at 1001–02.
90. See O’Bannon, 802 F.3d at 1054–55 (discussing the history of the NCAA’s amateurism rules and enforcement).
91. See Testimony of Defendants’ Expert Witness, John Dennis, at 2603–05, O’Bannon, 7 F. Supp. 3d 955 (No. 4:09-cv-03329-CW), 2014 WL 6862783 [hereinafter “Dennis Testimony”] (showing Dr. John Dennis’s survey results on how the paying of college athletes supposedly affects demand, particularly in “viewing and attending college football games and basketball games”).
92. O’Bannon, 802 F.3d at 1059.
consumers, an area that is rife with speculation and potential inaccuracy as similar studies demonstrated. Dr. Daniel Rascher, an expert who testified on behalf of the plaintiffs, discussed two previous consumer demand surveys regarding the anticipated skyrocketing of professional baseball players’ salaries in the 1970s and the eventual allowance of professional athletes competing in the Olympics. In both surveys, consumers indicated they would watch less once major league baseball player salaries increased and professionals competed in the Olympics, respectively, but consumers actually watched more major league baseball after player salaries rose, and viewership of the Olympics also increased when professionals competed in the Olympics. The faulty NCAA study also found that the more a college athlete might be paid, the less members of the general public or self-identified sports fans would approve paying college athletes.

The district court found the study unpersuasive and attacked the NCAA’s defense of amateurism. According to the district court, “the NCAA has revised its rules governing student-athlete compensation numerous times over the years, sometimes in significant and contradictory ways.” The district court also stated the NCAA’s “current rules demonstrate that, even today, the NCAA does not consistently adhere to a single definition of amateurism.” Nevertheless, the court somehow conceded that “some re-

93. Id. at 976–77 (noting the plaintiffs’ evidence that showed the “limits of opinion surveys as predictors of consumer demand,” such as examples of past consumer surveys that were inaccurate).
94. Id. at 977.
95. See id. at 1081 (Thomas, C.J., concurring in part and dissenting in part) (discussing the purported correlation of viewership to the payment of athletes).
96. See Dennis Testimony, supra note 91, at 2651–54. For example, the following are the disapproval rates based on the stated compensation amount each player would receive: (1) $20,000 payment: 38% disapproval for members of the general public and 36% disapproval for fans; (2) $50,000 payment: 47% for members of the general public and 52% for fans; and (3) $200,000 payment: 53% for members of the general public and 62% for fans. Id.
98. Id. at 1000.
99. Id. The district court explained:
A Division I tennis recruit can preserve his amateur status even if he accepts ten thousand dollars in prize money the year before he enrolls in college. A Division I track and field recruit, however, would forfeit his athletic eligibility if he did the same. Similarly, an FBS football player may maintain his amateur status if he accepts a Pell [G]rant that brings his total financial aid package above the cost of attendance. But the same football player would no longer be an amateur if he were to decline the Pell [G]rant and, instead, receive an equivalent sum of money from his school for the use of his name, image, and likeness during live game telecasts. Such inconsistencies are not indicative of “core principles.”

Id.
restrictions on compensation may still serve a limited procompetitive purpose if they are necessary to maintain the popularity of FBS football and Division I basketball[.]” finding, however, that there were less restrictive means to achieve this procompetitive justification.¹⁰⁰

The Ninth Circuit also accepted the amateurism argument as a procompetitive justification stating that “the amateur nature of collegiate sports increases their appeal to consumers”¹⁰¹ and “not paying student-athletes is precisely what makes them amateurs.”¹⁰² The Ninth Circuit relied heavily on dicta from the Supreme Court decision in Board of Regents, arguing that amateurism allows the “market for college football” to remain “distinct from other sports markets and must be ‘differentiate[d]’ from professional sports lest it become ‘minor league [football].’”¹⁰³

Finally, the courts looked at less restrictive alternatives than the NCAA’s prohibition on compensating college athletes above their grant-in-aid scholarship amounts for their NILs.¹⁰⁴ The district court found two: “(1) allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.”¹⁰⁵ The Ninth Circuit affirmed the district court’s first alternative but disaffirmed the second alternative because compensation above the full cost of attendance was, according to the court, “untethered” to educational expenses.¹⁰⁶ Thus, the Ninth Circuit placed athletes in their own group regarding compensation, as no other group in college athletics, including coaches, administrators, and executives, adheres to a requirement that its compensation is tethered to an educational component.¹⁰⁷ The Jenkins case, which is discussed in the next section, seeks compensation in a free market model for college athletes, just as it exists for everyone else in major college

¹⁰⁰ Id. (acknowledging that “‘maximiz[ing] consumer demand for the product’ is a legitimate procompetitive justification” (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984))).
¹⁰¹ O’Bannon v. NCAA, 802 F.3d 1049, 1073 (9th Cir. 2015).
¹⁰² Id. at 1076.
¹⁰³ Id. at 1076–77.
¹⁰⁴ See id. at 1074–79 (considering the “substantially less restrictive alternatives” the district court identified in its Rule of Reason analysis).
¹⁰⁵ Id. at 1074.
¹⁰⁶ Id. at 1076.
¹⁰⁷ See id. at 1078–79 (noting that the court was “afford[ing] the NCAA ‘ample latitude’ to superintend college athletics” (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984))).
athletics.  

D. The NCAA’s Prohibition on Athlete Compensation Violates Antitrust Law as Jenkins Currently Seeks

The Jenkins case, which has been stayed in the Northern District of California, seeks a free market approach for compensating college athletes. In the Jenkins complaint sets forth the analysis showing how the NCAA’s prohibition on athlete compensation violates antitrust law using the Rule of Reason. In Jenkins, several college football and men’s basketball players brought suit against the NCAA and the Power Five Conferences in a purported class action. The named plaintiffs include “three top-tier college football and men’s basketball players,” and the class includes all similarly situated college athletes.

In accord with the Rule of Reason analysis, the Jenkins complaint first sets out to identify the unreasonable restraint of trade that produces significant anticompetitive effects. In particular, the complaint alleges that defendants “entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid

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108. See infra Section II.D for a discussion on the Jenkins case that has been stayed in the Northern District of California. For a detailed look at how the free market system could work in major college sports, see infra Part III.


111. Id. at 1. The Power Five Conferences are the five major competitive conferences in college football today. See, e.g., ESPN Staff, Power 5 Conference Power Rankings, ESPN (Sept. 4, 2018), http://www.espn.com/college-football/story/_/id/24570980/power-5-conference-power-rankings (discussing all five conferences).

112. Id.

113. Id.
to these athletes for their services.” The defendants set the ceiling on compensation at the grant-in-aid level, or the full cost of attendance, which is horizontal price fixing by the NCAA and its member institutions, constituting a significant anticompetitive effect.

The complaint identifies the relevant market as the “market for . . . [FBS] football player services” and the “market for NCAA Division I men’s basketball player services.” But for the NCAA’s limit on athlete compensation, “FBS and D-I men’s basketball programs would clearly compete economically with one another for player services.” The complaint states that a free market with competition for the services of college athletes would “provide fair compensation to these athletes for the billions of dollars in revenue that they help generate.”

The purported procompetitive benefit of amateurism fails to provide an actual, substantive justification for the anticompetitive effect on the market. The defendants possess no reliable evidence that if college athletes are paid, then less people will watch college football and basketball games. Chris Plonsky, the former Athletic Director for Women’s Athletics at the University of Texas in Austin, testifying on behalf of the NCAA in the O’Bannon trial, put it best when she conceded, “I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university.” College football fans and men’s college basketball fans exhibit an unyielding passion for their teams rooted in geography (someone who grew up and lives in Kansas will likely always be a Kansas Jayhawks basketball fan) and family traditions (e.g., some families include generations of graduates from Notre Dame.

114. Id.
115. Id. at 28.
116. Id. at 13.
117. Id. at 19.
118. Id.
120. See O’Bannon v. NCAA, 7 F. Supp. 3d 955, 1001 (N.D. Cal. 2014), aff’d in part and vacated in part, 802 F.3d 1049 (9th Cir. 2015) (finding that “the NCAA restrictions on student-athlete compensation play a limited role in driving consumer demand for FBS football and Division I basketball-related products,” and that the NCAA did not “present sufficient evidence to show that its restrictions on student-athlete compensation actually have any effect on competitive balance”).
who will always cheer on the Fighting Irish football team) that will not be affected by college athletes receiving equitable compensation for their contributions.\(^{122}\) In fact, these alumni and boosters might willingly open up their checkbooks to cover the costs to secure the services of the premier athletes who might bring championships and glory to their respective teams.\(^{123}\) Furthermore, the general public might be more interested in watching college games if the product improves, which certainly could happen if, for example, the top college basketball players stay in school longer than one year because they sign a two or three-year deal with their university.\(^{124}\)

The NCAA’s and the Power Five conferences’ other supposed procompetitive benefits, such as integrating athletics and education, maintaining competitive equity, and increasing output should ultimately fail just as they did in O’Bannon.\(^{125}\) Because the defendants cannot satisfy their burden of demonstrating an actual procompetitive justification for the limit on college athlete compensation, the NCAA’s cap violates antitrust law.\(^{126}\) Therefore, a free market approach could be employed by the universities to compensate college athletes.\(^{127}\) The details of such an approach follow in the next section.

III. A DETAILED EXAMINATION OF A FREE MARKET APPROACH IN MAJOR COLLEGE SPORTS

This section describes how the free market approach would apply in college football and men’s college basketball. It addresses several key ingredi-

\(^{122}\) See O’Bannon, 7 F. Supp. 3d at 1002 (finding that the “popularity of college sports is driven primarily by factors such as school loyalty and geography”).

\(^{123}\) See Brad Wolverton & Sandhya Kambhampati, Colleges Raised $1.2 Billion in Donations for Sports in 2015, CHRONICLE (Jan. 27, 2016), https://www.chronicle.com/article/Colleges-Raised-12-Billion/235058 (demonstrating the volume of capital that is donated to college athletic programs).

\(^{124}\) Patrick Hruby, The Free Market Case Against the NCAA Chokehold on College Sports, WASH. TIMES (Mar. 30, 2012), https://www.washingtontimes.com/news/2012/mar/30/the-free-market-case-against-the-ncaa-chokehold-on/ (arguing that student athletes would have a “far greater incentive than they do now to stay at, play for, and graduate from their schools” if colleges paid them).

\(^{125}\) See O’Bannon v. NCAA, 802 F.3d 1049, 1072 (9th Cir. 2015) (accepting the district court’s findings that the NCAA’s compensation rules “do not promote competitive balance, . . . do not increase output in the college education market, and . . . play a limited role in integrating student-athletes with their schools’ academic communities”).

\(^{126}\) See id. at 1070 (explaining the three-step framework of the Rule of Reason that must be used to analyze the NCAA’s compensation rules in light of the Sherman Antitrust Act).

\(^{127}\) See id.
ents necessary for a successful free market system in college athletics, including the following: a hard salary cap; terms in a proposed standard player’s contract; and a determination of who can represent college athletes.

Before addressing these issues, a brief discussion of labor law is warranted to understand how a free market approach could be accomplished as college athletes would be paid like employees—because they are employees.

A. College Athletes Are Employees

As stated supra, the Ninth Circuit conceded in O’Bannon that college athletes provide the labor which is essential to creating the NCAA’s product, i.e., the games that consumers attend and watch.128 Similarly, a now-rescinded non-binding memorandum written by the former General Counsel of the National Labor Relations Board (NLRB), Richard Griffin, Jr. (“Griffin”), analyzed whether Division I FBS football players are employees under the National Labor Relations Act (NLRA) and determined that they are.129 The memorandum remains relevant to this discussion because it provides sound analysis and there is always a possibility that, if a new administration takes over, it might re-adopt Griffin’s viewpoint or the current administration might change its course on this topic at some point.130

The former General Counsel Griffin first analyzed the exemptions in the NLRA under Section 2(3) for employees and noted that they omit football players, which “is itself strong evidence of statutory coverage.”131 Griffin then concluded that football players are employees under the common law definition of employee, which “includes any person ‘who perform[s] services for another and [is] subject to the other’s control or right of control.

128. 802 F.3d at 1066.
130. See GENERAL COUNSEL’S REPORT, supra note 129, at 18–21 (analyzing whether FBS football players are employees and concluding that they are).
131. Id. at 18 (citing Trustees of Columbia Univ. in the City of New York, 364 NLRB No. 90, slip op. at 5 (Aug. 23, 2016)).

224
Consideration, i.e., payment, is strongly indicative of employee status."\textsuperscript{132}

The former General Counsel determined that college football players at Northwestern University, who brought the original complaint seeking to unionize, provided services to Northwestern University by “generat[ing] approximately $76 Million in net profit during the ten year period ending in 2012-2013[1] and provid[ing] an immeasurable positive impact to Northwestern’s reputation, which in turn undoubtedly boosted student applications and alumni financial donations."\textsuperscript{133} Football players received compensation in return for their services in the form of scholarships.\textsuperscript{134} Moreover, Griffin concluded that universities and colleges “control the manner and means of scholarship football players’ work on the field and numerous facets of the players’ daily lives to ensure compliance with NCAA rules[,]”\textsuperscript{135} and they also “regulat[e] players’ hourly tasks from the time they wake up until the appointed hour that they go to sleep and require[e] full-time hours during training camp and the regular season and the equivalent of a part-time job of between 12–25 hours during the off-season.”\textsuperscript{136}

Thus, Griffin reasoned, if Division I FBS football players at private universities brought a complaint, then the NLRB would treat them as employees and afford them with the protections of Section 7 of the NLRA, regardless of whether they choose to “form or support a union.”\textsuperscript{137} Section 7 provides employees with the “right to engage in concerted activities for ‘mutual aid or protection.’”\textsuperscript{138}

As employees, college athletes could utilize the College Athlete Players’ Association (CAPA), which helped file the Northwestern case before the NLRB, to negotiate standardized terms for the player’s form contract, which is discussed below.\textsuperscript{139} CAPA, comprised of over 17,000 Division I college athletes, is a national group that advocates for college athletes’ rights.\textsuperscript{140}

\textsuperscript{132} \textit{General Counsel’s Report}, supra note 129, at 18 (citing Boston Med. Ctr. Corp. & House Officers’ Ass’n Comm. of Intemis and Residents, 330 NLRB No. 30, slip op. at 160 (Nov. 26, 1999)).
\textsuperscript{133} \textit{General Counsel’s Report}, supra note 129, at 19.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.} at 19.
\textsuperscript{136} \textit{Id.} at 20.
\textsuperscript{137} \textit{Id.} at 21.
\textsuperscript{138} \textit{Id.} at 21; \textit{see also} 29 U.S.C. § 157 (2012) (discussing the rights of employees to self-organization and to collective bargaining).
\textsuperscript{139} \textit{See infra} Section III.C (analyzing a possible standard player’s contract for college athletes).
\textsuperscript{140} \textit{Who We Are, College Athlete Players Ass’n}, http://www.collegeathletespa.org/about (last visited Oct. 10, 2018) [https://perma.cc/9RMC-4JDP].
Each athlete could then obtain personal representation to negotiate the specifics of his contract, such as salary, bonuses, and length of contract—individual representation is also discussed below.\footnote{See infra Section III.E (discussing who can represent college athletes to negotiate their contracts with universities).}

\section{Hard Salary Cap}

The National Football League (NFL) and National Basketball Association (NBA) employ two different types of salary caps: a hard cap and a soft cap, respectively.\footnote{Alan M. Levine, Note, \textit{Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports League}, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 245 (1995) (specifying the salary cap structures applied by the NBA and NFL).} The NFL uses the hard cap, which "sets a specific limit on the amount a team may pay its players, and teams may not exceed this amount under any circumstances."\footnote{Id. at 245–46.} The NBA, on the other hand, utilizes the soft cap, which "sets a maximum amount, like the NFL cap, but allows its teams to exceed the cap in specific situations."\footnote{Id. at 278–79.} For instance, the veteran player exception to the NBA salary cap "allows a team to re-sign its own free agent for any amount, provided the player played with the team for at least three years."\footnote{Id. at 279. There are other exceptions to the NBA salary cap as well, such as: (1) the non-taxpayer mid-level salary exception; (2) the minimum salary exception; and (3) the early qualifying veteran free agent exception. See Christopher R. Deubert et al., \textit{Comparing Health-Related Policies and Practice in Sports: The NFL and Other Professional Leagues}, 8 HARV. J. SPORTS & ENT. L. (SPECIAL ISSUE) 1, 169 (2017) (enumerating various exceptions to the NBA salary cap).} Another exception enables "a team to sign one or more players, even if the team is over the cap, to contracts totaling one million dollars per year."\footnote{See Levine, supra note 142, at 248 (arguing the salary cap's purpose is to restrain players' salary); see also Scott J. Foraker, Note, \textit{The National Basketball Association Salary Cap: An Antitrust Violation?}, 59 S. CAL. L. REV. 157, 171 (1985) (noting there is evidence to suggest a salary cap restrains trade).} Salary caps clearly represent restraints on trade as they limit the amount players or employees can earn.\footnote{Foraker, supra note 147, at 176 (stating the salary cap restrains trade and must therefore be examined to determine whether the anticompetitive effects outweigh the procompetitive justifications).} Thus, under antitrust analysis, salary caps require some procompetitive justification to persist.\footnote{Id. at 245.} Competitive balance between the teams serves as the primary procompetitive justification for sal-

\begin{footnotesize}
\begin{enumerate}
\item See infra Section III.E (discussing who can represent college athletes to negotiate their contracts with universities).
\item Id. at 245–46.
\item Id. at 278–79.
\item Id. at 279. There are other exceptions to the NBA salary cap as well, such as: (1) the non-taxpayer mid-level salary exception; (2) the minimum salary exception; and (3) the early qualifying veteran free agent exception. See Christopher R. Deubert et al., \textit{Comparing Health-Related Policies and Practice in Sports: The NFL and Other Professional Leagues}, 8 HARV. J. SPORTS & ENT. L. (SPECIAL ISSUE) 1, 169 (2017) (enumerating various exceptions to the NBA salary cap).
\item See Levine, supra note 142, at 248 (arguing the salary cap's purpose is to restrain players' salary); see also Scott J. Foraker, Note, \textit{The National Basketball Association Salary Cap: An Antitrust Violation?}, 59 S. CAL. L. REV. 157, 171 (1985) (noting there is evidence to suggest a salary cap restrains trade).
\item Foraker, supra note 147, at 176 (stating the salary cap restrains trade and must therefore be examined to determine whether the anticompetitive effects outweigh the procompetitive justifications).
\end{enumerate}
\end{footnotesize}
ary caps.\textsuperscript{149} Salary caps allow for the even distribution of talent across teams that helps make the games between teams more competitive, which in turn creates a better product on the field or court for consumers.\textsuperscript{150} If teams could pay players any amount of money they wanted, then the teams with the most money would offer the best players more money, likely resulting in the best players going to the richest teams.\textsuperscript{151} As a result, the games might be less competitive, reducing consumer demand, if certain teams had all the best players and competed against teams with lesser players.\textsuperscript{152}

Similarly, if college teams could pay their athletes any amount they wanted, then the schools with the richest donors would pay exorbitant amounts to obtain the services of the best players in the country. Boosters of the University of Alabama, which boasts one of the most successful football teams in the country, paid off its head coach’s \$3.1 million mansion to entice the coach to stay at Alabama.\textsuperscript{153} If no salary cap existed in college athletics, there is no telling how much rabid boosters and alumni would pay to attract

\textsuperscript{149} Id. ("Proferred justifications for the salary cap are that it increases the financial stability of league franchises and that it fosters a competitive balance among franchises.").


\textsuperscript{151} Levine, supra note 142, at 288 ("Without [salary] restrictions, proponents of the salary cap argue, the resulting salary disparities would allow large market teams to outbid small market teams for the best players."); see also Why Certain MLB Teams Can Afford Star Players and Others Cannot, NW. BUS. REV. (Jan. 3, 2012), https://northwesternbusinessreview.org/why-certain-mlb-teams-can-afford-star-playlers-and-others-cannot-bb5d9fca0524 (discussing the MLB’s lack of a salary cap and the “clear gap” between the MLB’s richest teams and poorest teams that results).

\textsuperscript{152} Jeremy Venook, The NBA’s Latest Attempt to Promote Competition: $200-Million Contracts, ATLANTIC (May 17, 2017), https://www.theatlantic.com/business/archive/2017/05/nba-super-max-contract/526935/ [https://perma.cc/5BB9-ETT3] (["The salary cap and its penalties prevent[] situations like that currently happening in professional baseball, in which cash-rich teams like the Los Angeles Dodgers and New York Yankees often spend several times as much money on players as smaller-market teams . . . ."]); see also Michael Schottey, How the NFL Became the Most Competitive League in All of Sports, BLEACHER REP. (Mar. 20, 2013), http://bleacherreport.com/articles/1574285-how-the-nfl-became-the-most-competitive-league-in-all-of-sports [https://perma.cc/DDK9-4YDS] (depicting the effect of the salary cap on competition and implying that without the salary cap it is likely that enterprising owners would “jump at one of the top free agents every year”).


\[227\]
the top quarterback or running back to play for their schools. A salary cap in
college athletics would help maintain competitive balance while still allow-
ing athletes to earn compensation.\textsuperscript{154} Employing a salary cap, which the
NFL and NBA use, serves as a less restrictive means to maintain a compe-
titive balance than completely prohibiting college athlete compensation.\textsuperscript{155}

Moreover, if college players were considered employees, then the uni-
versities and the NCAA might seek some type of an exemption to avoid anti-
trust scrutiny of the salary cap altogether.\textsuperscript{156} For example, the universities
and the NCAA might ask Congress to grant a limited antitrust exemption to
allow the salary caps, or, if CAPA or some other entity negotiated a collect-
ive bargaining agreement on behalf of the players with the universities, the
universities and the NCAA might seek a non-statutory labor exemption to
shield a salary cap from antitrust scrutiny, just as the NFL and the NBA
do.\textsuperscript{157}

In any event, the simplicity of a hard cap appears more attractive than
multiple exceptions like the NBA utilizes.\textsuperscript{158} After the free market system
has existed in college athletics for several years, exceptions to the hard cap
may be appropriate or necessary.\textsuperscript{159} Until that time and need, a simple hard

\textsuperscript{154} See Stefan Kesenne, The Impact of Salary Caps in Professional Team Sports, 47 SCOTTISH J.
POL. ECON. 422, 429 (2000) (finding that “a salary cap improves the competitive balance in a
league”).

\textsuperscript{155} See Steve Murphy & Jonathan Pace, A Plan for Compensating Student-Athletes, BRIIGHAM
?article=1065&context=elj. Revenues include all revenue streams, including “ticket sales, revenue
from luxury box suites and premium seating, local and national broadcasting (TV/radio/Internet)
royalties, concessions, parking, local advertising, stadium leasing, and merchandising,” and in the
NFL, the salary cap is based on a percentage of the total revenues generated by the teams. See Al
/Faq.aspx (last visited Oct. 8, 2018) [https://perma.cc/26LH-VA5U]. The NBA’s salary cap is
determined in a similar fashion (according to its collective bargaining agreement between the league
and the NBA Players Association) by using the “basketball-related” income generated by the league
and its teams, including, among other things, “gate receipts, ... [b]roadcast rights[,] ... [p]rogram
and concession sales[,] ... [p]arking[,] and [p]roceeds from team sponsorships [and] ... team pro-
motions.” Larry Coon, NBA Salary Cap FAQ, CBFAQ (July 1, 2018), http://www.cbfaq.com/salary
cap.htm#Q12 [https://perma.cc/2HC5-DFSJ].

\textsuperscript{156} See Thomas R. Hurst & J. Grier Pressly III, Payment of Student-Athletes: Legal & Practical

\textsuperscript{157} See id. at 65.

\textsuperscript{158} Levine, supra note 142, at 278–79 (discussing the specific exceptions to the soft salary cap of
the NBA).

\textsuperscript{159} See id. (discussing the exceptions to the salary cap in the NBA, which could serve as an exam-
ple for future exceptions in college athletics).
cap will be the easiest to employ. Even in professional football, the number of available players—fifty-three (53) on the active roster and ten (10) on the practice squad—and the desire for a competitive league enable a hard cap to thrive. FBS teams typically include eighty-five (85) scholarship athletes, which is more than enough to account for injuries. In college basketball, when players leave for the professional ranks or suffer injuries, teams can add walk-ons to fill open spots. Thus, the recruitment of walk-ons will continue to be important in college basketball under a hard salary cap because, if three or four players under contract suffer injuries, then spots open up for playing time that year although money may not be available for those filling those spots on the roster.

1. Football Salary Cap: $3 Million

This Article proposes a hard salary cap of $3 million for several reasons. Most importantly, this number represents a figure that many schools who generate millions of dollars of revenue could easily afford to pay. If colleges and universities reallocated the hefty revenues generated by their teams or the salaries paid to their coaches and athletic administrators, then they could afford to pay players $3 million per year. For example, Jim Harbaugh, head coach of the University of Michigan’s football team, received a salary alone of over $7 million in 2017, and several of his assistants

160. See id.
162. Alex Kirshner, The difference between FBS and FCS football, explained quickly, SB NATION (Aug. 25, 2018, 7:54 AM), https://www.sbnation.com/college-football/2017/11/19/16647542/ncaa-fbs-fcs-differences-in-iaa-scholarships-division-i-what-is (“FBS teams are allowed 85 [scholarships], . . . while FCS teams allow 63 or fewer scholarships.”).
164. See id.; see also Michael Felder, Examining the Process of Being a College Football Walk-On, BLEACHER REP. (Apr. 3, 2013), https://www.bleacherreport.com/articles/1591099-examining-the-process-of-being-a-college-football-walk-on (explaining that recruited walk-ons make up the rest of the team in addition to the scholarship athletes in college sports).
166. See id.
now make $1 million each.\textsuperscript{167} Even football programs that are traditionally not as successful as others spend millions of dollars on coaches’ salaries, such as the University of Kentucky, which paid its football coaches over $6 million in 2016.\textsuperscript{168} Moreover, some athletic directors make seven figures, some of which could be reallocated to pay the players.\textsuperscript{169}

Also, college football playoff system revenues could cover the compensation expense of players. Conferences receive revenues from the college football playoff system based on how many of their teams reach the college football playoffs semifinals, how many of their teams play in the non-playoff bowl games—known as the New Year’s Six games—that are part of the of the college football playoff system, and how many of their teams meet the NCAA’s APR for participation in a post-season football game.\textsuperscript{170} The conferences then distribute the revenues to the teams pursuant to “each conference’s own rules.”\textsuperscript{171} In total, the revenues for each conference for the 2016–2017 season included: Atlantic Coast Conference (ACC), $88.5 million; Big 10, $132.5 million; Big 12, $95 million; Pac-12, $101 million; and Southeastern Conference (SEC), $101 million.\textsuperscript{172} The number of teams vary by conference, with fifteen being the most (in the ACC) and ten being the least (in the now improperly named Big 12).\textsuperscript{173} Thus, it would take $45 million (fifteen teams multiplied by the $3 million salary cap for each team) to compensate all of the football teams in the ACC. Therefore, the revenues from the college football playoff system alone, $88.5 million

\textsuperscript{167} 2017 NCAAF Coaches’ Salaries, supra note 13; 2017 NCAAF Assistant Coaches’ Salaries, supra note 13.

\textsuperscript{168} See 2017 NCAAF Coaches’ Salaries, supra note 13. Further, reallocation would be simple as coaching salaries only represent “a fraction of the expenses” that university athletic departments spend. Michael Aiello, Compensating the Student-Athlete, 23 SPORTS L.J. 157, 165 (2016).

\textsuperscript{169} See Athletic Director Salary Database, USA TODAY, https://www.usatoday.com/story/sports/college/2013/03/06/athletic-director-salary-database-methodology/1968783/ (last visited Sept. 25, 2018) [https://perma.cc/W8MW-U94Q] (reporting the highest athletic director salary goes to David Williams from Vanderbilt, whose salary totals $3,239,678, and indicating eight more athletic directors each receive compensation over $1 million).


\textsuperscript{171} Dosh, supra note 170.

\textsuperscript{172} Id.

for the Atlantic Coast Conference (ACC) (for example), would easily compensate its athletes with tens of millions of dollars left over for distribution according to each conference’s rules. The ACC would have $43.5 million remaining after compensating its athletes, and the Big 10 (which has fourteen teams) would have $90.5 million remaining.

Universities and athletic departments could also spend much less on facilities to attract players and simply pay the players. Kansas State finished its new football facility in 2015, which cost $68,000,000.\(^{174}\) Rice University, which does not reside in a Power Five Conference, invested over $30,000,000 to construct a new sports facility.\(^{175}\) Boosters and alumni who contribute to these projects could use those donations to pay the athletes instead.

Also, even if universities did not reallocate the millions of dollars they make to give some to players, then boosters and alumni could certainly cover that cost. Given that boosters paid off Nick Saban’s $3.1 million mansion,\(^{176}\) it appears that this number falls within the range that schools via boosters and alumni could afford to pay.

The $3 million hard salary cap also allows college athletes who generate millions of dollars for their schools to earn compensation for creating the product on the field and court without earning an exorbitant amount that the NCAA would argue might offend the average consumer.\(^{177}\) This theory assumes that teams would use its $3 million cap space to distribute the compensation amongst many of its players, as opposed to paying, for example, three players $1 million each. This would allow a team such as Rice University (hereinafter “Rice”), though, to pay fewer players and spend less than the $3 million, but Rice could outbid a Power Five Conference school like Ohio State for one or two of Ohio State’s 4 star recruits, which would make Rice a more competitive team.

\(^{174}\) See *K-State Football Announces Plans for Next Bill Snyder Family Stadium Project*, TOPEKA CAP.-J. (Sept. 9, 2015, 10:19 AM), http://cjonline.com/sports/catzone/2015-09-09/k-state-football-announces-plans-next-bill-snyder-family-stadium-project [https://perma.cc/5889-EN9V] (providing that “K-State had the grand opening of the $68 million . . . complex last week[ and the next phase of the stadium improvements has a $15 million price tag]”).


\(^{176}\) Scarborough, *supra* note 153.

\(^{177}\) O’Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015). In *O’Bannon*, the NCAA’s expert argued that “Americans ‘generally oppose[] the idea of paying college football and basketball players,’” particularly if the amounts paid reached $200,000 per player. *Id.*
2. Men’s College Basketball Salary Cap: $500,000

The salary cap for men’s college basketball should be lower than the college football cap because men’s college basketball only generates a fraction of the revenues that football does.\textsuperscript{178} For example, one of the highest revenue producing football programs is the University of Texas, which generated $127.5 million during the 2015–16 fiscal year.\textsuperscript{179} One of the highest revenue producing men’s college basketball programs is the University of Louisville, which generated $45.6 million during the 2015–16 fiscal year.\textsuperscript{180} Overall, college football programs consistently generate much more revenue than men’s college basketball programs.\textsuperscript{181} The much lower salary cap in basketball than football also stems from the fact that football programs include eighty-five (85) scholarship athletes while basketball programs only include thirteen (13) scholarship athletes.\textsuperscript{182}

The rationale for the salary cap discussed in the preceding section for college football also applies to the $500,000 salary cap for basketball, namely universities could afford it and the players’ salaries would likely not offend the average consumer. For example, John Calipari, the head coach of the University of Kentucky’s men’s basketball team, received a salary in


\textsuperscript{179} See Jones, supra note 178 (ranking the 25 richest football programs for the 2015–16 fiscal year “based on gross revenue figures obtained from the U.S. Department of Education,” which were in turn “obtained from the schools’ mandatory gender-equity filings” reflecting the 2015 football season); see also Michael Wayne Bratton, Five of the Top 10 Richest College Football Programs Are from the SEC, SATURDAY DOWN SOUTH, https://www.saturdaydownsouth.com/sec-football/five-top-10-richest-college-football-programs-sec/ (last visited Oct. 25, 2018) [https://perma.cc/DWA9-7J66] (reporting Texas was ranked as the number one college football program with the highest revenue for the 2015 football season “with a revenue of $127.5 million”).

\textsuperscript{180} Which College Basketball Programs Make the Most Money? Syracuse Among Top 5, supra note 178 (listing the college basketball programs with the highest revenue and naming Louisville as the program with the highest revenue for the 2015–16 basketball season).

\textsuperscript{181} Compare Jones, supra note 178 (reporting the top 25 college football programs made between $50 million and $127.5 million individually during the 2015–16 fiscal year), with Which College Basketball Programs Make the Most Money? Syracuse Among Top 5, supra note 178 (noting the top 20 college basketball programs made between $14.4 million and no higher than $45.6 million individually during the 2015–16 fiscal year).

\textsuperscript{182} See NCAA DIVISION I MANUAL §§ 15.5.5, 15.5.6.1 (Aug. 1, 2016), http://www.ncapspublications.com/productdownloads/D117.pdf [https://perma.cc/MB2W-57FN] (restricting football teams to eighty-five total scholarships and basketball teams to thirteen).
2016–2017 of over $7 million,\textsuperscript{183} some of which would easily cover the entire $500,000 needed to compensate his players. Additionally, or alternatively, revenues generated from success in the men’s NCAA basketball tournament could be used to compensate players.\textsuperscript{184} The ACC in 2016, for instance, reportedly received nearly $40,000,000, and only $7.5 million (fifteen teams multiplied by the $500,000 salary cap for each team) would be needed to compensate the players; the ACC could then distribute the remaining $32.5 million to its teams.\textsuperscript{185} Furthermore, boosters and alumni donations could cover the costs of compensating players.\textsuperscript{186} Prior to paying any college athlete, both the universities and the players would want a standard player’s contract that sets out the rights and responsibilities of both parties. The next section discusses and provides a proposed standard player’s contract.

\textbf{C. Standard Player’s Contract}

The NFL and NBA use a standard player’s contract to set forth the rights and responsibilities of the teams and the players,\textsuperscript{187} while college athletics utilize the National Letter of Intent, the Athletic Aid Agreement, and NCAA rules to cover the obligations of the parties when a university provides a scholarship to an athlete.\textsuperscript{188} Under a free market system, colleges

\begin{itemize}
\item \textsuperscript{183} See Malcolm Leemons, College Athletes Getting Paid? \textit{Here Are Some Pro and Cons}, HUFF. POST (Mar. 29, 2017, 10:06 AM), https://www.huffingtonpost.com/entry/college-athletes-getting-paid-here-are-some-pros-cons_us_58cfeee0e4b07112b647f9a (indicating that athletes should receive revenue from what they help to produce).
\item \textsuperscript{185} See Scarborough, supra note 153.
\end{itemize}
and athletes should utilize a standard player’s contract. As stated previously, CAPA could negotiate the terms of a standard player’s contract on behalf of college athletes.\textsuperscript{189} Attached as Appendix A is an exemplar of what that contract should include, and the following text discusses the key terms for each party.\textsuperscript{190}

Before discussing those essential terms for each side, it must be understood generally that these college athlete contracts will be based primarily on how the athlete performs in high school and how he is projected to perform in college.\textsuperscript{191} Athletes in football and men’s basketball receive rankings from nationally recognized organizations, such as Rivals, that assess the talent of high school prospects and project how successful those prospects will be in college.\textsuperscript{192} “Five stars” are highly coveted prospects and would likely seek higher salaries than two-star rated players or players who do not earn any stars in the ranking.\textsuperscript{193} The optional bonus sections built into the standard contract allow for flexibility in negotiating the contract to enable lower base salaries and incentive laden contracts.\textsuperscript{194}

1. Essential Terms for Universities and Colleges

The university or college would seek a number of provisions. As an initial matter, the university would require that the athlete meet the admission

\begin{thebibliography}{99}
\bibitem{189} See Hurst, supra note 156.
\bibitem{190} See infra Appendix A.
\bibitem{191} See infra note 192 and accompanying text.
\bibitem{192} See, e.g., 2017 Top Football Recruits, 247 SPORTS, \url{http://247sports.com/Season/2017-Football/RecruitRankings?InstitutionGroup=highschool} (last updated Nov. 22, 2017, 1:20 PM) (ranking 2017’s top recruits); Jeff Nusser, Rivals, Scouts, ESPN, 247: Star Rating System Explained, SB NATION (Jan. 31, 2016, 10:00 AM), \url{https://www.cougcenter.com/wsuc-football-recruiting/2013/2/S/3956800/rivals-scout-espn-247-star-rating-system-national-signing-day} [https://perma.cc/CG9S-AQDA] (explaining the star rating system is a “quick [...] way for recruiting services [such as, Rivals, Scouts, ESPN, and 247,] to convey the talent level of a specific recruit, ranging from two stars to five stars”); see also About Us, RIVALS (Jan. 8, 2016), \url{https://n.rivals.com/news/about-us} [https://perma.cc/T2G-X45Q] (crediting itself as having “revolutionized college football and basketball recruiting coverage” by providing, among other things, “national player rankings, online video highlights, player cards and searchable player database, [and] official visit lists”).
\bibitem{193} Nusser, supra note 192 (“It’s not hard to figure out that more stars are better [...]”); see also C.W. O’Brien, College Football Recruiting for Beginners Part I: How Are Players Ranked?, BLEACHER REP. (Jan. 29, 2009), \url{http://bleacherreport.com/articles/117345-recruiting-for-beginners-part-i-how-are-players-ranked} [https://perma.cc/6FB-RB-WECD] (noting a five star in Rivals recruiting services means the player is a “[g]reat prospect. Game ready as a true freshman. Prospect has the ability to be a difference-maker immediately”).
\bibitem{194} See infra Appendix A.

234
requirements of the university, 195 maintain academic eligibility, 196 and adhere to all academic and conduct policies of the university, conference, and NCAA to protect the academic integrity of the school and to uphold the reputation of the university. 197 The university would also require that the athlete attend all mandatory practices, workouts, meetings, and games. 198 The university, to protect its substantial investment in each player, would prohibit the athlete from engaging in physical activities that are either outside of playing the sport for the university or involve a significant risk of injury unless the university consented in writing beforehand. 199

The university would also seek a covenant not to compete to prevent the player from leaving during the term of the contract for a more lucrative contract at another university or in the professional ranks. 200 This provision could be softened to allow a player to leave early for the NBA or NFL if the player was drafted. 201 In any event, the university would want to retain the current NCAA rule that prevents players from leaving if a coach, such as the head coach who recruited that player, leaves the university. 202

2. Essential Terms for Athletes

The athletes would want a number of basic protections in their contract as well. Athletes would seek multi-year contracts, compensation for any injuries that arise based on playing for the university, and independent verification of their grades to avoid being removed from the team for non-academic or athletic performance issues. 203 Athletes might also seek bonuses based on individual athletic performance, team performance, and academic performance. 204

3. Essential Terms for Both Parties

The athlete would want a provision that provides injury will not result in

195. See Sample Athletic Financial Aid Agreement Letter, supra note 188.
196. See id.
197. See Bilas Interview, supra note 32.
198. NFL Player Contract, supra note 187.
199. Id.
200. See Bilas Interview, supra note 32.
201. Id.
203. See Bilas Interview, supra note 32.
204. See id.
the loss of salary for that school year, but the university would not be required to pay the player's salary for the remaining years on the contract if he was unable to play.\textsuperscript{205} Moreover, the athlete would want a provision that stated he could not lose his scholarship based on injury during the term of the contract.\textsuperscript{206} These provisions protect the academic integrity of the relationship between athlete and university by allowing the athlete to keep his scholarship if injured.\textsuperscript{207} These provisions also allow the university to restructure contracts for the next year with the additional money no longer subject to the cap that could be used on players who had outstanding years and deserve more compensation or on the incoming class for the next year, or both.\textsuperscript{208}

Critically, the contract would include a provision allowing the university (and the NCAA) to use the athlete's NIL to promote, advertise, and broadcast games, but the NCAA could not use the athletes' NIL to endorse any third-party products.\textsuperscript{209} The athlete, on the other hand, could profit on his NIL by endorsing third-party products, such as video games, food and beverages, clothing, cars, and any other product that aligns with the mission and values of the university and the NCAA.\textsuperscript{210} Numerous legal scholars advo-

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\textsuperscript{205} See, e.g., \textit{NFL Player Contract, supra} note 187 (providing an example of such a provision: "Unless this contract specifically provides otherwise, if Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury.").

\textsuperscript{206} See id.

\textsuperscript{207} See John S. Elson, \textit{Academic Integrity and/or Winning Football? The Moral Dilemma of Academically Elite Colleges with Division I Football Teams and the Special Case of Northwestern}, Huff. Post, https://www.huffingtonpost.com/john-s-elson/academic-integrity-and-or-b7308056.html (last updated May 19, 2016) [https://perma.cc/2V5C-475K] (suggesting that colleges must strike a balance between the competing interests of student athletes and coaches, especially when players are injured).

\textsuperscript{208} See Bilas Interview, supra note 32 (discussing that athletes and schools tend to plan contract terms with the future in mind).

\textsuperscript{209} See \textit{NFL Player Contract, supra} note 187.

\textsuperscript{210} See Gabe Feldman, \textit{The NCAA and “Non-Game Related” Student-Athlete Name, Image and Likeness Restrictions}, Knight Comm’N Intercollegiate Athletics (2016), https://www.knightcommission.org/wp-content/uploads/2008/10/feldman_nil_white_paper_may_20_16.pdf [https://perma.cc/5DXJ-A3pE] (proposing an endorsement framework that would allow the "NCAA [to] continue to ensure that all forms of commercial activity undertaken as part of college athletics (including broadcast and institutional sponsorship deals), are conducted in a manner consistent with the NCAA’s educational mission and other core goals").
\end{flushleft}
cate for college athletes to profit from their NILs, and the general population would likely not oppose such endorsement deals. Professor Gabe Feldman, the Director of the Tulane Sports Law Program and the Associate Provost for NCAA Compliance, presented a procedure for athletes to endorse commercial products to the Knight Commission, which seeks to protect and serve college athletes while maintaining the academic missions of the universities.

If not only college football and men’s basketball players could profit from their NILs, but also all other college athletes, such as baseball players, women’s basketball players, swimmers, and so on, then all college athletes could earn profits based on the sport they play, which might help minimize any animosity, if it even existed, or equity issues with the non-revenue generating sports. In a free market system, allowing college athletes to profit on their NILs might create more public interest in non-revenue generating college sports. For instance, if a swimmer like gold-medalist Katie Ledecky endorsed a major company, like McDonald’s or Gatorade, when she was swimming at Stanford University, and she became more popular and recognizable, then the public’s interest in seeing her compete in collegiate swim meets would have likely increased.


214. See id. at 3 (stating: “The basic case for allowing non-game related NIL payments is straightforward. As a general matter, free markets lead to the optimal economic outcome and interference with free competition leads to an inefficient allocation of resources and a variety of potential economic harms. The harm to student-athletes from collusion in the market for non-game NIL payments is obvious. Student-athletes (like all people) have a property right in their name, image, and likeness (‘NIL’). Many student-athletes have created tremendous value in their NILs and, absent NCAA restrictions, would receive significant compensation for them in an open market.”).

215. See id.

Under a free market system, the teams could choose any combination of compensation, including base salaries, signing bonuses, athletic bonuses, and academic bonuses.\textsuperscript{217} The compensation for each player would vary based on how much the market dictated each player should be paid.\textsuperscript{218} The simulations below demonstrate how Ohio State could compensate its football team and how Rice University could become more competitive in a free market system.

D. Free Market Simulations

1. Football

The following simulation includes the full 2017–2018 roster for Ohio State, and it details the players’ salaries and bonuses under the proposed salary cap of $3 million.\textsuperscript{219} The complete simulations, which include the players’ names, class year (i.e., Freshman, Sophomore, Junior, Senior, with a Redshirt [RS] designation as well, meaning the player sat out a year, or redshirted, because of health or the coaches’ decision), positions, and compensation, can be found in Appendix B at the end of this Article.\textsuperscript{220} The simulations make a number of assumptions. One, athletes who are more highly rated by traditional ranking services, such as Rivals, would likely earn higher base salaries than lower-rated players coming out of high school. This makes sense given that college athletes would typically enter into these contracts before they started in college. Two, the base salaries might be similar, then, for players with the same ranking coming out of high school. This could change, obviously, given the need of a team at certain positions or whether a team values certain positions more than others, such as a quarterback over a linebacker. The model below, however, provides a more uniform approach to determining base salaries a team could accept or easily modify as it pleases. Three, the simulation assumes that the players on scholarship are the athletes with a star-rating.

\textsuperscript{217} See Feldman, supra note 210.
\textsuperscript{220} See infra Appendix B.
In addition to the base salaries, the hypothetical contract for each player in the Ohio State simulation includes a bonus of $1,000 ($85,000 total for the 85 scholarship players) for reaching a college football playoff system bowl game, which this simulation assumes the team did. 221 The contract in this scenario also includes a bonus for earning a spot on the All-American team (either first, second, or third team), which includes $1,500 for First Team All-American honors, $1,000 for Second Team, and $500 for Third Team. 222 In the simulation, two players earn first team honors (Billy Price and Denzel Ward) and one player earns second team honors (Nick Bosa), and those players’ performance bonuses are marked with an asterisk. 223 Finally, each freshman player ranked as a 5-Star recruit by Rivals receives a signing bonus of $1,000 under the simulation, and there are six such players on this team. 224

This free market model does not include a minimum player salary like the NBA and NFL employ. 225 The primary reason for this is to prevent schools from being forced out of participating in college football or men’s college basketball because they claim they cannot afford to pay players. 226 Without a minimum, schools can decide how much, if any, they want to compensate players. 227 A player such as the author would have gladly chosen to play Division I football at Rice on full scholarship without a salary or bonus rather than not play Division I football at Rice (or at all). 228 In other words, Rice and other teams outside of the Power Five Conferences will still be able to procure players, likely including many of the exact same ones they do under the current system. 229

221. See infra Appendix B.
223. See infra Appendix B.
224. See infra Appendix B.
226. See Ginnitti, supra note 225; HOOPSHYPE, supra note 225.
227. See e.g., infra Appendix B.
228. See O’Bannon v. NCAA, 802 F.3d 1049, 1056 (9th Cir. 2015) ("[T]here are few athletes talented enough to play FBS football or Division I basketball or not to attend an FBS/Division I school . . . .").
229. See generally Rice Owls Football, SCOUT FANTASY SPORTS, https://fttoolbox.scoutfantasy
Under this simulation, Rice could pay its players the same base salary as the Ohio State players based on the star ratings—i.e., $30,000 for 3-Star recruits and $20,000 for 2-Star recruits (and one player without a star rating $10,000). In addition, Rice might be able to steal three Ohio State players, J.K. Dobbins, Kendall Sheffield, and Demetrius Knox, each of whom received 4-Star ratings. Under the Ohio State simulation, those same three players would receive $36,000 a year each, while under the Rice simulation they would receive $60,000 a year each, which might sway them to stay in their home state of Texas to play for the Fighting Owls in the city of Houston while being able to provide some more money to their families and themselves than if they chose to play for Ohio State. Rice does not have a 4-Star recruit on its actual roster, but under a free market model, Rice could possibly procure the services of several 4-Star players or even a 5-Star player, which would make Rice more competitive in college football. Under the current system, Rice has not obtained a 4-Star player, and without better players, Rice will continue to be less competitive than if it acquired better players. Under the simulation, however, which includes paying those three athletes who are Texas natives and 4-Star players, and who would otherwise be Ohio State-bound, $60,000 each, Rice’s total compensation paid to athletes would only be $1,890,000, which is over $1 million less than the salary cap and Ohio State’s payment of $3 million in compensation to its players. By acquiring these better players, Rice would become more competitive than they are under the current system. If Ohio State knew Rice was offering those 4-Star players a higher salary, then Ohio State might offer more salary or potential bonuses to those 4-Star players and pay certain 3-Star players less, resulting in a competition for the services of those 4-Star players. The players would need to weigh their options and priorities, [Vol. 46: 203, 2019] The Blue Devil’s In The Details PEPPERDINE LAW REVIEW


230. See infra Appendix B.

231. See infra Appendix B.

232. See infra Appendix B.


234. See id.

235. See Appendix B.

236. Compare infra Appendix B (with 4-Star recruits), with Rice 2018 Football Commits, supra note 233 (without 4-Star recruits).

237. See infra Appendix B.
such as the following: how important it is to them to play in a Power Five Conference with more national television exposure; the quality of coaching in both programs; the academic prestige of the universities; how each college prepares its players for life after college football; how much compensation each university is offering; and how important it is to the athlete to stay close to home.\textsuperscript{238} The universities would adjust their offers and compensation packages to the players to attract athletes to represent their universities.\textsuperscript{239} That competition between universities to procure the services of athletes describes precisely how a free market should and would work. Even if one accepted the NCAA’s flawed survey in \textit{O’Bannon} regarding consumer demand decreasing as the level of compensation increases for college athletes, a $3 million salary cap reduces the possibility that most players will earn over $100,000 total.\textsuperscript{240}

In fact, under the simulation, the highest paid player from Ohio State earns $47,000, and the highest paid player in the Rice simulation earns $60,000.\textsuperscript{241} Most players on Ohio State earn in the low $40,000 range or less, which would be considered a lower class income.\textsuperscript{242} The Pew Research Center defines middle class income as between $46,960 and $140,900.\textsuperscript{243} An average consumer should not be offended when college athletes who play on nationally televised games, appear in commercials promoting the games and on SportsCenter highlights, and generate millions of dollars for their respective universities, earn a lower-class income.\textsuperscript{244} Thus, consumer demand would likely not be affected.\textsuperscript{245}

\begin{footnotesize}
\begin{enumerate}
\item See \textsuperscript{238} id.; see also infra Appendix B.
\item See \textit{O’Bannon} v. NCAA, 802 F.3d 1049, 1077 (9th Cir. 2015). In the NCAA’s survey, which included three amounts, $20,000, $50,000, and $200,000, members of the general public and self-identified sports fans increased their disapproval of athlete payment as the compensation levels increased. \textit{Id}.
\item See \textsuperscript{239} infra Appendix B.
\item See \textsuperscript{240} infra Appendix B.
\item See \textsuperscript{241} \textit{O’Bannon}, 802 F.3d at 1077 (describing sports fans’ increased disapproval of athlete payment as the compensation levels increased).
\end{enumerate}
\end{footnotesize}
The simulations in this article are but two of thousands of possibilities that each team could use to compensate their players under the $3 million salary cap. For example, quarterbacks, regardless of their star-recruit ranking, might be paid more because they are so valuable to a team’s success, while a kicker, punter, or long snapper might be paid less because they may only play on special teams. Thus, in another simulation, all of the quarterbacks on the Ohio State roster—such as Ohio State’s former standout quarterback J.T. Barrett—could earn $5,000 or $10,000 more, and the kickers, punter, and long snapper on Ohio State could earn $5,000 or $10,000 less. In reality, the compensation will depend on the market and the player. Teams might also choose a wider range of salaries to pay its players, such as $50,000 or $60,000 for its top players and $15,000 or $20,000 for its least valuable players. Teams also might choose to pay certain bonuses, such as statistical team leaders or academic bonuses, as opposed to the bonuses chosen in the simulation. The beauty of a free market allows teams and players, as well as the market itself, to dictate the terms of the deal.

Critics of a free market model might argue that if players receive different compensation, or some receive no compensation at all while others do, then resentment and jealousy could derail team chemistry and the cohesiveness of the team. This argument misses the mark because it demonstrates a fundamental misunderstanding of athletes. Athletes view sports as a meritocracy. An athlete earns what he or she deserves because performance determines who receives the accolades and praise. The best players receive more awards, interviews, and media attention than the lesser players. Jay Bilas agrees. "It’s patently absurd that there would be fights in the locker room if the best player made more money than the last player on the


247. Cf. infra Appendix B (describing a different simulation).

248. See infra Appendix B (displaying the possibility of different compensations for different players based on their rankings).

249. See Mitten, supra note 10, at 7 (discussing sports as a meritocracy).

250. Bilas Interview, supra note 32.

251. Id.

252. Id.
team or [when][sic] the quarterback makes more than the person who snaps him the football, just as there are[n’t] fights in the locker room among coaches when the head coach makes more money than the assistants."

College athletes, who already receive a disparate amount of attention, would likely understand when more successful and coveted teammates earn compensation greater than less successful and less coveted teammates.

2. Basketball

The following is a simulation of the University of Kentucky’s men’s basketball team under the proposed $500,000 salary cap. It includes a number of the same assumptions as the football simulation, including that higher ranked players will receive higher salaries. This hypothetical also includes contracts for each player with performance bonuses that include $1,000 for each player if the team wins a conference tournament championship, $2,000 for each player based on a Sweet Sixteen appearance in the NCAA tournament, and $4,000 each for reaching the Final Four. This hypothetical assumes those goals were reached. This simulation also includes a $3,000 signing bonus for 5-Star recruits, payable upon matriculation into the school. The total compensation would equal $496,000, which could be paid through a reallocation of resources, including the coaches’ compensation or NCAA Tournament revenues, or willing and eager alumni and boosters could cover that expense.

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253. Id.
254. See infra note 260 and accompanying chart.
255. See infra note 260 and accompanying chart.
256. See infra note 260 and accompanying chart.
257. See infra note 260 and accompanying chart.
258. See infra note 260 and accompanying chart.
259. See infra note 260 and accompanying chart.
2017-2018 University of Kentucky Men’s Basketball Team\textsuperscript{260}

<table>
<thead>
<tr>
<th>Player</th>
<th>Position</th>
<th>Year</th>
<th>Base Salary</th>
<th>Signing Bonus</th>
<th>Performance Bonus</th>
<th>Rivals Ranking</th>
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<td>RS FR</td>
<td>35,000</td>
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As with football, a team like Rice could offer a 5-Star recruit $70,000 a year and its other athletes $20,000 a year (for six players) and $10,000 a year for its other players (six players), and the total compensation would only be $250,000, which is half of the salary cap. A 5-Star recruit would likely make Rice much more competitive in college basketball than it is now.\(^{261}\)

Another payment simulation might include an escalating yearly base salary, particularly for basketball players, to further entice them to stay in college and forgo entering the professional draft.\(^{262}\) The types of bonuses and amounts offered in each simulation could change, and each base salary need not be uniform based on the recruiting ranking.\(^{263}\)

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\(^{261}\) See Nusser, *supra* note 193, and accompanying text (explaining the rating system and demonstrating the value of a 5-Star player).


\(^{263}\) Cf. *supra* note 260 and accompanying chart.
tains for each player would depend on what the team agrees to based upon what the agent for the player seeks and successfully obtains. The representation for the players is discussed in the following section.

E. Determining Who Can Represent College Athletes

College athletes would need representation to negotiate their contracts with universities. The simplest way to ensure competent representation of college athletes would be to require the agent was certified by the NFL or NBA or the agent was a lawyer. Provided that the NFL or NBA could sanction an agent for conduct during the representation of a college athlete, then the entities and rules that govern the NFL, NBA, and lawyers would ensure proper agent conduct.264 For example, the NBA and NFL maintain rules for agents that represent players in their respective leagues, and each state bar regulates attorney conduct through its rules of professional conduct.265 The professional leagues and a lawyer’s state bar can sanction an agent for conduct in violation of the applicable rules, and sanctions could include the revocation of one’s certification or license, which serves as a powerful deterrence to improper agent conduct.266

Professional agents and lawyers should represent college athletes at an extremely reduced rate or on a pro bono basis to gain access to these players who might turn professional.267 Although one percent of college football


265. See Kestenbaum, supra note 254, at 66.


267. See John Infante, NCAA’s Legal Counsel Rules More Expansive Than You Think, ATHLETIC, https://www.athleticscholarships.net/2013/07/09/ncaas-legal-counsel-rules-more-expansive-than-
and men's college basketball players are drafted in their respective sports leagues, an agent who could represent one or more of the elite athletes in college would gain the inside track to representing them in the NFL or NBA, where the compensation for agents is significant. Moreover, college players' agents should receive only a small percentage of the signing bonus, which means that agents representing college football and basketball players who do not receive signing bonuses, which may be most agents, will not receive any compensation. Again, the payoff for these agents would come if and when they represent these players in their professional contracts, if the players reached the professional ranks.

Universities, the NCAA, and CAPA (on behalf of college athletes) might agree to a limitation on agent contact for high school athletes. For you-think.htm (last visited Oct. 13, 2018) [https://perma.cc/ZW64-9VN6]. Athletes, in addition to the possibility of paying agents to represent them, may also need to pay taxes given that their salaries and bonuses would be income. Ryan Prete, Paying NCAA Student Athletes: Are Potential Tax Burdens Worth It?, BLOOMBERG NEWS (Mar. 2, 2018), https://www.bna.com/paying-ncaa-student-n57982089474/ [https://perma.cc/93ND-DTTM]. Universities, which provide a number of programs to assist athletes already (such as study hall tutors and academic advisors), could utilize CPAs, lawyers, or programs like VITA that assist low-income taxpayers, to help athletes complete and file their taxes for free. See IRS VITA Grant Program, IRS (Apr. 27, 2018), https://www.irs.gov/individuals/irs-vita-grant-program [https://perma.cc/3AJB-DC5P]; Academic Support Services, UNIV. OF S. CAL., http://saas.usc.edu/academic-support-services/ (last visited Oct. 8, 2018) [https://perma.cc/H2AF-346D] (providing “academic counseling services[,] . . . [p]riority [s]cheduling[,] [s]tudy [h]all[,] [t]utorial [s]ervices[,] [c]omputer [l]abs[,] [t]ravel [l]aptops[,] [e]xcused [s]absence [l]eet[ers[,] OASIS . . . [O]nline Academic Student Information System[,] and [d]isability [t]esting” for its college athletes to make sure “they have a successful and delightful college career while engaging in their competitive sports”). College athletes would prefer to receive compensation that is taxed rather than no compensation at all. See Prete, supra note 267.


271. See James Malone & Darren Lipinsky, The Game Behind the Games: Unscrupulous Agents in College Athletics & California's Miller-Ayala Act, 17 L.A. ENT. L. REV. 413, 413 (1997) ("[T]he more talented the clients, the more money they will be worth, and the more money the agent will earn . . . The competition for the client who will be the next Shaquille O'Neal or Reggie White is fierce.").

example, an agent might be prohibited from signing a representation agreement with a high school athlete until the athlete’s senior year, but the agent could start talking with potential clients as early as spring of the athlete’s junior year.\textsuperscript{273} In any event, the stakeholders would need to negotiate on the particulars of the regulation of these agents.\textsuperscript{274} The next section addresses the advantages of a free market model for compensating college athletes.

\section*{F. Advantages of a Free Market Model}

Numerous advantages for college athletes exist if they received compensation above their scholarships for playing. One, the product, particularly basketball games, will likely improve, as players who might have left early stay in school because of the two or three-year deals they sign with their universities.\textsuperscript{275} Two, players can help provide for their families’ needs, especially if their families are socioeconomically disadvantaged.\textsuperscript{276} Three, players may stay in school longer and either graduate or get closer to graduating if they sign multi-year deals.\textsuperscript{277} Four, players might work harder academically to ensure they stay eligible because they understand they are providing necessary funds for their families.\textsuperscript{278} Finally, athletes will be treated equitably and like everyone else involved in the multibillion-dollar business of major college athletics because they will be able to earn compensation in a free market.\textsuperscript{279}

A free market system might also yield benefits for the universities and the NCAA.\textsuperscript{280} For example, if players stay in school longer, resulting in better teams and better rivalries (as players are playing against each other every year for several years), then more people may watch, resulting in higher rat-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{274} See generally id.
\item \textsuperscript{275} Bilas Interview, supra note 32.
\item \textsuperscript{276} Id.
\item \textsuperscript{277} O’Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015).
\item \textsuperscript{278} See Brendan Duggan, \textit{The Multifaceted Debate of Whether We Should Pay College Athletes}, WASH. SQUARE NEWS (Oct. 18, 2016), https://nyunews.com/2016/10/18/the-multifaceted-debate-of-whether-we-should-pay-college-athletes/ [https://perma.cc/GD9D-BWDE].
\item \textsuperscript{279} Bilas Interview, supra note 32; see also infra notes 281–82.
\item \textsuperscript{280} See generally id.
\end{itemize}
\end{footnotesize}
Higher ratings could result in even larger television deals, such as the NCAA’s eight-year, $8.8 billion extension with CBS Sports and Turner Broadcasting System Inc. to broadcast the men’s college basketball tournament that runs through 2032.

Moreover, by compensating college athletes, the NCAA and conferences avoid or reduce competition and potential competition from other leagues. For example, Tom Brady’s (quarterback of the New England Patriots in the NFL) agent, Don Yee, plans on starting a football league that “will pay players straight out of high school and build them up mentally and physically for an NFL career[.]” This new league, Pacific Pro, will be “the first professional football league ever created to provide developing football players with a choice to play professionally directly from high school—a league where emerging players can hone their craft, play football, and be compensated for it.” Thus, high school athletes will have a choice of whether to play in college without compensation or in the Pacific Pro league for compensation. Even if this league does not succeed, others may try to improve upon this league with similar leagues of their own.

281. See Andy Schwarz, But Nobody Even Makes Any Money On College Sports, SLATE (Jan. 6, 2014, 2:43 PM), http://www.slate.com/articles/sports/sports_nut/2014/01/paying_college_athletes_a_point_by_point_evisceration_of_the_ridiculous.html [https://perma.cc/E6CU-QLK9] (discussing the impact of good play on ratings and support, noting that “[e]ven among alumni, the intensity of fan interest varies greatly based on the quality of the team, which is driven primarily by the quality of the players”).


286. See Jarrett Bell, Agent Don Yee Lands Adidas as Sponsor for Pacific Pro Football, USA TODAY SPORTS (Feb. 28, 2018, 12:09 PM), https://www.usatoday.com/story/sports/nfl/columnist/bell/2018/02/28/don-yee-pacific-pro-football-league-adidas/281323002/ [https://perma.cc/GU53-MDPD] (“[P]layers in the future would have the option of bypassing the college game—and get paid—for the three years after high school until they are eligible for the NFL.”).
The NBA already has a developmental league, the G-League, which represents the NBA’s official minor league with its corporate partner Gatorade (hence the G in G-League). High school graduates are eligible to play in the G-League because the minimum age requirement is eighteen years old (as opposed to the NBA’s nineteen-year-old requirement). If universities and colleges pay college athletes in a free market model, then potential and current developmental leagues such as the G-League might either become less successful or non-existent. If the NCAA and conferences continue to prohibit payment of college athletes, then these developmental leagues may begin to thrive, and college football and basketball might lose its best labor and become less relevant and less popular.

Furthermore, if the plaintiffs in the Jenkins case prevail, then the NCAA will be forced to allow a free market system for compensating football and men’s college basketball players above their scholarships. If those plaintiffs do not prevail, then there will undoubtedly be other antitrust cases that challenge the NCAA’s prohibition on compensating college athletes. Despite the NCAA’s previous success in appellate courts on issues relating to college athletes, it might be just a matter of time before the NCAA’s cap on


291. See generally In re Nat’l Coll. Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig., 311 F.R.D. 532 (N.D. Cal. Dec. 4, 2015) (discussing how a positive outcome in Jenkins would go against the NCAA’s arguments and allow the free market model to pay athletes over their stipulated scholarships).

IV. COUNTER-ARGUMENTS TO THE FREE MARKET MODEL

Several of the main arguments against the free market model and responses thereto have already been discussed above, such as the argument that the best college football teams will get the better players, which is what already happens now, creating an imbalance in the competition,\footnote{See John Solomon, \textit{Inside College Sports: Here's What's Next for NCAA After O'Conner Ruling}, CBSSPORTS.COM (Oct. 2, 2015), \url{https://www.cbssports.com/college-football/news/inside-college-sports-heres-whats-next-for-ncaa-after-obannon-ruling/} [https://perma.cc/VQ7A-TT7B] (discussing future implications and cases after \textit{O'Bannon}).} and dissent amongst teammates will arise when the players start making different amounts of money.\footnote{See supra Section II.D.1.} This section addresses two other major arguments against the free market model: (1) Title IX prevents paying only football and men’s college basketball players; and (2) the model’s calculations should include the value of the players’ scholarships. These counterarguments are addressed below.

\footnote{See supra Section II.D.1.}
A. Title IX Prevents Paying Only Football and Men’s College Basketball Players

Antitrust economist Andrew Schwarz skillfully debunked thirteen myths about paying college athletes, one of which is that paying football and men’s college basketball players will violate Title IX.296 As an initial matter, Title IX was enacted to ensure equal participation in college sports for men and women.297 Paying football and men’s college basketball players will not affect women’s participation in sports.298 Second, Title IX is currently not being applied to require equal spending on college sports, which would entail universities spending equal amounts on men’s sports and women’s sports, including coaches’ salaries—men’s coaches are paid much more than women’s coaches.299

Furthermore, even if Title IX was interpreted to require equal spending and the government enforced that interpretation, universities could match the compensation paid to football and men’s college basketball players with funds for women’s sports through either alumni or booster donations or a reallocation of resources, such as coaches’ or athletic department salaries or revenue.300 For example, the proposed salary cap for football is $3 million, meaning a university would need $6 million to compensate the football team and match that amount by spending $3 million on women’s sports.301 The ACC received nearly $90 million from the college football playoff system, which would almost cover by itself the amount required to compensate every single scholarship football player in the ACC and the amount required to spend equally on women’s sports (fifteen schools multiplied by $6 million equals $90 million).302 The Big 10 could compensate all of its scholarship football players and match spending on women’s sports with the revenues from the college football playoff system revenues alone (fourteen teams multiplied by $6 million equals $84 million), and the Big 10 Conference would still have $48.5 million remaining from the revenue generated by the

297. Id.
298. Id.
299. Id. at 50–54.
300. Id. at 55–59.
301. Id. at 59–60.
302. Id.
college football playoff system. Thus, compensating athletes in the revenue generating sports (i.e., football and men’s college basketball) would not violate Title IX, and, if it resulted in universities spending substantially more money on women’s athletics, then women’s athletics would only improve.

B. The Free Market Model Calculations Should Include Scholarship Values

Opponents of compensating college athletes above their scholarship amounts argue that college athletes already receive enough through their scholarships, which have value. Although scholarships possess value, they have been awarded to athletes since the 1950s, well before major college athletics turned into a multibillion dollar industry. Universities’ athletic departments now enjoy vast resources and could compensate college athletes through a reallocation of their resources, or alumni or booster donations could pay the compensation earned by athletes.

V. Conclusion

Everyone involved in the business of college athletics, except the athletes, receives compensation based on a free market system, upon which this country’s capitalist system operates. The NCAA’s cap on athlete compensation violates antitrust law, and athletes should be allowed to earn their free market value as everyone else does. A free market approach, as this Article sets forth in detail, would not only be feasible, but it would likely improve the product on the field and the court, as well as the lives of those young men who provide so much excitement and joy to many through their athletic efforts.

303. See Dash, supra note 170.
304. See Jeffrey Doshman, Pay College Athletes? They’re Already Paid Up To $125,000 Per Year, FORBES (Aug. 29, 2013, 8:00 AM), https://www.forbes.com/sites/jeffreydoshman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000-year/; [https://perma.cc/8RSX-X3EF] (“Student athletes are already paid and the current system is pretty close to as fair as we are going to get.”); John R. Thelin, Here’s Why We Shouldn’t Pay College Athletes, TIME (Mar. 1, 2016), http://time.com/money/4241077/why-we-shouldnt-pay-college-athletes/ [https://perma.cc/D84W-FD3B] (arguing that a scholarship is better than paying college athletes because of tax benefits).
305. McCormick, supra note 27 (providing that universities formally sanctioned full grant-in-aid athletic scholarships in 1956).
306. See Nocera, supra note 165 (discussing a plan to pay college athletes with the existing budgets and resources).
APPENDIX A

Proposed Standard College Athlete Contract

THIS CONTRACT is between [Player’s Name], hereinafter “ATHLETE,” and [Name of University/College], hereinafter “UNIVERSITY,” a member of the National Collegiate Athletics Association, hereinafter “NCAA.” In consideration of the promises made by each to the other, ATHLETE and UNIVERSITY agree as follows: \(^{307}\)

1. TERM. This CONTRACT covers the sport of [Football or Basketball] and will begin on the date of execution or August __, 20__, whichever is later, and end on May __, 20__, unless extended, terminated, or renewed as specified elsewhere in this CONTRACT. \(^{308}\)

2. EMPLOYMENT AND SERVICES. UNIVERSITY employs ATHLETE as a skilled [Football or Basketball] player. ATHLETE accepts such employment. ATHLETE agrees to do the following:

   a. Meet the admission requirements of the UNIVERSITY; \(^{309}\)
   b. Report promptly for and participate fully in all UNIVERSITY meetings and practice sessions, and all preseason, regular season, and postseason football games scheduled for or by the UNIVERSITY; \(^{310}\)
   c. Meet and maintain the eligibility requirements for athletic participation established by the NCAA, the [relevant] Conference, and the UNIVERSITY; \(^{311}\)
   d. Abide by the UNIVERSITY’s Athletic Department’s academic standards program as set forth in the student-athlete handbook;\(^{312}\)
   e. Adhere to all rules and policies of the UNIVERSITY’s Athletic Department, including but not limited to team rules, equipment

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\(^{307}\) NFL Player Contract, supra note 187.

\(^{308}\) Id. ¶ 1.

\(^{309}\) See Sample Athletic Financial Aid Agreement Letter, supra note 188.

\(^{310}\) See NFL Player Contract, supra note 187, at ¶ 2.

\(^{311}\) See Sample Athletic Financial Aid Agreement Letter, supra note 188.

\(^{312}\) See id.
room policies, strength and conditioning program policies, and medical services policies.\textsuperscript{313}

3. OTHER ACTIVITIES. Without prior written consent of the UNIVERSITY, ATHLETE will not play [Football or Basketball] or engage in activities related to [Football or Basketball] or otherwise engage in any activity other than [Football or Basketball] for the UNIVERSITY that may involve a significant risk of personal injury.\textsuperscript{314}

4. COVENANT NOT TO COMPETE. ATHLETE represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a [Football or Basketball] player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. ATHLETE therefore agrees that UNIVERSITY will have the right, in addition to any other right that UNIVERSITY may possess, to enjoin ATHLETE by appropriate proceedings from playing [Football or Basketball] or engaging in [Football- or Basketball-related] activities other than for UNIVERSITY during the TERM of this CONTRACT or from engaging in any activity other than [Football or Basketball] which may involve a significant risk of personal injury during the TERM of this CONTRACT.\textsuperscript{315}

5. PUBLICITY. (a) ATHLETE hereby grants to UNIVERSITY and the NCAA, separately and together, the right and authority to use, and to authorize others to use solely as described below, his name, nickname, initials, likeness, image, picture, photograph, animation, persona, autograph/signature (including facsimiles thereof), voice, biographical information, and/or any and all other identifying characteristics (collectively, “Publicity Rights”), for the following purposes: promoting or advertising games, ticket sales, game broadcasts and telecasts, programming focused on college [Football or Basketball], one or more universities and/or their games and events (e.g., coaches’ shows, highlight-based shows, behind-the-scenes programming), other college [Football or Basketball]-related media offerings (e.g., branded content segments featuring game footage and other programming enhance-

\textsuperscript{313} See id.
\textsuperscript{314} See NFL Player Contract, supra note 187, ¶ 3.
\textsuperscript{315} See generally id. ¶ 3; see also supra note 277 and accompanying text for discussion of the benefits of requiring players to stay in college longer to avoid violating their contracts.
ments), media distribution platforms, official events, officially sanctioned awards programs, and public service or community oriented initiatives. This use of name, image, and likeness can be accomplished in any way in any and all media or formats, whether analog, digital, or other, now known or hereafter developed, including, but not limited to, print, tape, disc, computer file, radio, television, motion pictures, other audio-visual and audio works, Internet, broadband platforms, mobile platforms, applications, and other distribution platforms. Notwithstanding anything to the contrary, the foregoing grant does not confer, during or after the term of this Agreement, any right or authority to use ATHLETE’s Publicity Rights in a manner that constitutes any endorsement by ATHLETE of a third-party brand, product, or service (Endorsement).\textsuperscript{316} (b) ATHLETE may enter into endorsement deals with third parties and profit from the use of his name, image, and likeness.\textsuperscript{317}

6. COMPENSATION. For performance of ATHLETE’s services and all other promises of ATHLETE, UNIVERSITY will provide ATHLETE with the following:

a. A [grant-in-aid scholarship that will cover the ATHLETE’s tuition, room, books, and board] [or] [full cost of attendance scholarship] during the TERM of this CONTRACT.

b. A yearly salary as follows:

$____ for the 20___ season;
$____ for the 20___ season;
$____ for the 20___ season; and
$____ for the 20___ season.\textsuperscript{318}

c. In addition, UNIVERSITY will pay ATHLETE such earned bonuses as may be called for in this CONTRACT under the Addendum.\textsuperscript{319}

\textsuperscript{316} See NFL Player Contract, supra note 187, at \S 4.

\textsuperscript{317} See Leslie E. Wong, Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA For Infringing on the Former Student-Athlete’s Right of Publicity, 42 TEX. TECH L. REV. 1069, 1074–75 (2013) (noting that currently “[i]n order for a student-athlete to maintain his eligibility status . . . he may not accept endorsements of any kind from anyone or receive any compensation for the public use of his personal image”).

\textsuperscript{318} See NFL Player Contract, supra note 187, at \S 5.

\textsuperscript{319} See id.
7. PAYMENT. Unless this CONTRACT provides otherwise, ATHLETE will be paid 100% of his yearly salary under this CONTRACT in equal weekly or biweekly installments over the course of the applicable school year, commencing with the first mandatory reporting date. Unless this CONTRACT specifically provides otherwise, if this CONTRACT is terminated after the reporting date, the yearly salary payable to ATHLETE will be reduced proportionately and ATHLETE will be paid the weekly or biweekly portions of his yearly salary having become due and payable up to the time of termination. Bonuses will be paid at the end of the applicable school year or as set forth in the Addendum.\footnote{Id. ¶ 6.}

8. INJURY. Unless this CONTRACT specifically provides otherwise, if ATHLETE is injured in the performance of his services under this CONTRACT and promptly reports such injury to the UNIVERSITY physician or trainer, then ATHLETE will receive such medical and hospital care during the TERM of this CONTRACT as the UNIVERSITY physician may deem necessary, and will continue to receive his yearly salary during the season of injury only and for no subsequent period covered by this CONTRACT if ATHLETE is physically unable to perform the services required of him by this CONTRACT because of such injury. ATHLETE will not lose his scholarship even if he is physically unable to perform the services required of him during the TERM of this CONTRACT.\footnote{Id. ¶ 9.}

9. WORKERS’ COMPENSATION. Any compensation paid to ATHLETE under this CONTRACT for a period during which he is entitled to workers’ compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers’ compensation benefits due ATHLETE, and UNIVERSITY will be entitled to be reimbursed the amount of such payment out of any award of workers’ compensation.\footnote{Id. ¶ 10.}

10. FILING. This CONTRACT will be valid and binding upon ATHLETE and UNIVERSITY immediately upon execution. A copy of this contract, including any attachment to it, will be filed by the UNIVERSITY
with the NCAA within 10 days after execution.\footnote{323}

11. RECRUITING BAN AFTER SIGNING. All members of the NCAA are obligated to respect the ATHLETE’s signing and shall cease to recruit ATHLETE after signing this CONTRACT.\footnote{324}

12. COACHING CHANGES. ATHLETE understands he has signed this CONTRACT with UNIVERSITY and not with a particular coach. If a coach leaves the UNIVERSITY or the sports program (e.g., not retained or resigns), ATHLETE remains bound by the provisions of this CONTRACT. ATHLETE understands it is not uncommon for a coach to leave his or her coaching position.\footnote{325}

13. CANCELLATION. This CONTRACT may be immediately canceled during the TERM of this CONTRACT if ATHLETE violates any provision in paragraphs 2, 3, or 4 within this CONTRACT. This CONTRACT may also be cancelled if ATHLETE does any of the following: (1) becomes ineligible for intercollegiate competition (for example, by carrying less than 12 applicable semester credits); (2) engages in serious misconduct that brings disciplinary action from the UNIVERSITY; or (3) voluntarily withdraws from the sport for personal reasons.\footnote{326} ATHLETE cannot be terminated for disappointing athletic performance provided ATHLETE is maintaining himself in excellent physical condition.\footnote{327}

14. DISPUTES. Any dispute between ATHLETE and UNIVERSITY involving the interpretation or application of any provision of this CONTRACT will be submitted to final and binding arbitration\footnote{328} by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.\footnote{329}

\footnote{323} Id. at \textsection 18. \\
\footnote{324} See National Letter of Intent, \textit{supra} note 188, at \textsection 8. \\
\footnote{325} Id. at \textsection 11. \\
\footnote{326} See Sample Athletic Financial Aid Agreement Letter, \textit{supra} note 188. \\
\footnote{327} See \textit{NFL Player Contract}, \textit{supra} note 187, at \textsection 19; 2017–18 NCAA DIVISION I MANUAL, \textit{supra} note 57, ART. 12.1.2(a); Bilas Interview, \textit{supra} note 32. \\
\footnote{328} See \textit{NFL Player Contract}, \textit{supra} note 187, at \textsection 19. \\
\footnote{329} See generally \textit{Drafting Dispute Resolution Clauses: A Practical Guide}, AM. ARB. ASS’N
15. NOTICE. Any notice, request, approval, or consent under this CONTRACT will be sufficiently given if in writing and delivered in person or mailed (certified or first class) by one party to the other at the address set forth in this CONTRACT or to such other address as the recipient may subsequently have furnished in writing to the sender.\textsuperscript{330}

16. NO ORAL MODIFICATION OR WAIVER. No modifications or waivers of any provision in this agreement will be binding or valid unless in writing and executed by both parties.\textsuperscript{331}

17. INTEGRATION CLAUSE. This CONTRACT, including any attachment to it, sets forth the entire agreement between ATHLETE and UNIVERSITY and cannot be modified or supplemented orally. ATHLETE and UNIVERSITY represent that no other agreement, oral or written, except as attached to or specifically incorporated in this CONTRACT, exists between them.\textsuperscript{332}

18. LAW. This contract is made under and shall be governed by the laws of the State of [Name of State where UNIVERSITY is located].\textsuperscript{333}

19. EXECUTION. THIS CONTRACT is executed in four (4) copies. ATHLETE acknowledges that before signing this CONTRACT he was given the opportunity to seek advice from or be represented by persons of his own selection.\textsuperscript{334}

SEE ADDENDUM

SIGNATURES:\textsuperscript{335}

\textsuperscript{330} See NFL Player Contract, supra note 187, at ¶ 20.
\textsuperscript{332} See NFL Player Contract, supra note 187, at ¶ 21.
\textsuperscript{333} See id. at ¶ 22.
\textsuperscript{334} See id. at ¶ 25.
\textsuperscript{335} See id.
ATHLETE

Home Address

Telephone Number

Date

UNIVERSITY

By

UNIVERSITY Address

Date

ATHLETE’S AGENT

Address

Telephone Number

Date

Copy Distribution:
White-NCAA; Yellow-ATHLETE; Green-UNIVERSITY; Pink-ATHLETE’S Agent

ADDENDUM TO CONTRACT BETWEEN ATHLETE AND UNIVERSITY

SIGNING BONUS

1. As additional consideration for the execution of the CONTRACT for the TERM, for ATHLETE’s matriculating at UNIVERSITY and reporting

260
to the team upon matriculation, UNIVERSITY agrees to pay ATHLETE the sum of $________ as a signing bonus (Signing Bonus), payable as follows:336

<table>
<thead>
<tr>
<th>Amount:</th>
<th>Due and Payable:</th>
</tr>
</thead>
<tbody>
<tr>
<td>$</td>
<td>Within fifteen (15) days after ______, 20 ;</td>
</tr>
<tr>
<td>$</td>
<td>Within five (5) days after ______, 20 ;</td>
</tr>
<tr>
<td>$</td>
<td>Within five (5) days after ______, 20 ;</td>
</tr>
<tr>
<td>$</td>
<td>Within five (5) days after ______, 20 .337</td>
</tr>
</tbody>
</table>

2. It is expressly understood that no part of the Signing Bonus is part of any salary specified in the CONTRACT, and ATHLETE is entitled to the Signing Bonus even if the ATHLETE becomes unable to perform his services because of injury during the TERM of the CONTRACT.338

PERFORMANCE-BASED BONUS(ES) 339

3. ATHLETE will receive [$($_______)] for finishing the season as the team leader in [(for football) yards passing, yards rushing, yards receiving, total touchdowns, total scoring, sacks, defensive tackles, tackles for losses, interceptions, pass break-ups, special teams tackles, kickoff return yardage, and/or punt return yardage] or [(for basketball) points per game, rebounds, assists, blocked shots, and/or steals].

4. ATHLETE will receive [$($_______)] for reaching [x amount of] [(for football) rushing yards, touchdowns scored, passing yards, sacks, defensive tackles, tackles for losses, interceptions] or [(for basketball) points per game, rebounds per game, assists per game, blocked shots per game, and/or steals per game].


337. Id. at ¶ 1.

338. See id. at ¶ 3.

5. ATHLETE will receive the following bonuses if he earns any or all of the following individual honors:

<table>
<thead>
<tr>
<th>Honor</th>
<th>Bonus</th>
</tr>
</thead>
</table>
| Heisman Trophy Winner                      | $(_____)
| National Player of the Year                | $(_____)
| Conference Player of the Year              | $(_____)
| Conference Offensive Player of the Year    | $(_____)
| Conference Defensive Player of the Year    | $(_____)
| Conference Freshman/Newcomer of the Year   | $(_____)
| All-American First Team                    | $(_____)
| All-American Second Team                   | $(_____)
| All-American Third Team                    | $(_____)
| All-Conference First Team                  | $(_____)
| All-Conference Second Team                 | $(_____)
| All-Conference Third Team/Honorable Mention| $(_____)

6. ATHLETE will receive the following bonuses if the team achieves any or all of the following:

[Football]

<table>
<thead>
<tr>
<th>Postseason Game</th>
<th>Bonus</th>
</tr>
</thead>
</table>
| Conference Championship Game Participant | $(_____)
| Conference Championship Game Winner      | $(_____)
| Bowl Game Participant                     | $(_____)
| Bowl Game Winner                          | $(_____)
| National Semifinalist                     | $(_____)
| National Runner-Up                       | $(_____)
| National Champion                         | $(_____)

340. The bonuses proposed in the Duke Model range from $1,000 for All-Conference Third Team/Honorable Mention to $25,000 for the Heisman Trophy Winner. See David A. Grenardo, The Duke Model: A Performance-Based Solution for Compensating College Athletes, 83 BROOK. L. REV. 157, 193 (2017). These categories come from the Duke Model, but do not represent an exhaustive list. Universities and athletes would be free to negotiate compensation for any external honors they wanted.
[Basketball]

<table>
<thead>
<tr>
<th>Postseason Game</th>
<th>Bonus</th>
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<tr>
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<td>$(______)</td>
</tr>
<tr>
<td>Conference Championship Game Winner</td>
<td>$(_____ )</td>
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<tr>
<td>NCAA Tournament 1st Round Participant</td>
<td>$(_____ )</td>
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<tr>
<td>NCAA Tournament 2nd Round Participant</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NCAA Tournament Sweet 16 Participant</td>
<td>$(_____ )</td>
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<tr>
<td>NCAA Tournament Elite 8 Participant</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NCAA Tournament National Semifinalist</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NCAA Tournament National Runner-Up</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NCAA Tournament National Champion</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NIT Participant</td>
<td>$(_____ )</td>
</tr>
<tr>
<td>NIT Champion</td>
<td>$(_____ )</td>
</tr>
</tbody>
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ACADEMIC-BASED BONUS(ES)³⁴¹

7. ATHLETE will receive the following bonuses if he earns any or all of the following individual academic honors:

³⁴¹ See discussion supra Section III.B; see also Grenado, supra note 340, at 199.
<table>
<thead>
<tr>
<th>Honor</th>
<th>Bonus</th>
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<tr>
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</tr>
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<td>Academic All-American Second Team</td>
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</tr>
<tr>
<td>Academic All-American Third Team</td>
<td>$(__<em>)</em></td>
</tr>
<tr>
<td>Academic All-District Team</td>
<td>$(__<em>)</em></td>
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<tr>
<td>Academic All-Conference</td>
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### Appendix B

2017-2018 Ohio State University Buckeyes Football Team

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<th>Year</th>
<th>Base Salary</th>
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<th>Performance Bonus</th>
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