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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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The Blue Devil's In The Details: How A Free Market Approach To Compensating College Athletes Would Work¹

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

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.dbml?ATCLID=242333> (last visited Oct. 8, 2018) [<https://perma.cc/5B72-UBJJ>]. 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.

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violates antitrust law, and athletes should be allowed to earn their free market value as everyone else does in this country. This Article provides a detailed approach to compensating college athletes under a free market model, which includes a salary cap, the terms of a proposed standard player's contract, 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.

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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 proclamation 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

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-attendance-scholarships> [<https://perma.cc/8M6B-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”).

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.⁶ The Ninth Circuit reasoned that the \$5,000 was "untethered to educational expenses" and, therefore, impermissible.⁷ 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."⁸

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.⁹ 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.¹⁰

Major college athletics, which include the revenue-generating sports of college football and men's basketball,¹¹ have become an \$11 billion-a-year industry.¹² College coaches make millions of dollars, many in salary alone,

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.

10. See William B. Gould IV et al., *Full Court Press: Northwestern University, a New Challenge to the NCAA*, 35 LOY. L.A. ENT. L. REV. 1, 8-9 (2014) (discussing the multibillion dollar industry of men's college basketball and football); see also NCAA, 2015-16 NCAA DIVISION I MANUAL § 12.1.2 (Aug. 1, 2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> [<https://perma.cc/RJ4Z-Y9XM>] (providing that a college athlete becomes ineligible if one "[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport") [hereinafter "NCAA DIVISION I MANUAL"]; Amy C. McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 496-97 (2008) (stating the NCAA is a \$60,000,000,000 industry); Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote the Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 846-47 (2014) (addressing the multibillion-dollar industry of major college sports).

11. See Cork Gaines, *The Average College Football Team Makes More Money Than the Next 25 College Sports Combined*, BUS. INSIDER (Oct. 20, 2016, 12:08 PM), <http://www.businessinsider.com/college-sports-revenue-2016-10> [<https://perma.cc/9BDF-KVGQ>].

12. Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 CARDOZO L. REV. 1627, 1630-31 (2017).

along with compensation for bonuses and endorsements.¹³ 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.¹⁴ 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.¹⁵ Jimbo Fisher signed a \$75 million contract to coach Texas A&M over a ten-year period.¹⁶ College football coaches received over \$12 million in bonuses for the 2015 season,¹⁷ while men's basketball coaches also receive exorbitant bonuses, based primarily on the success of their teams.¹⁸ Moreover, the former head coach of the Ohio State football team, Urban Meyer, received \$2,201,450 from Ohio State's endorsement deal with Nike and television appearances on behalf of the team.¹⁹ Even assistant

13. Steve Berkowitz et. al, *2017 NCAA Tournament Coaches' Pay*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach/> (last visited Oct. 8, 2018) [<https://perma.cc/5ZWH-UYKP>] [hereinafter *NCAA Tournament Coaches' Pay*]; Steve Berkowitz et. al, *2017 NCAA Coaches' Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries> (last visited Oct. 8, 2018) [<https://perma.cc/74VZ-YQ35>] [hereinafter *2017 NCAA Coaches' Salaries*].

14. *2017 NCAA Tournament Coaches' Pay*, *supra* note 13.

15. *2017 NCAA Coaches' Salaries*, *supra* note 13.

16. *Jimbo Fisher gets 10-years, \$75 million deal at Texas A&M*, USA TODAY (Dec. 4, 2017, 1:30 PM), <https://www.usatoday.com/story/sports/ncaaf/2017/12/04/jimbo-fisher-gets-75-million-deal-to-coach-texas-a-m/108304980/> [<https://perma.cc/V9YT-MWR7>].

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/ncaaf/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.*

18. See Steven Berkowitz, *As Always, Big Bonus Bucks in Store for Sweet 16 Coaches*, USA TODAY (Mar. 22, 2017, 2:19 PM), <https://www.usatoday.com/story/sports/ncaab/2017/03/22/sweet-16-coaches-bonuses-march-madness/99494474/> [<https://perma.cc/2JB9-TW3G>] (detailing the bonus opportunities for the 2017 Sweet 16 head coaches and stating bonuses are given to basketball coaches for team wins, conference titles, rank, and post-season wins for appearance in NCAA tournament, Sweet 16, Elite Eight, Final Four, and NCAA title).

19. *Urban Meyer Contract at Ohio State*, NEWSDAY, <http://sports.newsday.com/long-island/data/college/college-football/coaches-salaries/urban-meyer/> (last visited Oct. 8, 2018) [<https://perma.cc/PY2X-ZTBG>]; Ben Cohen & Sara Germano, *Nike Reaches \$252 Million Deal to Extend*

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

Sponsorship at Ohio State, WALL ST. J. (Jan. 16, 2016, 1:21 PM), <https://www.wsj.com/articles/nike-reaches-252-million-deal-to-extend-sponsorship-at-ohio-state-1452811305>.

20. *2017 NCAAF Coaches' Salaries*, *supra* note 13; Steve Berkowitz et. al, *2017 NCAAF Assistant Coaches' Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/assistant> (last visited Oct. 8, 2018) [<https://perma.cc/6TLF-2J3R>].

21. *2017 NCAAF Coaches' Salaries*, *supra* note 13; *2017 NCAAF Assistant Coaches' Salaries*, *supra* note 20; Steve Berkowitz et. al, *2017 NCAAF Strength Coaches' Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/football/strength> (last visited Oct. 8, 2018) [<https://perma.cc/9NCA-GHG9>].

22. See Alex Kirshner, *The Embattled Mark Emmert Will Be the NCAA's President for 3 More Years*, SB NATION (Feb. 1, 2016, 1:17 PM), <https://www.sbnation.com/college-football/2016/2/1/10886996/mark-emmert-ncaa-president-contract-extension-salary> ("In 2012, [NCAA President] Emmert reportedly made \$1.7 million . . .").

23. Jason Gay, *Stop Giving College Athletes Million-Dollar Locker Rooms. Start Paying Them*, WALL ST. J. (Aug. 18, 2017, 12:52 PM), <https://www.wsj.com/articles/stop-giving-college-athletes-million-dollar-locker-rooms-start-paying-them-1503075169> [<https://perma.cc/T8RK-7WY9>].

24. Steve Rosen, *Awash in Big Ten Money, Nebraska Eyes Spending Opportunities*, HUSKERONLINE (Aug. 18, 2017), <https://nebraska.rivals.com/news/awash-in-big-ten-money-nebraska-eyes-spending-opportunities> (last visited Oct. 8, 2018) [<https://perma.cc/X6JQ-2RYJ>].

25. E.g., Michael Wilbon, *College Athletes Deserve to Be Paid*, ESPN (July 18, 2011), http://www.espn.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid [<https://perma.cc/2F3K-BJLX>]; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?mcubz=3> [<https://perma.cc/7Y3X-KXFT>].

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

26. See, e.g., *Negotiating Academic Job Offers*, UNIV. NEB., <http://www.unl.edu/gradstudies/current/news/negotiating-academic-job-offers> (last visited Oct. 8, 2018) [<https://perma.cc/3P89-J2RX>] (providing tips and suggestions on how to negotiate an employment contract with a university); see also Patricia Rogers & Sarah Drake, *UT is Austin's Largest Employer*, AUSTIN BUS. J. (Jun. 8, 2012, 12:27 PM), <http://www.bizjournals.com/austin/news/2012/06/08/ut-is-austins-largest-employer.html> [<https://perma.cc/LY7D-BG2T>] (indicating the University of Texas employed 21,626 people in 2012).

27. Robert A. McCormick & Amy C. McCormick, *The Myth of The Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 75–76 (2006) (recounting the lavish salaries of the coaches as well as the huge revenues media corporations generate from broadcasting college events).

28. See Report: *Georgetown RB Ty Williams Breaks Neck, Could Be Paralyzed*, SPORTS ILLUSTRATED (Sept. 6, 2015), <http://www.si.com/college-football/2015/09/06/georgetown-hoyas-ty-williams-broken-neck> [<https://perma.cc/L5RW-NLBZ>] (reporting that a running back for Georgetown broke five bones in his neck and vertebrae); Mark Viera, *Rutgers Player is Paralyzed Below the Neck*, N.Y. TIMES (Oct. 17, 2010), http://www.nytimes.com/2010/10/18/sports/ncaafootball/18rutgers.html?_r=0 [<https://perma.cc/8P66-N932>] (stating a Rutgers University defensive tackle was paralyzed after colliding with another player).

29. See *supra* note 28; see also A.J. Perez, *Study: CTE Diagnosed in 99% of Former NFL Players Studied By Researchers*, USA TODAY (July 25, 2017), <https://www.usatoday.com/story/sports/nfl/2017/07/25/cte-diagnosed-99-percent-former-nfl-players-according-study/507634001/> [<https://perma.cc/A3AW-GB8Z>] (discussing the frightening symptoms of CTE and the prevalence of CTE in former football players); Sam Mellinger, *Doctors Couldn't Find What Was Wrong with Michael Keck, but Football Star Knew It Would Kill Him*, KAN. CITY STAR (Nov. 21, 2015, 9:52 PM), <http://www.kansascity.com/sports/spt-columns-blogs/sam-mellinger/article45850180.html> [<https://perma.cc/88R9-C523>] (recounting the death of a twenty-five-year-old football player that was diagnosed with CTE).

30. See Karen Crouse, *When an Olympian Goes to College, Riches Stay Out of Reach*, N.Y. TIMES (Apr. 16, 2016), http://www.nytimes.com/2016/04/17/sports/olympics/katie-ledecky-olympian-goes-to-college-riches-stay-out-of-reach.html?_r=2 (“The rules of amateurism that severely curb the earning potential of college student-athletes do not apply to college student musicians.”).

their sport.³¹ 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.”³²

This Article acknowledges that a college education itself possesses value.³³ 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.³⁴ 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.³⁵ 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.³⁶ Part IV addresses the counterarguments to the approach and responses thereto.³⁷ 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.³⁸

31. See *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Nov. 9, 2018).

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).

33. See Anemona Hartocollis, *What Is a College Education Worth?*, N.Y. Times (Oct. 31, 2016) <https://www.nytimes.com/interactive/projects/cp/national/college-applications/what-is-a-college-education-worth> (discussing the economic importance of a college education in the United States).

34. See Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 129 (2012) (describing the unjust enrichment the universities receive by using players’ images and likeness without compensating them); Taylor Branch, *The Shame of College Sports*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (last visited Oct. 8, 2018) [<https://perma.cc/K9W8-LS2F>] (alleging college athletes contribute to the multibillion dollar industry of college sports, many without pay).

35. See *infra* Part II.

36. See *infra* Part III.

37. See *infra* Part IV.

38. Compare Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 208, 226–27, 235, 240, 255–61 (1990) (criticizing the NCAA’s no-pay model and exploring alternative models that could support compensation to college athletes, ulti-

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

mately concluding a free market model would be most appropriate), with Joshua Lee & Jaimie McFarlin, *A European Solution to America's Basketball Problem: Reforming Amateur Basketball in the United States*, 6 HARV. J. SPORTS & ENT. L. 95, 141–42, 144–46, 153, 155–56, 158 (2015) (proposing a socio-cultural approach to the issue of amateur sports similar to the club system predominate in Europe but with a foundation in free market principles where college athletes are able to pursue financial support based on their fair market value).

39. Walter T. Champion, Jr., *Sports Law: Cases, Documents, and Materials* 164 (2d ed. 2014).

40. *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> (last visited Oct. 8, 2018) [<https://perma.cc/6KLV-CN5S>].

41. Matthew Mitten et al., *Sports Law and Regulation* 107 (4th ed. 2013).

42. *NCAA, Division II Partial-Scholarship Model*, NCAA, <http://www.ncaa.org/about/division-ii-partial-scholarship-model> (last visited Oct. 8, 2018) [<https://perma.cc/78KE-JLQH>].

43. MITTEN, *supra* note 41, at 107.

44. *Id.*

45. *Divisional Differences and the History of Multidivision Classification*, *supra* note 40.

46. Gould, *supra* note 10, at 15–17.

47. *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1> [<https://perma.cc/B54G-LK9L>] (last visited Oct. 8, 2018).

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

⁴⁸ *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Oct. 8, 2018).

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 . . .").

⁵³ Eric Prisbell, *What is Full Cost of Attendance for NCAA Athletes?*, USA TODAY (Aug. 17, 2014, 5:06 PM), <http://www.usatoday.com/story/sports/college/2014/08/17/ncaa-full-cost-of-attendance/14200387> [<https://perma.cc/WH7W-RV22>].

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).

⁵⁶ See generally Jake New, *Autonomy Faces First Test*, INSIDER HIGHER ED (Jan. 14, 2015), <https://www.insidehighered.com/news/2015/01/14/power-five-members-flex-new-legislative-muscles-ncaa-convention> (discussing the history of autonomy legislation and the passage of new policies that allow schools to pay cost of living expenses).

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]eason 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

57. See generally Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INSTITUTE (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (providing a comprehensive history of the debate over paying NCAA athletes).

58. See *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Oct. 8, 2018) [<https://perma.cc/QX89-EPJ9>] (describing the goal of antitrust laws: “to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up”).

59. 15 U.S.C. § 1 (2012).

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 Hosps., Inc.*, 929 F.2d 1404, 1410 (9th Cir. 1991)).

62. *Law*, 134 F.3d at 1019.

63. *Id.*; see also *Fortner Enter., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (defining “[m]arket 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”).

the anticompetitive effect is based on an actual and legitimate procompetitive justification.⁶⁴ Thus, the defendant carries the heavy burden of proving that the “the challenged restraint enhances competition.”⁶⁵ Notably, “mere profitability or cost savings have not qualified as a defense under the anti-trust laws.”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.”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.”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.”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?”⁷⁰

64. *NCAA v. Bd. of Regents*, 468 U.S. 85, 113 (1984). Legitimate procompetitive objectives include “preventing free riding, lowering transaction costs, and facilitating other output-promoting transactions.” ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 988 (2d ed. 2008). Other examples of acceptable procompetitive objectives involve “increasing output, creating operating efficiencies, enhancing product or service quality, and widening consumer choice.” RAY YASSER ET AL., *SPORTS LAW: CASES AND MATERIALS* (7th ed. 2011).

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

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 I. 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).

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).

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.*

69. *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

70. WILLIAM C. HOLMES, *INTELLECTUAL PROPERTY AND ANTITRUST LAW* §§ 5:7; see, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 879 (2007) (conducting a Rule of Reason analysis).

In the seminal case of *Board of Regents*,⁷¹ the United States Supreme Court applied a Rule of Reason analysis to major college athletics, which courts continue to do today.⁷² 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.⁷³ 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.⁷⁴ 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.⁷⁵

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.⁷⁶

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."⁷⁷ The Supreme Court further argued, "[T]he NCAA plays a vital role in ena-

71. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

72. *Bd. of Regents*, 468 U.S. at 86–135; *see also* *Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012) (applying the Rule of Reason analysis); *Law*, 134 F.3d at 1020 (applying the quick-look approach under the Rule of Reason analysis); *McCormack v. NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988) (applying the Rule of Reason); *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) (applying the Rule of Reason).

73. *Bd. of Regents*, 468 U.S. at 85.

74. *Id.*

75. *Id.* at 85–89.

76. *Id.* at 101.

77. *Id.* at 102.

bling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”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 *O’Bannon*⁷⁹ case that limited the amount of compensation athletes can earn.⁸⁰

C. *O’Bannon Found an Antitrust Violation But Fell Short*

The plaintiffs in *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.⁸¹ The district court held the NCAA’s compensation rules violated antitrust law under the Sherman Act.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.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.”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-

78. *Id.*

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

80. *Id.*, at 1050; *see also 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”).

81. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014), *aff’d in part and vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

82. *Id.*

83. *Id.* at 989.

84. *O’Bannon*, 802 F.3d at 1078.

ticompetitive effect on the relevant market.⁸⁵ 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.”⁸⁶ 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-fix the amount they will pay college athletes for their NILs, and they set that amount at zero.⁸⁷ Video game manufacturers would also negotiate and compensate college athletes for the use of their NILs but for the NCAA’s compensation prohibition.⁸⁸

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.⁸⁹ 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.⁹⁰ The NCAA relied on a study it commissioned to try to show that consumers would watch less college athletics if the players received payment.⁹¹

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.”⁹² 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 those 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’ 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.

sumers, an area that is rife with speculation and potential inaccuracy as similar studies demonstrated.⁹³ 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.⁹⁴ 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.⁹⁵ 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.⁹⁶

The district court found the study unpersuasive and attacked the NCAA's defense of amateurism.⁹⁷ 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."⁹⁸ 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."⁹⁹ 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.*

97. *O'Bannon*, 7 F. Supp. 3d at 999–1005.

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.

strictions 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.¹⁰⁸

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.¹⁰⁹ The *Jenkins* complaint sets forth the analysis showing how the NCAA's prohibition on athlete compensation violates antitrust law using the Rule of Reason.¹¹⁰ 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.¹¹¹ The named plaintiffs include "three top-tier college football and men's basketball players," and the class includes all similarly situated college athletes.¹¹²

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.¹¹³ 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

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.

109. *In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.*, 24 F. Supp. 3d 1366, 1367 (J.P.M.L. 2014) (transferring the case from the District of New Jersey to the Northern District of California by a multidistrict litigation panel because of the other antitrust cases against the NCAA that were already pending in the Northern District of California); see also Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2363–64 (2014) (advocating for a free market system to compensate college athletes); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 208 (1990); Andy Schwarz & Dan Rascher, *Opposing View: College Sports Should Work as Free Market*, USA TODAY (Jan. 12, 2012, 11:33 PM), <http://usatoday30.usatoday.com/news/opinion/story/2012-01-12/college-football-free-market/52524448/1> [<https://perma.cc/Y4PA-Y9R3>] (opining that a free market model would increase graduation rates, improve academic performance, ultimately "provide competitive balance among those schools that care the most").

110. Second Amended Complaint—Class Action Seeking Injunction at 28, *Jenkins v. NCAA*, No. 4:14-cv-02758–CW, 2015 WL 732448 (N.D. Cal. Feb. 13, 2015).

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.”¹¹⁴ 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.¹¹⁵

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.”¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸

The purported procompetitive benefit of amateurism fails to provide an actual, substantive justification for the anticompetitive effect on the market.¹¹⁹ The defendants possess no reliable evidence that if college athletes are paid, then less people will watch college football and basketball games.¹²⁰ 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.”¹²¹ 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.*

119. Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: Amateurism in Big-Time College Sports*, 14 ANTITRUST 51, 55 (2000) (stating that “[c]ollege sports need not include amateurism to prosper,” and that national on-field and on-court competition could “thrive in a system of conference-level wage regimes”).

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”).

121. See Testimony of Defendants’ Expert Witness, Christine Plonsky at 1414–15, *O’Bannon*, 7 F. Supp. 3d 955 (N.D. Cal. 2015) (No. 4:09-cv-03329-CW), 2014 WL 6907626.

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.

129. Richard F. Griffin, Jr., Nat'l Labor & Relations Bd., General Counsel's Report on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context, 1–2 (2017), <https://apps.nlr.gov/link/document.aspx/09031d4582342bfc> [<https://perma.cc/N99B-RM36>] [hereinafter General Counsel's Report]; Joseph Wilkinson, *New NLRB General Counsel Rescinds Memo That Labelled Football Players As Employees*, Daily Nw. (Dec. 15, 2017), <https://dailynorthwestern.com/2017/12/15/lateststories/new-nlr-general-counsel-rescinds-memo-labelled-football-players-employees/> (reporting that the "[n]ew general counsel Peter Robb, who was appointed by President Donald Trump and confirmed by the U.S. Senate on Nov. 8, [2017] invalidated that [Griffin] memo on Dec 1[, 2017]").

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)).

Consideration, *i.e.*, payment, is strongly indicative of employee status.”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[] and provid[ing] an immeasurable positive impact to Northwestern’s reputation, which in turn undoubtedly boosted student applications and alumni financial donations.”¹³³ Football players received compensation in return for their services in the form of scholarships.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[,]”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.”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.”¹³⁷ Section 7 provides employees with the “right to engage in concerted activities for ‘mutual aid or protection.’”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.¹³⁹ CAPA, comprised of over 17,000 Division I college athletes, is a national group that advocates for college athletes’ rights.¹⁴⁰

132. GENERAL COUNSEL’S REPORT, *supra* note 129, at 18 (citing Boston Med. Ctr. Corp. & House Officers’ Ass’n Comm. of Interns and Residents, 330 NLRB No. 30, slip op. at 160 (Nov. 26, 1999)).

133. GENERAL COUNSEL’S REPORT, *supra* note 129, at 19.

134. *Id.*

135. *Id.* at 19.

136. *Id.* at 20.

137. *Id.* at 21.

138. *Id.* at 21; *see also* 29 U.S.C. § 157 (2012) (discussing the rights of employees to self-organization and to collective bargaining).

139. *See infra* Section III.C (analyzing a possible standard player’s contract for college athletes).

140. *Who We Are*, C. ATHLETES 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.¹⁴¹

B. 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.¹⁴² 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.”¹⁴³ 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.”¹⁴⁴ 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.”¹⁴⁵ 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.”¹⁴⁶

Salary caps clearly represent restraints on trade as they limit the amount players or employees can earn.¹⁴⁷ Thus, under antitrust analysis, salary caps require some procompetitive justification to persist.¹⁴⁸ Competitive balance between the teams serves as the primary procompetitive justification for sal-

141. See *infra* Section III.E (discussing who can represent college athletes to negotiate their contracts with universities).

142. Alan M. Levine, Note, *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).

143. *Id.*

144. *Id.* at 245–46.

145. *Id.* at 278–79.

146. *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., *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).

147. See Levine, *supra* note 142, at 248 (arguing the salary cap’s purpose is to restrain players’ salary); see also Scott J. Foraker, Note, *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).

148. 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).

ary caps.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.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.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.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.¹⁵³ If no salary cap existed in college athletics, there is no telling how much rabid boosters and alumni would pay to attract

149. *Id.* ("Proffered justifications for the salary cap are that it increases the financial stability of league franchises and that it fosters a competitive balance among franchises.").

150. See Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 260 (2009) ("The salary cap limits teams' ability to hoard talent via overcompensation . . ."); see also Timothy J. Bucher, Note, *London Bridges Falling Down: How Conflicts Between U.S. and European Law May Derail the NBA's Move to Europe*, 11 VA. SPORTS & ENT. L.J. 377, 412 (2012) (acknowledging the salary cap contributes to the distribution of players amongst teams); Ryan M. Rodenberg & Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. 191, 221 (2013) (arguing the distribution of talent and competitiveness are results of the salary cap).

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-players-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).

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/5B89-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 Schotter, *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").

153. Alex Scarborough, *Bama Boosters Pay Off Saban's Home*, ESPN (Oct. 27, 2014), http://espn.go.com/college-football/story/_/id/11772033/alabama-crimson-tide-boosters-pay-coach-nick-saban-home [<https://perma.cc/A5MG-UWYJ>].

the top quarterback or running back to play for their schools. A salary cap in college athletics would help maintain competitive balance while still allowing athletes to earn compensation.¹⁵⁴ Employing a salary cap, which the NFL and NBA use, serves as a less restrictive means to maintain a competitive balance than completely prohibiting college athlete compensation.¹⁵⁵

Moreover, if college players were considered employees, then the universities and the NCAA might seek some type of an exemption to avoid antitrust scrutiny of the salary cap altogether.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 collective 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.¹⁵⁷

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

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”).

155. See Steve Murphy & Jonathan Pace, *A Plan for Compensating Student-Athletes*, BRIGHAM YOUNG U. EDU. L. J. 167, 178–80 (1994), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?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 Lackner, *NFL Salary Cap FAQ*, ASKTHECOMMISH, <http://www.askthecommish.com/SalaryCap/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 team, including, among other things, “gate receipts, . . . [b]roadcast rights[,] . . . program and concession sales[,] . . . [p]arking[, and] [p]roceeds from team sponsorships [and] . . . team promotions.” Larry Coon, *NBA Salary Cap FAQ*, CBFAFAQ (July 1, 2018), <http://www.cbafaq.com/salarycap.htm#Q12> [<https://perma.cc/2HC5-DFSJ>].

156. See Thomas R. Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55, 81 (2000).

157. See *id.* at 65.

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

159. See *id.* (discussing the exceptions to the salary cap in the NBA, which could serve as an example for future exceptions in college athletics).

cap will be the easiest to employ.¹⁶⁰ 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.¹⁶¹ FBS teams typically include eighty-five (85) scholarship athletes, which is more than enough to account for injuries.¹⁶² In college basketball, when players leave for the professional ranks or suffer injuries, teams can add walk-ons to fill open spots.¹⁶³ 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.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ 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.*

161. Jeanna Thomas, *Here's How NFL Practice Squads Work*, SB NATION (Aug. 31, 2018, 9:47 AM), <https://www.sbnation.com/2016/9/3/12773904/nfl-practice-squad-players-roster-rules-eligibility-primer> [https://perma.cc/8P53-5BYU].

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-ia-iaa-scholarships-division-1-what-is> ("FBS teams are allowed 85 [scholarships] . . . while FCS teams allow 63 or fewer scholarships.").

163. *See* Charlie Zegers, *What Is a Walk-On?*, THOUGHTCO. (Jan. 30, 2018), <https://www.thoughtco.com/what-does-walk-on-mean-325796> (explaining that a walk-on is "an athlete who becomes part of a team without being . . . awarded an athletic scholarship").

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).

165. Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), <https://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html> [https://perma.cc/Q6V7-R5DZ] (proposing a \$3 million salary cap because universities could afford it).

166. *See id.*

now make \$1 million each.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 2016.¹⁶⁸ Moreover, some athletic directors make seven figures, some of which could be reallocated to pay the players.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 college football playoff system, and how many of their teams meet the NCAA's APR for participation in a post-season football game.¹⁷⁰ The conferences then distribute the revenues to the teams pursuant to "each conference's own rules."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.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).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

167. 2017 NCAAF Coaches' Salaries, *supra* note 13; 2017 NCAAF Assistant Coaches' Salaries, *supra* note 13.

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).

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 William from Vanderbilt, whose salary totals \$3,239,678, and indicating eight more athletic directors each receive compensation over \$1 million).

170. See *College Football Playoff Revenue Distribution Policies*, COLL. FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/revenue-distribution> (last visited Oct. 8, 2018) [<https://perma.cc/GR24-YT8L>] (detailing how revenue from college football playoffs are distributed); see also Kristi Dosh, *College Football Playoff Payouts by Conference for 2016–17*, FORBES (Dec. 31, 2016, 2:41 PM), <https://www.forbes.com/sites/kristidosh/2016/12/31/college-football-playoff-payouts-by-conference-for-2016-17/#4ebe8d4f572d> (recounting the payout for playoffs by each conference).

171. Dosh, *supra* note 170.

172. *Id.*

173. See *Power 5 Conference Power Rankings*, ESPN (Sept. 4, 2018), http://www.espn.com/college-football/story/_/id/24570980/power-5-conference-power-rankings.

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/5S89-E9V7>] (providing that "K-State had the grand opening of the \$68 million . . . [c]omplex last week[] and the next phase of the stadium improvements has a \$15 million price tag").

175. See *Rice Holds Ceremonial Groundbreaking for New Brian Patterson Sports Performance Center*, RICE OWLS (Mar. 10, 2015), <http://www.riceowls.com/genrel/031015aab.html> [<https://perma.cc/B9RV-3DTH>].

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.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.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.¹⁸⁰ Overall, college football programs consistently generate much more revenue than men's college basketball programs.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.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

178. See David Jones, *Which Are the 25 Richest College Football Programs? A Few Names Near the Top Might Surprise You*, PENN LIVE (May 8, 2017), http://www.pennlive.com/pennstatefootball/index.ssf/2017/05/richest_college_football_progr.html; *Which College Basketball Programs Make the Most Money? Syracuse Among Top 5*, SYRACUSE (Mar. 30, 2017), http://www.syracuse.com/orangebasketball/index.ssf/2017/03/which_college_basketball_programs_make_the_most_money_syracuse_among_top_5.html.

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”).

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).

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).

182. See NCAA DIVISION I MANUAL §§ 15.5.5, 15.5.6.1 (Aug. 1, 2016), <http://www.ncaapublications.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,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.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.¹⁸⁵ Furthermore, boosters and alumni donations could cover the costs of compensating players.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.

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,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.¹⁸⁸ Under a free market system, colleges

183. 2017 NCAAB Tournament Coaches' Pay, *supra* note 13.

184. See Malcolm Lemmons, *College Athletes Getting Paid? 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_58cfce0e4b07112b6472f9a (indicating that athletes should receive revenue from what they help to produce).

185. See Darren Rovell, *ACC on Track to Shatter Record for Money Earned in NCAA Tournament*, ESPN (Mar. 26, 2016), http://www.espn.com/mens-college-basketball/story/_/id/15071018/atlantic-coast-conference-set-shatter-record-money-earned-ncaa-men-basketball-tournament [<https://perma.cc/E7E8-QJCV>].

186. See Scarborough, *supra* note 153.

187. See *NFL Player Contract*, SB NATION, http://assets.sbnation.com/assets/744265/APPENDIX_A_player_contract.pdf (last visited Oct. 8, 2018) [<https://perma.cc/BST4-ZYRQ>] (providing an example of an NFL standard players' contract); NBA, *National Basketball Association Uniform Player Contract A-1*, TECH PROGNOSIS, http://blog.techprognosis.com/wp-content/uploads/2011/05/NBA_Constitution.pdf (last visited Oct. 8, 2018) [<https://perma.cc/9KAQ-372V>] (providing an example of an NBA Basketball Contract).

188. See *Sample Athletic Financial Aid Agreement Letter*, ATHNET, <http://www.athleticscholarships.net/wp-content/uploads/2013/01/Example-Athletic-Aid-Agreement.pdf> (last visited Oct. 10, 2018) [<https://perma.cc/5T65-AGU4>]; *National Letter of Intent*, ATHNET, <http://www.athleticscholarships.net/wp-content/uploads/2013/01/National-Letter-of-Intent-Example.pdf> (last visited Oct. 10, 2018) [<https://perma.cc/3874-QNTY>] (providing an example of a national letter of intent).

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.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.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.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.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.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.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

189. See Hurst, *supra* note 156.

190. See *infra* Appendix A.

191. See *infra* note 192 and accompanying text.

192. See, e.g., *2017 Top Football Recruits*, 247 SPORTS, <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), <https://www.cougcenter.com/wsu-football-recruiting/2013/2/5/3956800/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), <https://n.rivals.com/news/about-us> [<https://perma.cc/T22G-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").

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), <http://bleacherreport.com/articles/117345-recruiting-for-beginners-part-i-how-are-players-ranked> [<https://perma.cc/6FRB-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").

194. See *infra* Appendix A.

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.*

202. *National Letter of Intent*, *supra* note 188.

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.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.²⁰⁶ These provisions protect the academic integrity of the relationship between athlete and university by allowing the athlete to keep his scholarship if injured.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.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.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.²¹⁰ Numerous legal scholars advo-

205. See, e.g., *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.").

206. See *id.*

207. See John S. Elson, *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).

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

209. See *NFL Player Contract*, *supra* note 187.

210. See Gabe Feldman, *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").

cate for college athletes to profit from their NILs,²¹¹ and the general population would likely not oppose such endorsement deals.²¹² 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.²¹³

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.²¹⁴ In a free market system, allowing college athletes to profit on their NILs might create more public interest in non-revenue generating college sports.²¹⁵ 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.²¹⁶

211. See, e.g., Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 129 (2012); Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 775 (2015).

212. See Will Hobson & Emily Guskin, *Poll: Majority of Black Americans Favor Paying College Athletes; 6 in 10 Whites Disagree*, WASH. POST (Sept. 14, 2017), https://www.washingtonpost.com/sports/colleges/poll-majority-of-black-americans-favor-paying-college-athletes-6-in-10-whites-disagree/2017/09/14/27fa5fc2-98df-11e7-87fc-c3f7ee4035c9_story.html [<https://perma.cc/FD2J-73SM>] (showing a shift of support for the payment of college athletes).

213. See Feldman, *supra* note 210.

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.*

216. See Mwendwa M. Zipporah & Hellen K. Mberia, *The Effects of Celebrity Endorsement in Advertisements*, 3 INT'L J. ACAD. RES. ECON. & MGMT. SCI. 178 (2014), http://hrmars.com/hrmars_papers/The_Effects_OF_Celebrity_Endorsement_in_Advertisements.pdf [<https://perma.cc/5BWH-8MW7>] (discussing the relationship between celebrity endorsements and increased public popularity).

Under a free market system, the teams could choose any combination of compensation, including base salaries, signing bonuses, athletic bonuses, and academic bonuses.²¹⁷ The compensation for each player would vary based on how much the market dictated each player should be paid.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.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 red-shirted, because of health or the coaches' decision), positions, and compensation, can be found in Appendix B at the end of this Article.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.

217. See Feldman, *supra* note 210.

218. See Dave Barri, *How About a Free Market for College Athletes?*, FREAKANOMICS (Mar. 22, 2013, 9:36 AM), <http://freakonomics.com/2013/03/22/how-about-a-free-market-for-college-athletes/> [<https://perma.cc/HUE3-SEQH>] (mentioning the control that a free market would give to colleges).

219. See *San Francisco 49ers 2018 Salary Cap*, SPOTRAC, <http://www.spotracc.com/nfl/san-francisco-49ers/cap/> (last visited Sept. 25, 2018) [<https://perma.cc/R6KX-ZFPM>] (showing salary cap for San Francisco 49ers).

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.

222. See *infra* Appendix B; see also Ralph D. Russo, *2017 AP All-America Teams*, USA TODAY (Dec. 11, 2017, 12:05 PM), <https://www.usatoday.com/story/sports/ncaaf/2017/12/11/2017-ap-all-america-teams/108511150/> [<https://perma.cc/2PA6-93U6>] (listing the 2017 All-American teams).

223. See *infra* Appendix B.

224. See *infra* Appendix B.

225. See Michael Ginnitti, *NFL Minimum Salaries for 2017*, SPOTRAC (JAN. 28, 2017), <http://www.spotracc.com/blog/nfl-minimum-salaries-for-2017/> [<https://perma.cc/YJR2-VM9A>] (describing NFL minimum salaries); *What's the Minimum NBA Salary?*, HOOPSHYPE (Oct. 12, 2015), <http://hoopshype.com/2015/10/12/whats-the-minimum-nba-salary/> [<https://perma.cc/65PP-LVVZ>] (recounting the minimum salary for NBA players).

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) (“[V]ery few athletes talented enough to play FBS football or Division I basketball opt not to attend an FBS/Division I school . . .”).

229. See generally *Rice Owls Football*, SCOUT FANTASY SPORTS, <https://fftoolbox.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).²³⁰ 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.²³¹ 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.²³² 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.²³³ 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.²³⁴ 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.²³⁵ By acquiring these better players, Rice would become more competitive than they are under the current system.²³⁶ 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.²³⁷ The players would need to weigh their options and priorities,

sports.com/nfl_draft/profiles_by_team.cfm?school=Rice (last visited Oct. 8, 2018) [<https://perma.cc/65PP-LVVZ>] (displaying Rice Owls players and draft prospects).

230. See *infra* Appendix B.

231. See *infra* Appendix B.

232. See *infra* Appendix B.

233. See *Rice 2018 Football Commits*, 247 SPORTS, <https://247sports.com/college/rice/Season/2018-Football/Commits/> (last visited Oct. 8, 2018) [<https://perma.cc/A5GF-RTBF>] (showing Rice University's 2018 recruiting class without any 4-star recruits).

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.²³⁸ The universities would adjust their offers and compensation packages to the players to attract athletes to represent their universities.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 *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.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 \$60,000.²⁴¹ Most players on Ohio State earn in the low \$40,000 range or less, which would be considered a lower class income.²⁴² The Pew Research Center defines middle class income as between \$46,960 and \$140,900.²⁴³ 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.²⁴⁴ Thus, consumer demand would likely not be affected.²⁴⁵

238. See *Choosing a College*, NCAA, <http://www.ncaa.org/student-athletes/future/choosing-college> (last visited Oct. 13, 2018) [<https://perma.cc/A5GF-RTBF>].

239. See *id.*; see also *infra* Appendix B.

240. See *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. *Id.*

241. See *infra* Appendix B.

242. See *infra* Appendix B.

243. Tami Luhby & Tiffany Baker, *What is Middle Class, Anyway?*, CNN, <http://money.cnn.com/infographic/economy/what-is-middle-class-anyway> (last visited Oct. 8, 2018) [<https://perma.cc/498H-UHRC>].

244. *But see O'Bannon*, 802 F.3d at 1077 (describing sports fans' increased disapproval of athlete payment as the compensation levels increased).

245. Consumer demand is currently soaring for college football. See Adam Kilgore, *'It's Two Different Games': Why College Football Is More Fun Than the NFL*, CHICAGO TRIB. (Sept. 21, 2017, 9:04 AM), <http://www.chicagotribune.com/sports/college/ct-college-football-vs-nfl-20170921-story.html>. [<https://perma.cc/BKD7-KMQQ>]. Games are broadcasted on every day of the week during the fall season. *FBS (I-A) Schedule-2018*, ESPN, <http://www.espn.com/college->

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.²⁴⁶ 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.²⁴⁷ In reality, the compensation will depend on the market and the player.²⁴⁸ 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.²⁴⁹ An athlete earns what he or she deserves because performance determines who receives the accolades and praise.²⁵⁰ The best players receive more awards, interviews, and media attention than the lesser players.²⁵¹ Jay Bilas agrees.²⁵² “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

football/schedule (last visited Oct. 8, 2018) [<https://perma.cc/56GL-PYF4>]. ESPN even broadcasts several spring practice games, which are intra-squad games. *Id.* Live attendance of fans at spring games is also high. Austin Ward, *Ohio State Breaks Own Record for Attendance in Spring Game*, ESPN (Apr. 16, 2016), http://www.espn.com/college-football/story/_/id/15217254/ohio-state-breaks-own-record-attendance-spring-game [<https://perma.cc/PF85-6PUH>].

246. See Bucky Brooks, *Ranking Each Position's Importance, from Quarterback to Returner*, NFL (July 27, 2015, 10:34 PM), <http://www.nfl.com/news/story/0ap30000000503855/article/ranking-each-positions-importance-from-quarterback-to-returner> [<https://perma.cc/KG7W-MA3G>].

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.”²⁵³ 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.²⁵⁴ It includes a number of the same assumptions as the football simulation, including that higher ranked players will receive higher salaries.²⁵⁵ This hypothetical also includes contracts for each player with performance bonuses that include \$1,000 for each player if the teams 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.²⁵⁶ This hypothetical assumes those goals were reached.²⁵⁷ This simulation also includes a \$3,000 signing bonus for 5-Star recruits, payable upon matriculation into the school.²⁵⁸ 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.²⁵⁹

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 TEAM²⁶⁰

Player	Position	Year	Base Salary	Signing Bonus	Performance Bonus	Rivals Ranking	Cap Hit
Hamidou Diallo	Guard	RS FR	35,000		7,000	5 Stars	\$42,000
Wenyen Gabriel	Guard	SO	35,000		7,000	5 Stars	\$42,000
Quade Green	Guard	FR	35,000	3,000	7,000	5 Stars	\$45,000
Sacha Killeya-Jones	Forward	SO	35,000		7,000	5 Stars	\$42,000
Kevin Knox	Forward	FR	35,000	3,000	7,000	5 Stars	\$45,000
Nick Richards	Forward	FR	35,000	3,000	7,000	5 Stars	\$45,000
Jarred Vanderbilt	Forward	FR	35,000	3,000	7,000	5 Stars	\$45,000
PJ Washington	Forward	FR	35,000	3,000	7,000	5 Stars	\$45,000

260. 2017–18 Men's Basketball Roster, UK ATHLETICS, <http://ukathletics.com/roster.aspx?path=mbball> (last visited Oct. 13, 2018) [<https://perma.cc/5GYQ-622L>]; see *Cats Illustrated*, RIVALS, <https://kentucky.rivals.com/content/basketball> (last visited Oct. 8, 2018) [<https://perma.cc/Y7LZ-JMDP>] (listing the star rankings for the Kentucky basketball team).

Je-maral Baker	Guard	FR	30,000		7,000	4 Stars	\$37,000
Shai Gilgeous-Alexander	Guard	FR	30,000		7,000	4 Stars	\$37,000
Tai Wynyard	Forward	RS SO	30,000		7,000	4 Stars	\$37,000
Jonny David	Guard	JR	10,000		7,000	N/A	\$17,000
Dillon Pulliam	Guard	RS JR	10,000		7,000	N/A	\$17,000
Totals			390,000	15,000	91,000		\$496,000

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 What each contract con-

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

262. Cf. *supra* note 260 and accompanying chart; see also Associated Press, *Draft Decisions to Have Huge Impact on 2018–19 Hoops Season*, USA TODAY (May 31, 2018, 12:24 AM), <https://www.usatoday.com/story/sports/ncaab/2018/05/30/draft-decisions-to-have-huge-impact-on-2018-19-hoops-season/35517325/> [<https://perma.cc/CV7Y-UBLK>] (discussing the major impact of losing college basketball players to the draft).

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

264. See generally Tamara L. Barner, *Show Me the . . . Ethics?: The Implications of the Model Rules of Ethics on Attorneys in the Sports Industry*, 16 GEO. J. LEGAL ETHICS 519, 520 (2003) (considering "whether it is necessary to apply the additional requirements of the [Model Rules] to the attorneys operating in [the sports representation field]"); Walter T. Champion, Jr., *Attorneys QUA Sports Agents: An Ethical Conundrum*, 7 MARQ. SPORTS L.J. 349 (1997) (addressing the gaps in the regulation of sports agents); Chris J. Evanoff, *Show Me the Money: How the ABA Model Rules of Professional Conduct Can Deter NCAA Rules Violations Involving Sports Agents & College Athletes*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 63 (2011) (discussing how the rules of professional conduct apply to sports agents); Scott Kestenbaum, *Uniform Alternative Dispute Resolution: The Answer to Preventing Unscrupulous Agent Activity*, 14 PEPP. DISP. RESOL. L.J. 55 (2014) (regarding the regulation of agents in professional sports); J. Houston Smith, III, Comment, *In the Sports Representation Industry: The Best Things Come to Those Lawyers Who Follow the Model Rules*, 29 J. LEGAL PROF. 305 (2004) (examining how the ABA Model Rules affect the representation of athletes).

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

266. See, e.g., *NBPA Regulations Governing Player Agents*, NAT'L BASKETBALL PLAYERS ASS'N (June 1991), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20rules,%20regulations/Agent%20Regulations%20PDF.pdf [https://perma.cc/QP94-XJAB].

267. See John Infante, *NCAA's Legal Counsel Rules More Expansive Than You Think*, ATHNET, <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,²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ 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.²⁷¹

Universities, the NCAA, and CAPA (on behalf of college athletes) might agree to a limitation on agent contact for high school athletes.²⁷² 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. 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 [a]bsence [l]etters[.] 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.

268. *Probability of Competing Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last visited Oct. 8, 2018) [<https://perma.cc/L5HJ-VRSA>].

269. See *Show Me the Money: So... You Want To Be A Sports Agent?*, SPORTS MGMT. DEGREE HUB, <http://www.sportsmanagementdegreehub.com/sports-agent/> (last visited Oct. 8, 2018) [<https://perma.cc/T9ZU-3QB8>] (stating sport agents' average commissions and salaries).

270. See Diane Sudia & Rob Remis, *Ethical and Statutory Limitations on Athlete Agent Income: Fees, Referrals, and Ownership Interest*, 27 FLA. ST. U. L. REV. 787, 811–21 (2000) (breaking down general sport agent rules and regulations in each state, including limits on agents' portion of a bonus).

271. See James Malone & Daren Lipinsky, *The Game Behind the Games: Unscrupulous Agents in College Athletics & California's Miller-Ayala Act*, 17 LOY. 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[.]").

272. See Michael McCann, *What's Really to Come From the NCAA's Student-Athlete Agent Announcement?*, SPORTS ILLUSTRATED (Aug. 8, 2018), <https://www.si.com/college-basketball/2018/>

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.²⁷³ In any event, the stakeholders would need to negotiate on the particulars of the regulation of these agents.²⁷⁴ The next section addresses the advantages of a free market model for compensating college athletes.

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.²⁷⁵ Two, players can help provide for their families' needs, especially if their families are socioeconomically disadvantaged.²⁷⁶ Three, players may stay in school longer and either graduate or get closer to graduating if they sign multi-year deals.²⁷⁷ Four, players might work harder academically to ensure they stay eligible because they understand they are providing necessary funds for their families.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.²⁷⁹

A free market system might also yield benefits for the universities and the NCAA.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-

08/08/ncaa-agents-student-athlete-one-and-done-nba-draft [https://perma.cc/2BMJ-6QS5].

273. See Marc Tracy, *N.C.A.A. Alters Rules for Agents and Draft in Wake of Basketball Corruption Scandal*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/sports/ncaa-basketball-agents.html> [https://perma.cc/4UDX-DL7H] (establishing rules regarding the contact between agents and young recruits).

274. See generally *id.*

275. Bilas Interview, *supra* note 32.

276. *Id.*

277. O'Bannon v. NCAA, 802 F.3d 1049, 1059 (9th Cir. 2015).

278. See Brendan Duggan, *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].

279. Bilas Interview, *supra* note 32; see also *infra* notes 281–82.

280. See generally *id.*

ings.²⁸¹ 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 2032.²⁸²

Moreover, by compensating college athletes, the NCAA and conferences avoid or reduce competition and potential competition from other leagues.²⁸³ 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[.]"²⁸⁴ 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."²⁸⁵ Thus, high school athletes will have a choice of whether to play in college without compensation or in the Pacific Pro league for compensation.²⁸⁶ 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").

282. Andy Fixmer & Curtis Eichelberger, *CBS, Turner Sign \$10.8 Billion NCAA Basketball Deal*, BLOOMBERG (Apr. 22, 2010, 4:07 PM), <https://www.bloomberg.com/news/articles/2010-04-22/cbs-turner-ncaa-in-14-year-10-8-billion-pact-for-basketball-tournament>; *CBS, Turner Sign \$8.8 Billion Extension on NCAA Tournament Broadcast*, HUFF. POST (Apr. 12, 2016, 5:27 PM), https://www.huffingtonpost.com/entry/cbs-turner-sign-88-billion-extension-on-ncaa-tournament-broadcast_us_570d6470e4b0836057a2bb8c [<https://perma.cc/3QQ3-8VGS>].

283. See Brandon Wiggins, *The NBA G League Announces Salary Raises that Will Likely Entice More Players to Skip College*, BUS. INSIDER (Apr. 17, 2018, 3:11 PM), <https://www.businessinsider.com/nba-g-league-salary-skip-college-2018-4> [<https://perma.cc/MWE9-2H8X>].

284. Evan Grossman, *Tom Brady's Agent Don Yee Bucks Against Football System and NCAA with Pacific Pro League*, DAILY NEWS (May 27, 2014, 9:34 PM), <http://www.nydailynews.com/sports/football/don-yee-bucks-system-ncaa-pacific-pro-football-article-1.3201543> [<https://perma.cc/47L2-ZQDR>].

285. *Principles*, PACIFIC PRO FOOTBALL, <http://www.pacificprofootball.com/league/principles/> (last accessed October 8, 2018) [<https://perma.cc/YQ9T-5CVV>].

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).²⁸⁷ 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).²⁸⁸ 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.²⁸⁹ 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.²⁹⁰

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.²⁹¹ If those plaintiffs do not prevail, then there will undoubtedly be other antitrust cases that challenge the NCAA's prohibition on compensating college athletes.²⁹² 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

287. *What You Need to Know About the NBA G League*, NBA G LEAGUE, <http://gleague.nba.com/about/> (last accessed Oct. 13, 2018) [<https://perma.cc/WRJ2-KSZE>].

288. *Frequently Asked Questions: NBA G League*, NBA G-LEAGUE, <https://gleague.nba.com/faq/> (last visited Oct. 13, 2018) [<https://perma.cc/2WJA-YNGA>]; see also *What You Need to Know About the NBA G-League*, *supra* note 287.

289. See Rob Dauster, *Pay Raises Coming to G League Makes Early Entry More Appealing for Borderline Prospects*, NBC SPORTS (Apr. 17, 2018, 1:19 PM), <https://www.collegebasketball.nbcsports.com/2018/04/17pay-raises-coming-to-g-league-makes-early-entry-more-appealing-for-borderline-prospects/> [<https://perma.cc/3N5J-JA4X>] (discussing how G-League salaries sometimes make the difference when choosing between NCAA basketball and the G-League).

290. See Ira Boudway, *The NBA's Minor League Could Soon Transform Pro Basketball*, BLOOMBERG BUSINESSWEEK (June 20, 2018, 2:00 AM), <https://www.bloomberg.com/news/features/2018-06-20/the-nba-s-minor-league-could-soon-transform-pro-basketball> [<https://perma.cc/X28W-SK6B>] ("If the NBA gets it right, fans who once tuned in to watch James Harden play for the Arizona State Sun Devils will soon be watching the next James Harden play for the Rio Grande Valley Vipers.").

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).

292. See Mark Schlachach, *Court Strikes Down Payment Plans; Agrees NCAA Violates Antitrust*, ESPN (Sept. 30, 2015), http://www.espn.com/college-sports/story/_/id/13777916/appeals-court-nixes-plan-pay-student-athletes-ed-obannon-case-agrees-ncaa-antitrust-laws [<https://perma.cc/2TC8-AWRU>] (generally discussing the outcomes of *O'Bannon* and *Jenkins*).

athlete compensation falls.²⁹³

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,²⁹⁴ and dissension amongst teammates will arise when the players start making different amounts of money.²⁹⁵ 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.

293. See John Solomon, *Inside College Sports: Here's What's Next for NCAA After O'Bannon Ruling*, CBSSPORTS.COM (Oct. 2, 2015), <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 *O'Bannon*).

294. See *supra* Section II.D.1.

295. 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

296. Andy Schwarz, *Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes*, at 59–60 (2011), <https://drive.google.com/file/d/0BxM4wdtZ5uI-OWFhNGE1ZTItZTlYs00YmVILTk0YmItYTM4ZDUyY2MwNTE2/view> [https://perma.cc/366S-H38X].

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.³⁰³ 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.³⁰⁴ Although scholarships possess value, they have been awarded to athletes since the 1950s, well before major college athletics turned into a multibillion dollar industry.³⁰⁵ 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.³⁰⁶

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 Dosh, *supra* note 170.

304. See Jeffrey Dorfman, *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/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#c8489c52b828> [https://perma.cc/8RSH-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

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.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.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.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-

313. *See id.*

314. *See NFL Player Contract, supra* note 187, ¶ 3.

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).³¹⁶ (b) ATHLETE may enter into endorsement deals with third parties and profit from the use of his name, image, and likeness.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.³¹⁸
 - c. In addition, UNIVERSITY will pay ATHLETE such earned bonuses as may be called for in this CONTRACT under the Addendum.³¹⁹

316. See *NFL Player Contract*, *supra* note 187, at ¶ 4.

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").

318. See *NFL Player Contract*, *supra* note 187, at ¶ 5.

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.³²⁰
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.³²¹
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.³²²
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

320. *Id.* ¶ 6.

321. *Id.* ¶ 9.

322. *Id.* ¶ 10.

with the NCAA within 10 days after execution.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.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.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.³²⁶ ATHLETE cannot be terminated for disappointing athletic performance provided ATHLETE is maintaining himself in excellent physical condition.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 arbitration³²⁸ 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.³²⁹

323. *Id.* at ¶ 18.

324. *See National Letter of Intent*, *supra* note 188, at ¶ 8.

325. *Id.* at ¶ 11.

326. *See Sample Athletic Financial Aid Agreement Letter*, *supra* note 188.

327. *See NFL Player Contract*, *supra* note 187, at ¶ 19; 2017–18 NCAA DIVISION I MANUAL, *supra* note 57, ART. 12.1.2(a); Bilas Interview, *supra* note 32.

328. *See NFL Player Contract*, *supra* note 187, at ¶ 19.

329. *See generally 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.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.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.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].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.³³⁴

SEE ADDENDUM

SIGNATURES:³³⁵

(2013), https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf [<https://perma.cc/7M4B-JQTX>] (listing and discussing common arbitration clauses that can be included in contracts).

330. See *NFL Player Contract*, *supra* note 187, at ¶ 20.

331. See *No Oral Modification Sample Clauses*, LAW INSIDER, <https://www.lawinsider.com/clause/no-oral-modifications> (last visited Oct. 8, 2018) [<https://perma.cc/E6LZ-2XTL>].

332. See *NFL Player Contract*, *supra* note 187, at ¶ 21.

333. See *id.* at ¶ 22.

334. See *id.* at ¶ 25.

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

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

Amount:	Due and Payable:
\$ _____	Within fifteen (15) days after _____, 20 ____;
\$ _____	Within five (5) days after _____, 20 ____;
\$ _____	Within five (5) days after _____, 20 ____;
\$ _____	Within five (5) days after _____, 20 ____. ³³⁷

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].

336. See generally NFL PLAYER CONTRACT, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/Archives/edgar/data/1573683/000104746913009713/a2216998zex-10_3.htm (last visited Oct. 8, 2018) [<https://perma.cc/LNM4-YEST>] (showing professional football player Arian Foster's previous contract).

337. *Id.* at ¶ 1.

338. See *id.* at ¶ 3.

339. See discussion *supra* Section III.B; see also Joel Corry, *Agent's Take: Notable Players Who Cashed in on Performance Bonuses*, CBS SPORTS (Dec. 30, 2014), <http://www.cbssports.com/nfl/news/agents-take-notable-players-who-cashed-in-on-performance-bonuses> [<https://perma.cc/V4X7-2HMH>] (showing examples of football players that earned bonuses by reaching performance thresholds).

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

Honor	Bonus³⁴⁰
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]

Postseason Game	Bonus
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]

Postseason Game	Bonus
Conference Championship Game Participant	\$()
Conference Championship Game Winner	\$()
NCAA Tournament 1 st Round Participant	\$()
NCAA Tournament 2 nd Round Participant	\$()
NCAA Tournament Sweet 16 Participant	\$()
NCAA Tournament Elite 8 Participant	\$()
NCAA Tournament National Semifinalist	\$()
NCAA Tournament National Runner-Up	\$()
NCAA Tournament National Champion	\$()
NIT Participant	\$()
NIT Champion	\$()

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 Grenardo, *supra* note 340, at 199.

Honor	Bonus
Academic All-American First Team	\$()
Academic All-American Second Team	\$()
Academic All-American Third Team	\$()
Academic All-District Team	\$()
Academic All-Conference	\$()

APPENDIX B

2017-2018 OHIO STATE UNIVERSITY BUCKEYES FOOTBALL TEAM³⁴²

Player	Pos.	Year	Base Salary	Sign-ing Bonus	Perfor-mance Bonus	Rivals Rank-ing	Cap Hit
Okudah, Jeffrey	CB	FR	45,000	1,000	1,000	5 Stars	\$47,000
Grimes, Trevon	WR	FR	45,000	1,000	1,000	5 Stars	\$47,000
Brown-ing, Baron	LB	FR	45,000	1,000	1,000	5 Stars	\$47,000
Young, Chase	DE	FR	45,000	1,000	1,000	5 Stars	\$47,000
Jones, Keandre	LB	SO	45,000		1,000	5 Stars	\$46,000
Wade, Shaun	CB	FR	45,000	1,000	1,000	5 Stars	\$47,000
Davis, Wyatt	OL	FR	45,000	1,000	1,000	5 Stars	\$47,000
Bosa, Nick	DL	SO	45,000		*2,000	5 Stars	\$46,000
Dixon, Johnnie	WR	JR	35,000		1,000	4 Stars	\$36,000
Dobbins, J.K.	RB	FR	35,000		1,000	4 Stars	\$36,000
Haskins, Dwayne	QB	RS FR	35,000		1,000	4 Stars	\$36,000
Webb, Damon	SAF	SR	35,000		1,000	4 Stars	\$36,000
Sheffield, CB	SO		35,000		1,000	4 Stars	\$36,000

342. 2017 *Ohio State Buckeyes: Roster*, FOX SPORTS, <https://www.foxsports.com/college-football/ohio-state-buckeyes-team-roster?season=2017> (last visited Oct. 14, 2018) [<https://perma.cc/2VLN-XBPN>]; see generally *Buckeye Grove*, RIVALS, <https://ohiostate.rivals.com/content/football> (last visited Oct. 8, 2018) [<https://perma.cc/ZVQ4-BNU2>] (providing general information and star rankings of Ohio State players and prospects).

Kendall							
Cornell, Jashon	DT	RS SO	35,000		1,000	4 Stars	\$36,000
Victor, Binjimen	WR	SO	35,000		1,000	4 Stars	\$36,000
Riep, Amir	CB	FR	35,000		1,000	4 Stars	\$36,000
Holmes, Jalyn	DE	SR	35,000		1,000	4 Stars	\$36,000
Mack, Austin	WR	SO	35,000		1,000	4 Stars	\$36,000
Hill, K.J.	WR	RS SO	35,000		1,000	4 Stars	\$36,000
Pryor, Isaiah	SAF	FR	35,000		1,000	4 Stars	\$36,000
Davis, Wayne	DB	RS FR	35,000		1,000	4 Stars	\$36,000
Barrett, J.T.	QB	SR	35,000		1,000	4 Stars	\$36,000
Baker, Jerome	LB	JR	35,000		1,000	4 Stars	\$36,000
Cooper, Jonathon	DL	SO	35,000		1,000	4 Stars	\$36,000
Martell, Tate	QB	FR	35,000		1,000	4 Stars	\$36,000
Glover- Williams, Eric	SAF	JR	35,000		1,000	4 Stars	\$36,000
Werner, Pete	LB	FR	35,000		1,000	4 Stars	\$36,000
Campbell, Parris	WR	JR	35,000		1,000	4 Stars	\$36,000
William- son, Marcus	CB	FR	35,000		1,000	4 Stars	\$36,000
Hawkins, Kierre	TE	RS FR	35,000		1,000	4 Stars	\$36,000
Weber, Mike	RB	RS SO	35,000		1,000	4 Stars	\$36,000

Williams, Antonio	RB	SO	35,000		1,000	4 Stars	\$36,000
McCall, Demario	RB	FR	35,000		1,000	4 Stars	\$36,000
Booker, Dante	LB	SR	35,000		1,000	4 Stars	\$36,000
Smith, Erick	SAF	SR	35,000		1,000	4 Stars	\$36,000
Conner, Nick	LB	RS SO	35,000		1,000	4 Stars	\$36,000
Hilliard, Justin	LB	SO	35,000		1,000	4 Stars	\$36,000
Price, Billy	OL	SR	35,000		*2,500	4 Stars	\$39,000
Barrow, Malik	DT	RS FR	35,000		1,000	4 Stars	\$36,000
Lewis, Tyquan	DL	SR	35,000		1,000	4 Stars	\$37,000
Prince, Isaiah	OL	JR	35,000		1,000	4 Stars	\$36,000
Wohlabau gh, Jack	OL	RS FR	35,000		1,000	4 Stars	\$36,000
Pridgeon, Malcolm	OL	JR	35,000		1,000	4 Stars	\$36,000
Burrell, Matthew	OL	RS SO	35,000		1,000	4 Stars	\$36,000
Myers, Josh	OL	FR	35,000		1,000	4 Stars	\$36,000
Jordan, Michael	OL	SO	35,000		1,000	4 Stars	\$36,000
Jones, Jamarco	OL	SR	35,000		1,000	4 Stars	\$36,000
Feder, Kevin	OL	RS SO	35,000		1,000	4 Stars	\$36,000
Hill, Michael	DT	SR	35,000		1,000	4 Stars	\$36,000
Knox, Demetrius	OL	JR	35,000		1,000	4 Stars	\$36,000
White,	SAF	FR	35,000		1,000	4 Stars	\$36,000

Brendon							
Hausmann, Jake	TE	RS FR	35,000		1,000	4 Stars	\$36,000
McLaurin, Terry	WR	JR	35,000		1,000	4 Stars	\$36,000
Baugh, Marcus	TE	SR	35,000		1,000	4 Stars	\$36,000
Jones, Dre'Mont	DL	RS SO	35,000		1,000	4 Stars	\$36,000
Garrett, Haskell	DL	FR	35,000		1,000	4 Stars	\$36,000
Farrell, Luke	TE	RS FR	35,000		1,000	4 Stars	\$36,000
Arnette, Damon	CB	RS SO	30,000		1,000	3 Stars	\$31,000
Fuller, Jordan	SAF	SO	30,000		1,000	3 Stars	\$31,000
Hubbard, Sam	DE	JR	30,000		1,000	3 Stars	\$31,000
Burrow, Joe	QB	RS SO	30,000		1,000	3 Stars	\$31,000
Ward, Denzel	CB	JR	30,000		*2,500	3 Stars	\$31,000
Berry, Rashod	TE	RS SO	30,000		1,000	3 Stars	\$31,000
Harris, Jaylen	WR	FR	30,000		1,000	3 Stars	\$31,000
Wint, Jahsen	SAF	RS FR	30,000		1,000	3 Stars	\$31,000
Borland, Tuf	LB	RS FR	30,000		1,000	3 Stars	\$31,000
Worley, Chris	LB	SR	30,000		1,000	3 Stars	\$31,000
Harrison, Malik	LB	SO	30,000		1,000	3 Stars	\$31,000
Slade, Darius	DL	JR	30,000		1,000	3 Stars	\$31,000

Hamilton, Davon	DT	RS SO	30,000		1,000	3 Stars	\$31,000
Alabi, Joshua	OL	RS SO	30,000		1,000	3 Stars	\$31,000
Cupp, Gavin	OL	RS FR	30,000		1,000	3 Stars	\$31,000
Landers, Robert	DL	SO	30,000		1,000	3 Stars	\$31,000
Munford, Thayer	OL	FR	30,000		1,000	3 Stars	\$31,000
Bowen, Branden	OL	RS SO	30,000		1,000	3 Stars	\$31,000
Taylor, Brady	OL	JR	30,000		1,000	3 Stars	\$31,000
Gardiner, Elijah	WR	FR	30,000		1,000	3 Stars	\$31,000
Alexander, A.J.	TE	RS SO	30,000		1,000	3 Stars	\$31,000
Chrisman, Drue	P	SO	30,000		1,000	3 Stars	\$31,000
Sprinkle, Tracy	DL	SR	30,000		1,000	3 Stars	\$31,000
Thompson, Dylan	DL	JR	30,000		1,000	3 Stars	\$31,000
Haubeil, Blake	K	FR	30,000		1,000	3 Stars	\$31,000
Nuernberger, Sean	K	JR	30,000		1,000	3 Stars	\$31,000
Cage, Jerron	DL	FR	30,000		1,000	3 Stars	\$31,000
McCullough, Liam	LS	RS SO	20,000		1,000	2 Stars	\$21,000
Totals			2,905,000	\$6,000	\$89,000		\$3,000,000

2017-2018 RICE UNIVERSITY FOOTBALL TEAM³⁴³

Player	Pos.	Year	Base Salary	Sign-ing Bonus	Perfor-mance Bonus	Rivals Rank-ing	Cap Hit
Dobbins, J.K. ³⁴⁴	RB	FR	60,000			4 Stars	\$60,000
Sheffield, Kendall ³⁴⁵	CB	SO	60,000			4 Stars	\$60,000
Knox, Demetri-us ³⁴⁶	OL	JR	60,000			4 Stars	\$60,000
Walter, Aston	WR	RS JR	30,000			3 Stars	\$30,000
Walter, Austin	RB	RS JR	30,000			3 Stars	\$30,000
Smalls, Miklo	QB	FR	30,000			3 Stars	\$30,000
Orji, Kenneth	DE	FR	30,000			3 Stars	\$30,000
Granato, J.T.	QB	RS SO	30,000			3 Stars	\$30,000
Thomas, Cole	SAF	RS SR	30,000			3 Stars	\$30,000
Thomp-son, Ken-neth	OL	RS SR	30,000			3 Stars	\$30,000

343. 2017 Football Roster, RICE OWLS, <https://riceowls.com/roster.aspx?roster=38&path=football> (last visited Oct. 8, 2018) [<https://perma.cc/N47D-SYWY>]; see *OwlsInsiders.com*, RIVALS, <https://rice.rivals.com> (last visited Sept. 25, 2018) [<https://perma.cc/U4SM-VZNX>] (listing star rankings for Rice football players).

344. Mr. Dobbins is from La Grange, Texas. *J.K. Dobbins*, OHIO STATE BUCKEYES, <https://ohiostatebuckeyes.com/roster/j-k-dobbins/> (last visited Oct. 14, 2018) [<https://perma.cc/V9R9-KPU6>].

345. Mr. Sheffield hails from Missouri City, Texas. *Kendall Sheffield*, OHIO STATE BUCKEYES, <http://ohiostatebuckeyes.com/roster/kendall-sheffield/> (last visited Oct. 8, 2018) [<https://perma.cc/8QF2-XVHN>].

346. Mr. Knox comes from Fort Worth, Texas. *Demetrius Knox*, OHIO STATE BUCKEYES, <https://ohiostatebuckeyes.com/roster/demetrius-knox/> (last visited Sept. 25, 2018) [<https://perma.cc/A278-D36V>].

Abercrombia, Zach	DT	RS SO	30,000			3 Stars	\$30,000
Fox, Jack	K	JR	20,000			2 Stars	\$20,000
Douglas-Dotson, Brandon	CB	JR	20,000			2 Stars	\$20,000
Glaesmann, Sam	QB	RS FR	20,000			2 Stars	\$20,000
Newsome, Dasharm	DB	RS FR	20,000			2 Stars	\$20,000
Wright, Lance	WR	RS SR	20,000			2 Stars	\$20,000
Boudreaux, Chris	WR	FR	20,000			2 Stars	\$20,000
White, Destri	SAF	SR	20,000			2 Stars	\$20,000
Bickham, Justin	CB	RS SO	20,000			2 Stars	\$20,000
Myers, Jordan	WR	RS FR	20,000			2 Stars	\$20,000
Montgomery, Cameron	WR	FR	20,000			2 Stars	\$20,000
Silcox, Dylan	DB	RS FR	20,000			2 Stars	\$20,000
Clark, Jorian	CB	RS JR	20,000			2 Stars	\$20,000
Trammell, Austin	WR	FR	20,000			2 Stars	\$20,000
Smith, Parker	WR	RS JR	20,000			2 Stars	\$20,000
Ellis, D'Angelo	DB	SO	20,000			2 Stars	\$20,000
Whitaker, Collin	RB	RS FR	20,000			2 Stars	\$20,000
Bertrand,	DB	JR	20,000			2 Stars	\$20,000

Christian							
Tyner, Jackson	QB	RS SO	20,000			2 Stars	\$20,000
Akunebu, Uzoma	LB	SO	20,000			2 Stars	\$20,000
Blosser, Robbie	QB	FR	20,000			2 Stars	\$20,000
Cum- mings, Joshua	CB	RS SO	20,000			2 Stars	\$20,000
Ibe, J.T.	SAF	RS JR	20,000			2 Stars	\$20,000
Granson, Kylan	WR	SO	20,000			2 Stars	\$20,000
Thornton, Tyrae	DB	FR	20,000			2 Stars	\$20,000
Banks, V.J.	CB	SR	20,000			2 Stars	\$20,000
Marsh- man, Evan	QB	FR	20,000			2 Stars	\$20,000
Nyakwol, George	DB	FR	20,000			2 Stars	\$20,000
Uretsky, Nick	LB	RS SR	20,000			2 Stars	\$20,000
Richard- son, Isai- ah	DB	FR	20,000			2 Stars	\$20,000
Stewart, Samuel	RB	RS JR	20,000			2 Stars	\$20,000
Ellerbe, Nahshon	RB	RS SO	20,000			2 Stars	\$20,000
Harrison, Will	K	FR	20,000			2 Stars	\$20,000
Sorensen, Nicholas	WR	FR	20,000			2 Stars	\$20,000
Cephus, Aaron	WR	RS FR	20,000			2 Stars	\$20,000

Robert, Houston	SAF	RS SO	20,000			2 Stars	\$20,000
Nwakam ma, Mar- tin	SAF	RS JR	20,000			2 Stars	\$20,000
Ekpe, An- thony	LB	RS FR	20,000			2 Stars	\$20,000
Esukpa, Emmanu- el	RB	RS SO	20,000			2 Stars	\$20,000
Phillips, Will	TE	RS FR	20,000			2 Stars	\$20,000
Adams, Myles	DL	SO	20,000			2 Stars	\$20,000
Wright, Brady	DE	RS JR	20,000			2 Stars	\$20,000
Royall, Randall	LB	FR	20,000			2 Stars	\$20,000
Womac, Brian	DE	RS SR	20,000			2 Stars	\$20,000
Grammer, Garrett	LB	FR	20,000			2 Stars	\$20,000
Green, DJ	LB	RS SR	20,000			2 Stars	\$20,000
Smith, Corbin	OL	FR	20,000			2 Stars	\$20,000
Godber, Peter	OL	RS SR	20,000			2 Stars	\$20,000
Hubbard, JaVante	DL	RS FR	20,000			2 Stars	\$20,000
Schuman, Trey	DE	FR	20,000			2 Stars	\$20,000
Martin, Trey	OL	RS SR	20,000			2 Stars	\$20,000
Klingler, Cory	OL	RS JR	20,000			2 Stars	\$20,000
Gordon,	DT	RS	20,000			2 Stars	\$20,000

Preston		JR					
Baker, Shea	OL	FR	20,000			2 Stars	\$20,000
Ellerbee, Emmanu- el	LB	SR	20,000			2 Stars	\$20,000
Mokry, Crockett	OL	RS SO	20,000			2 Stars	\$20,000
Peterson, Brandt	OL	FR	20,000			2 Stars	\$20,000
Anderson, Calvin	OL	RS JR	20,000			2 Stars	\$20,000
MacKel- lar, Greg- or	OL	FR	20,000			2 Stars	\$20,000
Greene, Jack	OL	RS FR	20,000			2 Stars	\$20,000
Terrill, Matt	OL	RS SO	20,000			2 Stars	\$20,000
Pierce, Sam	OL	RS JR	20,000			2 Stars	\$20,000
Osuji, Uzoma	OL	RS FR	20,000			2 Stars	\$20,000
Dill, Jo- seph	OL	SO	20,000			2 Stars	\$20,000
Sanchez, Jonathan	TE	FR	20,000			2 Stars	\$20,000
Bull, Jae- ger	TE	FR	20,000			2 Stars	\$20,000
Long, Trevor	WR	RS JR	20,000			2 Stars	\$20,000
Wells, Robby	TE	RS SR	20,000			2 Stars	\$20,000
Padgett, Blain	DE	JR	20,000			2 Stars	\$20,000
Thomp- son, Carl	DT	JR	20,000			2 Stars	\$20,000
Garcia, Elijah	DL	RS FR	20,000			2 Stars	\$20,000

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The Blue Devil's In The Details
PEPPERDINE LAW REVIEW

Hanusa, Parker	DL	RS JR	20,000			2 Stars	\$20,000
Schantz, Graysen	DE	RS SR	20,000			2 Stars	\$20,000
Wilkins, Roe	DT	RS SO	20,000			2 Stars	\$20,000
Johnson, Cameron	WR	RS SO	10,000			NA	\$10,000
Totals			1,890, 000				\$1,890, 000