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The Ninth Circuit Decision in *O'Bannon* and the Fallacy of Fragile Demand

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THE NINTH CIRCUIT DECISION IN *O'BANNON* AND THE FALLACY OF FRAGILE DEMAND

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> First of all, under the Rule of Reason, in this Court and in the Supreme Court, to be valid, a restraint need only be reasonably necessary to achieve the pro-competitive ends. So . . . the question is whether the NCAA's rule of no pay for play—none—is so inconsistent with its objective of preserving amateur athletics that it violates the Rule [of Reason].[1]

With these words, NCAA counsel Seth Waxman succeeded in diverting the Ninth Circuit majority in *O'Bannon v. NCAA*[2] from its actual task, enforcing the antitrust laws. Instead, after having determined the NCAA was a cartel in restraint of trade and liable under the Sherman Act,[3] the court chose to take on the role of the enforcement arm of the NCAA, focused on preserving amateurism rather than preserving competition.

This error was not lost on the Chief Judge of the Ninth Circuit Judge Sidney Thomas who explained in dissent

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1. Oral Argument at 16:05, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015) (No. 14-16601), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000007396.

2. *O'Bannon*, 802 F.3d at 1076 ("But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*.").

3. *Id.* at 1079 ("Today, we reaffirm that NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason. . . . In this case, the NCAA's rules have been more restrictive than necessary to maintain its tradition of amateurism in support of the college sports market.").

> The majority characterizes our task at step three of the Rule of Reason as determining "whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses is 'virtually as effective' in preserving *amateurism* as not allowing compensation." This conclusion misstates our inquiry. Rather, we must determine whether allowing student-athletes to be compensated for their NILs is 'virtually as effective' in *preserving popular demand for college sports* as not allowing compensation. In terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.[4]

This confusion—between restraints that promote "amateurism" and those that promote competition by allowing a product to exist at all, particularly one that meets consumer demand but could not exist without the restraint—is at the heart of the NCAA's now sixty years of successful price fixing (dating back to 1956). These efforts were, ironically, given a substantial boost when the NCAA lost the *NCAA v. Board of Regents*[5] case (the first of a trilogy of cases that found the NCAA to be an anticompetitive price-fixing cartel[6]). In essence, the NCAA argues (without a proffer of market-based evidence) that amateurism is unable to stand on its own in the marketplace and that rules that provide for collective punishments, including full-on boycotts, are necessary for the product to exist, and therefore the specific rules that define amateurism are immune from antitrust scrutiny. What matters, argues the NCAA, as to the legality of a particular restraint is not whether it provides a *sine qua non* without which college sports (or even amateur college sports) could not exist, but rather whether the rule in suit is a reasonable ancillary restraint to preserve, not competition or even the product in question, but amateurism itself, as the NCAA defines (and continually redefines) it.

Neither this confusion nor efforts to bring it into the light as a sophisticated but sophistic ruse is new. In 2000, Rascher and Schwarz explained

> There is a subtlety here that seems to have been missed by later interpreters of *NCAA v. Board of Regents*. In essence, the

4. *Id.* at 1081 (Thomas, J., dissenting) (citation omitted). NIL stands for name, image, and likeness. *Id.* at 1055.

5. *See generally* NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

6. The other two being *O'Bannon,* 802 F.3d 1049 and Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998).

> *NCAA* Court said one thing: academic affiliation is what differentiates NCAA football from NFL football, and thus creates a market—i.e., this differentiation is procompetitive. The Court then went on to assume that a particular restraint used to achieve that differentiation—amateurism—is both reasonable and necessary. In *NCAA*, there was no need to determine if amateurism was actually a reasonable and necessary restraint; the Court merely sought to highlight the comparative lack of justification for the NCAA's TV restraints.
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> However, in later cases, particularly *McCormack v. NCAA*, *Gaines v. NCAA*, and *Banks v. NCAA*, the courts have used *NCAA v. Board of Regents* as a starting point, reading Supreme Court dicta as evidence that amateurism itself has passed the reasonableness test, moving forward to evaluate specific follow-on rules designed to support amateurism. These cases analyze whether the NCAA's rules are reasonable and necessary for preserving amateurism, not if amateurism itself is reasonable and necessary. Since *NCAA* did not perform this formal analysis (because this question did not apply to the matter at hand), it remains an open issue for the courts.[7]

As a simple example of this difference, consider the so-called Sanity Code, by which the NCAA banned all scholarship aid in 1948 in the name of amateurism. Under a proper Rule of Reason analysis (had one been performed prior to the restraint collapsing through schools' refusal to enforce the collective boycotts),[8] the question would be whether a strict and blanket prohibition on all form of scholarship aid whatsoever[9] was necessary to produce college sports. Almost certainly such an answer would have been (and would still be) no, as no such rule existed during the rise of college football as a popular sport (far more popular than the NFL prior to World War

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7. Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable Nor Necessary: "Amateurism" in Big-Time College Sports*, ANTITRUST, Spring 2000, at 51 (footnotes omitted) (citations omitted).

8. Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332–34 (2007) (noting that the Sanity Code only existed for approximately two years before being abandoned and eventually replaced by a form of the NCAA's current bylaws).

9. Gary T. Brown, *NCAA Answers Call to Reform: The 'Sanity Code' Leads Association down Path to Enforcement Program*, NCAA.ORG (Nov. 22, 1999), http://fs.ncaa.org/Docs/NCAANewsArchive/1999/19991122/active/3624n24.html.

II[10]). However, from the NCAA's position, the question is not whether "sanity" was needed to produce college sports, but whether "sanity" was a reasonably necessary means of ensuring that amateurism existed, regardless of whether amateurism itself was necessary to produce college sports.

From the perspective of 2015, with the Sanity Code gone for over sixty years, it may seem ludicrous that a court might be asked to rule in favor of a restraint prohibiting all scholarship aid, under the theory that if the NCAA feels it is necessary to preserve amateurism, no further inquiry is needed. Ludicrous or not, the NCAA in fact did ask the Ninth Circuit to rule as such, as argued again by Counsel Seth Waxman:

> As a thought exercise, think of what would happen, let's assume . . . the NCAA goes back and says . . . we are simply going to require the Division-III model or the Ivy League model of all schools. That is, students get in, we can try to recruit athletes, but no one gets any athletic scholarships. You get scholarships based on need, if the school has sufficient resources to provide it. Under the Plaintiffs' theory in this case and I think under the district judge's rationale that would be a violation of the antitrust laws . . . The point is, that this is a product, it's again, I think no one would contend, that if the NCAA just decided that we're not going to offer athletic scholarships, which is the rule that existed in 1906 when the rules were first permitted, and instead we're simply going to endorse the rules that we have for Division III, that that would be a violation of the antitrust laws.[11]

To those aware of this dichotomy between truly procompetitive restraints that preserve competition and seemingly unjustified restraints that merely perpetuate the abuse of monopsony power under the guise of amateurism, *O'Bannon* provided an ideal testing ground for whether the antitrust laws would function to protect competition or to preserve the NCAA's cartel power.

The result of this test, to date, is incomplete.[12] The Ninth Circuit majority

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10. The quick rise in popularity of the NFL can be traced back to the 1958 NFL Championship Game between the Baltimore Colts and New York Giants, which led to the league quickly surpassing college football in terms of national popularity. *See* MICHAEL MACCAMBRIDGE, AMERICA'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION ix–xix (2004). Perhaps not coincidentally, this rise coincided in time with the first period of NCAA enforcement of amateurism that began in 1956.

11. Oral Argument, *supra* note 1, at 7:31.

12. Indeed, while this Article was in final proofs, both the *O'Bannon* Plaintiffs and the NCAA have

(with agreement on this point by the dissent) found that the challenged NCAA rules were "*patently and inexplicably* stricter than is necessary to accomplish all of its procompetitive objectives"[13] and therefore upheld the district court's ruling that "the NCAA's amateurism rules . . . were an illegal restraint of trade under Section 1 of the Sherman Antitrust Act."[14] However, the majority of the court stopped short of allowing the NCAA's amateurism rules to fall by the wayside, arguing "that it is a 'self-evident fact' that '[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.'"[15] In essence, the majority appears to have decided that consumers will not purchase college sports if they are seen as non-amateur.[16] No evidence was presented for this claim, and as the dissent pointed out, much evidence to the contrary was first declared inapt or explained away by the majority before it could declare these truths to be self-evident.[17]

In contrast to this muddy legal picture, the economics are quite clear. Underpinning the application of the Rule of Reason to team sports is the simple truism that it takes more than one team to field a competitive sport contest.[18] Once coordination between two teams, likely economic competitors off-the-field (in some markets), is recognized as necessary for those teams to become sports competitors on-the-field, the normal legal standard against agreements among competitors to regulate output clearly must be modified for sports.[19] The result was a series of cases, primarily in the 1980s and early 1990s, recognizing that per se bans on restraints governing sports franchises risk banning procompetitive conduct.[20] Thus, the actual holding of *NCAA v. Board of Regents* (as opposed to the now rejected reading of its amateurism dicta) stood for the idea that the Rule of Reason was a more appropriate standard for

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appealed to the Supreme Court.

13. O'Bannon v. NCAA, 802 F.3d 1049, 1075 (9th Cir. 2015).

14. *Id*. at 1055–56.

15. *Id.* at 1081 n.3 (Thomas, J., concurring in part and dissenting in part) (alteration in original).

16. *Id.* at 1078–79.

17. *See id.* at 1080–83 (Thomas, J., concurring in part and dissenting in part). Ninth Circuit cases comprised 25.7% of all Supreme Court cases during the last four terms and were overturned 79.5% of the time. Stephen Wermiel, *SCOTUS for Law Students (Sponsored by Bloomberg Law): Scoring the Circuits*, SCOTUSBLOG (June 22, 2014, 10:28 PM), http://www.scotusblog.com/2014/06/scotus-for-law-students-sponsored-by-bloomberg-law-scoring-the-circuits/.

18. L.A. Mem'l Coliseum Comm'n v. NFL (*Raiders I*), 726 F.2d 1381, 1387 (9th Cir. 1984) (stating a per se rule was inappropriate due to "the unique nature of the business of professional football.").

19. *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010).

20. *See, e.g.*, Chi. Prof'l Sports Ltd. v. NBA, 961 F.2d 667, 671–72 (7th Cir. 1992); *Raiders I*, 726 F.2d 1381, 1387; McNeil v. NFL, 790 F. Supp. 871, 897 (D. Minn. 1992).

assessing whether agreements among universities as to the details of how they produce college sports than would be a per se prohibition of all discussion of price or output. But despite this recognition, the major sports leagues (with the obvious exception of baseball)[21] as well as college sports have all been found liable for violations of the Sherman Act under the Rule of Reason. Particularly with respect to conduct as it relates to fixing the price of talent, cases like *Robertson v. NBA*,[22] *McNeil v. NFL*,[23] and *Law v. NCAA*[24] firmly established that collective restraints on pay, when imposed outside of a valid collective bargaining framework, are illegal restraints of trade, even under the Rule of Reason standard.

An important economic grounding for why such a legal framework makes sense is the idea that prices in a specialized labor market are typically set, not by supply and cost factors but rather by demand factors. That is because the cost to produce a football player or even an assistant coach is fairly low relative to the competitive wage an athlete or coach can earn and is usually substantially higher than the athlete or coach's second-best wage offer outside of sports. As a matter of economics, it is clear that what is driving up the price of talent is demand.

This boils down to a simple first year undergraduate economic concept, namely the difference between movement along a demand curve, caused by a change in the cost of supply, versus movement of a demand curve, caused by the increased value of the product to its purchasers. The former has the potential to cause reduction in output—as prices rise for factors unrelated to demand, the least valuable product may find itself without a buyer willing to pay its now higher price.

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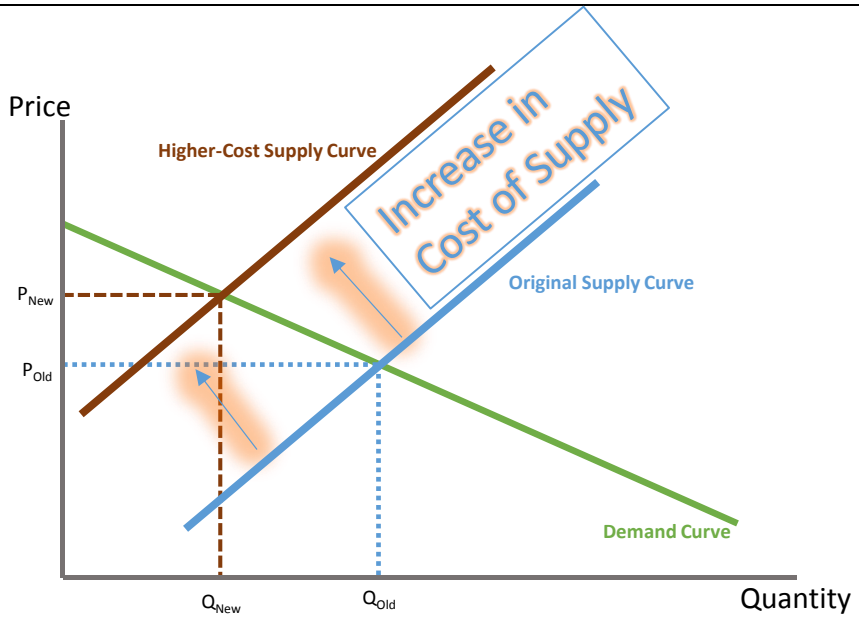
21. [T]his Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect.

Toolson v. N.Y. Yankees, 346 U.S. 356, 357 (1953) (referring to Justice Holmes's 1922 majority opinion in *Federal Baseball Club of Balt. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922)). *See generally* City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686 (2015), *cert. denied*, 136 S. Ct. 36 (2015) (upholding MLB's antitrust exemption).

22. Robertson v. NBA, 556 F.2d 682, 686 n.5 (2d Cir. 1977) (establishing free agency in the NBA, with the court stating that the non-statutory labor exemption, or CBA exemption, did not apply to unilateral employer actions, but rather only joint actions of the employers and union).

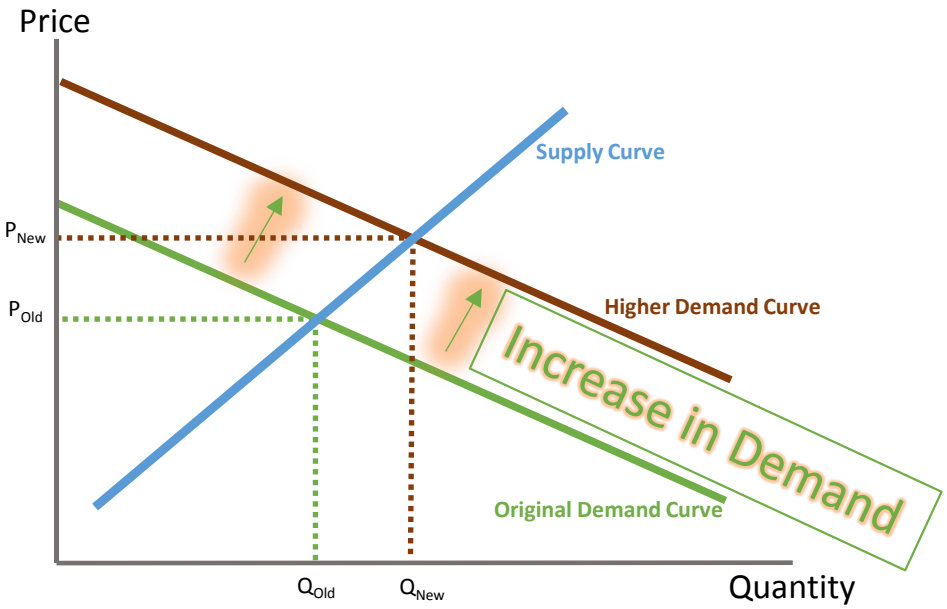
23. *McNeil*, 790 F. Supp. at 888–89 (finding Plan B free agency to be more restrictive than necessary after it failed two of the three *Mackey* test prongs and thereby not protected under the non-statutory labor exemption, which led to a settlement with the league creating a salary cap and free agency in the NFL).

24. *See generally* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998). The Tenth Circuit determined the restricted earning coaches cap violated antitrust law and was not exempted by *Board of Regents*. *Id.* at 1018–19.



Increase in Cost Leads to a Shift in Supply, Raising Price While Lowering Quantity

But the latter, a situation in which demand itself drives up price, the idea that purchasers will find these new prices unaffordable is economic nonsense—the prices have risen only because consumer demand has grown. The result, eminently natural to economists but seemingly contradictory to some lay folk, is one in which price and output rise.



Increased Consumer Interest Leads to a Shift in Demand, Raising Price and Quantity

What sort of economic phenomenon would involve an increase in demand? Imagine a wonderful world in which cinnamon powdered donuts were found to have cancer-fighting properties, so that instead of chemotherapy, certain cancers could be treated with a daily dose of donuts—and moreover, sufficient proactive donut consumption could stop cancer before it starts. One can easily see that the desire of consumers to purchase donuts would rise, even in the face of a price increase, simply because as wonderful as these little powdered gems may be today, adding in the additional benefit of curing cancer would surely grow their popularity.[25]

This effect is similar to what happens when artificially capped demand is set free (e.g., by ending collusion). Price rises, not because the cost of supply changed, but because effective demand has grown.

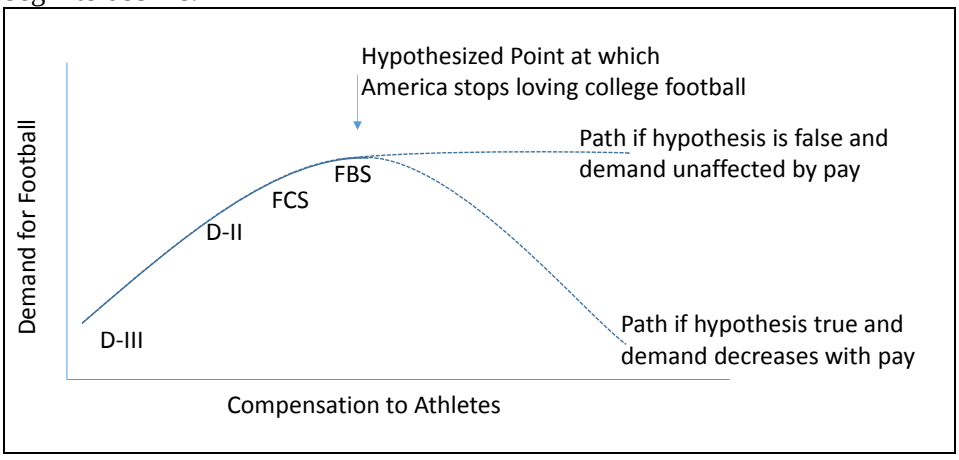
With this in mind, it should be clear that rational sports franchises really cannot drive up the price of talent to the point where no one can afford to purchase it. Even if, for example, the richest team in the NFL wants to pay its head coach $50 million per year, the ability for that price to drive the price of

25. One of the Authors is currently on a strict no-sugar diet, which may be responsible for the paean to cinnamon donuts above.

the thirty-second coach to the point that the thirty-second team cannot afford his salary would require some other source of demand for that coach's services.

Into this basic economic framework comes the NCAA's idea that if athletes are allowed to be paid a market price, the product of college sports would cease to exist. Clearly, economically, this idea is false. At a basic level, if demand (D) for college sports is a function of the level of payment (w) and level of quality (q), that is, $D = f(w, q)$, and if that function is decreasing for values of w above some magical threshold w^*, that is, $\frac{dD(w,q)}{dw}<0$ for $w>w^*$, then payments above the optimal level of wage will be prevented organically, by the simple fact that rational firms do not voluntarily undertake demand-decreasing purchases.

Such a market would have a relationship between compensation and consumer demand that followed the following schedule, where demand grows as compensation increases (from D-III in which athletes themselves pay to play, through D-II and FCS football) to the point of supposed maximum popularity, the FBS limits, after which, according to the NCAA, demand would begin to decline:



Going beyond this point requires costly investments that yield negative returns. Only an irrational or incompetent firm would take such steps. Thus no collective action would be needed to prevent an NFL team from installing sharp spikes on every seat in its stadium—the process would increase costs and at the same time decrease attendance. If payments to athletes above some level are demand decreasing, they would be as likely to happen absent a government mandate as a costly spike-installation process.

This is the economic fallacy behind the Ninth Circuit majority's opinion in *O'Bannon*. The Ninth Circuit explained:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status. In light of that, the meager evidence in the record, and the Supreme Court's admonition that we must afford the NCAA "ample latitude" to superintend college athletics, we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint. We thus vacate that portion of the district court's decision and the portion of its injunction requiring the NCAA to allow its member schools to pay this deferred compensation.[26]

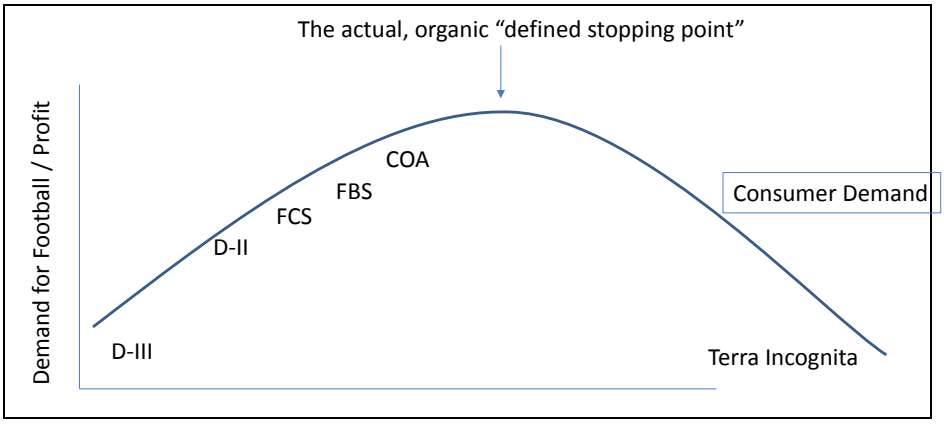
Under the Rule of Reason, if there is "no basis" for payments to stop at some arbitrary level that defines amateurism, but instead consumer demand will drive teams to pay athletes "until they have captured the full value of their NIL,"[27] then, as a matter of economics, any arbitrary limit is inherently unnecessary. Rather than laying out an argument for why a strict, collectively enforced rule defining amateurism was necessary to preserve consumer demand, the majority in *O'Bannon* expressed a fear that consumer demand would prove rules enforcing NCAA-style amateurism were themselves unnecessary.[28] After all, what industry in the history of American business has ever voluntarily incurred higher costs with the known goal of lowering consumers' evaluation of the product's quality? The very idea that athletes have a full value of their NIL that is currently being denied to them is evidence that the restraint of cost of attendance (COA) is too low, because that full value is only set in the context of consumer demand. If $\frac{dD(w,q)}{dw}<0$ at w=COA, then there is no risk of pay rising higher in a less constrained market. On the contrary, if $\frac{dD(w,q)}{dw}>0$ at w=COA, then if left unconstrained, pay will rise to the full value

26. O'Bannon v. NCAA, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (footnotes omitted) (citations omitted) (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 101–02, 120 (1984)).

27. *Id.*

28. See id.

of NIL and consumer demand will be enhanced.



Just as in the examples above, if payment rises for reasons driven by demand, rules designed to restrain that increase are almost certainly anticompetitive as a matter of economics.

Recall that the majority found the NCAA's actual rule, which limited scholarships to what was then known as a Full Grant-in-Aid (GIA) (several thousand dollars below full COA)[29] were "more restrictive than necessary"[30] and thus violated the Sherman Act. But, argued the majority, the COA line could not be crossed without making a "quantum leap."[31] Of course, in 1948, the NCAA argued this quantum leap was at $1 in aid, not at COA. And in 2006, when sued over COA issues in *White v. NCAA*, the NCAA argued that a rule allowing schools to pay the full COA for athletic aid was itself on the wrong side of the quantum leap line.[32] The idea that (a) the next dollar

29. Each university independently determines the list price of the components of a Full GIA as well as its official COA values. Jon Solomon, *2015-16 CBS Sports FBS College Football Cost of Attendance Database*, CBSSPORTS (Aug. 20, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25275374/-16-cbs-sports-fbs-college-football-cost-of-attendance-database. For example, Alabama is able to offer up to $5,386 in addition to the traditional elements of a GIA (room, board, books, tuition, and fees), while Ohio State is only able to offer up to $2,970. *Id.*

30. *O'Bannon*, 802 F.3d at 1075, 1079 (stating "[t]o the contrary, the evidence at trial showed that the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.").

31. *See id.* at 1078.

32. In October 2007, the NCAA argued prohibiting COA was necessary to "prevent 'pay-for-play'; ensure that student-athletes are students first; protect the NCAA's unique, amateur model of competition for the benefit of consumers and student-athletes." *See* NCAA's Memorandum of Points and Authorities in Support of Summary Judgment or in the Alternative, Partial Summary Judgment, at 40, White v. NCAA, No. CV 06–0999–RGK (MANx), 2006 WL 8066803 (C.D. Cal. Oct. 15, 2007).

beyond COA would destroy demand and that (b) schools would knowingly make that quantum leap remains an untested assumption.[33] As the dissent in *O'Bannon* explained, "After an extensive bench trial, the district court made a factual finding that payment of $5,000 in deferred compensation would not significantly reduce consumer demand for college sports. This finding was supported by extensive testimony from at least four expert witnesses. There was no evidence to the contrary."[34]

However, purely *arguendo*, suppose the majority in the Ninth Circuit has *sua sponte* unearthed some magical property of demand that applies to college sports and to no other market, which is that as long as consumers feel someone is minding the store to ensure "sanity" or amateurism, consumer demand is safe, but that if consumers feel some school is cheating, then the entire system will collapse. Surely then, one might ask whether the NCAA must step in to prevent schools from crossing that mystical line of demarcation, beyond which market collapse looms? That is, $\frac{dD(w,q)}{dw}$>0 for all w<=COA, and then there is some as-yet-unproven discontinuity, such that $D(w,q) = 0$ for all $w >$ COA.

Though a demand curve like this sounds somewhat improbable, there are consumer markets in which bad apples can spoil the whole bunch. For example, consider the market for organic fruit, in which organic apples, which cost more to produce and may look somewhat less appealing on the shelf, are nevertheless in high demand by a segment of consumers, and where that demand will drop to close to zero if the apples are produced non-organically. In the absence of some form of market regulation, there is little to stop an unscrupulous apple orchard from using pesticides and other tools of the non-organic trade, but labeling the resulting product as "organic" simply to tap into the higher consumer demand that such a sticker can drive. Much like the market for used cars in which lemons[35] drive out quality cars,[36] cheaper faux-ganic fruit can

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They had previously argued that "the NCAA will explain during summary judgment briefing why Plaintiffs' proposed 'COA cap' is not a viable, let alone less restrictive, means of achieving the pro-competitive benefits that the NCAA's current financial aid rules provide." Defendant NCAA's Reply in Support of Its Motion for Judgment on the Pleadings, at 7–8, n.9, White v. NCAA, No. CV 06–0999–RGK (MANx), 2006 WL 8066803 (C.D. Cal. Oct. 2, 2007). While White ultimately settled, the settlement (Stipulation and Agreement of Settlement Between Plaintiffs and Defendant National Collegiate Athletic Association, White v. NCAA, Case No. 2:06-cv-00999, 2008 WL 890625 (C.D. Cal., Jan. 28, 2008)) did not include any change in the NCAA's maximum GIA rules, and thus COA remained prohibited until 2015.

33. Mark Emmert, the president of the NCAA, stated, "If we move toward a pay-for-play model – if we were to convert our student-athletes to employees of the university – that would be the death of college athletics." 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.

34. *O'Bannon*, 802 F.3d at 1083 (Thomas, J., concurring in part and dissenting in part).

35. Apologies for having created a fruit salad of mixed metaphors.

36. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the*

drive out truly organic fruit and leave consumers worse off.

Organic fruit can be thought of as a form of amateurism—although perhaps not produced to the same level of mainstream, commercially defined quality as other fruit—one for which the specific characteristics that make it organic are essential to its consumer appeal. If the NCAA and the Ninth Circuit majority in *O'Bannon* are correct, amateurism is like this as well; when detached from the product itself, demand has (*arguendo*) the potential to drop to zero.

However, there is no need to ban commercially produced fruit to ensure organic fruit can survive. The solution is not to let all orchards collude to expel any non-organic producers, but rather to establish truth-in-labeling standards.

This distinction is illustrative for college sports because the concept that demand hinges on a magical line across which all demand perishes is similar. Almost certainly, the taste buds of organic-seeking consumers would not explode if non-organic food crossed their lips, but their demand function might collapse. And so, the legal remedy emerges by which standards are imposed, either by law or by voluntary associations of organic growers (playing a role much like that of the NCAA) to assure the public that the organic fruit on this side of the aisle truly merits the label "organic" while the fruit on side of the aisle, without such a sticker, may be cheaper, rosier, etc., but is not organic.

Under the Rule of Reason, if the organic standards solve an economic problem, such that without coordination, the organic fruit market might collapse, then this is the quintessence of procompetitiveness. And to the casual observer, the NCAA might seem perfectly analogous to such an organization, voluntarily organizing producers of organic or "amateur" products to ensure consumers know what they are getting and to let them choose among options, secure in the knowledge that their amateur college sports are not really professional sports in disguise.

But this view is incorrect, and it stems from (a) the insistence on a collective boycott by the NCAA of any college team that would deviate from the standard and (b) the presumption that amateur and college are perfect synonyms and that therefore college and professional are perfect antonyms.

THE NEED FOR STANDARDS IS NOT A NEED FOR BOYCOTTS

The organic fruit metaphor helps cut through the first issue quite cleanly. Organic fruit likely needs a body to inspect and certify the product as truly organic. It does not require a pledge that no supermarket that wishes to sell organic fruit also sells non-organic fruit. It does not impose penalties on those

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Market Mechanism, 84 Q.J. ECON. 488 (1970).

orchards or orchard corporate parents that sell some organic and some non-organic fruit. And it does not prevent orchards that are organic from conducting business with those that are not. But the NCAA *does* prohibit such conduct, so that its rules combine to expel a member from the association,[37] to terminate all rights and privileges,[38] and most egregiously, to mandate a collective boycott combined with a mandatory collective boycott by all other members, even in a scrimmage or exhibition.[39]

A related way to conceptualize the system of compensation cap and boycott is that the NCAA and its member schools have created a joint license, combining their own intellectual property with that of the players in its broadcasts. The question of a group license was of course central to *O'Bannon*. The district court focused on competition across individual groups and found that competition there was unchanged by the creation of a joint license.

> While Plaintiffs have shown that the NCAA's challenged rules harm student-athletes by depriving them of compensation that they would otherwise receive, they have not shown that this harm results from a restraint on *competition* in the group licensing market. In particular, they have failed to show that the challenged rules hinder competition among any potential buyers or sellers of group licenses.
>
> The sellers in this market would be the student-athletes. Plaintiffs have not presented any evidence to show that, in the absence of the challenged restraint, teams of student-athletes would actually compete against one another to sell their group licenses.[40]

However, in the context of a certification organization, the loss of competition driven by the NCAA's (and its member schools and conferences')

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37. *See* 2015-16 NCAA DIVISION I MANUAL art 19.9.7 (2015). "Additional Penalties for Level I and Level II Violations. In addition to the core penalties for Level I and Level II violations, the panel may prescribe one or more of the following penalties: . . . (e) Recommendation that the institution's membership in the Association be suspended or terminated pursuant to Constitution 3.2.5[.]" *Id.*

38. *See id.* art 3.2.5.1.1. "Cessation of Rights and Privileges. All rights and privileges of the member shall cease upon any termination or suspension of active membership." *Id.*

39. *See id.* art 3.2.4.10. "Discipline of Members. Pursuant to directions of the Board of Directors or the annual [Convention], active members shall refrain from athletics competition with designated institutions as required under the provisions of the Association's infractions process (see Bylaw 19)." *Id.*

40. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 994–95 (N.D. Cal. 2014).

insistence on exclusivity becomes more apparent. An instructive analogy can be found in the consent decrees established by the Department of Justice (DOJ) to govern performing rights organizations (PROs) such as the American Society of Composers, Authors and Publishers (ASCAP)[41] or Broadcast Music, Inc. (BMI).[42] The decrees encourage competition between the PROs to entice licensees and engage new members through the offering of non-exclusive licenses—the members maintain the right to individually license their work, though not to another PRO. The DOJ felt it necessary to create these decrees and subsequent rate systems to protect the artists from the PROs and balance the leverage between the parties at the table.

While not governed by a consent decree like ASCAP and BMI, the Society of European Stage Authors and Composers (SESAC) agreed to a settlement with the Television Music License Committee (TMLC) worth over $58 million to alter its market-restricting conduct.[43] The settlement stipulates that over the next twenty years, SESAC must offer alternatives to the blanket licenses that were only offered previously and allow their affiliates to directly enter licensing agreements with local stations, amongst other "forward-looking conduct restrictions."[44]

That is, in the case of PROs, the efficiency of creating a bundled license is balanced against the anticompetitive side effects that come from the removal of competitive offers among members of the group bundle. Analogously, the efficiency involved in conceiving the NCAA as a certification organization is the guarantee the NCAA provides that the two teams on the field both meet its standards of amateurism so that consumers who value that aspect of the product can rest assured they are attending or watching a truly amateur product.

However, as with the PROs, the line is crossed when the NCAA's collective boycott rules prohibit alternative arrangements from reaching the marketplace. Perhaps fans would relish more opportunities to watch a team of college athletes employed by their university play a team of college athletes meeting the existing amateurism rules (such as what happens annually when

41. *See generally* United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001).

42. *See generally* United States v. Broad. Music, Inc., No. 64 CIV. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994).

43. Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 657 (S.D.N.Y. 2015).

44. *Id.* at 657–58.

Army or Navy[45] play Notre Dame),[46] but the fact that the NCAA does not allow schools other than the military academies to pay their athletes as employees prohibits on-the-field and off-the-field competition between these two compensation models, a prohibition that is itself prohibited under the ASCAP and BMI decrees. As such, for the NCAA the plausible need for organic fruit certification has turned into an unnecessary ban on non-organic fruit.

COLLEGE AND PROFESSIONAL ARE NOT ANTONYMS

Thus enters the second source of error—the confusion between college and amateur. College sports would not vanish even if amateur college sports were somehow to do so. As Rascher and Schwarz argued in 2000,[47] and Schwarz explained in 2011[48], these terms are not inherently synonymous. It is easy to see that not all amateur sports are collegiate—any youth soccer league fits the bill. It is less common to see paid collegiate sports, but this is because of rules

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45. All college athletes at the three military academies (the United States Military Academy at West Point, the United States Naval Academy at Annapolis, and the United States Air Force Academy at Colorado Springs) are employees of their respective branches of the service and receive monthly wages, from which deductions are made. *See, e.g.*, *FAQ – Cadet Life*, WESTPOINT, http://www.usma.edu/admissions/SitePages/FAQ_Life.aspx (last visited June 9, 2016).

> A first-year cadet earns more than $900 a month, and the amount increases each year.[] A portion of that cadet pay is deposited into a personal checking account. Another portion of cadet pay is deposited to a "Cadet Account" that is used to help a cadet pay for expenses such as uniforms, books, a computer, activity fees, etc. Each cadet pays a standard amount for laundry, dry cleaning, haircuts, tailoring services and shoe repair. A cadet's gross salary is subject to federal and state withholding taxes and Social Security deductions.

Id.; *see also Cadet Pay*, U.S. AIR FORCE ACAD. (Apr. 13, 2009), http://www.usafa.af.mil/AboutUs/FactSheets/Display/tabid/1530/Article/428296/cadet-pay.aspx ("U.S. Air Force Academy cadets earn $846 a month in basic pay. Cadet pay is disbursed by direct deposit to the cadet's personal checking account."); *Student Life: General Information*, USNA, http://www.usna.edu/Student-Life/General-Information-for-Midshipmen.php (last visited June 9, 2016) (explaining that "Midshipmen pay is $1027.20 monthly, from which laundry, barber, cobbler, activities fees, yearbook and other service charges are deducted. Actual cash pay is $100 per month your first year, which increases each year thereafter.").

46. This year's Notre Dame–Navy game was aired on NBC (the broadcast network) on October 10, 2015. *See C.J. Prosise Scores 3 TDs as No. 15 Notre Dame Beats Navy*, ESPN (Oct. 10, 2015), http://espn.go.com/college-football/recap?gameId=400763584. The salaried employees of the Navy lost to the unsalaried non-employees of Notre Dame, 24–41. *See id.* Notably, as of November 22, 2015, this was the Navy's only loss for the season, but the Authors are unaware of any outrage that paid employees are being allowed to compete against more standard amateur athletes.

47. *See generally* Rascher & Scwharz, *supra* note 8.

48. *See generally* Andy Schwarz, *Excuses, Not Reasons: 13 Myths About (Not) Paying College Athletes*, SELECTED PROC. SANTA CLARA SPORTS L. SYMP., Sept. 2011, at 46.

in question and the NCAA's grip over intercollegiate sports. In those rare cases where the NCAA does not govern, such as USA Cycling's (USAC) Collegiate Racing, there is no prohibition on professional cyclists participating as long as they qualify as bona fide college students.[49] USAC rules stipulate only a minimum level of funding and do not define or enforce any restriction on maximum compensation.[50] The primary requirement is simply that the athlete actually be in college.[51] Schwarz explained that this actually creates four possible options, not the false dichotomy of college or professional[52]:

	Capped In-Kind Payment ("Amateur")	Market Rate Payment ("Professional")
College	Current NCAA *Popular*	My proposal *Likely to be Popular*
Non-College	True Amateurs playing in the park, Club Ultimate Frisbee, post-collegiate Rugby, etc. *Not Popular*	NBA D-League and other minor leagues. *Not Popular*

The NCAA rules defining amateurism may be analogous to the idea of an organic fruit certifier, but when the NCAA enforces those rules with economic coercion, the analogy breaks down. If the industry needs a standard to define amateurism, and if consumers demand teams that meet that standard, then certification is sufficient to ensure their market demand is met. Instead, the actual marketplace sees constant efforts by schools to push beyond those rules (which the NCAA tends to call "major infractions")[53] and sees little decrease in

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49. *See* 2012 USA CYCLING RULE BOOK arts 7A1(b), 7G3 (2012). Collegiate Cycling has a goal of "[e]nabling elite riders to pursue an education while benefiting from development opportunities that integrate with amateur and professional teams and national development programs[.]" *Id.* art 7A1(b)."Current and former professional cyclists, who otherwise satisfy the eligibility requirements of these Rules, are allowed to compete in Collegiate Cycling Races." *Id.* art 7G3.

50. *See id.* art 7B1(r).

Varsity Cycling Team means any USA Cycling Collegiate member club in good standing, having submitted the appropriate Varsity application to USA Cycling proving that the Team employs or is advised by at least one USAC-licensed coach, and also meets any three of the following four requirements: (i) The Team is recognized as holding varsity status by the school with which it is affiliated. (ii) The Team disburses at least $10,000 in scholarships to its athletes annually. (iii) The Team attended any two of the four USA Cycling Collegiate National Championships in the previous calendar year. (iv) The Team pays for Riders' entry into Collegiate Cycling Races, so long as the funding is not derived from team dues of any kind.

Id.

51. *See id.*

52. Schwarz, *supra* note 48, at 67.

53. For a searchable database of these major infractions, *see Legislative Services Database - LSDBi*, NCAA.ORG, https://web1.ncaa.org/LSDBi/exec/miSearch (last visited June 9, 2016).

demand with each example. If consumer demand is truly a function of amateurism, then a rigorous standard setting and inspection regime, without the need for collective boycott, would suffice. If there were truly a demand for amateurism, then that consumer demand would be sufficient to prevent teams from making the "quantum leap" that destroys demand, and the promise of a rigorous certification and inspection (but not enforcement) would be all that is needed to ensure against market collapse.

A simple mental experiment makes this clear. Assume (*arguendo*) demand for Auburn football is, as the majority in the Ninth Circuit implicitly assumed, a function of Auburn refraining from crossing some magical line such as COA. In other words, assume (as above) that $\frac{dD(w,q)}{dw}>0$ for all w<=COA, and then there is some as-yet unproven discontinuity, such that $D(w,q)=0$ for all w > COA. As indicated by the functional notation *D(w,q)*, demand is also assumed to be a function of quality—that is, the evidence strongly suggests that fans will pay more for a winning Auburn Tigers team than a losing one and networks will more prominently broadcast winning Auburn games, all else equal. Now assume the NCAA investigates allegations that Cecil Newton, father of Heisman Trophy winner Cam Newton, received payment in exchange for his son attending Auburn.[54] Under the truth-in-labeling assumptions, Auburn wants to maintain the label of amateur to tap into consumers' demand for amateurism, but Auburn also wants to "cheat" by paying the elder Newton for the services of the younger to improve quality without seeming to cross the threshold (w>COA). If the NCAA exposes the payment so that consumers are aware that Newton received more than COA, (and if the assumptions about the consumer benefits of amateurism were true) demand for the Auburn product would collapse, just as demand for faux-ganic fruit would collapse if the specific brands in question were publicly revealed to be phony.[55] There is no need to fine or collectively boycott Auburn, because if the assumptions about demand were true, the market would punish Auburn once the NCAA revealed the truth.

Instead, as many may have surmised, it is possible the revelation of Cecil Newton having profited off the sweat of Cam's brow would have had little or no impact on demand for Auburn football. That is, it appears that $\frac{dD(w,q)}{dw}>0$ for some values of w>COA, or perhaps even the level of pay has no impact on demand, so that D = $f(q)$, rather than $f(w,q)$.[56] In that case, if Alabama were

54. Per documents released by Auburn, this example is counter-factual: "The documents indicate Newton's father, Cecil Newton, and ex-Mississippi State player Kenny Rogers sought from $120,000 to $180,000 for the quarterback to sign with the Bulldogs out of junior college but didn't ask any other school for money." *Auburn Releases Cam Newton Docs*, ESPN (Nov. 5, 2011), http://espn.go.com/college-football/story/_/id/7190987/auburn-tigers-records-reveal-details-cam-newton-scandal.

55. One might say the metaphorical apple would hit Newton on the head.

56. Indeed, the idea that demand is itself increasing or decreasing in wages is contrary to all

to choose (on its own) that it no longer wished to play against Auburn, the antitrust laws would have little to say about such unilateral choices. On the other hand, neither would the law prohibit Alabama from continuing to play Auburn, even while maintaining amateurism or instead opting to adopt payments similar to Auburn. If it did so, Alabama would be reacting like a normal market participant, adopting additional expenses only because it felt it would please its fans and thereby grow revenue. But such broadening of consumer choice is made impossible by NCAA rules, which stifle that market choice and mandate that Alabama boycott Auburn or else face a collective boycott itself.

In both cases, then, what the law allows—collaboration among competitors to ensure a product can exist and thrive—and what the law prohibits—collusion above what is reasonable and necessary or which stifles rather than widens competition—are a better match to a system in which the NCAA maintains a standard definition of amateurism and conducts rigorous audits of schools believed to be violating those standards (as it does now) to certify compliance of those schools that wish to display the certified amateur sticker, but without any enforcement mechanism other than denying that certification to those schools that fail to meet the qualifications.

That is, that the NCAA could continue to define the "molten core" of its product as it argued in the Ninth Circuit: "This is the molten core of the rule. This says, this is a rule that simply says in the product that we have, athletes cannot be paid, and we define what pay constitutes."[57] But, this would leave it to consumers to enforce that rule with their feet (by attending games played only by certified amateur teams) and their eyeballs (by watching games played only by certified amateur teams).

In such a system, consumers whose demand is truly driven by amateurism will not be fooled into purchasing "shamateur" college football, but those consumers for whom such arbitrary distinctions do not matter—much like those who are fine with apples grown with pesticides—are able to purchase college sports in a market in which restraints on payment (other than those self-enforced by demand) do not exist. In that market, a star athlete might be paid to stay one additional year in college rather than ride the pine in the NBA or NFL, but under NCAA rules, that choice, for schools and for consumers of those school's sport products, is constrained.

There was a time during which the NCAA defined amateurism but had no

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standard economics. For the NCAA's argument to be true, we already have to suppose that demand for college sports is *sui generis* because it hinges on wages in a way normal consumer demand does not.

57. Oral Argument, *supra* note 1, at 14:23.

enforcement power. From 1906 (when the NCAA was founded) until 1948,[58] the NCAA frequently described the aspirational goal of amateurism as it was then defined (no scholarships at all) and left it to schools and conferences to enforce such a rule. Few schools and conferences did, yet the sport thrived. Again, in 1951 with the wake of the Sanity Code, the NCAA ceased enforcing amateurism but demand remained steady.

Rather than widening consumer choice, in the way that organic labeling rules do, the NCAA's collective boycott perverts the idea of procompetitive restraints by narrowing choice and stifling competition between compensation systems. If the Ninth Circuit, or any court, seeks a truly less restrictive alternative to a blanket prohibition on the production of non-amateur college sports, a far simpler, far more competitive solution is to allow the NCAA its labeling role, but to strip it of enforcement of what amounts to a price-fixing cartel (or group boycott).

In some sense, the debate on a less restrictive alternative, on which *O'Bannon* hinged (and on which Plaintiffs have now appealed) and with which *Jenkins v. NCAA* and *Alston v. NCAA* also must grapple, is somewhat superfluous.[59] If the market truly wants amateurism, certified amateur sports will sell themselves. If not, there is no economic justification to allow price-fixing to achieve such an outcome if the market outcome would be, as the majority in *O'Bannon* assumed, one in which athletes capture their full value.

58. Note that in oral arguments the NCAA argued that it imposed amateurism from its inception in 1906. This is factually false and likely reflects an attempt by the NCAA to push backwards the start of its price fixing to make it seem more focal to college sports' early success than it actually was. The NCAA also failed to note it allows the exceptions for paid employees. *See* https://apps.oyez.org /player/#/burger8/oral_argument_audio/194259 (last visited June 9, 2016).

59. *See generally* Jenkins v. NCAA, 311 F.R.D. 532 (N.D. Cal. Dec. 4, 2015).