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THE ONLY GAME IN TOWN: AN EXAMINATION OF THE NCAA'S ANTICOMPETITIVE CONDUCT

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INTRODUCTION

The NCAA is violating § 2 of the Sherman Act by maintaining its monopoly power through an exclusionary scheme.[1] This article analyzes the NCAA's exclusionary conduct and the unique structure of the NCAA's "student-athlete" model. Whether the NCAA as an entity qualifies as a single entity with unitary decision-making and aggregate economic power, or as a combination of multiple entities conspiring together,[2] the end result is the same. Under either conception of the entity structure or either section of the Sherman Act, the underlying acts taken by the NCAA violate federal antitrust law. This article will follow a standard § 2 monopolization theory and will propose viable alternatives for the NCAA's current model that emphasize the anticompetitive nature of the NCAA's tactics.

Under the *Grinnell* monopolization test, a firm that possesses monopoly power and uses exclusionary acts to maintain that monopoly power has violated § 2 of the Sherman Act.[3] Here, the NCAA has used exclusionary acts to set its labor costs unreasonably low in order to maintain a monopoly on the college-

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[1] 15 U.S.C. § 2 (2020) (defining exclusionary scheme as "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

[2] Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 193 (2010) (holding that NFL teams, while all part of a larger consortium, are independent actors and thus can conspire amongst themselves to violate antitrust laws).

[3] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

level athlete market. Labor costs for the purposes of this paper are defined as the amount of compensation paid (including injury-liability avoided) to college-level athletes, which are athletes of the requisite age and skill necessary to compete in college basketball and football. As such, the NCAA has created an exclusionary scheme whereby the NCAA depresses the labor costs that would otherwise be due in a competitive market through predatory tactics, eliminating competitors from the market, and the NCAA recoups monopoly profits through the maintenance of its monopoly power.

I. THE NCAA'S COST SCHEME CONSTITUTES AN EXCLUSIONARY ACT IN VIOLATION OF THE *GRINNELL* MONOPOLIZATION TEST

The traditional framework for a § 2 monopolization claim can be found in the *Grinnell* case, where the Supreme Court held that

> the offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[4]

This paper will analyze the monopolization test by examining a unique exclusionary cost scheme: the NCAA, through exclusionary tactics, has made its labor cost so unreasonably low that no competitor paying market wages can compete with the NCAA in the college-level athlete market, thereby eliminating competition and ensuring maintenance of monopoly power and profits.

The Supreme Court has emphasized that as a general rule, lower production costs "either reflect[] the lower cost structure of the alleged [monopolist], and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting."[5] Similarly, the Court has steadfastly held that price discrimination is often a natural part of "vigorous competition" and "to hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share."[6] However, the general rule that lower production costs merely reflect a lower cost structure only applies to firms that

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[4] *Id.*

[5] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (referring to P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 720c (Supp. 1992)).

[6] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 116 (1986).

can improve their production costs through better management or improved efficiency. Here, the NCAA does not manufacture or produce physical goods; there is no technological advancement or efficient technique that it has implemented to lower costs. Rather than the result of "growth or development as a consequence of a superior product, business acumen, or historic accident,"[7] the NCAA's minimal labor costs merely reflect the use of exclusionary acts. The NCAA's unreasonably low costs are not legitimate price competition and result from predatory tactics that allow the NCAA to not pay its labor a reasonable market rate.

As the Department of Justice points out, the purpose of § 2 of the Sherman Act is to promote economic growth and societal wealth.[8] As such, monopolization claims run the risk of punishing efficient firms that have gained market share from inefficient rivals.[9] However, the NCAA, through its exclusionary cost structure, has created the type of harmful monopoly, with high monopoly prices and reduced supply, that the Sherman Act aims to prevent.[10] In other words, the NCAA's monopoly has arisen and been maintained by exclusionary tactics rather than vigorous competition or efficient operations.

A. The NCAA's Unreasonably Low Labor Costs Allow the NCAA to Undermine Potential Competitors' Price and Constitute an Exclusionary Act that Eliminates Competition in the Market

Showing antitrust harm is "not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously . . . ."[11] Similarly, low costs that are set as "an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws."[12] The purpose of the Sherman Act is concerned "with the protection of competition, not competitors."[13] In short, antitrust injury is an "injury of the type the antitrust laws were intended to prevent. . . . The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[14]

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[7] *Grinnell Corp.*, 384 U.S. at 571.

[8] U.S. DEP'T JUSTICE, SINGLE-FIRM CONDUCT AND SECTION 2 OF THE SHERMAN ACT: AN OVERVIEW (2015), https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1 (updated June 25, 2015).

[9] *Id.*

[10] *See id.*

[11] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[12] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993).

[13] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

[14] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

Here, the NCAA has created a pool of functionally free labor through its exclusionary scheme,[15] which allows the NCAA complete dominance of the college-level athletics market. As a result, both the requisite exclusionary conduct and subsequent harm to competition exists in the relevant market (i.e., college-level basketball and football). As a factual matter, no other entity supplies college-level athletics to consumers; the NCAA is, both literally and figuratively, the only game in town. More specifically, the NCAA is a monopsony, and the NCAA's restriction on college-level athlete compensation reduces competition in the market, causing antitrust harm.[16] Other entities exist in the high school (pre-college) athletics market.[17] Likewise, competitors exist in the professional (post-college) athletics market.[18] However, in the college-level athletics market, no other competitors exist, nor can any competitors enter.

Consider the plight of a potential competitor (e.g., public sports-apparel companies like Nike, Adidas, or Under Armour) that attempts to enter the market. Potential competitors cannot force college-level athletes to work for free.[19] Nor is it reasonable to expect college-level athletes to voluntarily work for a sports-apparel company without pay. As an anecdotal case, New Balance, a private footwear company, recently agreed to pay a highly-recruited college-level basketball player $1 million for a three-month internship to *not* play basketball at all.[20] Consequently, a competitor will have to compensate athletes for their services. As the recent college basketball scandal has shown, certain college-level basketball players are worth at least $100,000, as well as risking the potential negative consequences from NCAA sanctions and criminal bribery charges, for one year of play.[21] Regardless of the exact determination of what constitutes a reasonable market rate for college-level basketball and football players, that compensation will undoubtedly be greater than zero.

Under basic economic theory, a profit-maximizing company in a competitive market will set its price no lower than its cost.[22] At any valuation of a college-

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15 *See infra* pp. 11–16 (discussing NCAA's free labor pool in depth).

16 *See* O'Bannon v. NCAA, 802 F.3d 1049, 1057–58 (9th Cir. 2015).

17 *See History, Heritage & Tradition*, MCDONALD'S ALL AM., https://www.mcdonaldsallamerican.com/aag/en-us/history.html (last visited July 5, 2020) (explaining the history of the McDonald's All American high school basketball competition); *History*, UNDER ARMOUR FOOTBALL, http://uafootball.us/all-america-football-game/#history (last visited July 5, 2020).

18 The National Basketball Association and the BIG3 compete in professional American basketball. At the time this paper was written, the National Football League and the Arena Football League were competitors in professional American football. Arena Football has since filed for bankruptcy. Scott Gleeson, *Arena Football League Files for Bankruptcy, Ceases All Operations*, USA TODAY (Nov. 27, 2019), https://www.usatoday.com/story/sports/nfl/2019/11/27/arena-football-league-declares-bankruptcy-shuts-down/4322126002/.

19 U.S. CONST. amend. XIII, § 1.

20 Marc Stein, *A New Option for NBA Prospects: The Million Dollar Intern*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/sports/darius-bazley-g-league-new-balance.html.

21 *See* Matt Norlander, *Ultimate College Basketball Corruption Scandal Primer*, CBS SPORTS (Apr. 12, 2018), https://www.cbssports.com/college-basketball/news/ultimate-college-basketball-corruption-scandal-primer-explaining-the-latest-with-the-fbi-probe/.

22 KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 9–12 (2003).

level athlete's market wage rate, the potential competitor's labor cost (defined as C_x) will be higher than the NCAA's labor cost (defined as C_y) because of the fundamental fact that $C_x > 0$, whereas $C_y \approx 0$. As soon as a competitor enters the market, setting its price (defined as P_x) equal to C_x, the NCAA can simply lower its price (defined as P_y) to any amount marginally less than its competitor's price. Due to the NCAA's labor cost structure ($C_y \approx 0$), it will still make a profit at any $P_y > 0$ and eventually drive the competitor out of business. Once the competition has exited, the NCAA can simply return P_y to the highest monopoly price it can obtain. Even if a competitor were to forego short-term profitability in an attempt to increase market share by setting $P_x = P_y$, the end result would be the same. So long as $C_x > P_x$ but $P_y > C_y$, the NCAA will continue to turn a profit at any short-term price level that the competitor chooses. Therefore, no competitor can or will enter the market due to the NCAA's cost scheme, and the NCAA can maintain a monopoly price indefinitely.

Competition in the college-level athletics market is clearly eliminated by the NCAA's exclusionary tactics. However, the next question is whether such an exclusionary cost scheme as laid out above actually harms consumers of college athletics. Do consumers actually pay more for college basketball and football as a result of the NCAA's low-cost scheme? The answer, under any reasonable point of view, must be yes.

B. Presence of Competitors in the Market Reduces Price for Consumers While Simultaneously Increasing Compensation for College-Level Athletes

The Supreme Court has held that "[l]ow prices benefit consumers regardless of how those prices are set,"[23] and "depriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy."[24] In order "to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers."[25] The purpose of the Sherman Act is designed "not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[26] In essence, an antitrust claim "must demonstrate that the monopolist's conduct harmed competition, not just a competitor."[27] Here, the NCAA's exclusionary tactics result in unreasonably low labor costs, but those lower costs are not passed on to the consumer in the form of a lower price while simultaneously maintaining the NCAA's monopoly power.

[23] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 329, 340 (1884)).
[24] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 319 (2007) (quoting *Brooke Grp.*, 509 U.S. at 224).
[25] U.S. v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).
[26] Spectrum Sports Inc., v. McQuillan, 506 U.S. 447, 458 (1993).
[27] *Microsoft Corp.*, 253 F.3d at 59.

Though the NCAA is a non-profit organization,[28]it is most definitely not a charity. The NCAA is a profit-maximizing entity; it will set its price at the highest profit-maximizing level. Consider, as an example, the NCAA's sale of media rights for the men's annual championship basketball tournament. The NCAA recently extended its contract with two media companies, Columbia Broadcasting System and Turner Broadcasting System, by eight years for a total of $8.8 billion (starting in 2024) for the rights to broadcast the tournament.[29] No other entity can offer college-level basketball to consumers, but there are numerous media conglomerates willing to purchase the media rights for NCAA basketball. No serious argument can be made that the NCAA sold its men's basketball tournament rights to the lowest bidder; it clearly sold at the highest price offered. However, the question remains whether competitors offering college-level athletics would have lowered that sale price and subsequent cost to consumers. Such a determination can only be theoretical and counter factual, but the answer must be yes.

Economic theory posits that the presence of competitors reduces the power of the monopolistic firm to set a monopoly price level by providing alternatives for the buyer.[30] In the face of competitors offering supply-side substitution, the monopolistic firm would be constrained from setting its price too high lest the buyers switch to the competitors.[31] Regardless of the NCAA's underlying cost structure, new competitors will at least cause a marginal decrease in price as a hedge against consumers substituting one product (NCAA basketball or football) for a potentially cheaper alternative (Nike basketball or Under Armour football).

Similarly, the practical implications of competitors in the market suggests that the NCAA would have to reduce its price. If competitors enter the market, one can assume that the NCAA's monopoly power and exclusionary cost structure has dissipated and college-level athletes are now receiving market compensation for their services. In essence, there can be no competitors while the NCAA maintains its free labor source (as examined in the preceding section); therefore, the presence of competitors implies the absence of the NCAA's free labor pool. In such a scenario, the NCAA's cost has increased to the market rate, but an increase in labor cost does *not* imply a higher price to consumers. An increase in labor cost would lead to an increase in price only when that cost increase exceeds the market price level. Rather, the presence of competitors would merely force the NCAA to forego its monopoly profits through an increase in labor cost to the market rate and a reduction from the

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28 *Finances*, NCAA, http://www.ncaa.org/about/resources/finances (last visited July 5, 2020).

29 Marc Tracy, *N.C.A.A. Extends Basketball Deal with CBS Sports and Turner Through 2032*, N.Y. TIMES (Apr. 12, 2016), https://www.nytimes.com/2016/04/13/sports/ncaabasketball/ncaa-extends-basketball-deal-with-cbs-sports-and-turner-through-2032.html.

30 *Microsoft Corp.*, 253 F.3d at 52.

31 *See* HYLTON, *supra* note 22, at 232–36.

monopolist price to the competitive price level. Without a price reduction, the new competitors, who are operating at some price level less than the monopoly price charged by the NCAA, would siphon some, if not all, the business of the broadcasting companies. Given that the NCAA's annual labor cost for college-level athletes is functionally zero and it sold the media rights for an annual tournament at a rate of $1.1 billion per year,[32] there is an enormous amount of monopoly profits to spread around and increase labor costs while simultaneously reducing sale price.

Per the NCAA's 2017 Financial Report, the total amount in expenses (excluding labor of the athletes, which naturally does not appear as an expense) required to operate all of its athletic infrastructure across all sports and for the entire fiscal year was $396 million.[33] The amount of revenue derived from the sale of media rights and merchandise for the annual, month-long NCAA basketball tournaments was $981 million.[34] That leaves $585 million of monopoly profits leftover from the current exclusionary cost structure. Moreover, sixty-eight college teams participated in the 2016 NCAA tournament.[35] The NCAA allows thirteen scholarships (covering cost of attendance) to each of those teams.[36] Together, that results in 884 college-level athletes competing in the tournament. The average cost of attendance (tuition, fees, room and board) for all four-year universities during the 2015-2016 academic year was calculated at $27,213.[37] Altogether, the 884 athletes received scholarships worth just north of $24 million to compete in a tournament that generated the NCAA $585 million in profit. In other words, an entity "is a monopolist if it can profitably raise prices substantially above the competitive level. . . . Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear."[38]

Given the astronomically high profits derived by the NCAA under its current exclusionary cost structure, the presence of competitors and the payment of

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[32] *See supra* text accompanying note 29

[33] *See* NCAA, NCAA CONSOLIDATED FINANCIAL STATEMENTS 2016–17 AND INDEPENDENT AUDITORS' REPORT 5 (2017), https://web.archive.org/web/20181221210506/https://www.ncaa.org/sites/default/files/2016-17NCAAFin_FinancialStatement_20180129.pdf. The report lists total expenses at about $956 million, but that includes roughly $560 million of Distribution to Division I Members. Sharing the monopoly profits with member universities, while an expense for accounting purposes, is not the type of expense one would usually consider when looking at production costs. Thus, the $560 million was subtracted from the total, resulting in $396 of actual expenses.

[34] *Id.* The financial report included certain items (specifically, Investment income - net, Gain - Other, and Contributions) that are revenue for accounting purposes, but not useful in determining revenue from the production of goods and services. The $981 million figure reflects the removal of these items from the total revenues listed in the report.

[35] *See Division I Men's Basketball*, NCAA, https://www.ncaa.com/brackets/basketball-men/d1/2016 (last visited July 5, 2020).

[36] NCAA, 2018-19 NCAA DIVISION I MANUAL art. 15.5.5.1 (2018) [hereinafter NCAA 2018-19 DIV. I MANUAL].

[37] *See Tuition Costs of Colleges and Universities*, NAT'L CTR. EDUC. STATISTICS, https://nces.ed.gov/fastfacts/display.asp?id=76 (last visited July 5, 2020) [hereinafter *Tuition Costs*].

[38] U.S. v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

market rate wages to athletes would not increase the price to consumers. Similarly, the price of the media rights would undoubtedly drop given the supply-side substitution risk that competitors present to the NCAA. The lower price of media rights subsequently reduces the price paid by consumers, operating under a chain of reasoning where the lower price for media rights means lower cost to broadcasting companies, which reduces the price of purchasing the broadcast for the average consumer.[39]

C. The NCAA Currently has Monopoly Power in the College-Level Athlete Market

The monopolization prong from the *Grinnell* monopolization test requires a showing of monopoly power in the relevant market.[40] The Supreme Court defines "monopoly power as 'the power to control prices or exclude competition.'"[41] "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power."[42] In scenarios "where the market is highly diffuse and competitive, or where new entry is easy," monopoly power is unlikely to occur.[43]

Little argument can be made that NCAA does not have monopoly power in the college-level athletics market. The Supreme Court explicitly held that the NCAA has market power in the relevant market:

> As a factual matter, it is evident that [the NCAA] does possess market power . . . intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. These findings amply support [the] conclusion that the NCAA possesses market power.[44]

No other entity provides a venue for college-level athletes to perform, and consequently, no entity can offer broadcast rights or otherwise compete with the NCAA. Rather than a diffuse market with readily available substitutes, the college athletics market is concentrated in one entity, the NCAA. Questions remain whether the short-run cost of the NCAA's exclusionary scheme can be

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[39] This chain of reasoning relies upon basic supply and demand economic theory, but given the reputations of the cable conglomerates, it is unclear whether a decrease in the cost of purchasing a particular media right would actually result in lower cost to the subsequent consumers. This paper assumes that cable companies operate like normal firms in a competitive market.

[40] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

[41] *Id.* at 571 (quoting United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)).

[42] *E. I. Du Pont de Nemours & Co.*, 351 U.S. at 394.

[43] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993).

[44] NCAA v. Bd. of Regents, 468 U.S. 85, 111 (1984).

borne by the NCAA and whether it can maintain its monopoly power through the imposition of barriers to entry on competitors and switching costs on college-level athletes.

1. The "Student-Athlete" Model Allows the NCAA to Create a Functionally Free Pool of Labor, Eliminating Short-Term Costs Associated with an Exclusionary Scheme

The term "student-athlete" was coined by the first director of the NCAA, Walter Byers, in an effort to avoid the classification of the relationship between athletes and universities as an employee-employer relationship.[45] The ability of the NCAA to classify college-level athletes as non-employees has three consequences that allows the NCAA to create an exclusionary cost scheme at minimal or no cost to itself.

First, the employee-employer relationship has a great deal more protection than the "student-athlete" relationship, and the NCAA can avoid paying workers' compensation to its athletes as a result.[46] The amount of labor cost avoided by the "student-athlete" model is incalculable, but a few numbers to put the potential injury cost in perspective can be instructive. Since 2000, thirty college-level athletes have died while participating in NCAA football programs.[47] From 2000 to 2016, eighty-five athletes have died while participating across all NCAA athletic programs.[48] From 2004 to 2009, the NCAA calculated that 41,000 injuries occurred in football alone.[49] The severity and extent of those injuries will obviously vary, but the sheer scale of injuries as well as the persistent risk of death in football alone suggests that the NCAA has successfully avoided massive workers' compensation liability. As such, the NCAA has minimized its labor cost and subsequently minimized the burden of enacting its exclusionary cost scheme.

Second, the term "student-athlete" allows the NCAA to apply its "principle of amateurism" to college-level athletes who participate in NCAA athletic

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[45] Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true; *See* Jason Belzer, *Leveling the Playing Field: Student Athletes or Employee Athletes?*, FORBES (Sept. 9, 2013), https://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/.

[46] *See* Branch, *supra* note 45; Belzer, *supra* note 45.

[47] Erik Lief, *30 NCAA Football Players Have Died During Workouts Since 2000, HBO Reveals*, AM. COUNCIL SCI. & HEALTH (Sept. 28, 2018), https://www.acsh.org/news/2018/09/28/30-ncaa-football-players-have-died-during-workouts-2000-hbo-reveals-13456.

[48] Brian Burnsed, *The Breaking Point*, NCAA (2018), http://www.ncaa.org/static/champion/the-breaking-point/.

[49] NCAA, FOOTBALL INJURIES, https://www.ncaa.org/sites/default/files/NCAA_Football_Injury_WEB.pdf (last visited Dec. 12, 2020).

programs.[50] The Supreme Court has ensconced the supposed virtues of NCAA amateurism in the dicta of the *Board of Regents* case:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[51]

The Court has rationalized the latitude provided to the NCAA to preserve amateurism and the "student-athlete" model by assuming (without any deeper analysis) "that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[52] Regardless of the soundness of the legal reasoning (or lack thereof) and the factual realities of college athletics in 1984, the NCAA now presides over a billion-dollar industry. Nonetheless, the NCAA can continue to classify college-level athletes as non-employee amateurs and use any means to preserve the "revered tradition of amateurism." As such, the NCAA has complete control and an unfettered ability to regulate college-level athletes' compensation while still remaining "entirely consistent with the goals of the Sherman Act." The Court's "respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics"[53] allows the NCAA to utilize a conception of amateurism that has rather nefarious consequences. As the Court-sanctioned safeguard of noble amateurism, the NCAA can use any tactics necessary to maintain amateurism while also wielding the power to define that very same principle. For the NCAA, amateurism supposedly means college-level athletes are "motivated primarily by education and by the physical, mental and social benefits to be derived."[54] In reality, the NCAA's principle of amateurism is really an analysis of whether an athlete has competed with professionals, engaged representation on his behalf, or been paid for his services, with no consideration of whether the individual in question is motivated by physical or social benefits, nor whether the athlete's primary motivation was for a professional career.[55] In essence, the NCAA sets the distinction between professional athletes and amateur "student-athletes" on whether or not that athlete receives compensation for their efforts. The act of

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[50] *See* Branch, *supra* note 45; Belzer, *supra* note 45.
[51] NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).
[52] *Id.* at 117.
[53] *Id.* at 101.
[54] NCAA 2018–19 DIV. I MANUAL, *supra* note 36, art. 2.9.
[55] *Amateurism,* NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited July 5, 2020).

refusing to pay wages to athletes is thus turned into a virtue in service of the noble principle of amateurism. That conception of amateurism is particularly peculiar when compared to the Greek origin of the amateur athlete. Amateur athletes in Greece competed exclusively for prizes; there was no distinction between professional athletes and amateur athletes because the two ideas, as understood in modern times, were one and the same in ancient Greece.[56]

However, since the NCAA has control over defining what constitutes an amateur and whether a college-level athlete satisfies those standards, the NCAA can (and does) prescribe the amount of wages that college-level athletes can receive and still be considered amateurs.[57] Unsurprisingly, the amount of wages a college-level athlete can receive is zero.[58] Query whether profiting from the labor of college athletes who are barred from receiving remuneration is the type of exploitative conduct that the NCAA ostensibly strives to protect student-athletes from: "Student-athletes should be protected from exploitation by professional and commercial enterprises."[59]

Third, the amount of "compensation" the NCAA permits for college-level athletes does not actually result in a labor cost on the NCAA. The NCAA allows its member institutions to distribute a "grant-in-aid" to its athletes, which is equal to the financial aid cost of attendance limitation of the member university (i.e., tuition, fees, and room and board).[60] As mentioned above, the average cost of attendance across four-year universities, and therefore the average compensation to college-level athletes, was $27,213 in 2016.[61] Even if $27,213 was considered a fair market wage and consistent with a perfectly competitive college athletics market, that grant-in-aid allowed by NCAA regulations is neither practical compensation for the athletes nor does it actually result in equivalent labor costs to the NCAA. In other words, the grant-in-aid does not functionally increase the NCAA's labor costs above zero.

Consider the plight of a "student-athlete" under the NCAA's current model at the University of Alabama ("Bama").[62] The grant-in-aid allowable under NCAA regulations for Bama athletes is either $31,080 (in-state) or $51,424 (out-of-state).[63] Per NCAA rules, Division I football programs are allowed a

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[56] *See generally* Robert Lemons, *Amateurism and College Athletics* (April 28, 2014) (unpublished manuscript),https://economics.sites.stanford.edu/sites/g/files/sbiybj9386/f/publications/robertlemonshonorsthesis-may2014.pdf.

[57] NCAA 2018–19 DIV. I MANUAL, *supra* note 36, art. 12.02.10.

[58] *Id.* art. 12.02.11.

[59] *Id.* art. 2.9.

[60] *Id.* art. 12.01.4.

[61] *Tuition Costs*, *supra* note 37.

[62] The University of Alabama has a very large and profitable football program with publicly-available financial data. As such, it makes a good case study for the paper, but any public Division I member university would suffice.

[63] *Cost of Attendance*, UNIV. ALA., https://financialaid.ua.edu/cost/ (last visited July 8, 2020).

maximum of eighty-five scholarship players.[64] Even if every Bama football athlete was an out-of-state student, the total amount of grant-in-aid given to those players would be $4.37 million. However, Bama *does not actually bear the cost of those scholarships*. Per the 2017 financial report, Bama reported $483 million of tuition and fees net revenue.[65] That revenue surplus accounts for just over $237 million of scholarship expenses for all of its students (undergraduate and post-graduate).[66] In the same year, Bama reported $243 million in state appropriations, federal grants, and gifts, as well as an additional $24.5 million of scholarship operating expenses.[67] All but $19 million of Bama's entire scholarship expenses could be covered by third-party entities. Even where the scholarship expenses are not directly covered by a third-party, Bama can recoup the lost income from a scholarship by simply admitting additional non-scholarship students, or conversely, reducing the scholarship amounts it would have otherwise given to non-athletes. Per the same report, Bama had a full-time enrollment of 35,120 students.[68] Given that Bama's full allotment of football and basketball grant-in-aid scholarships is ninety-eight (thirteen for basketball, eighty-five for football), Bama need only admit ninety-eight additional students (an enrollment increase of 0.28%), with no scholarship allowances to erase the lost tuition revenue from the grant-in-aid scholarships.[69] The actual labor cost borne by the NCAA and its member institutions is functionally zero as third-party entities or enrollment adjustments disburse the cost. Put another way, the grant-in-aid scholarships result in an actual cost to the NCAA or its member universities only when those scholarship costs are not passed on to a different entity (the state government) or group (non-scholarship students).

As an analogy, consider what the "grant-in-aid" actually offers college-level athletes. Granting a full scholarship with sticker value of $27,000 to the "student-athlete" is similar to giving an athlete a retail gift card for $27,000. Yes, the gift card has a nominal value of $27,000, but the athlete can only use that money at the specific retailer, or in this case, paying the cost associated with attending an NCAA university. Since attending a member university is a pre-requisite for competing in college athletics, the NCAA has created a system that requires college-level athletes to pay $27,000 to participate, then generously allows the member universities to cover that required expense. To highlight the absurdity, consider the scholarship-as-compensation model in an employee-

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64 NCAA 2018-19 DIV. I MANUAL, *supra* note 36, art. 15.5.6.1.

65 *See* UNIV. ALA., 2016–17 FINANCIAL REPORT 21 (2018), https://finance-estus.fa.ua.edu/FinancialAccounting/FAPPub/UA%20Financial%20Reports/ua-financial-report%201617.pdf.

66 *Id.*

67 *Id.*

68 *Id.* at 19.

69 Of course, the expenses for Bama would technically increase, but it is safe to assume that those increases would be marginal given that most of a university's expenses are relatively fixed and do not vary greatly when a small number of additional students are enrolled.

employer context. An employer offers a potential employee a $27,000 salary. However, the employer informs the employee that working at the office requires a $27,000 annual workplace fee. Since the potential employee does not have $27,000, the employer offers to cover that $27,000 fee via a salary advance. The employee accepts the offer, and the employee now works the rest of the year for no pay since he's already received his $27,000 salary upfront to cover the annual workplace fee. Has that employee "earned" $27,000? Of course not, and neither have the student-athletes.

In any event, the NCAA has created a pool of labor outside the protections and obligations of the typical employee-employer relationship, gained control over what constitutes an eligible amateur athlete with the Supreme Court's blessing, and passed along any remaining labor costs to other entities. As such, the NCAA has minimized the compensation and wages it owes to college-level athletes, thereby reducing the costs of implementing its exclusionary cost scheme to zero while still, in fact, turning a profit from its exclusionary conduct.

2. NCAA Regulations Create an Insurmountable Barrier to Entry for Competitors While Simultaneously Prohibiting Exit by Participating College-Level Athletes Through Enormous Switching Costs

In order for monopoly power to be maintained and monopoly price level kept intact, the monopolist must impose entry barriers to bar competitors from entering the market. "[W]ithout barriers to entry it, would presumably be impossible to maintain supracompetitive prices for an extended time."[70] Entry barriers can be any "factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level."[71] Furthermore, barriers to entry can exist where the dominant firm in the market makes entry by new competitors so prohibitively expensive as to completely dissuade competitors from attempting to enter the market.[72]

The NCAA has developed a regulatory scheme that prevents competitors from undercutting the NCAA's monopoly price by imposing an insurmountable cost on entry. For example, the NCAA demands that all "student-athletes" that compete for the member institutions must abide by the NCAA regulations regarding benefits and awards in order to maintain eligibility.[73] The NCAA model formally sets these restrictions to delineate between amateur athletics and

[70] Matsushita v. Zenith Radio Corp., 475 U.S. 574, 590 n.15 (1986).
[71] United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).
[72] *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 578 (1967).
[73] NCAA 2018–19 DIV. I MANUAL, *supra* note 36, art. 1.2(b)–(c), (f).

professional,[74] but the functional distinction between amateur and professional athlete is whether or not an individual receives wages. More specifically, the NCAA sets out a list of permissible benefits that "student-athletes" are allowed to obtain while maintaining their amateur status, which does not include wages.[75] The manual notes that any "student-athlete" who receives compensation for his athletic production has become a professional athlete and is no longer eligible to compete in the collegiate model.[76] According to the NCAA, compensation for labor is by its very nature professional and consequently makes any athlete ineligible to compete in NCAA athletics.[77] As such, any athlete who receives any "award, benefit or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible for athletics competition in the sport for which the improper award, benefit or expense was received. If the student-athlete receives an extra benefit not authorized by NCAA legislation, the individual is ineligible in all sports."[78]

How then can a competitor enter the market? Theoretically, a competitor could offer any number of college-level athletes or future college-level athletes (i.e., high school students) compensation and start the hypothetical Fair Compensation League ("FCL"). From the outset, the potential competitor faces two problems. As examined earlier, the NCAA has minimal labor costs, so the FCL now must compete with the NCAA on uneven ground. Since the FCL pays its players and the NCAA does not, the barrier to entry for the FCL are the very wages that the FCL must pay to college-level athletes in order to enter the market. Rather than attempting to compete against a firm with similar costs, the FCL will have to bear the upfront cost of paying athletes and continue to pay those athletes for the duration of their services. At no point in time will the FCL have lower labor costs than the NCAA, and no matter what price the FCL attempts to sell at, the NCAA will earn a higher profit. As such, the barrier to entry is both enormously costly and never dissipates; by paying wages, the FCL will always earn less than its competitor. Given the bleak prospects of earning a profit when competing against an entity that does not pay wages, neither the FCL nor any rational decisionmaker will enter the market.

Notwithstanding the compensation entry barrier, a second barrier arises for the FCL: the costs associated with creating a comparable athletic infrastructure with the NCAA. Without an infrastructure (i.e., facilities, stadiums, and coaches), the FCL cannot create a product, develop talent, or otherwise produce revenue. However, the FCL faces another severe disadvantage in creating an

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[74] *See id.* art. 20.9 (explaining non-binding "Commitments to Division I Collegiate Model"); *see also id.* art. 12.01.2.

[75] *See id.* arts. 12.01.4, 12.02.2; *see also id.* at 222–23 fig.15-1.

[76] *See id.* art. 12.2.5; *see also id*. arts. 12.02.10–12.02.11.

[77] *See id.* art. 12.02.11.

[78] *See id.* art. 16.01.1.

infrastructure. The NCAA has long been protected from antitrust suits,[79] and that unfettered access to college-level athletes has allowed the NCAA to build an unparalleled athletic infrastructure. Consider that in 2014, the forty-eight NCAA-member universities in the five wealthiest conferences (i.e., the Southeastern Conference, Atlantic Coast Conference, Big 12, Big Ten, and the Pac-12) spent $772 million on athletic complexes.[80] In 2016, some NCAA-member universities spent over $200 million to build new stadiums.[81] In 2018, thirteen NCAA-member universities spent $5 million or more for head football coaches.[82] Those same universities spent, at minimum, an additional $3.6 million for assistant head coaches.[83] On top of the wage burden to compensate the athletes, a potential competitor must spend an enormous amount in initial outlay to build facilities, construct stadiums, and hire coaches. The true cost of such an endeavor is hard to determine, but given the small sample of capital spent by the NCAA and its member institutions above, an initial outlay in the hundreds of millions, if not billions, seems imminently plausible.

In the same vein, the same NCAA regulations on compensation that create an entry barrier for competitors create an exit barrier or switching cost on college-level athletes. Where "the cost of switching is high . . . [individuals] are thus 'locked in.'"[84] Traditionally, switching costs are attributed to customers as part of a tying claim. Here, the switching costs or exit barriers apply to the athletes when considering whether to join a competitor willing to pay wages, or remain with the NCAA, which does not. All else being equal, a rational decisionmaker would choose to be compensated over not being compensated. However, any currently eligible NCAA athlete who wants to join the FCL faces a tough choice: receive compensation for his athletic exploits and be instantly disqualified from competition in the NCAA, or forego compensation in favor of competing in the NCAA. The rules are explicitly designed to punish and deter athletes from deviating from the NCAA model. Consider the indefinite suspension for running back Todd Gurley after he received $400 to sign autographs[85] or the four-game suspension for wide receiver A.J. Green for

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[79] *See generally* NCAA v. Board of Regents, 468 U.S. 85 (1984).

[80] Will Hobson & Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHI. TRIB. (Dec. 23, 2015), https://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html.

[81] *See* David Sirota & Andrew Perez, *College Football: Public Universities Spend Millions on Stadiums, Despite Slim Chance for Payoff*, INT'L BUS. TIMES (Jan. 11, 2016), https://www.ibtimes.com/college-football-public-universities-spend-millions-stadiums-despite-slim-chance-2258669.

[82] *See NCAA Salaries*, USA TODAY SPORTS, https://web.archive.org/web/20190420200000/https://sports.usatoday.com/ncaa/salaries/ (last visited July 5, 2020).

[83] *Id.*

[84] Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 476 (1992).

[85] Tony Manfred, *The Todd Gurley Autograph Scandal Is Everything That's Wrong with the NCAA*, BUS. INSIDER, (Oct. 10, 2014), https://www.businessinsider.com/todd-gurley-autograph-scandal-2014-10.

selling a commemorative bowl jersey for $1,000.[86] The list of suspensions for relative pittances of money is nearly endless, and each suspension simply reinforces the extremely punitive nature of the NCAA regulations. Since there is no paid alternative to the NCAA with a comparable athletic infrastructure, the only way for a college athlete to maintain his value to future employers is to stay on the field and continue to produce. As such, an NCAA suspension for impermissible benefits undermines an athlete's chances at receiving compensation from a professional employer. If approached by the FCL, an athlete would have to weigh the compensation offered by the FCL against the enormous switching cost associated with a finding of ineligibility by the NCAA. As noted before, the athletic infrastructure of the FCL would likely be a serious downgrade compared with the infrastructure the NCAA currently has in place. In all likelihood, a rational athlete would choose to forego wages in an effort to maintain eligibility and access to the NCAA infrastructure in lieu of wages and an uncertain or lesser infrastructure from the FCL. In essence, the draconian eligibility standards, combined with the NCAA's hegemony and athletic infrastructure, create such a high exit barrier that college athletes would likely forego an offer of current compensation, lest the inability to access the NCAA's infrastructure destroy the athletes' future wage-earning potential. In the NCAA's student-athlete model, they get athletes both coming and going.

To summarize, NCAA regulations create two entry barriers into the college-level athlete market due to the disparity in labor costs and enormous initial outlay expense needed to create a sufficient athletic infrastructure. Similarly, those same eligibility regulations place an enormous switching cost on college athletes, creating an exit barrier and forcing college-level athletes to forgo even the smallest amounts of compensation.

II. THE NCAA'S ALLEGED PROCOMPETITIVE JUSTIFICATIONS DO NOT OUTWEIGH THE ANTICOMPETITIVE EFFECT OF ITS EXCLUSIONARY ACTS

If an anticompetitive effect has been demonstrated, then the monopolist can proffer a procompetitive justification for its conduct.[87] "If the monopolist asserts a procompetitive justification--a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal--then the burden shifts back to the plaintiff to rebut that claim."[88] The balancing of the anticompetitive effect and

[86] Associated Press, *Georgia Star Receiver A.J. Green Suspended 4 Games for Selling Bowl Jersey for $1,000*, FOX NEWS (Nov. 20, 2014), https://www.foxnews.com/sports/georgia-star-receiver-a-j-green-suspended-4-games-for-selling-bowl-jersey-for-1000.

[87] *See* United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001); *see also Eastman Kodak*, 504 U.S. at 483.

[88] *Id.*

procompetitive justifications is akin to the rule of reason test used for Sherman Act § 1 claims.[89] The analysis is solely concerned with whether the conduct promotes competition; other factors are relevant only to the extent that those factors impact the competitive consequences.[90]

The NCAA recently defended itself against antitrust claims in *O'Bannon*, where the NCAA's regulations and use of student-athletes likeness were challenged as anticompetitive conduct.[91] In *O'Bannon*, the Ninth Circuit considered two of the procompetitive justifications offered by the NCAA for its restraints on student-athlete compensation as viable: that integrating academics and athletics improves "the quality of educational services provided to student-athletes"[92] and "that the amateur nature of collegiate sports increases their appeal to consumers."[93] The NCAA recently faced another antitrust claim on behalf of former NCAA student-athletes challenging the anticompetitive nature of the NCAA regulations capping athlete compensation to the grant-in-aid amount.[94] In the NCAA's brief for the *In re: NCAA Grant-in-aid* case, the same procompetitive justifications are offered.[95]

In short, the Ninth Circuit held that the preservation of amateurism was a sufficient justification to uphold the NCAA's compensation restrictions, so long as the grant-in-aid rules gave student-athletes the full cost of attendance: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more."[96] However, when applying the NCAA's boilerplate procompetitive justification to the anticompetitive conduct described in this paper, the outcome is clear: the anticompetitive effect of the NCAA's exclusionary cost scheme does far more to destroy competition than to promote it.

First, the integration of academics and athletics is not a sufficient justification on its face. The quality of educational services provided to the student-athlete or the general relationship between student-athletes and other students are not relevant factors; justifications based on considerations other than effect on

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[89] Standard Oil Co. v. United States, 221 U.S. 1, 61–62 (1911).
[90] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).
[91] *See generally* O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
[92] *Id.* at 1059.
[93] *Id.* at 1073.
[94] *See* In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, No. 4:2014-md-02541 (N.D. Cal. Sept. 18, 2014).
[95] *See* Defendants' Closing Brief, In Re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation, No. 4:2014-md-02541 (N.D. Cal. Nov. 10, 2018). The student plaintiffs obtained a limited permanent injunction prohibiting the NCAA from "agreeing to fix or limit compensation or benefits related to education." Permanent Injunction, *In Re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation*, No. 4:2014-md-02541 (N.D. Cal. Mar. 8, 2019).
[96] *O'Bannon*, 802 F.3d at 1079. (showing the Northern District of California recently expanded upon *O'Bannon* and determined that the preservation of amateurism cannot justify restrictions on compensation or benefits related to education.).

competition, like improved quality, do not impact the analysis.[97] Even if, as the Ninth Circuit mistakenly found, that integration of academics and athletes to improve educational experience was a valid procompetitive justification, the positive impact on competition would not exist. Such a justification does not reduce the entry barriers for competitors, it does not lower the price of purchasing college-level athletics to consumers, and it does not reduce the probability that the NCAA will continue to recoup monopoly profits. As such, the proffered procompetitive justification of integration does not outweigh (or impact at all) the anticompetitive harm caused by the NCAA's exclusionary cost scheme.

Second, the amateur nature of college athletics increasing its popularity amongst consumers, while a stronger facial contention than the integration argument, nonetheless fails as a sufficient procompetitive justification. Assuming that the amateur nature of college athletics has a positive impact on demand (despite the dubious quality of the evidence used in the *O'Bannon* case), that positive impact misses the point of the analysis. As outlined above, the NCAA is currently the only supplier of college-level athletics. The amount of extra demand that the NCAA creates through the preservation of amateur athletics does not imply that competition has been benefited. Instead, the increased demand in a monopsony market merely causes the NCAA to reap higher monopoly profits. By utilizing an exclusionary cost scheme to "preserve amateurism," the NCAA can maintain a monopoly price while simultaneously increasing demand. Rather than greater competition, the only impact the allegedly procompetitive justification has is greater profits. Much like the integration justification, the amateurism justification does not solve or lessen the anticompetitive effect of the NCAA's exclusionary cost scheme. In fact, one can argue that the procompetitive justification actually worsens the anticompetitive effect of the scheme.

Much like the *Board of Regents* case, the *O'Bannon* case relies upon outdated policy views on the value that amateurism and the student-athlete model provide: "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."[98] Both the Ninth Circuit's and Supreme Court's views on the principle of amateurism seem to be clouded by a perception that amateurism, in and of itself, is a noble goal and worthy of preservation. However, that reasoning misses the mark entirely. The value of amateurism as a societal principle *has no bearing* on the competitive benefit or harm caused by the preservation of that principle.

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[97] Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 693–94 (1978).

[98] *O'Bannon*, 802 F.3d at 1078.

As the Ninth Circuit points out, once student-athletes are paid compensation for their wages, there would be "no basis for returning to a rule of amateurism."[99] The response to that concern, as far as antitrust analysis is concerned, is "so what?" The Sherman Act was not designed or intended to protect amateurism, only competition. If the principle of amateurism destroys competition more than it promotes competition, then that principle, when used in conjunction with monopoly power, is a violation of § 2 of the Sherman Act. Thus, the NCAA's exclusionary cost scheme, which already relies upon the amateur status of its athletes to maintain monopoly power, is not saved by the alleged virtue of amateurism.

III. THE SPONSORSHIP MODEL WOULD INCREASE COMPETITION IN THE MARKET BY ELIMINATING BARRIERS TO ENTRY AND THEREBY LOWERING PRICES TO CONSUMERS

Since the NCAA's exclusionary cost scheme violates antitrust law, a new model must be instituted to replace the student-athlete model and to promote competition in the college-level athlete market. One simple, procompetitive model can be implemented with ease: the sponsorship model.

If the courts view the principle of amateurism as an idea worth preserving, then the sponsorship model can provide a new system that maintains (to some extent) the ideal of amateurism while promoting competition. Rather than barring athletes from receiving any compensation beyond the grant-in-aid requirement, the NCAA regulations could be modified to allow third-party companies (i.e., Nike, Under Armour, Adidas, etc.) to compensate athletes through sponsorship deals. Not all college athletes would receive sponsorship deals, and those athletes would thus still be operating as an "amateur" as defined under the old student-athlete model. At the same time, the third-party entities, operating in an open market, would compensate athletes with sponsorship deals commiserate with their market value. Additionally, the college-level athletes would be permitted to participate and compete in third-party sponsored events with other college-level athletes. Such a model reduces the anticompetitive effect of the old student-athlete model in two ways.

First, the entry barriers and switching costs would be mitigated if not eliminated outright. Rather than having to pay all the wages for the athletes, the third-party sponsors are simply granting additional compensation to specific athletes while the member universities still provide the grant-in-aid amounts. Similarly, the third-party sponsors would not need to create an athletic infrastructure; the athletes can still use the NCAA's infrastructure for NCAA competitions. Any third-party sponsored competitions would only need to rent

[99] *Id.*

out arenas or stadiums on a per-event basis, significantly lowering the initial outlay costs. In the same vein, the exit barriers or switching costs under the student-athlete model would no longer exist; if a third-party offers compensation in the form of a sponsorship, the athlete can accept with no negative consequences.

Second, the price consumers must pay for college-level athletics would decrease with the increase in providers of college athletics. Third-party sponsors can pick specific athletes and market a particular niche brand of college-level athletics (i.e., the Nike All-Star League or the Under Armour Freshman League). The variety and increased availability, as well as the lower costs associated with the sponsorship model, would provide media rights buyers and ticket purchasers more options at lower price levels. The monopoly profits the NCAA obtained under the student-athlete model would now be disbursed amongst consumers and athletes.

In the event that the sponsorship model does not lead to the positive competition outcomes listed above, then a more drastic (but more consistent with a competitive market) model can be implemented: the professional model. Essentially, the professional model rejects all NCAA regulations on external compensation, creating an entirely open market for college-level athletes. Rather than bemoaning the conversion of college athletics into a professional "minor league,"[100] the change should be embraced as the natural progression of a truly competitive market. Given that the appeal of college athletics is based mostly on the consumer's affiliation with the university rather than amateurism,[101] the negative impact that the destruction of amateurism has on the demand for NCAA athletics would be outweighed by the proliferation of competitors in the college-level athletics market (given that the NCAA's exclusionary cost scheme would collapse in such a scenario). In other words, the number of consumers who would refuse to watch *any* college-level athletics that do not adhere to the principle of amateurism would probably be outweighed by the number of new consumers drawn in by the proliferation of competitors.

Both the sponsorship model and the professional model are far more consistent with the Sherman Act than the student-athlete model. The only negative, from the courts' perspective, comes from the disintegration of the principle of amateurism. However, if amateurism must die so that competition can live, then the principle of amateurism must give way. The only barrier to the implementation of the procompetitive sponsorship or professional models is a misguided policy judgement on the value of amateurism.

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[100] NCAA v. Bd. of Regents, 468 U.S. at 102 (1984).
[101] *O'Bannon,* 802 F.3d at 1059.

CONCLUSION: THE NCAA HAS VIOLATED AND IS CURRENTLY VIOLATING THE SHERMAN ACT

Little argument can be made that the NCAA's exclusionary cost scheme (and other exclusionary acts) have an anticompetitive effect; the leading NCAA cases go out of their way to note that the NCAA has monopoly power and has used that power in an anticompetitive way. At the same time, those cases tout the benefits of amateurism as a totem to ward off antitrust claims. Despite the obvious monopoly profits, entry barriers, and exclusionary tactics, the NCAA remains mostly immune from the Sherman Act.

Of course, the judges deciding these cases all went to college; they likely have fond memories of cheering on their college teams in a variety of sports. However, those rose-tinted glasses should not blind the courts to the anticompetitive nature of the NCAA. When the NCAA espouses the virtue of amateurism, or the virtue of working without pay, on the one hand, and denounces the scourge of compensation, while gorging on hundreds of millions in profit, on the other, any procompetitive justifications ring hollow.

In summation, the NCAA's exclusionary cost scheme violates § 2 of the Sherman Act by accruing monopoly power through plainly anticompetitive acts that benefit only the profits of the monopolist. No efficiency or pro-competitive justifications offered by the NCAA are sufficient to outweigh the anticompetitive harm caused by the NCAA's monopoly. The only rationale remaining is a flawed policy on the value of amateurism, a consideration that has no place in antitrust analysis. The NCAA is a monopolist that jealously wields its monopoly power to eliminate competition and increase profits at the expense of the consumer and the athletes. Ending the NCAA's monopoly is right, both legally and as a matter of just policy.