

EMPLOYEE-ATHLETES, ANTITRUST, AND THE FUTURE OF COLLEGE SPORTS

William W. Berry III*

The Ninth Circuit's antitrust analysis in its recent college sports cases centers on whether amateurism offers a pro-competitive justification for its restraint on athlete compensation. Specifically, the question is whether the market for college football and basketball would suffer if universities paid their athletes. Despite this framing, there remains an implicit assumption driving the analysis—the determination of whether to characterize athletes as “employee-athletes” or “student-athletes.”

This Article argues that rather than merely applying the relevant antitrust law, the Ninth Circuit court decisions emanate from an entirely different question—whether college athletes are employees. The assumptions the judges make about this seemingly unrelated question undergird their ultimate conclusions about the appropriate antitrust remedy.

Having made the implicit assumptive concept explicit, the Article explores four key questions that should bear on the determination of whether college athletes are employees. The Article then concludes by proposing that the employee-athlete question is not bi-modal, but rather a spectrum, providing a map for universities and administrators eager to preserve the current status quo.

Part I explains the competing arguments raised by O'Bannon and their likely application in Jenkins. Part II argues that the real question does not concern economics and markets but instead rests upon the question of whether athletes are employees. Part III frames the potential analysis of the employee question by suggesting four indicia that ought to guide this determination. Finally, Part IV provides a road map for preserving the status quo in light of the employee-athlete question.

* Associate Professor of Law and Montague Professor of Legal Studies and Professionalism, University of Mississippi. The author thanks Ron Rychlak, Jo Potuto, Matt Mitten, Roger Groves, and Marc Edelman for insights during preliminary discussions concerning this topic. The author also thanks Allison Bruff for her valuable research assistance with the Article. Finally, the author would like to thank all of the members of the *Stanford Law & Policy Review* for putting on an excellent symposium in May 2017 as well as working hard to improve this Article during the editing process. Special thanks go to Jillian Katterhagen Mills, Ashwin Aravind, and Brian Castelloe.

INTRODUCTION	246
I. THE ANTITRUST CHALLENGE TO THE STUDENT-ATHLETE MODEL	249
A. Antitrust and the NCAA	251
1. The Sherman Act	251
2. The NCAA.....	252
B. <i>O'Bannon v. NCAA</i>	254
C. <i>Jenkins v. NCAA</i>	258
II. THE IMPLICIT QUESTION—ARE ATHLETES EMPLOYEES?	259
A. The NCAA's Amateurism Narrative	260
B. The Employee-Athlete Narrative.....	262
C. How the Narratives Drive the Antitrust Application	264
1. The Influence of Narrative on Doctrine	264
a. Defining the Applicable Market	264
b. Anti-competitive restraints.....	265
c. Pro-competitive justifications	265
2. The Influence of Narrative on Equity.....	266
III. THE ANTITRUST ANALYSIS THROUGH THE EMPLOYEE LENS.....	267
A. Who Funds Whom?	267
B. Time Allocation	268
C. Character of Remuneration.....	269
D. Revenue Generated.....	270
IV. A ROAD MAP FOR SAVING THE STATUS QUO	271
CONCLUSION	272

INTRODUCTION

“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer”

—NLRA section 152(3)¹

The National Collegiate Athletic Association (NCAA) recently survived the latest “bet-the-company” challenge to its amateurism model in the Ninth Circuit’s decision in *O’Bannon v. NCAA*.² Indeed, this antitrust challenge threatened the NCAA’s very existence with its claim that the NCAA operates as a cartel that restrains the ability of student-athletes to participate in an open market to receive compensation for their services as athletes.³

1. Note the circularity of the NLRB’s definition, situated within a statute that gives no additional guidance. See generally National Labor Relations Act of 1935, 29 U.S.C. §§ 151-69 (2012).

2. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015).

3. *Id.* For further discussion on the implications of the court’s opinion, see Thomas A. Baker III & Natasha T. Brison, *From Board of Regents to O’Bannon: How Antitrust and Media Rights Have Influenced College Football*, 26 MARQ. SPORTS L. REV. 331 (2016); Chris Bonti, *O’Bannon v. National Collegiate Athletic Association and the Current State of*

The first part of the court's holding—that the Sherman Act applies to the NCAA and that the current student-athlete model is anti-competitive—sets the stage for future challenges to the student-athlete model.⁴ A current class action in federal district court—*Jenkins v. NCAA*—aims to exploit this opening created in *O'Bannon*.⁵

But the *Jenkins* plaintiffs must overcome the second part of the Ninth Circuit's holding in *O'Bannon*: providing student-athletes the cost of attendance served as an adequate remedy for the antitrust violation, particularly in light of the pro-competitive benefits the court found that the current system of amateurism provides. Specifically, the court determined that the product of college football and basketball games could suffer without restraint on athletes from receiving compensation.⁶

To be sure, *Jenkins* is not merely *O'Bannon* re-litigated. The *O'Bannon* case began as a challenge to the use of former student-athletes' names, images, and likenesses (NILs) in EA Sports video games manufactured in partnership with the NCAA.⁷ The *Jenkins* plaintiffs have the opportunity to develop a much more direct factual basis for their antitrust claim.⁸ Particularly, the plaintiffs can provide evidence undermining the NCAA's claim that the success

Antitrust Jurisprudence Concerning Intercollegiate Athletics, 27 U. FLA. J.L. & PUB. POL'Y 237 (2016); Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016); Roger M. Groves, *A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education*, 17 TEX. REV. ENT. & SPORTS L. 101 (2016).

4. *O'Bannon*, 802 F.3d at 1053-66; see Jake New, *An Amateurism Challenge Evaporates, but Others Loom for NCAA*, INSIDE HIGHER ED (Oct. 4, 2016), <https://www.insidehighered.com/news/2016/10/04/supreme-court-declines-hear-obannon-case-focus-turns-other-antitrust-lawsuits>.

5. *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 4:14-CV-02758 (N.D. Cal. Aug. 5, 2016). Another class action, originally brought by former West Virginia University running back Shawne Alston, just settled, with the NCAA paying \$208 million to 40,000 athletes cover the difference between scholarships paid and the cost of attendance from March 2010 to 2014. See Michael McCann, *How Tentative Grant-in-aid Class Action Settlement Affects NCAA, Student-Athletes*, SPORTS ILLUSTRATED (Feb. 4, 2017), <http://www.si.com/college-football/2017/02/04/shawne-alston-grant-aid-class-action-lawsuit-ncaa-settlement>.

6. As explored below, this argument eerily echoes the losing argument of the NCAA in *Board of Regents v. NCAA*, where the NCAA lost the ability to share in the profits of college football telecasts. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984). The NCAA argued that it needed to limit the number of games shown on television in order to entice fans to continue to attend the games. *Id.* Time has shown that argument to be a bit shortsighted.

7. See Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77 (2013); see also *Symposium Transcript – Amateurism and the Future of the NCAA*, 3 MISS. SPORTS L. REV. 1 (2013) (symposium discussion of *O'Bannon* and the future of college sports).

8. Marc Edelman, *Top Five Sports Law Stories for 2017*, FORBES (Dec. 27, 2016), <http://www.forbes.com/sites/marcedelman/2016/12/27/top-five-sports-law-stories-for-2017>; Michael McCann, *In Denying O'Bannon Case, Supreme Court Leaves Future of Amateurism in Limbo*, SPORTS ILLUSTRATED (Oct. 3, 2016), <http://www.si.com/collegebasketball/2016/10/03/ed-obannon-ncaa-lawsuit-supreme-court>.

of the economic product of NCAA football and basketball depends in significant ways upon maintaining the amateur status of student-athletes.⁹ The *Jenkins* plaintiffs are also requesting injunctive relief, not money damages. Specifically, they seek to prevent the NCAA from enforcing its amateurism rules.¹⁰

This Article, however, argues that the court's decision in *Jenkins* will not simply turn on the application of antitrust principles but instead hinge on a deeper assumption concerning the character of the athletes themselves. Specifically, the outcome in *Jenkins* rests in large part upon whether the court views the athletes as employees of the university or students.

To be clear, the labor and employment law question—whether college athletes are employees—does not, on its face, speak to whether the NCAA's restraint violates antitrust law. Instead, it informs the degree to which a court is willing to alter the status quo in the name of economic fairness.

This employment law determination—implicit but unacknowledged in *O'Bannon*—will likely drive the antitrust outcome in *Jenkins*. If the athletes are employees, the anti-competitive nature of the restraint—the prohibition against receiving remuneration under amateurism rules—clearly violates the first part of the rule of reason in the application of the Sherman Act. Further, even if the court finds a pro-competitive effect in the protection of the market for college sports, the value of preventing any diminution of such a market would disappear when weighed against the complete restraint imposed by the NCAA.¹¹ This is particularly true when weighing the revenue in the latter market (billions of dollars annually) against the restraint (no compensation). Under this view, there must be some lesser restraint that would not destroy the market for the products of college football and basketball.

On the other hand, if athletes are merely students and *not* employees, then the anti-competitive restraint (cost of attendance) seems less significant when compared to similarly situated students. To the degree that student-athletes receive compensation for their participation, this provision mirrors the compensation that other outstanding students on campus might receive—full scholarships and stipends—particularly in its direct relation to the education that the university provides.¹² As such, one might argue athletes are student-athletes, not employee-athletes.

9. The Olympics provide an analogous example that permitting compensation for amateur athletes does not reduce the popularity or marketability of the economic product of the competitions themselves. The difference here is that the compensation would come from the universities, not corporate sponsors and endorsements.

10. In theory, these same antitrust challenges could also apply to the NCAA's academic rules and requirements but that is not currently part of the *Jenkins* case.

11. See Herbert J. Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J.L. & BUS. 369 (2016).

12. Indeed, this bright-line description of acceptable compensation as remuneration related to education rested at the heart of the Ninth Circuit's decision in *O'Bannon*.

Earlier this year, the General Counsel of the NLRB expressed his view that college athletes were university employees, consistent with the regional director's opinion in the Northwestern case, despite the NLRB's ultimate decision that college athletes are not employees.¹³ While this question remains at the center of the pay-for-play conversation, courts and commentators alike have not related it to the recent or pending antitrust cases against the NCAA. Instead, this argument has languished in unsuccessful labor and employment lawsuits.¹⁴

This Article, then, argues that rather than merely applying the relevant antitrust law, the Ninth Circuit court decisions stem from an entirely different question—whether college athletes are employees. The assumptions judges must make about to address this seemingly unrelated question will undergird their ultimate conclusions about the appropriate antitrust remedy.

Having made the implicit assumptions explicit, the Article then explores four key questions that should bear on determining whether college athletes are employees. The Article concludes by proposing that the employee-athlete question is not binary, but rather a spectrum, and provides a map for universities and administrators eager to preserve the current status quo.

Part I explains the competing arguments raised in *O'Bannon* and their likely application in *Jenkins*. Part II argues that the real question for the courts does not concern economics and markets but instead rests upon the question of whether athletes are employees. Part III frames the potential analysis of the employee question by suggesting four indicia that ought to guide this determination. Finally, Part IV provides a road map for saving the status quo in light of the employee-athlete question.

I. THE ANTITRUST CHALLENGE TO THE STUDENT-ATHLETE MODEL

For decades, college athletes have challenged NCAA rules, including its prohibition against hiring agents, its proscription against receiving compensation from advertisements, its penalty of loss of amateur status resulting from entering the draft, its academic rules, and others.¹⁵ With the

13. See Memorandum GC 17-01 from Richard Griffin, Jr., Gen. Counsel, NLRB, on the Statutory Rights of University Faculty and Students in the Unfair Labor Practice Context to All Reg'l Dirs., Officers-in-Charge, and Resident Officers (Jan. 31, 2017) [hereinafter Memorandum GC 17-01], <http://apps.nlr.gov/link/document.aspx/09031d4582342bfc>. The context of this ruling concerned whether athletes at private universities possessed the same free speech rights as university employees in light of team-imposed social media and interview restrictions. See also Lester Munson, *NLRB Rules that Football Players at Private FBS Schools are Employees*, ESPN (Feb. 3, 2017), http://www.espn.com/espn/otl/story/_/id/18612851/nlr-rules-football-players-private-fbs-schools-employees.

14. See *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016) (finding that college athletes were not employees for FLSA purposes); *Dawson v. Nat'l Collegiate Athletic Ass'n*, 2017 WL 1484179 (N.D. Cal. 2017).

15. See, e.g., *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012); *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180 (3d Cir. 1998), *vacated*, 525 U.S. 459

revenue from college football and basketball experiencing exponential growth over the past decade,¹⁶ athletes and commentators alike have called for reform and greater benefits for college athletes.¹⁷

In many cases, the athletes have not sought monetary compensation itself, but health care benefits, increased funding for food, and coverage of the full cost of attendance.¹⁸ At Northwestern, for instance, football players attempted to unionize, with the stated purpose of achieving such benefits.¹⁹ Similarly, Connecticut basketball player Shabazz Napier used his Final Four interviews to decry the inadequate provision of meals for college athletes.²⁰

Increasingly, however, athletes are challenging the entire model itself, arguing for compensation—“pay for play”—and the ability to share in the profits generated by athletic competitions, particularly in the television revenue.²¹ The two cases described below—one recently decided and one pending—frame this issue in terms of the Sherman Act and advance the claim that the current student-athlete amateurism model illegally violates their ability to receive remuneration in the market for the services they provide.

(1999); *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081 (7th Cir. 1992); *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990); *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004).

16. See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills> (“Big-time college sports departments are making more money than ever before . . .”).

17. See, e.g., Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No Pay Rules Violate Section One of the Sherman Act*, 64 CASE W. RES. L. REV. 61 (2013); Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643>; Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAG. (Jan. 1, 2012), <https://nyti.ms/2kgO9w9>.

18. See, e.g., *Alston v. Nat'l Collegiate Athletic Ass'n*, No. 3:14-CV-01011 (N.D. Cal. Aug. 19, 2015); Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in Alston Could Impact College Athletics*, SPORTINGNEWS (Nov. 4, 2015), <http://www.sportingnews.com/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/1uro6chmw5naj1o6n15opblfmy>. For decades, universities provided scholarship athletes with tuition, room, books, and board. Full cost of attendance includes other costs related to being a student, including transportation to and from the university, and money for other extraneous expenses.

19. See Jeffrey Eisenband, *Northwestern Football's Union Effort: Bringing Context to the Saga*, THEPOSTGAME (Aug. 22, 2015), <http://www.thepostgame.com/blog/daily-take/201508/kain-colter-union-northwestern-football-fitzgerald-ncaa>; Ben Strauss, *Northwestern Quarterback Makes His Case for Players' Union*, N.Y. TIMES (Feb. 18, 2014), <https://nyti.ms/2nEbiuI>.

20. See Mike Singer, *Connecticut's Shabazz Napier: We Do Have Hungry Nights*, CBS SPORTS (Apr. 7, 2014), <http://www.cbssports.com/college-basketball/news/connecticuts-shabazz-napier-we-do-have-hungry-nights>.

21. See, e.g., *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 4:14-CV-02758 (N.D. Cal. Aug. 5, 2016) (challenging the amateurism rules of the NCAA).

A. Antitrust and the NCAA

Before exploring the cases, though, it is helpful to frame the connection between the Sherman Act and the NCAA. The Sherman (Antitrust) Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”²²

1. The Sherman Act

Under the Sherman Act, courts generally apply one of two tests—a per se test or a rule of reason test.²³ The per se test, typically used for horizontal restraints of trade, mandates a finding that the conduct in question violates the Act and focuses on the appropriate remedy.²⁴ The rule of reason test, typically used for vertical restraints, requires the court to conduct a balancing test.²⁵ The court first inquires as to whether the conduct in question restrains a particular market by limiting economic competition in that market.²⁶ The court then assesses whether this anti-competitive conduct in the first market nonetheless promotes competition (i.e., is pro-competitive) in another market.²⁷ If so, the court must weigh the effect on competition in the one market against the other, and explore whether there exist less restrictive restraints that could otherwise produce the same benefit.²⁸

With respect to athletics, the Supreme Court and other appellate courts have typically applied the rule of reason test, partially because confusion can arise with respect to limiting competition.²⁹ Certainly, in order to have athletic events, one must limit competition in some way, as one team can only play against one other team at a time.³⁰ The applicable distinction here is between athletic and economic competition. Restraints concerning athletic competition

22. Sherman Act, 15 U.S.C. §§ 1-7 (1890).

23. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231 (1918). Over time, the Supreme Court has added a middle-ground “quick look” test as well. *See, e.g.*, 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 1504-07 (3d ed. 2011).

24. *See, e.g.*, *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984); AREEDA & HOVENKAMP, *supra* note 23.

25. *See, e.g.*, Herbert J. Hovenkamp, *The NCAA and the Rule of Reason* (July 16, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810580; Hovenkamp, *supra* note 11.

26. *See, e.g.*, AREEDA & HOVENKAMP, *supra* note 23, at ¶¶ 1504-07, 1720.

27. *See, e.g.*, C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927 (2016).

28. *See id.*; Edelman, *supra* note 17; Hovenkamp, *supra* note 11.

29. *See Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010) (holding that the rule of reason applies in all sports antitrust cases); *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101 (1984).

30. *Bd. of Regents*, 468 U.S. at 101 (“Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.”).

generally do not violate the Sherman Act; restraints concerning economic competition do.³¹ If the NCAA restricts the number of coaches a particular sport may have, it does not violate the Sherman Act. By contrast, if the NCAA places a cap on the amount of pay coaches can receive, it does violate the Sherman Act.³²

2. *The NCAA*

The NCAA serves as the governing body for intercollegiate athletics.³³ As such, its member institutions and their constituent students agree to abide by its rules.³⁴ The NCAA thus acts as a cartel for college sports, providing a centralized organizational structure with no competing organization.³⁵

By definition, then, the NCAA creates a wide range of restraints for intercollegiate athletes.³⁶ Its infamously complex, byzantine rulebook regulates eligibility, athletic activities, source of remuneration, permissible benefits, and even time spent with respect to certain activities.³⁷

The framework the NCAA applies, discussed in detail below, conceptualizes athletes as “student-athletes,” making them amateurs.³⁸ This principle of amateurism, which has shifted over time, does not mean amateur in the pure, traditional sense—receiving no benefits from anyone.³⁹ Instead, the NCAA model allows benefits related to education—tuition, room, board, and

31. *See, e.g.*, *Pennsylvania v. Nat’l Collegiate Athletic Ass’n*, 948 F. Supp. 2d 416 (M.D. Pa. 2013) (holding that NCAA’s imposition of severe penalties on Penn State football program in the wake of sexual abuse scandals was noncommercial and thus not reachable under the antitrust laws).

32. *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1012 (10th Cir. 1998) (finding that the NCAA’s limit on salary for restricted earnings of basketball coaches violated antitrust law).

33. *See generally* NCAA, <http://www.NCAA.org> (last visited Apr. 16, 2017) (describing the relationship between the organization and intercollegiate athletics); NCAA, 2016-2017 NCAA DIVISION I MANUAL (Apr. 28, 2016) [hereinafter NCAA MANUAL], <http://www.ncaapublications.com/productdownloads/D117.pdf>.

34. *See generally* NCAA MANUAL, *supra* note 33.

35. *See* Joe Nocera, *The College Sports Cartel*, N.Y. TIMES (Dec. 30, 2011), <http://www.nytimes.com/2011/12/31/opinion/nocera-the-college-sports-cartel.html>; Zachary Stauffer, *Does the NCAA Rule College Sports Like a “Cartel”?*, PBS: FRONTLINE (June 11, 2014), <http://www.pbs.org/wgbh/frontline/article/does-the-ncaa-rule-college-sports-like-a-cartel>.

36. *See generally* NCAA MANUAL, *supra* note 33.

37. *See generally id.* For some, these rules are a source of great injustice. *See* JOE NOCERA & BEN STRAUSS, *INDENTURED: THE INSIDE STORY OF THE REBELLION AGAINST THE NCAA* (2016).

38. As discussed below, Walter Byers deserves the credit for this moniker. Mark Inabinett, *Walter Byers, First NCAA Executive Director, Inventor of ‘Student-Athlete’ Dies at Age 93*, AL.COM (May 28, 2015), http://www.al.com/sports/index.ssf/2015/05/walter_byers_first_ncaa_execut.html.

39. *See* William W. Berry III, *Amending Amateurism*, 68 ALA. L. REV. 551, 557 (2016).

books—but no compensation or other benefits for participation in intercollegiate athletics.⁴⁰

Particularly with age limits concerning when athletes can join professional sports leagues, the NCAA and its institutions provide the main opportunity for athletes seeking a career playing sports professionally.⁴¹ For all practical purposes, the NCAA and its member institutions have control over the entire industry of college sports.

Previously, the NCAA has lost significant antitrust cases, most notably the *Board of Regents* case.⁴² There, the NCAA had restricted the universities from entering into contracts to televise college football games, managing which games received air time and limiting the number of games shown.⁴³ The NCAA argued that the restraint was necessary to maintain attendance because the attendance at games would dissipate if networks televised a large number of games.⁴⁴ The Court rejected that argument and opened the door to a free market for televising college sports.⁴⁵

Historically, the NCAA has argued that there is no economic market for college athletes, consistent with its amateurism principle.⁴⁶ As men's college basketball and college football have become billion dollar industries, the idea that there is no economic dimension to college sports has become increasingly dubious.⁴⁷

Assuming there is a market, the question becomes how one defines that market, and whether economic restraints in that market have a pro-competitive effect in another market. The court in *O'Bannon* made a first attempt to assess these questions, albeit without a fully-developed record at trial.

40. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2015), *aff'd in part, vacated in part*, 802 F.3d 1039 (9th Cir. 2015); NCAA MANUAL, *supra* note 33.

41. International leagues exist in basketball, but these typically are not a good option for athletes. It is rare for athletes to make it in the NBA through these leagues, particularly if they begin in the United States.

42. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

43. *Id.* at 94.

44. *Id.* at 89-90.

45. Over thirty years later, one can see how shortsighted the NCAA's argument was, with attendance growing significantly despite an oversaturation of television coverage.

46. See, e.g., *Bd. of Regents*, 468 U.S. at 109; *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Apr. 16, 2017) [hereinafter *NCAA Amateurism*].

47. See *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances> (last visited Apr. 16, 2017); NOCERA & STRAUSS, *supra* note 37.

B. *O'Bannon v. NCAA*

In 2009, Ed O'Bannon discovered that an EA Sports college basketball video game included his likeness as part of a UCLA team.⁴⁸ Having graduated from college years before, O'Bannon was dismayed that EA Sports and its partner, the NCAA, were continuing to profit off the use of his likeness and other college basketball players' likenesses.

He initially sued EA Sports for misappropriation of his likeness.⁴⁹ Over time, the lawsuit expanded into a class action involving both past and current NCAA athletes, with the NCAA added as a defendant.⁵⁰ After EA Sports settled with the athletes depicted in its video games, the remaining lawsuit focused upon (1) the current use of the athletes' likenesses in television broadcasts and (2) the restrictions the NCAA's amateurism rules place on the ability of athletes to receive endorsements.⁵¹ Specifically, the *O'Bannon* plaintiffs sought an injunction against the application of amateurism rules against them in both contexts.⁵²

In the district court, Judge Claudia Wilken held that the restriction on athletes receiving remuneration for the use of their likenesses violated the Sherman Act, which prohibits antitrust violations.⁵³ The court, however, limited the remedy for this violation to \$5,000 per year per athlete, which the NCAA would hold in a trust until the athlete left the university.⁵⁴ This meant that the court enjoined the NCAA from punishing universities or athletes under its rules for payments to athletes that were \$5,000 or less per year. Further, the court held that athletes did not have a right to receive endorsements.⁵⁵

Both parties appealed the court's decision. On appeal, the Ninth Circuit upheld both decisions but reduced the remedy to the antitrust violation.⁵⁶ Specifically, it held that providing athletes with the cost of attendance remedied the violation; the Act did not enjoin the NCAA from banning cash payments to athletes for amounts beyond the athlete's tuition, room, board, books, and cost of attendance.⁵⁷

48. See Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, NYTIMES.COM (June 9, 2014), <https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html>.

49. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1055 (9th Cir. 2015).

50. The district court in *O'Bannon* also merged the case with a separate lawsuit, *Keller v. NCAA*, which focused on similar issues.

51. Creg Stephenson, *O'Bannon Lawsuit with EA Sports Settled for \$60 Million; Tyrone Prothro to Receive \$5,000*, AL.COM (Mar. 16, 2016), http://www.al.com/sports/index.ssf/2016/03/obannon_lawsuit_with_ea_sports.html.

52. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1039 (9th Cir. 2015).

53. *Id.* at 1008-09.

54. *Id.*

55. *Id.* at 984 (including all uses of the athlete's name, image, and likeness).

56. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

57. *Id.*

At the district court, the plaintiffs framed the antitrust question in terms of two particular markets: (1) the “college education” market, in which NCAA Division I schools recruit athletes to play college football and basketball and (2) the “group licensing market,” in which third parties compete for group licenses to use the names, images, and likenesses of college football and basketball players.⁵⁸ Judge Wilken concluded that the college education market existed in the form of institutions supplying unique opportunities to participate in intercollegiate athletics to athletes.⁵⁹

With respect to the restraint, Judge Wilken found the NCAA and its member institutions limited the applicable market by fixing the price of their product—participation in Division I sports. NCAA rules limit the kind of compensation paid to education-related categories (e.g., tuition, room, board, and books) while prohibiting cash payments, deferred payment, or other kinds of fixed compensation. The athletes receive this education-related compensation in exchange for “the bundle of educational and athletic opportunities they offer: to wit, the recruit’s athletic services along with the use of his name, image, and likeness while he is in school.”⁶⁰ As such, the district court found that the NCAA amateurism rules, as applied by the conferences and member institutions, constituted an anti-competitive restraint of trade.⁶¹

The question then became whether the restraint that the NCAA imposes on the college education market generates pro-competitive benefits in another market. In other words, the court had to determine whether free market competition in another market increased because of the restraint at issue.⁶²

The NCAA asserted four potential pro-competitive justifications at trial: (1) amateurism, (2) promoting competitive balance among college football and basketball teams, (3) the integration of academics and athletics, and (4) the ability to generate greater output in the relevant markets.⁶³

The court partially accepted the NCAA’s claim that amateurism promoted competition, not as a complete pro-competitive justification, but instead as a means to limit the remedy for the antitrust violation.⁶⁴ Judge Wilken rejected

58. *O’Bannon*, 7 F. Supp. 3d at 965-71. Under the applicable Ninth Circuit precedent, the term ‘relevant market’ “encompasses notions of geography as well as product use, quality, and description. The geographic market extended to the area of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.” *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)).

59. *O’Bannon*, 7 F. Supp. 3d at 988. The court also found that the second market existed but did not find any restraint as to group licensing. *Id.* at 993-99.

60. *Id.* at 988.

61. The NCAA attempted to argue, as in the past, that no market existed because the benefit it pays athletes as amateurs is close to zero, if not zero. Judge Wilken rejected this argument as ignoring the economic realities of FBS football and Division I basketball. *Id.*

62. *Id.*

63. *Id.* at 973, 978–79, 981.

64. *Id.* at 999-1001.

the NCAA's reading of the dicta in the *Board of Regents* case where the Court indicated that to maintain the product of college sports, athletes "must not be paid."⁶⁵ Likewise, Wilken found evidence of the NCAA's longstanding commitment to amateurism to be unpersuasive as a pro-competitive justification.⁶⁶

Specifically, the court found the presence of a "limited pro-competitive purpose" of the restriction on payments to athletes in the sense that the restraints may be "necessary to maintain the popularity of FBS football and Division I basketball."⁶⁷ Thus, the court explained that "if the challenged restraints actually play a substantial role in maximizing consumer demand for the NCAA's products—specifically, FBS football and Division I basketball telecasts, re-broadcasts, ticket sales, and merchandise—then the restrictions would be pro-competitive."⁶⁸

Given the limited pro-competitive benefit, the district court found that some payment to athletes might be acceptable without undermining the market for the product of college football and basketball.⁶⁹ Without a thorough record on what this amount might be, Judge Wilken relied on the testimony of television executive Neal Pilson, who indicated that \$5,000 would be an amount that would not significantly affect the market.⁷⁰

The court also found some validity to the NCAA's claim that its restrictions help athletes integrate into the academic life of the university.⁷¹ Without the restrictions the NCAA places on the athletes, the integration of athletes with the academic communities at their schools might be less possible.⁷² But the court did not find any evidence that the current restraint is necessary to achieve this goal.⁷³ The court indicated that such a restraint would be permissible only where it served to prevent athletes from being cut off from the academic community.⁷⁴

The court rejected the promotion of competitive balance, as it addressed athletic competition more so than economic competition.⁷⁵ Likewise, the court rejected the justification of being able to generate output in other markets, as the NCAA had not shown that institutions compete because of a "philosophical commitment to amateurism."⁷⁶

65. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984).

66. *O'Bannon*, 7 F. Supp. 3d at 999.

67. *Id.* at 1000.

68. *Id.*

69. *Id.* at 1005-06.

70. *Id.* at 983, 1008.

71. *Id.* at 1003.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1001-02.

76. *Id.* at 1004.

The Ninth Circuit opinion largely adopted the reasoning of the lower court with respect to the antitrust analysis, but it altered the remedy chosen by the lower court.⁷⁷ As to the question of whether amateurism constituted a valid pro-competitive justification, the panel explained that the district court's findings were largely consistent with the *Board of Regents* case. In *Board of Regents*, the Supreme Court characterized the college football market as “a particular brand of football” that draws from “an academic tradition [that] differentiates [it] from . . . professional sports.”⁷⁸ Thus, the NCAA “plays a vital role in enabling college football to preserve its character,” meaning that its restrictions enable “a product to be marketed which might otherwise be unavailable.”⁷⁹

The Ninth Circuit warned, however, “not every rule adopted by the NCAA that restricts the market is necessary to preserving the ‘character’ of college sports.”⁸⁰ It found that the plaintiffs had made a significant showing that alternatives existed to the restraints in place.⁸¹ Specifically, the alternatives were (1) “allowing NCAA member schools to give student-athletes grants-in-aid that cover the full cost of attendance” and (2) “allowing member schools to pay student-athletes small amounts of deferred cash compensation for use of their NILs.”⁸² The Ninth Circuit reversed the district court's decision to adopt the latter, and instead adopted only the former, holding that antitrust law prevented the NCAA from restricting the ability to pay athletes the full cost of attendance.⁸³

The Ninth Circuit relied on a slippery slope argument in rejecting the district court's second remedy.⁸⁴ Emphasizing that the prohibition of NIL payments is “*precisely what makes them amateurs*,”⁸⁵ the court found that a remedy of small cash payments would undermine the character of college sports.⁸⁶ Providing the cost of attendance—an amount close to the \$5,000 for NILs—would be more effective from the court's perspective given that at some point, payments to athletes will affect the product and market in question.⁸⁷

The court further held that 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.”⁸⁸ The

77. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1074 (9th Cir. 2015).

78. *Id.* (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984)).

79. *Id.* (quoting *Bd. of Regents*, 468 U.S. at 102).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1074-76.

84. *Id.* at 1076-79.

85. *Id.* at 1076.

86. *Id.*

87. *Id.*

88. *Id.* at 1078.

court then hypothesized that “[o]nce 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 the plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL.”⁸⁹ The worry for the court, and the strength of the amateurism defense, thus rests in the idea that such payments would alter the character of the product, changing it into a minor league sports product.⁹⁰ Finally, it is worth noting that the court cited both the lack of evidence in the record and the Supreme Court’s admonition that courts should allow the NCAA “ample latitude to oversee college athletics in reaching its decision.”⁹¹

The dissent’s only issue with the majority opinion was the reversal of the \$5,000 compensation for use of athletes’ NILs.⁹² Importantly, it stressed “in terms of antitrust analysis, the concept of amateurism is relevant only insofar as it relates to consumer interest.”⁹³ The dissent found that the majority’s reading of alternative remedies being equally effective was erroneous.⁹⁴ Finally, the dissent closed by asserting that the role of appellate judges was not to resolve the national debate about amateurism.⁹⁵

One important consequence of the decision in *O’Bannon* has been the recent settlement in another lawsuit, *Alston v. NCAA*.⁹⁶ The *Alston* plaintiffs were NCAA athletes from 2010-15 who sought the full cost of attendance for their athletic scholarships.⁹⁷ On February 3, 2017, the NCAA settled with these plaintiffs for \$208 million, amounting to approximately \$7,000 per athlete.⁹⁸

C. *Jenkins v. NCAA*

In 2014, Clemson football player Martin Jenkins and other former players filed an antitrust lawsuit against the NCAA and the Power 5 conferences to challenge the limitations on athletes receiving compensation for their participation.⁹⁹ While *O’Bannon* focused on cost of attendance, this case, which is also a class action, seeks to challenge the amateurism model itself as violating antitrust law.¹⁰⁰

89. *Id.* at 1078-79.

90. *Id.* at 1079.

91. *Id.*

92. *Id.*

93. *Id.* at 1081.

94. *Id.*

95. *Id.* at 1083.

96. McCann, *supra* note 5.

97. *Id.*

98. *Id.*

99. *Jenkins v. Nat’l Collegiate Athletic Ass’n*, No. 14-2758, slip op. at 1 (N.D. Cal. Aug. 5, 2016); Edelman, *supra* note 8; McCann, *supra* note 8.

100. *Jenkins*, No. 14-2758, slip op. at 2.

The *Jenkins* case, like *O'Bannon*, is in Judge Wilken's docket in the Northern District of California.¹⁰¹ The court's most recent decision denied the NCAA's 12(b)(6) motion to dismiss, which claimed that the Ninth Circuit's decision in *O'Bannon* foreclosed a decision in favor of the plaintiffs.¹⁰²

Judge Wilken's opinion's acknowledged that while *O'Bannon* prohibited cash payments not "tethered" to education, it did not necessarily exclude other in-kind compensation or payments tethered to education. Going forward, the *Jenkins* plaintiffs must demonstrate a relationship between the relief requested and educational expenses.

Given this background, this Article argues that there is an implicit concept that influences how the judges apply antitrust law to college athletics and the NCAA. The implicit concept is whether college athletes are really student-athletes or better characterized as employee-athletes. Specifically, such a determination could bear heavily on the outcome of *Jenkins*, and more broadly, the future of intercollegiate athletics.

II. THE IMPLICIT QUESTION—ARE ATHLETES EMPLOYEES?

While consistently dismissed for decades, the idea that college athletes are employees of their institutions has gained increasing traction over the past five years.¹⁰³ In particular, the case filed by the Northwestern football players with the National Labor Relations Board brought this concept to the forefront of public discussion.¹⁰⁴

The initial opinion by NLRB regional director Peter Ohr articulated a compelling vision of athletes as employees.¹⁰⁵ He cited the compensation they receive in scholarships, their purpose for being on campus (football), their time commitment to football, and the amount of revenue they generate for the university.¹⁰⁶

While the NLRB board vacated his decision on appeal, largely because of a jurisdictional issue, it did not reject outright the claim.¹⁰⁷ And the NLRB

101. *Id.*

102. *Id.*

103. This has certainly been true in the workers' compensation context. *See, e.g.*, *State Comp. Ins. Fund v. Indus. Comm'n*, 314 P.2d 288 (Colo. 1957); *Rensing v. Ind. State Univ. Bd. of Trustees*, 444 N.E.2d 1170 (Ind. 1983); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983); *Waldrep v. Tex. Emp'rs Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000).

104. *See, e.g.*, William W. Berry III, *How Unions Can Save the NCAA*, SLATE: MONEYBOX (Mar. 31, 2014), http://www.slate.com/articles/business/moneybox/2014/03/northwestern_football_players_allowed_to_unionize_how_labor_unions_can_save.html.

105. Decision and Direction of Election, *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>, *dismissed on other grounds*, 362 N.L.R.B. 167 (2015).

106. *Id.*

107. *Id.*

general counsel recently opined publicly that he believed college athletes were employees.¹⁰⁸ Northwestern, of course, immediately refuted this characterization.

Two recent cases also have considered this question. In *Berger v. NCAA*, the Seventh Circuit rejected the claim of University of Pennsylvania women's track and field team members that they were employees entitled to the benefit of minimum wage under the Fair Labor Standards Act.¹⁰⁹ The majority held that their participation in athletics did not make them employees. A concurring opinion, however, did acknowledge that the outcome might be different for an athlete in a revenue sport in a Big-Five conference, as opposed to a non-revenue sport athlete in the Ivy League.¹¹⁰

A second case, *Dawson v. NCAA*, resulted in the Northern District of California reaching the same conclusion. Rejecting the distinction suggested in the *Berger* concurrence, the court held that wage and hour laws did not apply to Pac-12 conference football and men's basketball players under the Fair Labor Standards Act.¹¹¹ Again, the court held that despite the commercialization of football and basketball, the athletes were not employees of their universities.¹¹²

These cases raise two competing paradigms: the student-athlete versus the employee-athlete. By making these implicit notions explicit, one can see how they impact the judge's preference for a particular antitrust remedy.

A. *The NCAA's Amateurism Narrative*

The NCAA has long defined college athletes as "student-athletes," amateurs who participate in sports as an avocation that is merely part of the broader education that the university offers.¹¹³ Over time, this definition of amateurism has shifted,¹¹⁴ but the NCAA and its member institutions have remained steadfast in defending its most current iteration.

The compensation athletes currently enjoy includes five years of tuition (a value of over \$200,000 at some institutions), payment of a stipend to cover the costs of housing, payment or provision of meals, payment for books and other supplies, access to state-of-the-art facilities, access to nutritionists and athletic trainers, medical care during their time as a student, the opportunity to purchase

108. Memorandum GC 17-01, *supra* note 13. The context of this ruling concerned whether athletes at private universities possessed the same free speech rights as university employees in light of team-imposed social media and interview restrictions. *See* Munson, *supra* note 13.

109. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285 (7th Cir. 2016).

110. *Id.* at 298 (Hamilton, J., concurring).

111. *Dawson v. Nat'l Collegiate Athletic Ass'n*, No. 16-5487, 2017 WL 1484179, slip op. at 5-6 (N.D. Cal. Apr. 25, 2017).

112. *Id.* at 5-7.

113. NCAA MANUAL, *supra* note 33, § 2.9.

114. *See* Berry, *supra* note 39, at 557.

career insurance, access to academic tutors and other academic support, and after *O'Bannon*, other associated costs of attendance.¹¹⁵ These benefits far exceed what a pure amateur would receive: nothing.

For the NCAA, this scheme remains foundational to the entire enterprise of intercollegiate athletics. It continues to police even the most minor benefits provided to a student-athlete by an individual outside of the athletic department.¹¹⁶

The stated purpose of the amateurism model is education.¹¹⁷ Indeed, one of the NCAA's television commercials emphasizes that most of its athletes are "going pro" in something other than sports.¹¹⁸ The former NCAA chair Walter Byers coined the phrase "student-athlete" to communicate this intended goal over and over again.¹¹⁹

The NCAA also adopts rules designed to highlight its focus on academics—it has minimum requirements on a sliding GPA-standardized test scale for athletes to play at the collegiate level.¹²⁰ It also requires certain types and numbers of core high school classes in order for athletes to participate.¹²¹

Furthermore, the NCAA recently introduced its Academic Progress Rate scale that measures athlete graduation rates by school and by sport within that school. The NCAA requires universities to maintain a certain graduation rate, or "APR."¹²² Failure to do so can result in a loss of scholarships, or worse, a ban from postseason competition.¹²³

115. See Decision and Direction of Election, *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n* (CAPA), No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>, *dismissed on other grounds*, 362 N.L.R.B. 167 (2015); Steve Berkowitz & Andrew Kreighbaum, *College Athletes Cashing in with Millions in New Benefits*, USA TODAY (Aug. 19, 2015), <http://www.usatoday.com/story/sports/college/2015/08/18/ncaa-cost--attendance-meals-2015/31904839>.

116. Some of the NCAA rules create silly outcomes, punishing such aid as giving athletes rides and other *de minimis* benefits. See generally NCAA MANUAL, *supra* note 33.

117. NCAA Amateurism, *supra* note 46.

118. Apparently, many "go pro" with careers at Enterprise Rent-A-Car. See Creativelab101, *Enterprise Rent a Car NCAA 2102* [sic] Commercial, YOUTUBE (Mar. 5, 2012), <https://www.youtube.com/watch?v=720aObZm6bM>.

119. Inabinett, *supra* note 38.

120. See generally Eligibility Center, NCAA, <http://www.ncaa.org/student-athletes/future/eligibility-center> (last visited Apr. 16, 2017).

121. *Id.*

122. See generally Division I Academic Progress Rate (APR), NCAA, <http://www.ncaa.org/about/resources/research/division-i-academic-progress-rate-apr> (last visited Apr. 16, 2017).

123. *Id.*; Adam Himmelsbach, *UConn Is Among Those Barred from Postseason Basketball*, N.Y. TIMES (June 20, 2012), <http://www.nytimes.com/2012/06/21/sports/ncaabasketball/uconn-basketball-is-among-those-to-receive-postseason-ban.html>.

The NCAA Committee on Infractions doggedly pursues all allegations of improper provision of benefits to athletes.¹²⁴ From the NCAA's perspective, maintaining one's amateur status remains sacrosanct to the entire endeavor and thus warrants extensive vigilance. The NCAA requires its member institutions to monitor their own activity to make sure that they do not violate NCAA rules. Indeed, the NCAA imposes additional, more serious penalties for failure to report violations or failure of institutional control where a number of violations exist. Certainly, the rules are so complicated and thorough that hundreds of small violations occur each year, but if university compliance offices report such occurrences, no serious punishments follow.¹²⁵

Finally, the NCAA rules strive to ensure that athletes do not participate in activities that would compromise their amateurism.¹²⁶ This includes hiring agents, participating in professional drafts (with the exception of baseball), and receiving endorsements for participation in outside activities.¹²⁷

B. *The Employee-Athlete Narrative*

The employee-athlete narrative takes the opposite approach and suggests that the only reason athletes come to campus is athletics. They perform their duties as a full-time job to generate revenue for the university and, in some cases, create the opportunity to play their sport professionally.

The employee-employer arrangement works as follows: The university hires the athlete pursuant to a term contract of up to four years (a minimum of one year, depending on the school).¹²⁸ Under the terms of the agreement, athletes work for the university by training for and participating in athletic competitions.¹²⁹ In exchange, the universities provide compensation in the form of tuition, room, board, books, and the cost of attendance.¹³⁰ Universities also provide academic tutors, first-class training facilities, trainers, nutritionists, and other support staff.¹³¹ While employees do attend classes and work towards a degree, such efforts are secondary to their primary purpose on campus—to participate in intercollegiate athletics.¹³² Certainly, their choice to

124. See generally *Division I Committee on Infractions*, NCAA, <http://www.ncaa.org/governance/committees/division-i-committee-infractions> (last visited Apr. 16, 2017).

125. See generally *Compliance*, NCAA, <http://www.ncaa.org/compliance> (last visited Apr. 16, 2017).

126. *NCAA Amateurism*, *supra* note 46.

127. *Id.*

128. Decision and Direction of Election, *Nw. Univ. Emp'r & Coll. Athletes Players Ass'n (CAPA)*, No. 13-RC-121359 (N.L.R.B. Mar. 26, 2014), <http://apps.nlr.gov/link/document.aspx/09031d4581667b6f>, *dismissed on other grounds*, 362 N.L.R.B. 167 (2015).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

attend the university focused on athletic opportunity (not academic opportunity), and the majority of their time on campus is spent following the schedule mandated by their coaches and the athletic department.¹³³

Because employee-athletes have more than full-time jobs (when one includes educational responsibilities), this narrative contemplates that they could also receive additional compensation for their efforts.¹³⁴ Specifically, employee-athletes should receive compensation for use of their NILs in broadcasts of sporting events.¹³⁵ Alternatively, or perhaps in addition, the athletes as employees should receive a share of the revenue generated from games, whether from ticket sales or from television revenue.¹³⁶

This narrative further views the current status quo as unjust.¹³⁷ Under the current arrangement, the NCAA, the universities, their employees, the coaches, and a wide variety of third-party stakeholders are able to profit financially from intercollegiate athletics, particularly in football and men's basketball. Nonetheless, the employee-athletes may not profit off of this economic windfall solely because of the NCAA's amateurism rule, which member institutions must follow to be part of the NCAA. This disconnect has led to increased calls for more economic equity and pay-for-play arrangements for college athletes.¹³⁸

At the very least, proponents of the employee-athlete narrative advocate for an opportunity for athletes to enjoy the benefits of participating in an open market. This would include the ability to choose an employer based on compensation for services, rather than be faced with identical compensation packages (with the exception of small differences in cost of attendance) from each employer. In addition, employee-athletes ought to have the opportunity to receive endorsements from third-parties without such benefits affecting their eligibility.

133. *Id.*

134. See, e.g., C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1089 (1997); Allen R. Sanderson & John J. Siegfried, *Enough Madness: Just Pay College Athletes*, CHICAGO TRIBUNE (Feb. 2, 2016), <http://www.chicagotribune.com/news/opinion/commentary/ct-ncaa-athletes-pay-sports-college-perspec-0203-20160202-story.html>.

135. See Goplerud, *supra* note 134; NOCERA & STRAUSS, *supra* note 37.

136. See Goplerud, *supra* note 134; NOCERA & STRAUSS, *supra* note 37.

137. See NOCERA & STRAUSS, *supra* note 37.

138. See *id.*

C. *How the Narratives Drive the Antitrust Application*

1. *The Influence of Narrative on Doctrine*

a. *Defining the Applicable Market*

The first step in applying the Sherman Act to the NCAA and its member institutions with respect to intercollegiate athletics is to determine the applicable market. In *O'Bannon*, the applicable market consisted of the marketplace for athletes to participate in college athletics or put in the opposite way, a marketplace for universities to recruit athletes. Viewed either way, this market definition centers on participation in athletics.

By contrast, a completely different characterization could exist if courts considered athletes as students more generally. Such a market would also include non-athletes and focus more generally on the universities' provision of benefits to students that they sought to attract. The value that such students bring to a campus defines their worth in the marketplace with certain credentials (e.g., high test scores, prior experiences) garnering benefits from the university.

The student-employee question is implicit in the decision of which market ought to apply. In the first framing, the market allows for athletes to be either employees or students but leans in favor of the employee characterization. If the reason that athletes choose universities is their athletic programs, and not their educational opportunities, then the athletes seem more like employees. This is particularly true when one acknowledges that over 95% of intercollegiate athletes do not become professional athletes and yet still choose the institution based on its athletic offerings. Athletes receive the benefit of playing college athletics in exchange for providing strong teams to generate revenue for their respective institutions. With education being a secondary (at best) consideration of the consumer in the market, the market seems more like one for employment and less like one for education.

In the second framing, the athletes are students. If the market framing is one of recruiting students to enhance the reputation of the university (either academically or athletically), then the recruited athletes seem more like students. In essence, Athletes exchange athletic performance for academic opportunity.

As such, the characterization a court adopts may influence the first step of the antitrust analysis. Clearly, the *O'Bannon* and *Jenkins* plaintiffs favor the first characterization—a market for athletes—as it opens the door to an employee characterization and an application of antitrust law more likely to allow for compensation beyond cost of attendance.

b. *Anti-competitive restraints*

The second question in the antitrust analysis under the rule of reason is whether the NCAA amateurism rules restrain the market. Again, the student-employee question is implicit in this assessment.

It is clear that the NCAA caps the benefits available to athletes to tuition, room, board, books, and cost of attendance. The limit seems anti-competitive even if athletes are merely students, but only to the extent it caps incentives that the market otherwise might offer to students. Thus, the consequence of the restriction might be different.

If, on the other hand, athletes are employees, the restraint needs much greater justification, as employees in this market could be worth tens of thousands, if not hundreds of thousands of dollars per year. This is particularly true given that college football and basketball are billion dollar industries.

In both cases, the rule of reason would require additional analysis. But the point of comparison is significantly different, depending on one's view of the athletes as students or employees.

c. *Pro-competitive justifications*

The degree to which the NCAA can justify its restraints on the college education market as promoting economic competition in another market is the degree to which it can avoid antitrust liability and injunction against its student-athlete amateurism model. In both the district court and Ninth Circuit *O'Bannon* opinions, the NCAA successfully demonstrated that the model served to protect its product of college football and basketball broadcasts.

One way to understand the difference between the opinions is to explore the implicit adoption or rejection of the concept of employee-athletes. For the district court, the view that some remuneration for athletes would not destroy the product of college sports indicates a level of sympathy toward the employee-athlete narrative. Likewise, the idea that some payment would not completely undermine the product supports the conception of athletes as employees, a sentiment echoed by the Ninth Circuit dissent.

By contrast, the Ninth Circuit majority opinion casts the athletes as students. Its description of cash payments for NILs, even *de minimis* ones, as crossing the Rubicon reflects a view that athletes are students, not employees.¹³⁹ As such, the remedy of providing cost of attendance constituted an acceptable remedy precisely because it reinforced the educational goal of amateurism and went no further.

Ultimately, the implicit question of student versus employee bears directly on the nature of the product allegedly enhanced by the restraint in the college education marketplace. Under the NCAA's student-athlete characterization,

139. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1079 (9th Cir. 2015).

amateurism and the students as athletes are what make the product unique in the market.

Without the student-athlete frame, the product of intercollegiate sports moves easily into the employee characterization, where payments to athletes would do little to undermine the products of college football and basketball. Under this view, the uniqueness of the product lies in its connection to educational institutions, not in the degree to which its athletes adhere to the NCAA's amateurism definition.

As a result, if a court adopted the view of athletes as employees, it would likely open the market significantly, if not completely, to remuneration for athletes. For now, the status quo view that athletes are merely students remains, at least in the Ninth Circuit.

2. *The Influence of Narrative on Equity*

One's chosen narrative also bears significantly on equitable considerations, which extend beyond the antitrust doctrine itself. Antitrust law remains an area in which the government and courts both maintain wide enforcement discretion. Therefore, the sense of fairness underlying the decision to apply antitrust law, and how aggressively to apply it, are both relevant in assessing the possible effects of the Sherman Act on amateurism in college sports.

Embracing the student-athlete narrative counsels against broad application of antitrust law in this context. The NCAA has long argued that the concept of student-athlete should prohibit courts from even finding that any market exists at all, much less consider its amateurism rules as economic restraints. The language of the Ninth Circuit's slippery slope argument adopts much of this sentiment. If the court uses antitrust law as a means to allow some payment for student-athletes, then it, in essence, opens the door to future antitrust challenges to that amount. From the perspective of the student-athlete narrative, the inherent unfairness to the concept of student-athlete and amateurism more broadly would argue for a narrow application of antitrust law, if at all, to college athletics.

By contrast, the employee-athlete approach would seek a robust application of antitrust law, given the economic inequity between athletes and other stakeholders such as coaches. It would view antitrust law as the appropriate tool to ensure equity through economic competition in the marketplace, not by permitting the NCAA to restrict the market completely through its amateurism model. Here, the restraints in question as well as the market with the claimed pro-competitive justification should receive careful scrutiny to assess whether the restraint has adequate justification.

At its broadest application, equity in this context might even lead to the application of a *per se* antitrust rule rather than the rule of reason. The horizontal nature of the restraint imposed by the NCAA is similar in many ways to restraints struck down in the *per se* context. This approach would eliminate such restraints and lead to an open market for employee-athletes.

III. THE ANTITRUST ANALYSIS THROUGH THE EMPLOYEE LENS

Having framed the two competing paradigms of student-athlete and employee-athlete and demonstrated their purchase in the antitrust analysis, the question remains for how courts might determine which narrative more accurately captures the current reality on university campuses. This section offers some likely indicia and their application to the larger question of the narratives.

A. *Who Funds Whom?*

Following the money seems like a good place to start, particularly in the antitrust context. The question is whether the university funds college athletics or whether college athletics funds itself and gives some of its money to the university. In the former situation, the idea that college athletes are employees becomes stronger because the goal is to fund athletics, not academics. The focus is to promote athletics by using whatever resources necessary, including tuition from non-athletes.

The latter situation, where athletics does not require university funds, and in some cases, actually contributes to the academic side of the university, appears more in-line with a student-athlete narrative. In this more symbiotic arrangement, athletics and academics have mutual priority, instead of one dominating the other.¹⁴⁰

Interestingly, most universities follow the former, not the latter approach. At over 130 universities, the university funds over 50% of the athletic department budget through its tuition and fees.¹⁴¹ A significant group of universities fund over 90% of their respective athletics budgets.¹⁴² To be fair, the athletic departments themselves have two, possibly three, revenue sports (i.e., football, men's basketball, and women's basketball) that fund all of the other non-revenue sports, including facilities, coach salaries, uniforms, equipment, and travel.

In recent years, only a handful of institutions (around 15 to 20) have had athletic departments which did not spend more than the revenue they earned. These are Power 5 conference schools with significant donor bases.¹⁴³

Athletic revenue has increased dramatically over the past decade, with the creation of conference specific television networks and increased postseason revenue from the expansion of bowl games and the creation of a college

140. See William W. Berry III, *Enhancing "Education,"* 78 LA. L. REV. (forthcoming 2017) (on file with author).

141. See Shane Shifflett & Ben Hallman, *The Subsidy Gap: The \$10 Billion Divide Between Elite Sports Programs and All the Rest*, THE HUFFINGTON POST & THE CHRONICLE OF HIGHER EDUCATION (Nov. 25, 2015), <http://projects.huffingtonpost.com/projects/ncaa/subsidy-gap>.

142. *Id.*

143. *Id.* The Power 5 conferences are the Pac-12, SEC, Big 10, Big 12, and the ACC.

football playoff. The consequence, however, has not been increased profits or funding of academic departments. Rather, the increase in revenue has led to an arms race for making university athletic facilities world-class and giving priority to stadium upgrades over academic building renovations. Coaches' salaries have escalated wildly, with head coaches in revenue sports earning several million dollars per year and even assistant coaches garnering seven-figure contracts.¹⁴⁴

Schools that do not enjoy the same level of television revenue or ticket sales have nonetheless struggled to keep up with their wealthier competitors, particularly in terms of upgrading facilities. At some point, these costs become too great, and schools are starting to consider abandoning revenue sports, albeit with significant backlash.¹⁴⁵

The consequence, then, of a model that uses non-athlete tuition to fund a significant part of athletics department expenses gives the employee-athlete model much more credence than a model where athletics is self-sufficient and perhaps even funds academics. The expenditures reveal, at least partially, the priorities of the institution.

B. *Time Allocation*

A second, equally important indicator of whether the employee-athlete narrative better represents the reality of college sports is the time allocation of the athletes. Where athletes allocate roughly equal amounts of time between athletics and academics, the student-athlete narrative seems an apt description. Under that time allocation, athletes would be giving equal weight to both endeavors, balancing dual responsibilities.

On the other hand, where athletes spend a majority of their time on athletics, the employee-athlete description seems more appropriate. If academics are a secondary pursuit performed solely to maintain eligibility or only after athletics commitments are satisfied, then athletes seem more like employees and less like students.

Currently, the NCAA restricts the amount of time athletes can spend in formal, coach-supervised activities.¹⁴⁶ While these limits are around 20 hours a week, they do not include time that the athletes elect to spend on training, watching film, studying their playbook, or most importantly, traveling to

144. The highest paid public employee in most states is a football or basketball coach. Feature, *Who's the Highest Paid Public Employee in Every State*, ESPN (Mar. 30, 2017), http://www.espn.com/espn/feature/story/_/id/19019077/highest-paid-us-employees-dominated-college-football-college-basketball-coaches (showing that coaches are the highest paid state employees in thirty-nine of fifty states).

145. UAB closed its football program, but reopened within a year because of alumni backlash. SI Wire, *UAB to reinstate football program after shocking reversal*, SI.COM (MAY 31, 2015), <https://www.si.com/college-football/2015/06/01/uab-blazers-football-program-reinstated>.

146. NCAA MANUAL, *supra* note 33.

games. Many revenue athletes spend between forty and sixty hours per week on their sport during the season.¹⁴⁷

Universities go to great lengths to ensure athletes graduate, particularly since the adoption of the APR by the NCAA. Academic staff members monitor class attendance, supervise an army of tutors, and work to make sure the students pass their classes and fulfill their academic requirements.¹⁴⁸

Some institutions, even ones with outstanding academic reputations, cut corners with respect to athletes' academics. North Carolina is perhaps the most egregious example of this, having a department that held no classes for over two decades.¹⁴⁹ The increased time commitment required by athletics certainly imposes significant pressure on the academic requirements and creates incentives to short-circuit the educational process. Athletic departments in some cases discourage certain majors, and in recent years, some institutions have seen athletes clustering in particular majors. If the NCAA and its member institutions are really serious about the student aspect of the student-athlete narrative, they will need to continue to implement reforms in this area.¹⁵⁰ Otherwise, the status quo seems more like an employee-athlete and less like a student-athlete arrangement.

C. Character of Remuneration

In addition to the flow of money across the university and the time allocation of athletes, the character of athlete remuneration bears on the question of whether athletes are more like employee-athletes or student-athletes. The Ninth Circuit *O'Bannon* opinion limited remuneration to the cost of attendance in addition to the tuition, room, board, and books provided to students. It rejected the district court's award of up to \$5,000 as compensation for use of the athletes' NILs. The court's requirement that compensation be tethered to education strongly adopts a student-athlete approach. The slippery slope argument it relied upon clearly indicates its view that cash payments untethered to education were unacceptable, an implicit rejection of the employee-athlete narrative.

147. Peter Jacobs, *Here's the Insane Amount of Time Student-Athletes Spend on Practice*, BUSINESSINSIDER.COM (Jan. 27, 2015), <http://www.businessinsider.com/college-student-athletes-spend-40-hours-a-week-practicing-2015-1>; Chris Isidore, *Playing College Sports: A Long, Tough Job*, CNNMONEY.COM (Mar. 31, 2014), <http://money.cnn.com/2014/03/31/news/companies/college-athletes-jobs>.

148. Jacobs, *supra* note 147; Isidore, *supra* note 147.

149. It is worth noting that the department was not created to circumvent athletic requirements, but athletes did take advantage of its relaxed requirements in a serious way. *See, e.g.*, B. David Ridpath, *North Carolina Academic Fraud Case Takes Another Sorry Turn*, FORBES.COM (Mar. 14, 2017), <https://www.forbes.com/sites/bdavidridpath/2017/03/14/north-carolina-academic-fraud-case-takes-another-sorry-turn/#477b3fa5136b>.

150. *See generally* William W. Berry III, *Educating Athletes*, 81 TENN. L. REV. 795 (2014) (arguing for a reduced in-semester academic load and an extended academic career).

If the *Jenkins* court adopts a different view, closer to the employee-athlete end of the continuum, it is more likely to affirm other benefits not tethered to education and/or cash payments tethered to education. The employee-athlete paradigm also offers a broader view of education such that education could include all services provided to the university, particularly if such remuneration was not in the form of cash payments. Here, the analogy would be to provide the employee extra benefits—expanded health care, travel, clothing, equipment, access to facilities—rather than a salary increase.

One interesting question is whether bonus payments to athletes based on reaching certain benchmarks (e.g., conference titles, national championships) would violate the court's holding in *O'Bannon*. The remuneration would be for athletic performance but in relation to the benefit provided the university. An expansive employee-athlete view would make such an outcome more palatable to a court than one guided by a strict student-athlete view.

It is clear that the kind and amount of remuneration reflects the adopted narrative. The status quo applicable limits lean more toward the student-athlete than the employee-athlete model.

D. Revenue Generated

One final indicator of whether the dominant narrative should be employee-athlete or student-athlete relates to the revenue generated by the athletes in question. Indeed, the increase in revenue generated is in many ways responsible for the ongoing conversation concerning paying athletes.

With the explosion of sports on television, the growth of ESPN and other sports television networks, the interest in the NCAA basketball tournament, and the adoption of a college football playoff, the revenue generated by college athletics continues to escalate.¹⁵¹ Both football and basketball are billion dollar industries, and most experts believe that neither has reached a saturation point.¹⁵²

With the increase in revenue, athletes increasingly look like employees because their performances generate so much money. It is difficult to conceive of the athletes as pure amateurs participating for their love of the game. Rather, the commercialization of college sports suggests that making money takes precedence over everything else including academics. To limit the financial benefit to the few athletes that make professional teams seems to unfairly deny athletes just compensation in this employee-athlete frame.

In light of the financial windfall, the student-athlete characterization seems tenuous at best. Its credibility relies on the ability of athletes to enjoy a robust academic career alongside participation in billion dollar industries without

151. See, e.g., Brad Wolverton, et al., *The \$10-Billion Sports Tab: How Colleges Are Funding the Athletics Arms Race*, CHRONICLE.COM (Nov. 15, 2015), http://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014.

152. *Id.*

compensation. To the degree that the NCAA and its member institutions want to combat this view, they must continue to strengthen the academic part of the athlete experience.

IV. A ROAD MAP FOR SAVING THE STATUS QUO

Even after the Ninth Circuit's opinion in *O'Bannon*, the future of college athletics remains in play. The antitrust challenge of *Jenkins* will certainly test the strength of the pro-competitive amateurism justification offered by the NCAA and the degree to which its product requires the current restraints. One can imagine the increased commercialization of college sports continuing to give rise to additional antitrust challenges, at least until the Supreme Court weighs in on the issue.

In the meantime, this Article concludes by offering a brief roadmap for universities interested in preserving the status quo, or at least as many elements as possible. Generally speaking, the NCAA and its member institutions should realign their practices to verify the student-athlete narrative and undermine the employee-athlete narrative where possible.

First, the universities should seize greater control of their athletic departments, particularly in spending on coaches' salaries and unneeded facility upgrades. Where possible, the university should minimize the degree to which non-athlete tuition funds athletics. In the Power 5 conferences, athletic departments should work to contribute some revenue (maybe 10%) to academics. Indeed, athletic departments could serve as a hedge against declines in government revenue at large public institutions. At smaller schools, institutions should be realistic about the balance between athletics and academics, choosing not to mortgage academic departments to prop up the facilities for athletic teams.

In addition, the NCAA and its member institutions should create more balance between academics and athletics in athlete schedules. Being reasonable about the required commitments would reduce pressure on the athletes and make academic achievement more of a reality. Decreasing the required academic commitment in-season and decreasing the allowable athletic commitment out-of-season might be one way to achieve a better overall balance in this area. Providing athletes the opportunity to return to school after entering the draft and failing to land with a team might also help. While schools now allow scholarships to resume for athletes who return to the university after leaving it to turn pro, offering continued room and board might signal a greater commitment to athlete education.

Next, the continued decision to tie remuneration to educational pursuits could help save the status quo. Without a doubt, universities could significantly expand the amount of money received by athletes through additional opportunities such as study abroad programs, scholarships and stipends for graduate degrees and professional schools, provision of clothing for job interviews, health care beyond graduation, and other similar benefits.

In doing so, the NCAA and its universities could undermine the commercialism narrative. Indeed, by putting money into additional benefits for athletes, additional academic opportunities for such students, or academic departments more generally, the NCAA and its member institutions could demonstrate that making money is a secondary goal to education. Certainly, this idea remains core to the NCAA literature and stated policies, but real reallocation of resources consistent with these ideals could reinforce the concept of student-athletes enough that it might survive.

CONCLUSION

This Article has explored the current question of whether antitrust law will allow college athletes to receive pay-for-play. Specifically, it has argued that the competing narratives of employee-athlete and student-athlete have implicitly driven the courts' analysis of antitrust law and will continue to do so in the future. Further, it has identified some key measures by which to assess the question of which narrative ought to prevail. Finally, the Article has concluded by providing a brief roadmap to explore what institutions might do to prevent a paradigm shift from student-athlete to employee-athlete.