Tennessee Law Review

Volume 85
Issue 3 *Spring 2018*

Article 3

2018

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This article provides the first detailed study to show that paying college football players does not decrease fan interest in watching college football—substantially debunking the NCAA's myth that amateurism conforms to the requirements of antitrust law. Part I of this article details the history of collegiate sports in the United States and the NCAA's amateurism rules. Part II examines the origins and evolution of the NCAA's procompetitive presumption defense of amateurism; a legal fiction that presumes consumer interest in amateurism justifies a quasi-antitrust exemption for the NCAA's "no pay" rules. Part III sets the framework for our empirical study by describing how the Ninth Circuit's reasoning in O'Bannon v. NCAA *established the need for an economic investigation into the influence of amateurism on consumer demand for the NCAA's most popular product, college football. Part IV describes the methods used for the empirical examination in this study and analyzes the results. Finally, Part V concludes with a discussion of the implications drawn from the results of our investigation and explains why the findings in our study disprove the presumption that the consumer demand for college football depends on preservation of regulations that limit athlete compensation.*

INTRODUCTION

The National Collegiate Athletic Association (NCAA) has long claimed that its amateurism rules constitute legally necessary requirements to preserve consumer demand for college sports. Nevertheless, in the two years since the U.S. Court of Appeals for the Ninth Circuit held that the NCAA's "no pay" rules violated Section 1

of the Sherman Act, consumer interest in big-time college football has only continued to rise.[4]

This article provides the first detailed study to show that paying college football players does not decrease fan interest in watching college football—substantially debunking the NCAA's myth that amateurism conforms to the requirements of antitrust law. Part I of this article details the history of collegiate sports in the United States and the NCAA's amateurism rules. Part II examines the origins and evolution of the NCAA's procompetitive presumption defense of amateurism; a legal fiction that presumes consumer interest in amateurism justifies a quasi-antitrust exemption for the NCAA's no pay rules. Part III sets the framework for our empirical study by describing how the Ninth Circuit's reasoning in *O'Bannon v. NCAA* established the need for an economic investigation into the influence of amateurism on consumer demand for the NCAA's most popular product, college football. Part IV describes the methods used for the empirical examination in this study and analyzes the results. Finally, Part V concludes with a discussion of the implications drawn from the results of our investigation and explains why the findings in our study disprove the presumption that the consumer demand for college football depends on preservation of regulations that limit athlete compensation.

I. A BRIEF HISTORY OF COLLEGE SPORTS AND NCAA AMATEURISM RULES

College sports in the United States date back to the 1840s when students at Ivy League schools such as Harvard University and Yale University first organized regattas as a form of social entertainment.[5] Initially, college students supervised their own sporting events.[6] But by the late 1800s, some college administrators recognized that college sports served as a marketing opportunity for their schools.[7]

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4. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA violated Section 1 of the Sherman Act by capping college athlete compensation below the full cost of their attendance).

5. Marc Edelman, *The NCAA's 'Death Penalty' Sanction—Reasonable Self-Governance or an Illegal Group Boycott in Disguise?*, 18 LEWIS & CLARK L. REV. 385, 388–89 (2014).

6. *Id.* at 389.

7. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989–90 & n. 24 (1987).

Consequently, they began to get involved in overseeing their schools' athletic teams.[8]

With the goal of standardizing game rules and leveling the playing field of competition, college administrators advocated in favor of forming formal collegiate athletic conferences.[9] Among the first athletic conferences to establish player eligibility rules was the Big Ten Conference, which included a number of large Midwestern universities.[10] To ensure that the participants in college sports were truly students and not "ringers," the Big Ten Conference agreed that no college athletes should ever receive a paycheck in exchange for their participation in organized sports. They hoped other conferences would adopt identical rules.

On a national level, a formal organization of collegiate sports emerged in 1905 when President Theodore Roosevelt encouraged college presidents to form a more encompassing body to address safety risks in college football.[11] This new, national body, which became known as the National Collegiate Athletic Association, initially included sixty-two members from across various athletic conferences. In time, it grew to over twelve hundred members. The NCAA also moved away from a safety-oriented focus and adopted an important role in setting "playing rules, standards or amateurisms, standards for academic eligibility, regulations concerning the recruitment of athletes, and rules governing the size of athletic squads and coaching staffs."[12]

At present, the NCAA generates over $1 billion in annual revenues, most of which comes from college football and men's basketball.[13] By adopting formal rules that prevent colleges from paying their athletes, much of the revenue derived from college sports remains within the system for other pursuits, including paying coaches and athletic directors.[14] At present, of the 128 head football coaches in the NCAA's Football Bowl Subdivision, more than seventy-

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8. Edelman, *supra* note 5, at 389.
9. *Id.*
10. *Id.*
11. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).
12. Board of Regents v. NCAA, 468 U.S. 85, 88 (1984). *See also O'Bannon*, 802 F.3d at 1054–55.
13. *Revenue*, NCAA, http://www.ncaa.org/about/resources/finances/revenue (last visited June 12, 2017). *See* Alex, *Here's How the NCAA Generated a Billion Dollars in 2017*, SBNATION (Mar. 8, 2018, 7:00 AM), https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017.
14. *Revenue*, NCAA, http://www.ncaa.org/about/resources/finances/revenue (last visited June 12, 2017).

five earn annual incomes of more than $1 million per year.[15] Meanwhile, the head track and field coach at the University of Kentucky earns $429,000, and the school's athletic director makes $695,000. [16] Based on the foregoing, it becomes rather difficult to construe college sports as "amateur," despite the NCAA's heartened adherence to the term "amateurism."

II. AMATEURISM, ANTITRUST LAW, AND THE DUBIOUS PRO-COMPETITIVE PRESUMPTION

A. An Introduction to Section 1 of the Sherman Act

Given the gross inequity of college sports' revenue sharing arrangement—an arrangement that is skewed in favor of "management" (administrators, athletic directors and coaches)—it is not at all surprising that college athletes have gone to great efforts to seek to reforms. Some college athletes have sought changes through public protest.[17] Others have sought changes through accepting money "under the table."[18] Meanwhile, still a third group of college athletes has sought change through tangible legal action.[19]

Although plaintiffs have challenged the NCAA's amateurism rules under a wide range of theories, the most meaningful legal challenge to the NCAA's no-pay rules arise under antitrust law, and specifically Section 1 of the Sherman Act. Section 1 of the Sherman Act, in pertinent part, states that "[e]very contract, combination[,] . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal."[20] Read literally, Section 1 seems to prohibit all commercial

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15. *NCAA Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries/ (last visited June 12, 2017).

16. Will Hobson, *As NCAA Money Trickles Down, Even Tennis Coaches are Outearning Professors*, WASH. POST (March 13, 2017), https://www.washingtonpost.com/sports/colleges/as-ncaa-money-trickles-down-even-tennis-coaches-are-outearning-professors/2017/03/13/d40d448e-043b-11e7-b9fa-ed727b644a0b_story.html?utm_term=.4c134b2145d6.

17. *See, e.g.*, Tom Ziller, *Nigel Hayes is the Right Athlete to Protest the NCAA* (Oct. 17, 2016, 10:04 AM), https://www.sbnation.com/college-basketball/2016/10/17/13297796/nigel-hayes-protest-ncaa-paid-athletes.

18. *See, e.g.*, Steven Godfrey, *Meet the Bag Man: How to Buy College Football Players, in the Words of the Man who Delivers the Money*, SBNATION (Apr. 10, 2014), https://www.sbnation.com/college-football/2014/4/10/5594348/college-football-bag-man-interview.

19. *See, e.g.*, O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

20. Sherman Act, 15 U.S.C. § 1 (2006).

contracts.[21] Most courts, however, have restrained Section 1 of the Sherman Act to only contracts that "unreasonably" restrain trade.[22]

A court typically applies a two-part test to determine whether a particular agreement violates Section 1 of the Sherman Act: "First, the court will determine whether the alleged restraint involves concerted action between two legally distinct entities in a manner that affects interstate commerce (threshold requirements). Then, a court whether the alleged restraint "unduly suppresses competition within any relevant market" (competitive effects analysis)."[23]

In assessing the threshold requirements, a court will begin its analysis by making two separate inquiries.[24] First, a court will assess whether there exists the presence of "concerted action" by considering "whether there is evidence of an agreement, either written or implied, between entities that lack a common objective."[25] Next, a court will determine whether the alleged restraint affects interstate commerce based on whether the restraint involves "the exchange of buying and selling of commodities especially on a large scale involving transportation from place to place."[26]

Thereafter, in composing a competitive effects inquiry, a court would apply one of at least two different tests.[27] On one end of the spectrum, if a restraint is so nefarious that there is a high probability that the restraint lacks any redeeming value whatsoever, a court will apply the per se test, which presumes illegality without any further inquiry.[28] On the other end of the spectrum, if a court, upon first glance, believes the restraint may have some competitive benefit, the court will instead apply a full rule of reason inquiry.[29]

Under a full rule of reason inquiry, "a court will examine every aspect of an alleged restraint, including whether the parties involved had the power to control any relevant market, whether the restraint encourages or discourages competition, and whether the restraint

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21. Marc Edelman, *A Prelude to* Jenkins v. NCAA*: Amateurism, Antirust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LOUISIANA L. REV. 227, 231 (2017).

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 231–32.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

causes any 'antitrust harm,' or, stated otherwise, harm to consumers."[30] The rule of reason test is thus highly fact intensive.

B. Early Legal Challenges to NCAA Amateurism

Two federal antitrust decisions from the 1970s set the groundwork for the NCAA's presumption that its amateurism rules comply with antitrust law, albeit both of these cases were resolved at the "threshold issues" stage of the antitrust inquiry rather than the competitive effects stage.

In the first decision, *College Athletic Placement Service, Inc. v. NCAA*, the plaintiff—a company that helped young athletes to find college scholarships—brought suit against the NCAA to enjoin the NCAA from preventing high school students from paying for scholarship services under the guise of amateurism. On review, the U.S. District Court for the District of New Jersey held that the College Athletic Placement Service could not state an antitrust claim within the purview of antitrust laws because the NCAA bylaws related to the pursuit of scholarships served for "preserving the educational standards in member institutions" and not for any commercial purpose.[31] To support this conclusion, the court relied on an earlier decision from the U.S. Court of Appeals for the First Circuit—*Marjorie Webster Junior College, Inc. v. Middles States Association of Colleges*—which held that a college's failure to obtain accreditation from a nonprofit association did not give rise to antitrust harm in situations denying accreditation did not amount to marketplace exclusion.

In the second decision, *Jones v. NCAA*, a college hockey player who was deemed ineligible for competition based on his receipt of an athletic stipend brought suit against the NCAA in the U.S. District Court for the District of Massachusetts.[32] Upon review, the court in *Jones* likewise held that the plaintiff could not challenge the NCAA's rules on antitrust grounds because "the actions of the [NCAA] in setting eligibility guidelines has [no] nexus to commercial or business activities."[33] In other words, the court in *Jones* failed to find that the plaintiffs met their threshold requirement of showing any commercial activity on the part of the NCAA.

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30. *Id.*

31. College Athletic Placement Service, Inc. v. NCAA, No. 74-1144, 1974 WL 998, at *4–5 (D.N.J. Aug. 22, 1974).

32. Jones v. NCAA, 392 F. Supp. 295, 296 (D. Mass. 1976).

33. *Id.* at 303.

Interestingly, neither of these two decisions truly analyzed the competitive effects of the NCAA's longstanding amateurism rules, as both cases were decided in the context of a threshold inquiry into the presence (or absence) of interstate commerce.[34] Thus, neither case truly provides much information about the court's economic analysis of amateurism. Indeed, perhaps both cases should be removed from the amateurism-antitrust lexicon in their entirety and be disregarded as a relic based on old definitions of "interstate commerce." Nevertheless, both cases from time to time reappear as part of early support for the NCAA's legal presumption that their amateurism rules are procompetitive.

C. The Supreme Court's Creation of the Procompetitive Presumption in Board of Regents

Further groundwork for the NCAA's "procompetitive presumption defense" emerges from the U.S. Supreme Court's 1984 decision in *Board of Regents of the University of Oklahoma*—a case that seems to eschew the "threshold issues" inquiry, from *NCAA v. College Athletic Placement Service, Inc.* and *Jones,* in favor of evaluating NCAA conduct on its competitive merits.[35]

Board of Regents, in pertinent part, involved a legal challenge by the University of Oklahoma and University of Georgia to the NCAA's efforts to limit the number of games that any member school could play on national television. Both plaintiffs argued that it was tantamount to an illegal group boycott for the NCAA to threaten to "take disciplinary action against any [member school] that [scheduled more televised games]."[36]

Ultimately, the U.S. Supreme Court agreed with the plaintiffs by holding that (1) the NCAA constituted two or more parties, (2) the NCAA engaged in interstate commerce, and (3) the NCAA's conduct in the television broadcast market was anticompetitive because it "eliminated competitors."[37] Nevertheless, even though the NCAA lost this case, it hangs onto certain phrases in dicta that it argues solidifies

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34. Baker III, T.A., Maxcy, J.G. and Thomas, C., White v. NCAA*: A Chink in the Antitrust Armor*. 21 J. LEGAL ASPECTS SPORT 75, 75–99 (2011–2012).

35. 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, 342 (2016).

36. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 95 (1984).

37. *Id.* at 120.

a "procompetitive presumption" about amateurism under antitrust law.

The first point of dicta on which the NCAA relies to establish this purportedly "procompetitive presumption" of amateurism appears in the section of the *Board of Regents* decision in which the Court debates whether to review the competitive effects of the NCAA's broadcast-market restraints under the per se test or the rule of reason.[38] In opting to review the NCAA's broadcast restraints under the rule of reason rather than the per se test, the Supreme Court explains that collegiate sports is a unique industry because certain horizontal restraints on competition "are essential if the product is to be available at all", and that "in order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like."[39] The Court further opines, as reason in favor of applying the rule of reason, that the NCAA's actions "widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive."[40]

The second point of dicta comes from the final paragraph of the *Board of Regents* decision, in which the majority identifies the NCAA's critical role in maintaining the "revered tradition of amateurism in college sports."[41] Specifically, the majority opinion states that "[t]here can be no question but that [the NCAA] needs ample latitude to play that role, or that 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."[42]

Whether these points of dicta should have any legal relevance whatsoever is subject to debate. It is critical to remember that the Supreme Court's assertions were made in the context of whether the review conduct under the rule of reason or the per se test and not based on the substantive merits of antitrust law.[43] Furthermore, "the exact language from [*Board of Regents*] actually states that the NCAA's amateurism rules should be analyzed under the full rule of reason by a court because they '*can* be viewed as procompetitive,'" and

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38. *Id.* at 99.
39. *Id.* at 101–02.
40. *Id.* at 102.
41. *Id.* at 120.
42. *Id.*
43. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 94 (2013).

the word "can" is fundamentally different from the word "must."[44] Nevertheless, since the Supreme Court's ruling in *Board of Regents*, four federal circuits have jumped on these dicta to presume the Supreme Court intended to create, at a minimum, a "procompetitive presumption" about amateurism, and, perhaps even, an explicit exception to antitrust law for the NCAA's amateurism rules.

D. How Four Federal Circuits Changed a Presumption into an Exemption

Although the Supreme Court's holding in *Board of Regents* marked an unequivocal win for the plaintiffs, a string of lower court decisions thereafter ran with the decision's loose dicta instead of its holding, in a manner that can best be likened to a bad game of telephone.[45] Over time, these decisions continuously moved further away from the Supreme Court's original intent in *Board of Regents*, and helped to indoctrinate into the law of several circuits this bizarre myth that the NCAA's amateurism rules, as a matter of law, conform with antitrust scrutiny.[46]

The first lower court decision after *Board of Regents* to apply the Supreme Court's loose dicta about amateurism in a manner favorable to the NCAA was *McCormack v. NCAA*, which was decided by the Fifth Circuit in 1988.[47] There, an alumnus of Southern Methodist University (SMU), along with an SMU football player and several cheerleaders challenged the NCAA's ban for the SMU football program as a punishment for paying its athletes.[48]

The court, in ruling in favor of the NCAA, cited to *Board of Regents* for the proposition that unlike rules that govern college football broadcasts, rules that determine player eligibility "enhance public interest in intercollegiate athletics."[49] The court further opined that the NCAA's rules restricting athlete compensation were essential to product creation because they "allowed for [college football's] survival in the face of commercial pressures."[50] The court further concluded,

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44. *Id.*

45. The game "telephone" is one in which a participant whispers a message to another and then that participant shares the same rumor with a different person and the process repeats down a chain of participants. The point of the game is to compare the original message with what was whispered to the last person in the chain. Typically, the original message becomes distorted, comically so, through the process.

46. Edelman, *supra* note 43, at 94.

47. McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).

48. *Id.* at 1340.

49. *Id.* at 1344.

50. *Id.* at 1345.

without one iota of economic investigation, that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition."[51]

After *McCormack*, a similar issue emerged again in the the Seventh Circuit decision of *Banks v. NCAA*. *Banks* involved an appeal from the dismissal of a former college football player's antitrust challenge to the NCAA's "no-draft" and "no-agent" rules. There, the court upheld a district court's dismissal of the case based on the plaintiff's failure to allege an anticompetitive effect within a relevant market.[52] However, the court justified the role of amateurism in NCAA athletics by citing to the dicta in *Board of Regents* to conclude that the NCAA's "no-draft" and "no-agent rules" were necessary to preserve the character and quality of the NCAA's products and thereby maintain the "bright line of demarcation" that divides college and professional football.[53]

Nevertheless, not every judge on the U.S. Court of Appeals for the Seventh Circuit shared the majority view. Indeed Judge Joel Martin Flaum, in his partially dissenting opininion, challenged the existence of amateurism by classifying the concept as "chimerical."[54] More specifically, he viewed college football as nothing more than a "free farm system" for the NFL.[55] The majority countered Judge Flaum's stance on amateurism by calling it "surprisingly cynical."[56]

The issue emerged again in *Smith v. NCAA*[57]—a case involving a graduate transfer student who challenged the NCAA's post-baccalaureate bylaw that prohibited her from participating in intercollegiate athletics while enrolled in a graduate degree program at an institution that was not her undergraduate institution.[58] The NCAA denied Smith's request to spend her remaining eligibility playing intercollegiate volleyball at her graduate school despite the fact that the student plaintiff was pursuing her degree program of choice, which her undergraduate institution did not offer.[59] The Third Circuit affirmed a district court's dismissal of Smith's complaint and

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51. *Id.* at 1344 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984)).

52. Banks v. NCAA, 977 F.2d 1081, 1094.

53. *Id.* at 1090.

54. *Id.* at 1099 (Flaum, J., concurring in part and dissenting in part).

55. *Id.* at 1099–100 (quoting Fredric C. Klein, *College Football: Keeping 'em Barefoot*, WALL ST. J., Sept. 4. 1987, at 15).

56. *Id.* at 1092.

57. *See generally* Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998).

58. *Id.* at 182.

59. *Id.* at 183.

in doing so focused on the "character of the NCAA's activities" rather than the plaintiff's injuries.[60] Had the court focused on the character of the specific NCAA activity that was at controversy in *Smith*—the post-baccalaureate bylaw—there would have been no reference to the procompetitive presumption because that bylaw did not involve athlete compensation. Instead, the majority in *Smith* characterized all athlete regulation by the NCAA based on the Court's reasoning in *Board of Regents* that gave rise to the procompetitive presumption.[61] Specifically, the court cited *Board of Regents* in finding that NCAA eligibility rules existed to ensure fair competition,[62] enhance public interest in intercollegiate athletics,[63] and, therefore, were not designed to provide the NCAA with a commercial advantage.[64]

Unlike the claims asserted in *Smith*, the controversy before the Sixth Circuit in *Bassett v. NCAA* did involve the NCAA's preservation of amateurism.[65] Although, the plaintiff in *Bassett* was not a student-athlete, but instead a former coach who claimed, among other things, that the NCAA's enforcement of amateurism rules that restricted athlete recruitment violated antitrust law by costing him his coaching career.[66] In dismissing Bassett's antitrust claims, the district court relied on the Third Circuit's ruling in *Smith* that eligibility rules governing amateurism were not related to the NCAA's commercial business activities and, therefore, were not within the purview of antitrust law.[67] Actually, the Sixth Circuit labeled the NCAA's amateurism rules and recruiting restrictions as "anti-commercial" because they promoted the "spirit of amateur athletics."[68]

In *Agnew v. NCAA*, the Seventh Circuit rejected the interpretation of *Board of Regents* in *Smith* and *Bassett* that led those courts to conclude that the NCAA's regulation of athletes did not involve commercial activity.[69] The facts in *Agnew* involved an antitrust challenge to NCAA bylaws that limited scholarships to one year and prevented schools from offering multi-year scholarships.[70] Twenty

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60. *Id.* at 185.
61. *Id.* at 185–86.
62. *Id.* at 185.
63. *Id.* at 186 (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).
64. *Id.* at 185–86.
65. *See generally* Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008).
66. *Id.* at 428.
67. *Id.* at 430 (citing Smith v. NCAA, 139 F.3d 180, 186 (3d. Cir. 1998)).
68. *Id.* at 433.
69. Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 332 (7th Cir. 2012).
70. *Id.* at 332–33.

years after penning his dissenting opinion in *Banks*,[71] Judge Flaum wrote for the majority in *Agnew*, and in delivering the opinion for the court, he maintained his stance that a labor market exists for college athletes.[72] With this recognition, the court dismissed the non-commercial nature defense and instead found that "[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a household recruiting program."[73] The problem for the plaintiffs in *Agnew*, however, was that they had asserted nothing resembling a labor market in their amended complaint.[74]

In dicta, Judge Flaum's opinion in *Agnew* addressed the need for preserving amateurism with an interpretation of *Board of Regents* that restricted the procompetitive presumption's reach to protect only those NCAA regulations that courts deemed necessary for preserving the "revered tradition of amateurism."[75] According to the Court in *Agnew*, NCAA regulations that do not safeguard amateurism within NCAA athletics are not essential to product creation and therefore should be subjected to a more searching rule of reason analysis when challenged under antitrust.[76] It should not escape notice that Judge Flaum's description of amateurism as a "revered tradition" was a dramatic departure from his suggestion in *Banks* that the concept of amateurism is "chimerical."[77] This observation aside, it is his opinion in *Agnew* that now controls the Seventh Circuit.

With its description of the procompetitive presumption in *Agnew*, the Seventh Circuit acknowledged the commercial nature of the NCAA's restrictions while still preserving for the NCAA a quasi-exemption from antitrust law that activated anytime amateurism was implicated in an antitrust challenge. It should come as little surprise that the NCAA would rely heavily on *Agnew* in its defense to the antitrust challenges to its amateurism restrictions that were before the Ninth Circuit in *O'Bannon*.

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71. Banks v. NCAA, 977 F.2d 1081, 1094–110 (Flaum, J., concurring in part and dissenting in part).

72. *Agnew*, 683 F.3d at 346.

73. *Id.* at 340.

74. *Id.* at 347.

75. *Id.* at 342–43.

76. *Id.* at 343.

77. Banks v. NCAA, 977 F.2d 1081, 1099 (Flaum, J., concurring in part and dissenting in part).

III. *O'BANNON V. NCAA*: THE NINTH CIRCUIT CHANGES THE GAME AND SETS THE STAGE FOR EMPIRICAL TESTS OF THE PROCOMPETITIVE PRESUMPTION

In 2009, former NCAA All-American basketball player Ed O'Bannon filed a class action lawsuit against the NCAA and the Collegiate Licensing Company (CLC), the entity that licenses the trademarks of the NCAA and a number of its member institutions.[78] O'Bannon alleged that the NCAA's amateurism rules imposed an illegal restraint of trade under Section 1 of the Sherman Act.[79] Specifically, O'Bannon pointed to the fact that college athletes were unable to financially benefit from the use of their likenesses in television broadcasts and in sport video games produced by Electronic Arts (EA).[80] Judge Claudia Ann Wilken heard *O'Bannon* at the district court level and found that the NCAA's amateurism provisions violated antitrust law because the preservation of amateurism could be achieved through two less restrictive alternatives: (1) allowing schools to extend the NCAA's compensation cap to cover the full cost of attendance, and (2) the provision of $5,000 per year in deferred compensation to student-athletes at the close of their intercollegiate athletic careers.[81] The NCAA appealed Judge Wilken's decision to the Ninth Circuit.[82] In deciding *O'Bannon*, the Ninth Circuit deviated from more twenty years of federal district and appellate case law from other circuits that interpreted *Board of Regents* in a way that fortified the NCAA's amateurism rules from rule of reason review. In doing so, the Ninth Circuit in *O'Bannon* opened the door for future classes of student-athlete plaintiffs to challenge the preservation of amateurism via antitrust.

A. The Ninth Circuit Rejects The Quasi-Exemption And The Non-Commercial Activity Defenses

In its appeal, the NCAA argued that Justice Stevens's dicta in *Board of Regents* created a presumption of validity under antitrust law for all NCAA eligibility rules governing amateurism.[83] The Ninth

78. O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
79. *Id.*
80. *Id.*
81. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 999, 1005–06 (N.D. Cal. 2014), *aff'd in part & reversed in part*, 802 F.3d 1049 (9th Cir. 2015).
82. *See* O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).
83. *Id.* at 1061–66.

Circuit disagreed with this read of *Board of Regents*, finding instead that Justice Stevens's seminal dicta did nothing more than detail why horizontally-imposed restraints for sport products like the NCAA's were not per se illegal and instead should be subjected to rule of reason analysis.[84] The Ninth Circuit noted that it did not take Justice Stevens's dicta lightly and afforded it the deference due; however, no amount of deference to dicta bound the Ninth Circuit to automatically validate "every NCAA rule that somehow relates to amateurism."[85] Furthermore, the majority found that Justice Stevens' statements on the role of amateurism in college football did not support the "tremendous weight" of the NCAA's argument "even if the language . . . were *not* dicta."[86]

In fact, the Ninth Circuit found that nothing in *Board of Regents* established an antitrust exemption for NCAA regulation of amateurism.[87] In making this finding, the Ninth Circuit also rejected the NCAA's interpretation of a decision from its "sister circuit" in *Agnew*.[88] The Ninth Circuit found that the *Agnew* court read *Board of Regents* too "broadly" in concluding that a procompetitive presumption of validity applies when NCAA bylaws clearly exist to preserve amateurism or to preserve the student-athlete in higher education.[89] The Ninth Circuit found that the *Agnew* court's "procompetitive presumption" depended on a "dubious proposition" that the Court in *Board of Regents* "blessed" the NCAA's amateurism rules as "virtually exempt" from antitrust scrutiny.[90] Conversely, the court doubted that Stevens ever intended to extend antitrust exemption status to any of the NCAA's rules and refused to give the seminal dicta the "aggressive construction" that is found in *Agnew*.[91] For the Ninth Circuit, the NCAA had to prove the validity of its amateurism rules.[92]

The court turned its attention to the possibility that antitrust law did not apply to NCAA eligibility rules regulating student-athletes because those rules were not commercial activity and therefore not

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84. *Id.* at 1063.
85. *Id.*
86. *Id.* at 1063–64.
87. *Id.* at 1064.
88. *Id.*
89. *Id.* (citing Agnew v. NCAA, 683 F.3d 328, 342–43 (7th Cir. 2012)). The Ninth Circuit also recognized that like Justice Stevens' version of the presumption in *Board of Regents*, the Seventh Circuit's in *Agnew* was also dicta.
90. *Id.*
91. *Id.*
92. *Id.*

subject to scrutiny under the Sherman Act.[93] The court dismissed the non-commercial (or anti-commercial) activity argument as "not credible."[94] Like the Seventh Circuit in *Agnew*, the Ninth Circuit rejected the notion that "big-time" NCAA programs do not anticipate economic gain from their recruitment of high school talents. [95]

Addressing the decisions in *Smith* and *Bassett*, the Ninth Circuit stated that it was not convinced by either to find that the compensation limits were noncommercial.[96] The court found that the post-baccalaureate bylaw in *Smith* could easily be distinguished from compensation limits because the rules regulating athlete compensation actually involved money.[97] To this end, the compensation limits did regulate business activities because the "labor of student-athletes is an integral and essential component of the NCAA's product" and rules setting the price for that labor cut into "the heart of the NCAA's business."[98] The Ninth Circuit admitted that it could not, however, easily distinguish the NCAA rules at controversy in *Bassett* from those before the court in *O'Bannon* because both sets of rules restricted payments to college athletes.[99] Rather, the Ninth Circuit declared that the *Bassett* court's reasoning that "anti-commercial" rules were not commercial was "simply wrong."[100] Accordingly, the NCAA's amateurism regulations at issue in *O'Bannon* were scrutinized by the Ninth Circuit in an application of the rule of reason.

B. The Ninth Circuit Reshapes The Procompetitive Presumption Into A Procompetitive Justification

In subjecting the NCAA's amateurism regulations to the rule of reason review,[101] the Ninth Circuit adopted a deferential, rather than skeptical, view of the NCAA's mission in preserving amateurism.[102]

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93. *Id.* at 1064–65.
94. *Id.* at 1065.
95. *Id.* (quoting Agnew v. NCAA, 683 F.3d 328, at 340 (7th Cir. 2012)).
96. *Id.* at 1066.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. The purpose of this study concerns the commercial importance placed by courts on amateurism and our examination of *O'Bannon* is limited to this focus.
102. *Id.* at 1066. The Ninth Circuit's respect for the NCAA's fidelity to preserving amateurism stood in contrast to skepticism from Judge Wilken. In fact, the Ninth Circuit recognized that Judge Wilken "probably underestimated the NCAA's commitment to amateurism" with her refusal to accept the preservation of amateurism

Deference aside, the fact that the rules have existed for a long time did not matter.[103] The Ninth Circuit cared about whether the amateurism regulations produced a net procompetitive effect.[104] The court found two procompetitive effects produced by the amateurism rules: (a) the preservation of consumer interest in the NCAA's sports products and (b) the integration of academics and athletics.[105] Of the two, only the first putatively affects consumer welfare, but that did not stop the court from valuing both as procompetitive aims.[106]

Perhaps more important to the resolution of future cases than the actual holding is the way in which the court reached its decision that the NCAA's amateurism rules are procompetitive. The court relied on the record as supporting a "concrete procompetitive effect" in preserving the NCAA's version of amateurism based on the concept's appeal to consumers.[107] Furthermore, the court read the district court's reasoning on the appeal of amateurism as "largely consistent" with the conclusion in *Board of Regents* that the "academic tradition" is what differentiated college football from its professional counterpart.[108] Yet, the Ninth Circuit's reading of the record seemingly ignored the fact that the district court did not believe that amateurism serves as a primary driver for consumer demand of college sports.[109] The district court, instead, concluded that what attracts consumers to college sports were aspects unrelated to amateurism, "such as loyalty to their alma mater or affinity for the school in their region of the country."[110] If amateurism was not treated as a "core component" then it could not be treated as essential to product creation and this finding would seemingly remove the regulations from the type of horizontal activity that *Board of Regents* protected from the per se rule's reach.

The Ninth Circuit retreated from the district court's analysis on amateurism's appeal with a recitation of the dicta from *Board of Regents* that established amateurism as essential to product

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as the NCAA's "core principle." Nevertheless, the majority considered that observation to be irrelevant because the critical question did not involve fidelity to amateurism, but whether amateurism produces a procompetitive effect.

103. *Id.* at 1073.

104. *Id.*

105. *Id.* at 1074.

106. *See id.*

107. *Id.* at 1073.

108. *Id.* at 1074.

109. *See id.* at 1059; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 975, 977–78 (N.D. Cal. 2014).

110. *O'Bannon*, 802 F.3d at 1059 (citing *O'Bannon*, 7 F. Supp. 3d at 977–78).

creation.[111] If readers are not careful, the recycling of *Board of Regents* by the court in *O'Bannon* may be misunderstood as nothing more than a deferential reference. Upon closer examination, the Ninth Circuit's reiteration strengthens its insistence that the district court's amateurism analysis was in line with the oft-cited dicta from *Board of Regents*.[112]

Accordingly, the Ninth Circuit has not done away with the presumption from *Board of Regents* that consumer demand in college sport depends on the preservation of amateurism.[113] Based on *O'Bannon*, that presumption now serves as a procompetitive justification rather than an actual presumption of validity.[114] This distinction is not as subtle as it may seem because *O'Bannon* makes clear that the procompetitive presumption will not serve as an automatic exemption to antitrust liability for the NCAA when its rules that implicate amateurism are challenged in antitrust actions.[115] The rejection of a quasi-exemption based on the procompetitive presumption means antitrust challenges in the Ninth Circuit to NCAA rules that restrict athlete compensation are now subjected to the more searching rule of reason review. This review allows student-athlete plaintiffs to proffer evidence that discredits the presumption asserting consumers actually care about amateurism. Following *O'Bannon*, the Ninth Circuit instead applies the procompetitive presumption in a way that shifts a burden of *disproof* to student-athlete plaintiffs.[116] In its application of the less-restrictive alternative test, the Ninth Circuit addressed the type of evidence that will not convince it to ignore the presumption that consumers care about amateurism.[117]

C. The Ninth Circuit's Less-Restrictive-Alternative Analysis: A Call For Direct Market Evidence And A Flawed Description Of Cost-Of-Attendance

Recall that the district court found two less-restrictive means for preserving amateurism when it recognized alternatives in (1) the extension of grant-in-aid to cover the full cost-of-attendance and (2)

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111. *Id.* at 1076 (citing NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).

112. *See id.*; *see also Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

113. *See O'Bannon*, 802 F.3d at 1072–74.

114. *See id.*

115. *Id.* at 1063–64.

116. *Id.*

117. *Id.*

the provision of deferred compensation for use of athlete NILs.[118] The Ninth Circuit agreed with only the first option, and in its analysis of these alternatives the court not only tipped its hand concerning the type of evidence needed to overcome the procompetitive presumption, it also created the opportunity for the collection of that evidence.[119]

In addressing the cost-of-attendance alternative, the Ninth Circuit found that all of the evidence before the district court showed that raising the cap to cover the full cost of attendance would have "virtually no impact on amateurism."[120] The evidence referenced by the Ninth Circuit included testimony from NCAA President Dr. Mark Emmert, who stated at trial that a cost-of-attendance extension would not violate the NCAA's principles because the money would only cover "legitimate costs."[121] Furthermore, no evidence in the record suggested that a cost-of-attendance extension to athletic scholarship allotments would lessen consumer interest in college sports or interfere with the integration of athletes into their academic communities.[122]

The majority in *O'Bannon*, however, rejected the lower court's alternative of deferred compensation for the use of athlete NILs, concluding that this approach was not "virtually as effective" as grant-in-aid in preserving the market for amateur athletics.[123] In doing so, the majority reiterated the presumption from *Board of Regents* that the caps on college athlete compensation preserved consumer demand by preventing college football from morphing into "minor league [football]."[124] The court noted that being a "poorly-paid professional athlete" is not the same as being an "amateur."[125] To reach this conclusion, the majority addressed evidence in the record consisting of a survey conducted by Dr. J. Michael Dennis, testimony from sport management expert Dr. Daniel Rascher, and testimony from television sports consultant Neal Pilson.[126] An examination of how the Ninth Circuit treated the testimonies from Drs. Dennis and Rascher, in particular, provides insight into the type of evidence that is unlikely

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118. O'Bannon, 7 F. Supp. 3d at 982–83 (N.D. Cal. 2014).
119. O'Bannon v. NCAA, 802 F.3d at 1053 (9th Cir. 2015).
120. *Id.* at 1074–75.
121. *Id.* at 1075.
122. *Id.*
123. *Id.* at 1076.
124. *Id.* at 1077. This section of the majority's opinion again reinforces Justice Stevens' description of amateurism as necessary to the creation of the NCAA's college sport products.
125. *Id.*
126. *Id.* at 1077–78.

to persuade the court to deviate from the procompetitive presumption in future cases.

The district court discredited Dennis's survey-designed survey in which participants were asked to provide their opinions on whether college athletes should be paid.[127] The court did so on the grounds that the procedures for the survey primed participants to perceive any form of payments to athletes as illicit.[128] On appeal, the majority highlighted a different threat to the internal validity of Dennis's survey by finding that the survey instrument addressed "the wrong question."[129] The Ninth Circuit noted that the district court relied on Dennis's findings that payments of $200,000 per year would alienate the public more than payments $20,000 in reaching a less-restrictive alternative that would allow deferred compensation payments limited to $5,000 per year ($20,000 for four years).[130] However, the Ninth Circuit believed that the district court's use of the survey was misguided because the issue before the court was never whether small cash payments preserved consumer demand more so than bigger cash payments.[131] The issue, as recognized by the Ninth Circuit, was whether paying athletes any sum of money was virtually as effective in preserving amateurism as not paying them at all.[132] The court added that "not paying athletes is precisely what makes them amateurs" and that amateurism is what "differentiates" college sports markets from professional sports markets.[133]

Next, the court addressed testimony from Dr. Rascher, a respected economist with research and teaching specialization in sport management.[134] Rascher explained to the district court how Dennis's survey was no different than surveys used by Major League Baseball in the 1970s that revealed consumer opposition to rising baseball salaries.[135] However, consumer demand in baseball did not dip with the introduction of free agency and dramatic increases in athlete compensation.[136] Perhaps more relevant to the facts at issue in *O'Bannon*, Rascher also explained to the district court how consumer interest in the Olympics did not decrease when amateurism

127. *Id.* at 1059.
128. *Id.*
129. *Id.* at 1077.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1076 (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).
134. *Id.* at 1077.
135. *Id.*
136. *Id.*

restrictions were lifted.[137] In fact, Rascher's testimony proved that consumer interest in the Olympics increased substantially after the games were opened to professionals. Like college athletics, the concept of amateurism was also once considered as central to the Olympic ideal; it was one of the core principles of the modern games.[138] Yet, increased commodification of the postmodern Olympics through media right sales and sponsorships resulted in claims of hypocrisy and exploitation that ultimately pressured the International Olympic Committee (IOC) to lift its amateurism restrictions.[139] The IOC's decision to allow professionals to play in the Olympics drew strong criticism from those who believed amateurism to be necessary and essential to the operation of the games, with one pundit cautioning that "the [Olympics] will be destroyed within eight years."[140] The NCAA and its *amici* mongered similar fears in their defenses of amateurism with nothing more than their opinions and the results produced from Dr. Dennis's dubious survey to support their cause. However, neither the lack of credible evidence from the NCAA nor the existence of Dr. Rascher's empirically supported examples influenced the Ninth Circuit's decision concerning the importance consumers place on amateurism. Instead, the majority clung to its conclusion regarding consumer interest in amateurism and casually dismissed Dr. Rascher's comparisons with the simple statement that "professional baseball and the Olympics are not fit analogues to college sports."[141] Based on the court's treatment of Dr. Rascher's testimony, only *direct evidence* of amateurism's influence on consumer interest in intercollegiate sports has the potential to persuade the Ninth Circuit.

The Ninth Circuit had a bit more difficulty with testimonial evidence produced by the NCAA's witness, a former television executive named Neal Pilson. The NCAA held Pilson out as an expert on consumer interest in college athletics. Pilson opined that if college athletes were paid for performance, then they would no longer be

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137. *Id.*

138. Michael R. Real, *The Postmodern Olympics: Technology and the Commodification of the Olympic Movement*, 48 QUEST 9, 6 (1996).

139. *Id.* Very similar to the Olympics, NCAA football and men's basketball at the Division I levels have also ballooned into a multi-billion dollar industries due, in large part, to the leveraging of media rights for television broadcasts. *See* Baker & Brison, *supra* note 35, at 331.

140. Patrick Hurby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 27, 2012), http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/.

141. *O'Bannon*, 802 F.3d at 1077.

amateurs, which would "harm the student-athlete market."[142] When pushed as to whether a line existed as to how much compensation could be afforded without harming the market, Pilsner responded that he was "not sure."[143] He eventually stated that "a million dollars would trouble" him, but "$5,000 wouldn't."[144] The court pointed to Pilson's testimony as the "sole support" for the district court's $5,000 deferred stipend for the use of NILs.[145] The Ninth Circuit took issue with the district court's finding, concluding that there was "simply not enough" evidence to justify a "far-reaching conclusion" that paying students $5,000 per year would be "as effective" in preserving amateurism within NCAA athletics.[146]

However, the Ninth Circuit's reasons for rejecting Pilson's testimony and the deferred compensation alternative seemingly contradict the court's reasoning concerning the cost-of-attendance alternative, as well as its interpretation of the procompetitive presumption. Based on the court's reasoning in *O'Bannon*, the difference between offering college athletes education-related compensation and cash sums untethered to educational expenses was a "quantum leap."[147] The court found that once college athletes are paid cash sums for their performance, then a line would be crossed from which there is no return.[148] In that event, the court believed that the NCAA would have surrendered its amateurism principles entirely and college football would be reduced to "minor league status."[149] However, the Ninth Circuit found that the cost-of-attendance calculation for each member institution set a reasonable limit for what colleges could cover for student-athletes while allowing the NCAA to preserve consumer interest in its sports products.[150] The court's reasoning on the cost-of-attendance issue is inconsistent with its application of the procompetitive presumption because cost-of-attendance stipends are, in fact, cash payments to student-athletes that lack any tether to educational expenses.

The costs associated with attendance under cost-of-attendance formulas were designed to provide students and parents with an estimate of the financial amounts in addition to tuition, fees, books,

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142. *Id.* at 1077–78.
143. *Id.* at 1078.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 1078–79.
148. *Id.*
149. *Id.* at 1079.
150. *Id.* at 1078–79.

and room and board that are thought necessary to attend a particular institution.[151] Cost of attendance varies from institution to institution, but always includes some mix of personal expenses as part of the equation. Personal expenses covered by the cost of attendance may include materials needed for matriculation at the institution (e.g., pens, paper, and laptops).[152] The personal expense aspect of the cost of attendance is a loose calculation generally formulated to capture the cost of living as a student at a particular institution.[153] With that in mind, the living expenses considered could also encompass payments for personal items and services like cell phone bills and laundry. Some schools even recognize social engagement as a consideration in their cost-of-attendance estimates (i.e., the occasional night out with friends).[154]

When student-athletes are provided with their cost-of-attendance stipends, they may use that money to purchase items necessary for class like bluebooks or calculators. It's equally possible that many will instead spend their stipends on personal items like video games and Beats by Dre®.[155] Neither the NCAA nor its member institutions have any control over how student-athletes spend their stipends. The Ninth Circuit in *O'Bannon* warned against paying students cash for their athletic performances,[156] but that's exactly what is done with the provision of cost-of-attendance stipends. The fact that the amounts for the payments were calculated in consideration of how much it costs to attend a university does not change the fact that the payments are, effectively, cash-in-hand for student-athletes.

Furthermore, NCAA member institutions set their own cost-of-attendance amounts and this has led to variances among programs that now influence student-athlete recruitment. In fact, some NCAA

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151. For a description of cost-of-attendance calculations, see *Financial Aid 101: Understanding Your Cost of Attendance*, UNIV. DENVER, https://www.du.edu/financialaid/internal/emails/101/coa.html (last visited Jan. 31, 2017).

152. *Id.*

153. Cost-of-attendance amounts vary per university but range from $1,000 to $6,000. For a more detailed explanation of the amounts students receive, see Jon Solomon, *Cost of Attendance Results: The Chace to Pay College Players*, CBSSPORTS.COM (Aug. 20, 2015), http://www.cbssports.com/college-football/news/cost-of-attendance-results-the-chase-to-pay-college-players/.

154. For an example, see *Cost of Attendance*, UNIV. OR., https://financialaid.uoregon.edu/cost_of_attendance (last visited Jan. 28, 2017).

155. For a discussion of the discretionary spending of cost-of-attendance stipends by student-athletes, see Steve Berkowitz and Andrew Kreighbaum, "College Athletes Cashing in with Millions in New Benefits," *USA Today*, August 19, 2015.

156. O'Bannon v. NCAA, 802 F.3d 1049, 1078 (9th Cir. 2015).

coaches have alleged that the cost-of-attendance stipends have disadvantaged their recruitment of student-athletes because the institutions for which they coach offer less through stipends than rival institutions provide.[157] Additionally, claims have also been made that some member institutions have increased their cost-of-attendance estimates with the design of gaining recruiting advantages in NCAA sports.[158] Member institution use of cost-of-attendance stipends as a recruiting tool produces the very type of financial competition for athletes that the NCAA's compensation limits serves to prevent.[159]

IV. AN EMPIRICAL ANALYSIS OF CONSUMER IMPACT ON NCAA AMATEURISM RULES

This study follows the Ninth Circuit's reasoning in *O'Bannon* by being the first to directly test the strength of the procompetitive presumption through an examination of the effect that an increase in stipends has on consumer interest in NCAA football. A study of this type is now possible because the amounts provided to college athletes changed for the first time in forty-two years in August 2015.

Recall that Justice Stevens's procompetitive presumption posits that the preservation of consumer interest in college football requires that student-athletes not receive cash payments in exchange for their athletic participation in NCAA sports.[160] For this reason, NCAA eligibility rules that restrict student-athlete compensation to cover only educational expenses have been considered by courts as "essential" to the creation of the NCAA's products, college football in particular. An essential component of a product is something that

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157. Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER ED (Aug. 12, 2015, 3:00 AM), https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance-numbers-increasing-stipends-athletes.

158. *Id.* (quoting University of Alabama football coach Nick Saban as saying, "You can't create a system that really can almost promote fraud. Even in the NFL, they have a salary cap. When we don't have a cap that makes it equal for everybody, it really goes against everything we've tried to do in the NCAA that we've tried to do for parity." Soon after Saban made those remarks, Alabama recalculated its cost-of-attendance and now offers student-athletes one of the largest amounts in NCAA football.).

159. The NCAA's rules were necessary because without them "no competitor would assume the restraints on athlete compensation unilaterally." *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

160. *O'Bannon*, 802 F.3d at 1079 (citing *Bd. of Regents of Univ. of Okla.*, 468 U.S. at 102).

should result in consumer reactions when modified.[161] If consumers prefer a product component but their consumption of that product is not dependent on the component remaining unchanged, or existing at all, then the component is not essential to product creation in a way that widens consumer choice.[162] If caps that limited athlete compensation to direct academic costs are "essential" to the creation of college football, making it a distinct product alternative to professional football, then a modification that increases compensation to include cash payments that students are free to use for non-academic purposes should produce a negative consumer response.

V. RESEARCH DESIGN AND DATA COLLECTION

To analyze how consumer interest may fluctuate based on the increase in stipends given to NCAA student-athletes in 2015, this research employs regression analysis, a statistical technique commonly used in fields such as economics and political science to examine how changes in a dependent variable are related to independent variables.[163] Specifically, regression analysis has been defined as an "analysis of numerical data consisting of values of a dependent variable (response variable) and of one or more independent variables (explanatory variables)."[164]

While it is possible to have a regression with just two variables (one being a dependent variable, and the other an independent variable), researchers more commonly use multiple regression analysis; that is, an analysis of one dependent variable and two or more independent variables.[165] The use of multiple explanatory variables allows researchers to control for multiple factors, thus providing a more complex understanding of statistical relationships.[166] Within empirical research analyzing economic demand, including the examination of the demand for sports products, multiple regression analysis is often employed as the main statistical technique within the academic literature.[167]

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161. *See* Mark Baimbridge et al., *Satellite Television and the Demand for Football: A Whole New Ball Game*, 43 SCOT. J. POL. ECON. 317, 330 (1996); *see also*, Borland & MacDonald, *Demand for Sport*, 19 OXFORD REV. ECON. POL'Y, 4, 481.

162. Borland & MacDonald, *supra* note 161, at 481.

163. John N. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1134 (2009).

164. *Id.* at 1133–34.

165. *Id.*

166. *Id.* at 1106–07.

167. Borland & MacDonald, *supra* note 161, at 483.

Furthermore, multiple regression analysis is extremely beneficial for those conducting research on complex subjects such as the sales of goods in a marketplace, public policy, and other multifaceted issues, as it allows them to build more complex models with multiple variables through which the researcher can examine statistical relationships.[168] Indeed, previous legal studies have discussed the need for and value of regressions in providing information that is helpful in both legal cases and academic literature.[169] As such, the use of regressions as part of an econometric analysis is widely considered to be a rigorous process that requires a great deal of expertise and knowledge of both economics and statistical methods.[170] Importantly, this statistical technique has been recognized as a legitimate methodology to analyze data within antitrust cases for the last several decades,[171] as antitrust deals with the nexus of economics and the law.

VI. SPORTS DEMAND AND METHODOLOGY

Turning our focus to the specific context of this paper—the economics of demand for sports products—we begin by considering the lineage of academic studies focused on this topic. Numerous studies have examined the demand for sports, with a primary focus on the use of attendance numbers to measure consumer interest.[172] Though there has been a growth in the last several decades, the literature itself dates back to the 1950s[173] and 1960s,[174] when economists began to consider the uniqueness of the sports industry. Following these seminal theoretical works, economists in the 1970s and 1980s began to analyze data from professional and collegiate sports leagues across the world to try and better understand the intricacies of the sports industry.[175]

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168. Franklin M. Fisher, *Multiple Regression in Legal Proceedings*. 80 COLUM L. REV. 702, 702 (1980).

169. Keith Leffler & Ted Tatos, *Competitive Injury and Damages Under the Robinson-Patman Act:* Morton Salt *and Statistical Analysis*, 60 ANTITRUST BULL. 318, 329 (2015).

170. Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1049–50 (1985).

171. Leffler & Tatos, *supra* note 169, at 329.

172. Borland & MacDonald, *supra* note 161, at 483.

173. Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 242 n.1 (1956).

174. Walter C. Neale, *The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition*, 78 Q. J. ECON. 1, 1 (1964).

175. Borland & MacDonald, *supra* note 161, at 478–79.

Due to various important ramifications that demand has for the sports industry, the interest that consumers have for sports products has received a great deal of attention within the literature.[176] Generally, sports demand research has placed its primary focus on live attendance for sporting events, though in recent years there has been a growth in analyzing how individuals consume sports through television and other digital channels.[177] Consider this lineage of research studies from the perspective of a team, owner, and league: demand is of high interest because sports consumption of telecasts and tickets is a primary source of revenue for both professional and collegiate sports organizations.[178] Thus, understanding demand allows organizations to make decisions that help increase revenues[179] or meet other organizational goals.[180] Furthermore, it has been argued that demand is not just about understanding the ability to maximize interest and profits, but that it also has the potential to impact the on-field performance of teams.[181] Since increasing revenues allows sports organizations to have greater purchasing power to acquire talent, facilities, equipment, coaching, and so forth, ticket sales and broadcast rights have become a vital part of helping teams to compete on the field.[182] Finally, the demand for sports products is also important to other stakeholders, such as marketers wishing to attach their own goods to the popularity of sports, or even politicians making decisions in regard to whether a team's popularity justifies spending public funds to finance team facilities.[183]

As the core focus of this paper is an example of how consumer interest for NCAA sporting events may be influenced by student-athlete compensation, the following sections will provide an empirical analysis of potential statistical relationships. In order to accomplish this, a model is created to analyze the demand for NCAA Division-I

176. *Id.* at 480.

177. Arne Feddersen & Armin Rott, *Determinants of Demand for Televised Football: Feature of the German National Football Team*, 12 J. SPORTS ECON. 352, 353 (2011).

178. John L. Fizel & Randall W. Bennett, *The Impact of College Football Telecasts on College Football Attendance*, 70 SOC. SCI. Q. 980 (1989).

179. Dennis Coates & Brad R. Humphreys, *Ticket Prices, Concessions and Attendance at Professional Sporting Events*, 2 INT'L J. SPORT FIN. 161, 162 (2007).

180. Brian P. Soebbing & Nicholas M. Watanabe, *The Effect of Price Dispersion on Major League Baseball Attendance*, 28 J. SPORT MGMT. 433, 433 (2014).

181. Nicolas Scelles et al., *My Team is in Contention? Nice, I Go to the Stadium! Competitive Intensity in the French Football Ligue 1*, 33 ECON. BULL. 2365, 2367 (2013).

182. Borland & MacDonald, *supra* note 161, at 490.

183. *Id.* at 480.

Football Bowl Subdivision Power Five conference regular season games during the 2014 and 2015 seasons. This is accomplished by identifying those key variables which theory dictates should be important in examining the demand for college football.[184] Considering the theoretical backing and the specific focus of this research, this hypothesis is formulated for this study:

> H1: There is no statistical relationship between the consumer interest for NCAA college football and increases in stipends for student-athletes.

This paper specifically uses a null hypothesis as the basis for the research, as the theoretical and empirical literature do not suggest that changes in payments or stipends for athletes will significantly change fan interest in sporting contests.

Next, it is necessary to identify variables to represent the different categories being measured, as well as to collect data so that empirical results can be estimated using regression analysis.[185] In this research, the dependent variables[186] are those that measure the demand for home college football games. Traditional sports economics studies have long focused on using attendance data to measure the demand that consumers have for sporting events.[187] Thus, the first model within this paper measures demand through the use of the attendance numbers announced for each institution's home games.[188] Specifically, this data was gathered by going to the box scores and game statistics of every home football contest, and then finding the attendance number reported by the school. These numbers were then cross-checked against other major sports news websites such as ESPN.com to ensure that the attendance numbers were consistent.

The second form of demand analyzed is the viewership numbers for telecasts of NCAA college football games.[189] In this, the estimated number of households that viewed each game is used as the measure of demand,[190] with these values being derived from the ratings of each game by the television channels. It is important to note that less data

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184. *Id.* at 481.

185. *Id.* at 483.

186. For more on dependent variables see Fisher, *supra* note 168, at 704.

187. Babatunde Buraimo, *Stadium Attendance and Television Audience Demand in English League Football*, 29 MANAGERIAL & DECISION ECON. 513, 513 (2008).

188. Borland & MacDonald, *supra* note 161, at 487.

189. *Id.*

190. Scott Tainsky & Chad D. McEvoy, *Television Broadcast Demand in Markets Without Local Teams*, 13, J. SPORTS ECON. 205, 253 (2012).

is available for television demand, as several networks that broadcast college football games do not publish their ratings or viewership numbers. Thus, the dependent variables in this study are attendance and the television viewership numbers, with each variable included separately in their own regression model.[191]

Turning to independent variables, various factors are included to control for variables which may be significant in regards to consumer interest in college football.[192] First, in measuring the quality of the home team, three specific variables are used.[193] These include: the total number of wins a team has coming in to a game, the number of losses, and a variable measuring the Massey ranking of the home team before each game.[194] The Massey ranking was also used to measure the strength of each opposing team.[195] To account for consumer preferences for NCAA college football games,[196] our study developed measures for the differences in conference affiliation, the varying stipend amounts that student-athletes received, and how games were broadcast on television. A dummy variable is used to capture whether a team is a member of any of the Power Five conferences: the Atlantic Coast Conference (ACC), Southeastern Conference (SEC), Pac Twelve, Big Twelve, or Big Ten.[197] As these conferences represent different regions with varied traditions and history with regard to consuming and watching college football,[198] these measures of consumer preference not only help to control for differences in conference affiliation, but also the makeup of the fan base for each of these conferences.

The next variable included within this research is the dollar amount increase in stipends (*SAStipend*) that student-athletes received from the previous academic year. For 2014, the first year of

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191. Curiously, the average viewership value for televised NCAA football games in our data was about 2.4 million, indicating that about 2.4 million households (not individuals) watched these games. The standard deviation of NCAA football telecasts was 2.2 million, which indicates that about 68% of the NCAA games played had household viewership numbers between 200,000 and 4.6 million. These relatively lower numbers may possibly be attributed to the fact that there are numerous college football games televised at a single time, and thus it may be hard to draw a large number of viewers to any specific game.

192. Mark D. Groza, *NCAA Conference Realignment and Football Game Day Attendance*, 31, MANAGERIAL & DECISION ECON. 517, 522 (2010).

193. *Id.*

194. Borland & MacDonald, *supra* note 161, at 489.

195. *Id.*

196. *Id.* at 481.

197. Groza, *supra* note 192, at 522.

198. *Id.* at 519.

the data set, there was no increase for teams from 2013, and thus 2014 values are recorded at $0. However, after the NCAA passed new regulations allowing individual conferences and schools to decide new stipend amounts to help cover the cost of attendance,[199] there was a good deal of variation in the increased dollar figure that student-athletes received. Using data gathered from *USA Today*'s report on stipends,[200] this research uses these values to model the different amounts of additional money which schools have paid out to each student-athlete. The two-year average of stipend additions is about $1,650, but the value is skewed by the fact that the first year had no increases. Thus, focusing just on the increased payments from 2015, the average value across all schools was $3,486 per student. Based on data reported by university athletic departments, the lowest increases were $1,250 at Boston College and $1,270 at Michigan State. At the opposite end of the spectrum, the highest paying schools were both from the SEC conference, with Auburn paying an additional $5,586 on average to student-athletes, and Tennessee providing an extra $5,666.[201]

The last two consumer preference variables are only included in the second model, focused on television household viewership numbers.[202] Specifically, two dummy variables are created. The first, *OverAir*, measures those channels that are broadcast over the air at no cost to the consumer: ABC, NBC, CBS, and Fox.[203] Conversely, the *Cable* variable indicates when an NCAA football game is shown on a paid channel, such as ESPN, FoxSports, etc. Notably, there were many more games in our data set which were shown on cable television, as these channels are often dedicated to sports, dramatically increasing the number of games that consumers can watch. At the same time, the *OverAir* channels often get the premier matchups for teams because the games they broadcast are shown at peak viewership times. Thus, these variables not only help control for the differences in cost between these channels, but also account for the varied nature of programming and matchups.[204]

Continuing discussion of variables in our model, the next group includes those which measure the differences in the quality of viewing.[205] First, weather data for each game was gathered to

199. Berkowitz & Kreighbaum, *supra* note 155.
200. *Id.*
201. Berkowitz & Kreighbaum, *supra* note 155.
202. Borland & MacDonald, *supra* note 161, at 487.
203. *Id.*
204. *Id.*
205. *Id.* at 481.

measure temperature, wind speed, and whether it was clear, raining, or snowing during each game.[206] Next, timing variables were included to take into account the month of the year and the day of the week in which each game took place. These are all dummy variables for the following categories: *August*, *September*, *October*, *November*, *December*, *Weekday*, and *Weekend*. These variables are important, as the timing within a season often helps to determine the consumer interest in games.[207] For example, many of the prime matchups in conferences occur during the latter months of the football season, while the Power Five teams in this data set play weaker non-conference opponents (often dubbed "Cupcake" opponents for their relative lack of strength) in August and September.[208] Thus, one would expect that there would naturally be a greater level of interest in games that were played later in the season, especially in the months of November and December.

The last grouping of factors in the function represent the market potential for each school.[209] In this regard, the present study follows previous research,[210] by employing the adjusted per capita income (*AdjPCI*) and population (*Population*) for the region in which the team's academic institution's main campus is located.[211] Data for these variables was gathered from the Bureau of Economic Analysis (BEA) data site. Notably, the regional definitions which were used were not city level data, but rather the metropolitan and micropolitan statistical areas (MSA).[212] Research in sports economics often use these regional definitions for the market for sports teams, as they provide a more comprehensive picture of the team's market area.[213] Thus, academic studies tend to avoid city level data in favor of data from broader regions that span multiple counties which are considered to be within a reasonable traveling distance.[214]

While the economic measures of a local market are important in accounting for the potential consumers within the academic institution's area, it is also important to control for the actual size of the school, as well as the financial resources available to the athletic

206. *Id.*
207. *Id.*
208. Groza, *supra* note 192, at 519 (discussing this imbalance in college football).
209. Groza, *supra* note 192, at 519.
210. Coates & Humphreys, *supra* note 179, at 166.
211. Borland & MacDonald, *supra* note 161, at 481.
212. Coates & Humphreys, *supra* note 179, at 166.
213. *Id.*
214. Borland & MacDonald, *supra* note 161, at 481.

department.[215] As students who attend a university may be more inclined than other consumers to attend games (and in some cases are provided with free or reduced price tickets), it is critical to account for the number of individuals who attend the institution.[216] To account for that factor, the *Enrollment* variable measures the number of students who are enrolled full-time in an academic institution. Additionally, as the athletic department at each institution will have varying financial power because of their prior success, consumer interest, television contracts, and so forth,[217] this research also includes the yearly adjusted revenue (also in 2015 dollars) for each athletic department. This variable is necessary, as athletic departments that have more revenue (*AdjRevenue*) may have larger market potential than other schools because of things like better television contracts. Furthermore, they may have a greater ability to market, build facilities, and attract talent, which in turn could lead to better performance on and off the field.[218] The data for *Enrollment* and *AdjRevenue* were both gathered from the Equity in Athletics Database, a website that reports enrollment, financial data, and other information for a university and its athletic department as part of their Title IX compliance efforts.[219] Finally, the last variable is *Capacity*, which measures the yearly capacities for the venue in which each home game was played.[220] With all the variables now defined for use in the empirical models within the research, the subsequent sections of the paper will discuss the specific treatment of the data, the regression methods used, and the estimated results from the models.

Lastly, an understanding of our empirical methodology requires special attention to, and discussion of, the nature and time span of the data set employed.[221] Whereas many studies collect and examine data which does not include the same entities repeating their appearances, an examination of sports teams over time means that most teams will

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215. Groza, *supra* note 192, at 524.

216. *Id.*

217. Revenues reported by NCAA athletic departments are often used in econometric studies to control for financial strength. *See, e.g.*, Randy R. Grant, John C. Leadley, & Zenon X. Zygmont, *Just Win Baby? Determinants of NCAA Football Bowl Subdivision Coaching Compensation*, 8, INT'L J. SPORT FIN. 61, 69 (2013).

218. *Id.*

219. *EADA Equity in Athletics Data Analysis*, U.S. DEP'T OF EDUC., https://ope.ed.gov/athletics/#/. This data is all available to the public.

220. The use of capacity to control for the size of stadiums is common with sport demand studies. *See* Borland & MacDonald, *supra* note 161, at 481 (to be an important determinant of demand).

221. Borland & MacDonald, *supra* note 161, at 483.

appear multiple times.[222] A data set of this nature, where an identified group (in this case, NCAA football teams) appears many times, is known as a panel data set.[223] It is necessary to use specific methods when estimating results from the panel data.

Generally, when dealing with panel data, it is important to consider the type of effects which will be used in the estimation process.[224] The ideal situation is one where the researcher estimates results using both fixed effects (FE) and random effects (RE), and then compares the results of these regressions using a Hausman test.[225] Thus, a Hausman test was conducted on models with fixed and random effects, with the tests both returning insignificant results at the five percent level ($p < 0.05$).[226] These results and other statistical tests and corrections indicate that it is appropriate to run the models with random effects.[227] Therefore, the final models for both attendance and television demand use a Generalized Least Squares (GLS) regression with random effects.[228]

VII. RESULTS

First, the results for the live attendance viewership model can be found in Table 1. After cleaning the data, the model included 697

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222. *Id.*

223. *Id.*

224. Nicholas M. Watanabe, Grace Yan, & Brian P. Soebbing, *Major League Baseball and Twitter Usage: The Economics of Social Media Use*, 29, J. SPORT MGMT. 619, 626 (2015).

225. DAMODAR N. GUJARATI, BASIC ECONOMETRICS 754–55 (4th ed. 2000).

226. Watanabe, *supra* note 224, at 626.

227. The use of a GLS regression is also beneficial for these models, as it allows the inclusion of time-invariant factors, whereas a panel OLS regression with fixed-effects would automatically exclude those variables that do not change between time periods. Additionally, the results were also run using standard errors that were clustered by team. The use of clustered standard errors is a useful statistical technique that allows for the grouping of observations which have similar characteristics. In this manner, sport researchers use clustering as a way to treat observations of individual teams as being similar to one another in panel data, as is done in the models estimated in this research. Finally, the data was tested for any potential multicollinearity which may exist between variables included in both of the models. By examining the Variance Inflation Factors (VIF) for all of the variables in this dataset, it was found that some of the month dummy variables had high VIF and could thus potentially affect the estimated results from the regression models. From this, additional models were run which omitted the problematic variables and found that there was no significant difference in the results for all models. Thus, the final models presented in this research include all the month variables because their presence does not greatly affect the results.

228. Watanabe, Yan, & Soebbing, *supra* note 224, at 626.

team-game observations, with each observation representing the home-game matchup for a team. The R-squared value for this model returned an overall value of 0.9034, which means that this model explains about ninety percent of the variation in the data.[229] Focusing on the main variable of interest within this study, we found that the stipend (*SAStipend*) did not have a significant statistical relationship with attendance.[230] In other words, there is no discernable change in attendance based on changes in the amounts that schools paid to their student-athletes. Considering the remaining consumer preference factors measuring team membership in different conferences, the model found that the three conferences of the Big Twelve, ACC, and SEC were all statistically insignificant, while the Pac Twelve was negative and significant. As the reference variable was *BigTen*, this means that there is an observable decline in attendance for Pac Twelve football games when compared to the other power conferences in NCAA football.[231]

Next, focusing the on-field strength of teams, the variable measuring home-team wins was insignificant, while the controls for the number of losses and the Massey ranking of a team had a negative relationship with attendance at the one percent level. This means that as teams accumulated more losses, consumers tended to lose interest, with each loss causing an average reduction of 662 attendees.[232] At the same time, because the Massey ranking works in reverse order, the negative relationship indicates that the higher a team's ranking, the greater their attendance. Furthermore, having the opposing team ranked highly (closer to 1) was also significantly related to increased attendance, suggesting that games have higher demand when both home and away teams offer better quality.[233]

The next set of variables measuring economic factors such as market power were all insignificant. That is, there was no statistical relationship between attendance and income level, population, enrollment, and athletic department revenue for the institutions

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229. The R-squared value reported the observed variation in the data, which is commonly done in sports economics research. *See* Grant, Leadley, & Zenon, *supra* note 217, at 72.

230. *See* Fisher, *supra* note 168 (discussioning the significance of regression results and their meanings).

231. Research by Groza, *supra* note 192, at 524, highlights that there may be some observable difference between conferences in regards to attendance demand.

232. Similarly, Gregory A. Falls & Paul A. Natke, *College Football Attendance: A Panel Study of the Football Bowl Subdivision*, 46, APPLIED ECON. 1093, 1100 (2014), found that as NCAA teams had more wins, attendance grew.

233. Previous research by Groza, *supra* note 192, at 525, likewise found that as teams were ranked higher, fans were more inclined to attend games.

measured in this dataset. Looking at the quality of viewing, we found that all the weather related variables were also insignificant. This suggests that fans who attend NCAA Power Five conference football games are not deterred by weather conditions.[234] Similarly, in examining the factors controlling for the timing of the sporting event, we found that the day of the week was insignificant (when measuring weekday versus weekend),[235] but that most of the month variables were negative and significant. This result suggests that the games in December, which are often the deciding games for many teams to be placed in bowl games or even the College Football Playoff, may draw larger attendance. Notably, attendance in prior months relative to December does generally increase as the season progresses, indicating that fan interest does build throughout the NCAA football season. Finally, the capacity variables controlling for the supply of seats available for consumers was positive and significant, meaning that stadiums with more seats also had higher attendance.

Turning to the second model estimated in this research, the analysis provides an understanding of variables which are important in determining demand for television viewership of NCAA football games. Notably, the data set for television demand has 368 observations, a value lower than the live-attendance model because not all games were televised on channels that recorded and published the number of households that watched games. Finally, the overall R-Squared for the GLS regression from Table 2 returned a value of 0.6447, meaning that the model explained about sixty-four percent of the variation in the data.

First, focusing on the variable of interest, student-athlete stipends, the regression returned similar results as the previous model in that there was no significant relationship with television viewership. Thus, both the models for live attendance and television viewership find no statistical evidence that the increases in stipends have any relationship with consumer interest in college football games. Next, controlling for the conference in which the teams played, the *BigTwelve* and *PacTwelve* variables were negative and significant in relation to television viewership. This means that these two conferences had significantly less households watch their games in

234. Falls & Natke estimated similar results in regards to temperature having no effect; however, they do find that cloud cover and precipitation caused a decline in consumer interest in college football. Falls & Natke, *supra* note 232, at 1100.

235. These findings are in line with the results of Falls & Natke, *supra* note 232, at 1100.

comparison to the other Power Five conferences.[236] The last set of consumer preference variables accounted for whether a game was on cable or the free channels.[237] We found that having games on free channels was positive and significant. That is, NCAA football games televised on cable had lower viewership, which would be expected as the large number of games on these channels competing in similar time slots would likely disperse consumer interest.

Moreover, focusing on the on-field performances and quality of teams, the home team's win-loss record had no connection to viewer interest.[238] Rather, the variables measuring the Massey ranking for both the home team and the away team were negative and significant, indicating that viewers at home were most attracted to games that had two highly ranked teams playing against one another.[239] Next, none of the economic variables measuring market size had any significant relationship with attendance, except for the revenue of the athletic department. In other words, the positive relationship between athletic department revenues and television viewership would seem to indicate that those teams which bring in more money are also the ones whose games had higher viewership.[240] These findings could also be a result of the fact that television numbers are measured at the national-level, and thus measuring local markets may not capture the larger audience for NCAA Power Five football games.

Furthermore, in considering the quality of viewing, all of the weather-related variables were insignificant, probably because households viewing games will not be affected by weather conditions when they are watching the game at home.[241] The results from the television model also found that day of the week was not a significant determinant of television viewership of NCAA football games.[242]

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236. As noted before, Groza, *supra* note 192, at 524, finds that there may be some observable difference between conferences in regards to attendance demand.

237. *See* Feddersen & Rott, *supra* note 177, at 361 (note that the channel a game is on may have an impact on consumer interest in watching a game).

238. These findings run counter to our results for live-attendance, as well as prior studies. *See, e.g.*, Falls & Natke, *supra* note 232, at 1100.

239. The result that rankings for home and away teams is similar to that of the attendance model presented earlier, as well as other research on consumer interest in college sport, including Groza, *supra* note 192, at 525.

240. *See* Grant, Leadley, & Zenon, *supra* note 217, at 72 (arguing that revenues are an important determinant in understanding behaviors of the college sport marketplace).

241. As previously noted, Falls & Natke, *supra* note 232, at 1100, used multiple measures of weather in their modeling of college football attendance.

242. Similar results have been found regarding the impact of weekends on television viewership for German soccer matches. *See* Feddersen & Rott, *supra* note 177, at 361.

While the natural expectation would be that weekend games would be higher, the early season premier matchups on weekdays and the sheer volume of games on weekends may lead to weekday games actually getting higher household viewership numbers than expected. For the variables measuring months, all months were insignificant.

As a last step in the analysis for this research, a Tobit (censored) regression is included to take into account that some of the observations for the dependent variables could be skewed and thus need to be accounted for.[243] This is especially the case in sports leagues where some teams may experience a large number of games which are sold out, and thus creates attendance observations which are skewed to the right-hand side of a distribution.[244] In order to run the Tobit regression, the same statistical software, data, and model as the previous regressions was employed, except in this case the capacity variable was removed from the models. Tobit regressions were thus estimated for both attendance and television viewership.

The results for the television viewership model reported no significant differences from the previous models, including the *SAStipend* variable which remained insignificant. However, the Tobit regression for live attendance (Table 3) found a positive relationship between attendance and the payment amounts for student-athletes. Thus, the findings from this model suggests that as payments to student-athletes increase, consumer interest in attending games rises, but that there is no significant change in television viewership.

CONCLUSION

While many variables were found to influence the consumption of NCAA Power Five football games, the first change in student-athlete compensation in forty-two years did not. At a minimum, the results from this study validate the Ninth Circuit's determination in *O'Bannon* that increases to student-athlete compensation that include the full cost-of-attendance preserve consumer interest in college football in a way that is less restrictive than the limits imposed by grant-in-aid. For that reason alone, the findings produced by this study contribute significantly to the literature concerning the application of antitrust law to NCAA regulations. Additionally, inferences can also be drawn that rebut the procompetitive presumption that consumer interest in college football is influenced

243. Prior studies of college football attendance such as Falls & Natke, *supra* note 232, at 1100, use a Tobit regression in order to control for capacity.

244. Groza, *supra* note 192, at 523.

by the NCAA's caps on student-athlete compensation. Inferences that we drew from the results not only extend the literature by making this the first study to produce economic evidence that contradicts the procompetitive presumption, they also serve as valuable ammunition for current and future antitrust actions that challenge the NCAA's caps on student-athlete compensation.

First, if consumers perceive student-athlete compensation limits as essential to the creation of the NCAA's products, then a significant increase in student-athlete compensation should have produced a consumer reaction. After all, an essential component of a product is something that should result in consumer reactions when modified.[245] Yet, the results revealed no change in consumption of Power Five football games following the first significant increase in student-athlete compensation in more than forty-two years. Thus, the results from this study fracture the foundation for the procompetitive presumption's premise that consumer demand for the NCAA's products depends on the existence of eligibility rules that cap student-athlete compensation.

Second, the results from this study contradict the Ninth Circuit's determination in *O'Bannon* that consumer demand for college football would be irreparably harmed by schools providing student-athletes with cash sums that are untethered to educational costs.[246] The Ninth Circuit stated that the provision of money to student-athletes for non-educational purposes would transform the NCAA's football products into minor league versions of what the NFL produces.[247] The fundamental flaw with the Ninth Circuit's reasoning is that cost-of-attendance stipends *are* payments to student-athletes that *are* untethered to educational costs. Through cost-of-attendance stipends, student-athletes receive payments of money that they can spend as they see fit.[248] The only tether that ties the NCAA's cost-of-attendance stipends to education is found in the fact that schools consider some education-related expenses in their calculations.

As for the amounts that student-athletes are afforded through the cost-of-attendance stipends, the Ninth Circuit in *O'Bannon* stated that courts should not focus on dollar amounts in preserving consumer

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245. Baimbridge, *supra* note 161; *see also* Borland & MacDonald, *supra* note 161, at 481.

246. O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

247. *Id.*

248. Ray Glier, *Pets, Car Repairs, and Mom: How College Football Players Use Their Stipends*, N.Y. TIMES (Jan. 5, 2017), http://www.nytimes.com/2017/01/05/sports/ncaafootball/pets-car-repairs-and-mom-how-football-players-use-their-stipends.html.

interest in amateurism.[249] The Ninth Circuit distinguished consumer interest in sports involving "poorly-paid professional athlete[s]" from those that involved "amateur" athletes and directed courts to focus on prohibiting direct payments to student-athletes that are disconnected to educational costs.[250]Yet, the results from this study failed to find a negative influence on the consumption of Power Five football following an increase in student-athlete compensation that included some degree of discretionary income. Furthermore, no negative influence was found despite allegations from coaches that some institutions have inflated their cost-of-attendance stipends in order to gain recruiting advantages.[251] If restricting the method of payment and limiting student-athlete compensation to educational expenses actually influences market demand for the NCAA's products, then this study should have found a negative change in consumer interest in Power Five football following the implementation of the cost-of-attendance stipends. Instead, the opposite was found for one important measure of consumer interest because the results revealed a correlation between increases in payments to student-athletes and increases in attendance at football games.

The results of this study correlate with similar investigations revealing increases in consumer interest in the Olympics prior to the International Olympic Committee's decision to open competition to professional athletes.[252] Still, the results do not preclude the existence of a financial breaking point at which the amounts provided through stipends to student-athletes harm consumer interest in the NCAA's products. However, even if the NCAA were able to show a decrease in consumer demand for its products following increases in student-athlete compensation, that likely would not provide enough reason to justify the NCAA's constraints because the resulting market already takes considerations like that into account.[253] Therefore, courts should rely on empirically-produced research, rather than assumptions, in determining the procompetitive nature of amateurism by actually measuring consumer interest in the concept.

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249. *O'Bannon*, 802 F.3d at 1078–79.

250. *Id.*

251. New, *supra* note 157.

252. Alex Moyer, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 827 (2015).

253. Andy Schwarz & Richard J. Volante, *The Ninth Circuit Decision in O'Bannon and the Fallacy of Fragile Demand*, 26 MARQ. SPORTS LAW REV. 398, 391–410 (2016) (stating that the market accounts for consumer interest in compensation by lowering the revenue for teams that pay too generously and encouraging teams to stay within consumers' tolerance of acceptable levels of compensation).

To this end, courts should follow the rule of reason in placing the burden on the NCAA to demonstrate, with actual market-based evidence, that a set limit on student-athlete compensation is needed to preserve consumer interest in its products.[254] Without actual evidence of consumer harm, courts in future antitrust actions should not recognize a procompetitive justification for the NCAA's rules that restrict student-athlete compensation.

254. For the position that antitrust law does not permit competitors to define a product based on restraints on trade that lack economic evidence that justifies their role in product creation, *see* Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 255–56 (2014).

APPENDIX

Table 1

GLS Regression Results – Dependent Variable is Attendance

Variable	Coefficient	Standard Error	P-Value
Temp	8.90	23.33	0.703
Wind	-51.14	51.87	0.324
Clear	694	432	0.108
Rain	-175	768	0.819
Snow	-741	5,271	0.888
Massey	-71.85	16.69	<0.001***
OppMassey	-46.31	7.74	<0.001***
Wins	-238	221	0.282
Loss	-663	311	0.033**
Capacity	0.8439	0.0798	<0.001***
Population	-0.0003	0.0003	0.397
PCI	-0.1026	0.1052	0.329
AdjRevenue	0.0001	0.0001	0.114
Enrollment	0.0315	0.1341	0.814
SAStipend	-0.1158	0.5118	0.821
PacTwelve	-4,518	2,412	0.061*
BigTwelve	-2,117	2,928	0.470
ACC	-4,848	2,978	0.104
SEC	1,254	2,785	0.653
BigTen	---	---	---
August	-5,822	2,756	0.035**
September	-5,395	2,112	0.011**
October	-4,262	1,569	0.007***
November	-2,357	923	0.011**
December	---	---	---
Weekday	-645	895	0.471
Weekend	---	---	---
Year	46	1,724	0.979
constant	-76,657	3,470,231	0.982

*p<0.10, **p<0.05, ***p<0.01

Table 2

GLS Regression Results – Dependent Variable is Television Viewership

Variable	Coefficent	Standard Error	p-value
OverAir	1,833,817	426,549	<0.001***
Cable	85,122	408,107	0.835
Temp	-5,686	6,763	0.401
Wind	-3,847	15,108	0.799
Clear	-168,160	166,061	0.311
Rain	109,240	213,213	0.608
Snow	254,773	399,436	0.524
Massey	-12,769	5,293	0.016**
OppMassey	-34,522	3,358	<0.001***
Wins	113,176	88,296	0.200
Loss	-76,648	76,866	0.319
Capacity	3.53	8.08	0.662
Population	-0.0070	0.0283	0.806
PCI	-21.07	13.05	0.107
AdjRevenue	0.0138	0.0068	0.042**
Enrollment	0.9304	13.65	0.946
SAStipend	-83.71329	101	0.408
PacTwelve	-1,406,375	313,461	<0.001***
BigTwelve	-1,480,978	272,722	<0.001***
ACC	-383,371	359,463	0.286
SEC	-227,930	332,750	0.493

BigTen	---	---	---
August	838,465	1,065,578	0.431
September	-430,594	846,908	0.611
October	-883,360	692,664	0.202
November	-794,169	587,855	0.177
December	---	---	---
Weekday	355,111	249,943	0.155
Weekend	---	---	---
Year	394,863	362,007	0.275
constant	-791,000	729,000	0.278

*p<0.10, **p<0.05, ***p<0.01

Table 3

Tobit Regression– Dependent Variable is Attendance (Upper Limit is Capacity)

Variable	Coefficient	Standard Error	p-value
Temp	24.15	51.81	0.641
Wind	-83.37	108	0.439
Clear	-105	1,076	0.922
Rain	1,393	1,738	0.423
Snow	-3,608	8,647	0.677
Massey	-327	31.87	<0.001***
OppMassey	-34.20	16.22	0.035**
Wins	-791	481	0.100*
Loss	460	527	0.383
Population	-0.0001	0.0002	0.503
PCI	-0.1275	0.0770	0.099*
AdjRevenue	0.0005	<0.0001	<0.001***
Enrollment	0.8173	0.0767	<0.001***
SAStipend	1.67	0.7847	0.033**
PacTwelve	-9,523	1,772	<0.001***
BigTwelve	-9,209	1,951	<0.001***
ACC	-1,487	1,936	0.443
SEC	6,653	1,895	<0.001***
BigTen	---	---	---
August	-3,448	8,189	0.674
September	-5,462	6,985	0.435

October	-4,741	6,148	0.441
November	-2,383	5,642	0.673
December	---	---	---
Weekday	-2,371	1,863	0.204
Year	-6,514	2,912	0.026**
constant	13,100,000	5,863,826	0.025**

*p<0.10, **p<0.05, ***p<0.01