HOW ANTITRUST LAW COULD REFORM COLLEGE FOOTBALL: SECTION 1 OF THE SHERMAN ACT AND THE HOPE FOR TANGIBLE CHANGE

*Marc Edelman**

I. INTRODUCTION

College football is business, and big business at that. It comprises an overwhelming share of the National Collegiate Athletic Association's estimated eleven billion dollars in annual revenues.[1] The largest college sports programs, such as the University of Texas and the University of Alabama, bring in more revenue each year than almost any single National Hockey League ("NHL") team.[2] In addition, a substantial share of the revenues derived from college football is paid out in salaries to college presidents, athletic directors, and coaches.[3]

Sadly, the very same individuals who most directly profit from college football—the university presidents, athletic directors, and coaches—are

* Professor Marc Edelman (Marc@MarcEdelman.com) is an Associate Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also a summer adjunct professor at Fordham University School of Law and a columnist for Forbes SportsMoney. Professor Edelman advises sports businesses on a wide range of legal issues, including matters related to sports antitrust law and the legal status of NCAA amateurism rules.

1. *See* 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, 61 (2013).

2. *Compare NCAA Finances*, USA TODAY: SPORTS, http://sports.usatoday.com/ncaa/finances (last visited Feb. 20, 2016) (listing the 2014–2015 revenues of the University of Texas athletic program at $161,035,187 and the University of Alabama athletic program at $153,234,273), *with NHL Team Values: The Business of Hockey*, FORBES, http://www.forbes.com/nhl-valuations (last visited Feb. 20, 2016) (listing only five NHL teams with annual revenues exceeding $153,234,273).

3. *See* Edelman, *supra* note 1, at 63 (noting that "the NCAA and its leaders hide behind a 'veil of amateurism' that maintains the wealth of college sports 'in the hands of a select few administrators, athletic directors, and coaches'").

steadfast in maintaining a national policy that prevents the sharing of revenues with the game's many hard-working athletes.[4] This means that college athletes are not allowed to accept money for playing in games, nor are they allowed to profit from endorsement deals.[5] Until this year, there was even monitoring to make sure that colleges did not spend too much money on food for their athletes[6]—a complete absurdity when considering the amount of revenues these athletes derive for their universities.

In today's speech, I will discuss how the absurdity came to pass where college football has become a multibillion dollar business, yet a majority of college football players live below the poverty line.[7] I also will discuss how antitrust litigation against the National Collegiate Athletic Association (the "NCAA") and its member colleges could serve as the much-needed impetus for reform to the system, and why a proper antitrust remedy could yield economic reform and tangible change in college sports.[8] Overall, this is a speech built on optimism, but only optimism presuming that the courts properly recognize that the NCAA's current mode of business violates federal antitrust laws, and only if the courts ultimately require changes to better protect the legal rights of all stakeholder groups within the collegiate sports industry.

---

4. *Id.*

5. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–14 NCAA DIVISION I MANUAL § 12.1.2(d) (2013), http://www.ncaapublications.com/productdownloads/D114.pdf (prohibiting athletes from receiving various forms of "pay" in return for "athletics skill or participation").

6. *See* Nathan Fenno, *Three Oklahoma Athletes Penalized by University for Eating Pasta*, L.A. TIMES (Feb. 19, 2014), http://articles.latimes.com/2014/feb/19/sports/la-sp-sn-three-oklahoma-athletes-penalized-over-pasta-20140219 (noting various cases in which NCAA athletes who ate too much university food during mealtime were perceived to violate NCAA rules); *see also* Michelle Brutlag Hosick, *Council Approves Meals, Other Student-Athlete Well-Being Rules*, NCAA (Apr. 15, 2014), http://www.ncaa.org/about/resources/media-center/news/council-approves-meals-other-student-athlete-well-being-rules (announcing a change in NCAA rules to no longer limit the amount of food that college athletes may receive from their schools).

7. *See* RAMOGI HUMA & ELLEN J. STAUROWSKY, THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORTS 19, http://www.ncpanow.org/research/study-the-price-of-poverty-in-big-time-college-sport (last visited Feb. 20, 2016) (noting that the room and board provisions in a full scholarship leave eighty-five percent of players living on campus and eighty-six percent of players living off campus living below the federal poverty line).

8. *See infra* Part III.

II. THE HISTORY OF AMATEURISM IN COLLEGE SPORTS

A. How the Amateurism Concept Emerged

The history of amateur sports, much like the history of so many things in the United States, can be traced back to England.[9] Back in the 1800s, the British were a very class-conscious people.[10] Those who had attended affluent colleges such as Oxford and Cambridge were very loyal to their own universities and wanted to see their universities excel in regattas and other organized sporting events. But, at the same time, the British aristocrats did not want to see lower- and middle-class students mix with them simply for the purposes of winning in sports.[11]

One way that the British aristocracy tried to keep out the mere plebeians was by preventing any compensation whatsoever for athletes who competed in their college sports.[12] The idea was that, as long as athletes could not be compensated for their performance, there would be no working arrangements between low-income athletes and these purportedly pristine, high-class colleges.[13]

Well, lo and behold, America, by the middle 1800s, had moved beyond its desire to differentiate itself from England, and, in many respects, those in the Northeast had begun seeking to replicate British traditions. Thus, once America learned about the regattas that had emerged at Oxford and Cambridge, similar events came to Ivy League colleges such as Harvard University, Yale University, and the University of

---

9. *See* Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 557 n.13 (2013).

10. *See* Robert A. McCormick & Amy Christian McCormick, *Major College Sports: A Modern Apartheid*, 12 TEX. REV. ENT. & SPORTS L. 13, 22 (2010) (describing the "rigid class divisions" in Great Britain at the time).

11. *See id.* (discussing the desire among those in Great Britain not to lose their class separations).

12. *See id.* at 22–23 (explaining that amateurism requirements in England maintain class divides by keeping a particular group outside of college sports).

13. *See id.* at 22 (stating that the amateurism requirement in British sports "precluded the working classes from competing in athletic contests, reserving that privilege for the wealthy and thereby reinforcing the British system of segregation and separation of the classes").

Pennsylvania.[14] And, initially, the Ivy League regattas adopted the same rules of amateurism as had appeared in England.[15]

Not long after regattas emerged at elite U.S. colleges, competitive football also emerged across east coast U.S. colleges.[16] But unlike in England, where class consciousness won out over in-sport excellence, by the 1870s and 1880s, the American desire to win in sports became so great that colleges began to invite individuals onto the sports teams to help them win—sometimes even individuals that did not truly attend college.[17] In some cases, the colleges and their students even paid for these outside players to participate in the games.[18]

Originally, college sports in the United States were overseen primarily by the student bodies themselves.[19] But by the 1880s and 1890s, many professors at schools began to get involved with college athletics, as they had begun to realize that college athletics were valuable for another reason as well—when their teams won, it led to goodwill for the university.[20] This increase in goodwill led to a greater group of incoming students that wanted to choose one school over another.[21] And thus, the professors all wanted their teams to do well on the field.[22]

---

14. 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) (noting that "[c]ollege athletics in the United States date back to the late 1840s when regattas between Ivy League schools such as Harvard and Yale emerged as an important part of campus life").

15. McCormick & McCormick, *supra* note 10, at 23 ("Amateurism requirements continue to reinforce class and race differences in America, not by excluding working class athletes as in Great Britain, but by applying only to the players and not to any of the many other participants in the lucrative college sports enterprise.").

16. Edelman, *supra* note 14, at 389 ("By the late 1850s, many other colleges had launched competitive baseball teams. Meanwhile in 1869, the College of New Jersey (now Princeton University) and Rutgers College met for the first official collegiate football game." (footnote omitted)).

17. *See, e.g.*, Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988–89 (1987) (discussing Harvard's use "of a coxswain who was not currently a student" during an early regatta against Yale).

18. *Id.* at 989.

19. *See* Edelman, *supra* note 14, at 389 (noting the laissez-faire operation of early college sports).

20. *See id.* (discussing the increased involvement of college faculty with intercollegiate athletics).

21. *See* Smith, *supra* note 17, at 989–90.

22. *See id.* at 990 ("It is clear, however, that by the latter part of the nineteenth century, when initial efforts to control the excesses of intercollegiate athletics first were promulgated, that the very tensions facing reform efforts in intercollegiate athletics today—commercialization, institutional pride and vacillation among faculty and administration

But some professors became upset when they saw rival colleges using non-students to help them win.[23] So what happened as professors began to take a role in overseeing college athletics is they began to put in place a series of rules between themselves and the schools in which they played.[24] They began to put in place rules that said that if you want to play on college sports teams you really have to be a student at the school and you cannot be an outsider that is being paid separately.[25] The original goal in the 1880s and 1890s was to preserve college athletics as an activity for the real student body.[26]

Now, at right around the same time as college professors began to seize some control over college sports, the colleges began to more formally organize into conferences with formal game rules and schedules.[27] Perhaps best known was a group of what had ultimately become ten schools in the Midwest that wanted to set forth their own rules about how their college sports would operate and included rules that said you had to go to the school and you could not be paid by the school and whatnot.[28] These schools ultimately became known as the Big Ten Conference.[29]

---

relating to the purposes of intercollegiate athletics—constituted significant impediments to those early reform efforts.").

23. *See id.*

24. *See id.*

25. *See id.* ("[E]fforts to form conferences and develop rules appropriate for intercollegiate athletics were underway by 1895 and, in some sense, established initial precedent for the ultimate creation of a national organization to regulate athletics.").

26. *See infra* note 28 and accompanying text (explaining the underlying reasons behind the founding of the precursor to the Big Ten Conference in 1895).

27. *See* Edelman, *supra* note 14, at 389 ("[B]y the late nineteenth century some faculty members began to involve themselves in college athletics and called for the standardizing of college sports-eligibility rules. To facilitate standardizing eligibility rules, some colleges also joined together into conferences." (footnote omitted)).

28. *See* Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the* NCAA Student-Athlete Name & Likeness Licensing Litigation *Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1024 (2014). As explained in a previous law review article:

> The Big Ten Conference, from its inception, has been the most organized of the early college athletic conferences. Whereas many early athletic conferences ignored issues related to athlete eligibility, the Big Ten Conference has long enforced rules that limit eligibility to "full-time students who were not delinquent in their studies." Under the leadership of a conference commissioner, the Big Ten Conference has also historically prohibited its members from scheduling non-conference games against colleges that do not adhere to its strict academic requirements.

Id. (footnotes omitted).

29. *See* Edelman, *supra* note 14, at 389.

B. The NCAA and Its Early Role in College Sports

Flash forward to the year 1905, and completely separate from the amateurism issue, there was a terrible incident on the football field in a game between NYU and Union College that was documented in a *Washington Post* article from that year.[30] A football player from Union College took a severe hit to the head, stayed in the game, and ultimately passed away.[31] Nobody used the "C" word to define what happened, but the article talked about the serious hit that the Union College player took, how he was wobbly after, how he had memory issues, and how he thereafter passed away.[32] In the wake of this tragedy, the chancellor of NYU—a gentleman by the name of Henry MacCracken—was so unhappy and concerned about the on-field death that he said there needed to be change in college football, or college football needed to be abandoned altogether.[33]

Around this time, seventeen other college football players purportedly died from head and neck injuries.[34] Apparently, there were certain plays that were being used on the football field at the time that are no longer used now. One was known as a "flying wedge," and it involved players grabbing hands with each other and if you tackled one they would all go falling down.[35] In another, teams would give the ball to the running back, and the linemen would pick up the running back and attempt to throw him with the ball over the other team's defensive line for a first down.[36]

Due to the huge safety concerns arising from these types of football plays, U.S. President Theodore Roosevelt ultimately got involved in

---

30. W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 214–15 (2006) (citing *Football Player Killed; William Moore, of Union College, Dies from Blow on Head*, WASH. POST, Nov. 26, 1905).

31. *Id.*

32. *See id.*

33. JOHN SAYLE WATTERSON, COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY 72–73 (2000).

34. *See* Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 866 (2002).

35. *See* S. deJ. Osborne, *Flying Wedge First Used in 1892 by Deland Coached Harvard Team*, HARV. CRIMSON (Nov. 5, 1926), http://www.thecrimson.com/article/1926/11/5/flying-wedge-first-used-in-1892.

36. *See* Robert J. Kerby, *Antitrust Law—NCAA Thrown for a Loss by Court's Traditional Antitrust Blitz*—NCAA v. Board of Regents of the University of Oklahoma, 104 S. Ct. 2948 (1984), 18 CREIGHTON L. REV. 917, 926 n.84 (1984) (describing this most dangerous play as the "hurdle play").

reviewing the activities of college football.[37] Theodore Roosevelt had heard the comments coming from the media, which originally came from MacCracken at NYU.[38] He expressed real concern that football had become unsafe and needed to be changed.[39] Now, there are two schools of thought about Theodore Roosevelt on this: one was that he really was concerned about the college athletes and wanted them to be kept safe; the other is that the President simply loved football and knew if he did not get involved and order minor changes, the sport would cease to exist in its entirety.[40]

Either way, at the end of 1906, with the leadership of MacCracken, President Theodore Roosevelt, and others, an organization was formed that, in the year 1910, was renamed as the NCAA.[41] And the original purpose of the NCAA was to—please try not to laugh—protect college athletes from head injuries and protect their safety in sports.[42]

So we then had two movements going on at once in this country. First, there were the individual conferences out there in football that were very concerned about fairness of play, that did not want to see athletes getting paid, and wanted to try to keep the on-field competition close.[43] And then we had this organization, the NCAA, which was a relatively powerless organization, that was more aspirational in goals, whose primary interest was to protect players' safety.[44] And they existed at the same time.[45]

---

37. *See* Edelman, *supra* note 34, at 866 (explaining that "[i]n late 1905, President Theodore Roosevelt called for two White House conferences to encourage reforming football rules to benefit safety").

38. *See* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

39. *See* Edelman, *supra* note 34, at 866.

40. *See* Edelman, *supra* note 28, at 1025 n.27 (explaining that "[s]ome scholars believe that President Theodore Roosevelt was not entirely bothered by the physically dangerous nature of college football, but rather feared that, without change, the game would soon be abolished in its entirety").

41. *Id.* at 1025.

42. *See id.* at 1026 (noting that, in the early days, the NCAA's "primary responsibilities included hosting championship events and providing a forum for colleges to discuss on-field safety issues").

43. *See supra* text accompanying notes 27–29.

44. *See* Edelman, *supra* note 28, at 1026.

45. *See supra* text accompanying notes 27–29, 41.

C. How the NCAA Became Charged with Enforcing Amateurism

For a very long time, even though the NCAA was national in base, it was relatively powerless.[46] And just to express the point, the Big Ten Conference—this is a Conference that has Michigan, Wisconsin, and now even Rutgers too—had very nice, big offices in Chicago, while the NCAA operated out of a back room basement in the Big Ten's office.[47] The Big Ten had tons of employees that oversaw the league in general; meanwhile, the NCAA, until 1951, did not have a single full-time employee.[48] And while the NCAA was not that powerful until 1951, the Big Ten, through the 1920s and 1930s, was the most powerful football conference in the country.[49]

The Southeastern Conference ("SEC") traditionally was not as strong as the Big Ten,[50] but as the economy changed in America, and socioeconomics changed as well, many of the SEC schools decided that they wanted to be dominant in football.[51] Now, being in the South, they struggled sometimes to induce top athletes to their programs the way the Big Ten schools were able to induce them.[52] So, many of the SEC schools decided that a good way to attract college athletes would be to improve living conditions for them.[53] Some purportedly began making payments to the athletes and their parents.[54] Meanwhile, others began providing jobs directly to the parents of the athletes.[55]

---

46. *See* Edelman, *supra* note 28, at 1026 ("In its incipience, the NCAA served in accordance with its charter as a 'minor force' in the governance of college athletics.").

47. *See* Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1400 (2010) (noting that "in 1951, the NCAA's member schools voted to expand the NCAA headquarters from a backroom of the Big Ten Conference's offices into its own office space").

48. *See id.* at 1400–01 (explaining the Walter Byers became the NCAA's first full-time executive director and presumably also the NCAA's first full-time employee).

49. *See* Edelman, *supra* note 28, at 1026–27.

50. The Big Ten won seven national championships during the first ten years of the SEC's existence. *Championship History,* NCAA, http://www.ncaa.com/history/football/fbs (last visited Feb. 20, 2016); *SEC History*, SEC, http://www.secsports.com/article/12628010 (last visited Feb. 20, 2016).

51. *See* WATTERSON, *supra* note 33, at 183.

52. *See id.*

53. *See generally* Edelman, *supra* note 28, at 1028–29 (discussing fear among Big Ten member schools that the Southeastern Conference schools were going to become superior in football by offering players superior benefits).

54. *See id.* at 1028.

55. *See, e.g.*, WATTERSON, *supra* note 33, at 184 (discussing how Louisiana Governor Huey Long suggested that Louisiana State University compete for a football player planning to attend Tulane "by giving his father a state job").

At this time, the Big Ten schools became concerned because they wanted to be seen as the dominant football program.[56] SEC schools were providing better opportunities than the Big Ten schools financially, but the Big Ten had no jurisdiction over the SEC.[57] And the Big Ten member schools and their athletic directors and coaches were very unhappy about this.[58] So they got together and they met with college coaches and athletic directors from many other schools from around the country and began to argue that, for college athletics to be run the way they wanted them to be run, the athletes had to remain unpaid.[59] And it was not enough to have conference-by-conference self-regulation; something was needed to prevent even the SEC member schools from compensating their athletes.[60]

In 1951, the NCAA member schools voted, with a lot of prodding from the Big Ten, to revise, change, and expand the power granted to the NCAA, and to augment the enforcement of the NCAA's longstanding principle of amateurism.[61] The goal was to give the NCAA the power to sanction and abandon any school that did not comply with this principle of amateurism.[62] This now changed everything because, on a national level, all of the member schools in college football agreed that they would abide by the same rule of not paying college athletes. And, of course, under the table some colleges may have tried to cheat on this agreement and create better situations. But, the fear of not following this rule was extraordinary because the sanction for paying college athletes was no longer just the ban from a single conference, but it became tantamount to a national group boycott.[63] So, whereas before 1951 some colleges may have had the economic incentive to compete in the free market for college athletes, after the NCAA rule went into place, that incentive was gone.

This increase in the NCAA's power also changed the operation of college athletics in a second way. Walter Byers, who had been an assistant with the Big Ten, became the first commissioner of the NCAA,

---

56. *See* Edelman, *supra* note 28, at 1028–29 (discussing the Big Ten's desire to prevent the power dynamic in college football from shifting to southern schools).

57. *See id.*

58. *See id.*

59. *See id.* at 1029.

60. *See id.*

61. *See id.*

62. Edelman, *supra* note 14, at 390–91 (discussing first the creation of the NCAA Sanity Code and then its lifting and replacement with the more detailed set of NCAA rules).

63. *Id.* at 391–92 (explaining how this became especially true in 1985, once the NCAA member schools voted in favor of implementing a "death penalty" rule against colleges that did not comply with core rules, including the NCAA's no-pay rule of its athletes).

and he began to further commercialize college sports.[64] With the advent of television, Walter Byers began to sell rights to games of the week to be televised, and the revenues derived from the broadcasts went back to the universities.[65] Initially these contracts were close to one million dollars.[66] Now, we are at the point where in college basketball we have close to an eleven billion dollars, fourteen-year agreement to broadcast March Madness.[67]

As we step forward to today, the schools have all adhered—at least thus far—to the principle of amateurism agreed to in 1951 out of fear that the failure to do so would lead to their financial annihilation from the world of college sports. But as the revenues from college sports have skyrocketed, and the obligation or agreement reached amongst the schools has been not to pay the athletes, the revenues have needed to go somewhere. What this has led to is a world where huge revenues are coming in and being allocated to athletic directors, to coaches, and, to a limited extent, back up to university presidents, but not to the athletes themselves.[68] Today, there is a huge incentive for those that vote on behalf of universities on NCAA policies to maintain the status quo, because every time a coach or athletic director has to vote at the NCAA level about whether to have reform, they know that, if we change the rules and increase compensation for the college athletes, the financial windfall that extends to them will be somewhat less.

III. ANTITRUST LAW AS A VEHICLE FOR CHANGE

A. An Introduction to Section 1 of the Sherman Act

So what can we do about the great inequities that have emerged in college sports? Section 1 of the Sherman Act[69] is the most important antitrust law in the United States when it comes to governing the

64. *See* Edelman, *supra* note 28, at 1029–32.

65. *Id.* at 1030.

66. *Id.*

67. Press Release, Nat'l Collegiate Athletic Ass'n, CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement (Apr. 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement.

68. *See* Edelman, *supra* note 1, at 63 ("[T]he NCAA and its leaders hide behind a 'veil of amateurism' that maintains the wealth of college sports 'in the hands of a select few administrators, athletic directors, and coaches.'"); *see also 2015 NCAAF Coaches Salaries*, USA TODAY, http://sports.usatoday.com/ncaa/salaries (last visited Feb. 20, 2016) (showing that seventy-one college football coaches currently earn salaries upwards of one million dollars per year, led by University of Alabama head coach Nick Saban, who maintains a current compensation package of just over seven million dollars in 2014–2015).

69. 15 U.S.C. § 1 (2012).

conduct of commercial sports leagues. The statute says, in pertinent part, that any contract, combination, or conspiracy in the "restraint of trade" shall be "declared to be illegal."[70] Historically, this statute has been used to overturn restraints in commercial sports where the overall effect has been harmful to competition.[71]

In an economic sense, the NCAA is a joint venture. In other words, it is a collection of businesses that to some extent compete against one another, but to another extent need to cooperate. What that means is the NCAA's restraints of trade will be deemed to be illegal under section 1 of the Sherman Act if they are found to be economically unreasonable pursuant to the rule of reason.[72] Stated otherwise, if the NCAA member schools have market power and their restraints do more to harm competition than to help it, they should be found illegal.[73]

B. Historic Application of Antitrust Law Against the NCAA

The NCAA has been challenged under antitrust law before and has indeed been found subject to the antitrust laws of the land. In 1984, the Supreme Court ruled in *NCAA v. Board of Regents of the University of Oklahoma* that the NCAA is a trade association that is indeed subject to section 1 of the Sherman Act and that the rules that the NCAA had in place at the time—stating that certain schools could only appear on television a certain number of games per year—restrained trade in the market for television broadcasts and were illegal, and thus, should be struck down.[74]

More recently, the NCAA tried to impose a rule that capped low-level assistant coaches' salaries, and the U.S. District Court for the District of Kansas as well as the U.S. Court of Appeals for the Tenth Circuit found

---

70. *Id.* ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is [hereby] declared to be illegal.").

71. For a discussion of cases in which courts have used section 1 of the Sherman Act to overturn restraints in professional sports, see Marc Edelman, *Does the NBA Still Have "Market Power?" Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. 549, 553–54 & nn.21–29 (2010).

72. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7 (2006) (holding that unilateral decisions by a legitimate joint venture are not per se unlawful and thus are more appropriately analyzed under the rule of reason).

73. *See* Marc Edelman & Brian Doyle, *Antitrust and Free Movement Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT'L L. & BUS. 403, 414–15 (2009) (noting that today all joint ventures are reviewed under antitrust law based on the rule of reason, which finds an antitrust violation where three factors are present: "(1) market power; (2) anticompetitive effects that exceed any pro-competitive justifications; and (3) harm").

74. 468 U.S. 85, 112–17 (1984).

that to be illegal.[75] Both courts held that any single NCAA member school could say, "We only want to pay an assistant coach a certain amount," but, when all one-thousand-plus NCAA member schools get together and all agree with one another to cap coaches' salaries, that would be seen as a restraint of trade—an act of wage-fixing and group boycott in violation of section 1 of the Sherman Act.[76]

So the antitrust argument against the NCAA's current no-pay rules of college athletes is rather straightforward. While the NCAA calls its current business practices the "principal of amateurism," an antitrust attorney would call these practices a group boycott.[77] Nobody is saying that any single college has to pay its football players or even that it should. It is a free decision whether individual colleges want to compete for athletes through pay. But, when every single college athletic program that competes on the premier level gets together and reaches an agreement with one another that says, "None of us will pay our athletes," as a method of keeping more revenues with the colleges and their athletic directors and coaches, it represents as classic a wage-fixing and group boycott arrangement as one could imagine within the scope of a joint venture.[78]

C. Two Ongoing Challenges to the NCAA Under Antitrust Law

1. *O'Bannon v. NCAA*

At the time of this speech, there are two very important antitrust cases ongoing against the NCAA. The first one you have probably heard of—*O'Bannon v. NCAA*—is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit.[79] The thrust of *O'Bannon*, at least originally, was that the NCAA member schools in Division 1 men's basketball and Football Bowl Subdivision football colluded by requiring

---

75. *See* Law v. NCAA, 902 F. Supp. 1394, 1405 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

76. *See Law*, 134 F.3d at 1024 (affirming the holding of the district court).

77. *See* Edelman, *supra* note 14, at 420 (concluding that "it is imperative that American law recognizes the NCAA 'death penalty' not for the way it is disguised but rather for the manner in which it actually operates—as an illegal group boycott that violates the spirit of section 1 of the Sherman Act"); Edelman, *supra* note 1, at 78–82 (noting that "[t]here is . . . a strong argument that the NCAA's no-pay rules constitute an illegal group boycott against colleges that would otherwise seek to pay their student-athletes").

78. *See* Edelman, *supra* note 1, at 75–82 (explaining why the NCAA's enforcement of "no pay" rules represents both wage-fixing and a form of illegal group boycott).

79. O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).

athletes to sign a document when they came to school that set the athletes' share of their likeness revenue at zero and prevented the athletes at any school from negotiating any other terms.[80] After several years of litigation, on August 8, 2014, Judge Wilken of the U.S. District Court for the Northern District of California issued a seminal ruling.[81] She found the following: first, the NCAA is indeed subject to antitrust laws, even in the area of college-athlete labor; second, the NCAA's no-pay rules with respect to the likenesses of college athletes violated section 1 of the Sherman Act; and finally that the NCAA member schools could no longer collude to prevent paying athletes the full cost of college attendance plus up to $5000 per year in a graduation trust.[82]

While the plaintiffs' lawyers in *O'Bannon* did not appeal the narrowness of the awarded remedy, the NCAA's lawyers did appeal the case in its entirety.[83] Among other things, the NCAA's lawyers have argued that they should be treated as exempt from antitrust law altogether as a noncommercial actor.[84] Now, I agree with you it is funny that an eleven billion dollar business would claim to be noncommercial, but before we laugh too hard, I am ashamed to say the U.S. Court of Appeals for the Third Circuit in several previous cases had agreed with that position.[85]

In addition, the NCAA argued that the virtues of amateurism helped to integrate college athletes into the mainstream community and, at the same time, made their games more desirable to fans.[86] The NCAA even produced a study that purports to show that fans would be less likely to

---

80. *See* Marc Edelman, *The District Court Decision in* O'Bannon v. National Collegiate Athletic Association*: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2322–23 (2014) (discussing the facts of the original *O'Bannon* complaint and how the facts changed over time).

81. *See O'Bannon*, 7 F. Supp. 3d 955.

82. *Id.* at 1007–08; *see also* Edelman, *supra* note 80, at 2347–63 (discussing the district court holding and implications of the *O'Bannon* case).

83. *See* Ben Strauss, *N.C.A.A. Appeal of Ruling in* O'Bannon *Case Is Heard*, N.Y. TIMES (Mar. 18, 2015), http://www.nytimes.com/2015/03/18/sports/ncaa-appeal-of-ruling-in-obannon-case-is-heard.html?_r=0 (discussing appellate court's hearing the NCAA appeal in *O'Bannon*).

84. *See* Brief for the NCAA, at 32–35, *O'Bannon*, 802 F.3d 1049 (Nos. 14-16601, 14-17068) (arguing that the NCAA's rules with respect to amateurism should lie outside of the scope of the Sherman Act as noncommercial activity).

85. For an example of a Third Circuit decision that has found the NCAA exempt from antitrust law based on commercial status, see *Smith v. NCAA*, 139 F.3d 180, 185 (3d Cir. 1998) (stating that "many district courts have held that the Sherman Act does not apply to the NCAA's promulgation and enforcement of eligibility requirements"), *vacated on other grounds*, 525 U.S. 459 (1999).

86. *See* Brief for the NCAA, *supra* note 84, at 11–12.

attend games if the athletes were paid.[87] Now, unfortunately, O'Bannon's lawyers did not have a counter-study to that.[88] They did not even try to produce one. And they did a minimal job at best of poking holes into the NCAA's study.[89] Whatever the case, we are now waiting for the U.S. Court of Appeals for the Ninth Circuit to review the legal challenges in *O'Bannon*. If it is fully overturned, players will be back to square one. If it is not, there will be a small opportunity for change.

2. *Jenkins v. NCAA*

But *O'Bannon* is not the end of the day; *O'Bannon* is the tip of the iceberg. Because lying right behind *O'Bannon* is the case I find even more exciting—*Jenkins v. NCAA*.[90] For reasons I will never understand, it was filed here in the Third Circuit, which is problematic because of the case law with respect to the NCAA's purported non-commercial status here. But luckily for the plaintiffs, the case was transferred to the Ninth Circuit at the point in time that *O'Bannon* was being heard.[91]

Jenkins is being tried not by an intellectual property attorney, but by one of the most famous antitrust attorneys in the sports context, Jeffrey Kessler—the very same lawyer who helped players gain important economic rights in the NFL and in the NBA.[92] In addition, the *Jenkins* case goes far further than *O'Bannon* does because it is not linked to players' likenesses and it is not about just a small amount of money.[93] The plaintiff is saying the NCAA's restraints in college athlete labor markets are not just illegal at their outermost fringes; it is the entirety of the restraints that violate antitrust law.[94] And the plaintiff argues that

87. *See* Edelman, *supra* note 80, at 2338 n.87.

88. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 975–77 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (discussing the NCAA's consumer demand study, produced for the NCAA by Dr. J. Michael Dennis).

89. *See id.* at 976 ("[T]he Court notes that the NCAA produced Dr. Dennis's survey as a rebuttal report, which may have limited Plaintiffs' opportunity to commission such a survey.").

90. *See* Complaint and Jury Demand—Class Action Seeking Injunction and Individual Damages, Jenkins v. NCAA, No. 14CV01678 (D.N.J. Mar. 17, 2014), 2014 WL 1396975.

91. Kurt Orzeck, *NCAA Scholarship Class Actions Merged in Calif. Court*, LAW360 (June 4, 2014, 8:27 PM), http://www.law360.com/articles/544917/ncaa-scholarship-class-actions-merged-in-calif-court.

92. *See* Profile of *Jeffrey L. Kessler*, WINSTON & STRAWN LLP, http://www.winston.com/en/who-we-are/attorneys/kessler-jeffrey-l.html (last visited Feb. 20, 2016).

93. *See* Complaint, *supra* note 90, ¶¶ 1–8, 81–87. In essence, the *Jenkins* case makes the same arguments about the NCAA's restraints as I had previously articulated in my law review article, *A Short Treatise on Amateurism and Antitrust Law*. *See* Edelman, *supra* note 1, at 64.

94. *See* Complaint, *supra* note 90, ¶¶ 40–53.

the agreement among NCAA member schools not to allow compensation for athletes coming in to school is, in itself, a violation of antitrust law.[95] Thus, the plaintiffs in *Jenkins* will be seeking a far broader remedy—a free market for college athletic services.[96] So that the same way as a professor, when I want to choose a school to teach at, I can negotiate my own salary, *Jenkins* seeks to allow the same result for college athletes.

IV. THE FUTURE OF COLLEGE SPORTS AFTER ANTITRUST SCRUTINY

So what does this all mean for the future of college athletics? And what happens if the plaintiffs in *O'Bannon* and *Jenkins* win? The NCAA purports it will lead to the demise of college sports. And of course they do. They do not want this result. But, the reality is the outcome is probably going to be a lot more nuanced than the media seems to imply, perhaps in a positive way. If the NCAA restraints are all declared to be illegal, the schools can no longer say we are keeping the status quo. There will have to be some type of solution that works for everybody. And there are two possible outcomes that could be a step in the right direction: one that entails inter-conference free market competition and the other that involves college athlete representation and collective bargaining.

A. The Inter-Conference Free Market Model for College Athletics

One option that might emerge should the plaintiffs ultimately prevail in *O'Bannon* and *Jenkins* would be the shifting of amateurism rules from the national level to the conference level, with individual conferences competing against one another to set the most desirable terms of athlete employment.[97] In other words, college sports could revert back to the way they operated prior to 1951 with several large conferences setting their own economic rules rather than a single monopolistic trade association doing so. As a result, the competition among athletic conferences for college football player labor would seem to return to the marketplace.

If that were to happen, athletic conferences would make decisions about college athlete pay based on their own economic and perhaps moral interests, recognizing, however, the existence of a competitive marketplace. A conference such as the Ivy League that provides very

95. *Id.* ¶ 1.

96. *See id.* ¶¶ 124–32.

97. *See* Edelman, *supra* note 28, at 1046–47 (explaining that wage restraints implemented at the college conference level rather than the NCAA level are far more likely to comply with antitrust law because it seems unlikely that any individual college athletic conference has the ability to exercise "market power").

strong educational opportunities to students may still choose to put in a rule that says, "we will not pay our college athletes"—competing instead purely on the virtue of the value of their school's college education.[98] Meanwhile, on the other end of the spectrum, a conference such as the SEC may allow for some payment to college athletes as a way to induce top football players to their schools.

As far as the Big Ten Conference goes, membership will have to make a choice. The conference can certainly maintain its no-pay rules as it purports a desire to do. But the conference members will have to understand that doing so may make it more difficult to recruit top college athletes away from colleges in conferences where pay is available. If the Big Ten colleges want to compete effectively against colleges in conferences that pay their athletes, they will need to find some other value proposition to induce college football players to choose their schools over schools that offer money. Or, they can do what they probably ultimately will choose: allow their athletes to enjoy at least certain financial benefits.

B. The Collectively Bargained Model for College Athletics

The other possible outcome merges antitrust and something else: labor law. We know the football players at Northwestern University had long wanted to form a union, and the NCAA has long fought against it.[99] But for those that have taken antitrust law, you probably know that the reason we have price-fixing, wage-fixing, and group boycotts in pro-sports—and for the most part it is entirely legal—is based upon something known as the non-statutory labor exemption to antitrust law.[100] This means that when employees choose to unionize, the

---

98. *See* Pamela MacLean, *NCAA Says Students Are Losers if Amateur Sports Rules Tossed*, BLOOMBERG BUS. (Mar. 17, 2015, 5:01 AM), http://www.bloomberg.com/news/articles/2015-03-17/ncaa-says-students-are-losers-if-amateur-sport-rules-discarded.

99. *See* Nw. Univ., 362 N.L.R.B. 167 (2015) (declining the Northwestern University football players' request for the National Labor Relations Board to accept jurisdiction over their proposed bargaining unit).

100. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 236–37 (1996) (recognizing an exemption from antitrust laws when unionized employees bargain in good faith with their employers over hours, wages, and working conditions). In a recent law review article, I further explain the non-statutory labor exemption as follows:

> This "exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions." Further, the Court explained that the non-statutory labor exemption arises because "as a matter of logic, it would be difficult . . . to require groups of employers and employees to bargain together, but at the same time to

employers have to bargain with them over hours, wages, and working conditions. And because it is sometimes impossible to comply with antitrust law and labor law at the same time, if a collection of employers is complying with labor law, they will be exempt from antitrust law.[101]

So, the second potential outcome, separate from the bifurcated college approach, is that the NCAA member schools, if found fully subject to antitrust law, might step back and say, "We are no longer going to fight the college athlete unionization movement. In fact, we want Division I basketball players and football players to unionize as a multi-employer bargaining unit. And we will bargain with them over hours, wages, and working conditions because we do not want to be subject to antitrust law."

Now this could lead to a positive outcome as well, because for the first time athletes would get a voice at the collective bargaining table.[102] Athletes would have an opportunity to negotiate for at least some compensation, and greater freedom from their schools.[103] Athletes for the first time would have a chance to argue for the working conditions they need—better concussion protocols, protection from injuries, and even opportunities to take classes for free even after they graduate.[104] And if we move to the second model, all the colleges might continue not to make a large amount of revenue. But the athletes themselves would have a voice.

V. CONCLUSION

Both of the aforementioned outcomes that would likely arise if plaintiffs prevail against the NCAA in *O'Bannon* and *Jenkins*, in my mind, create a far superior result from where we are today. If antitrust

---

> forbid them to make . . . *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable."

Edelman, *supra* note 80, at 2356 n.173 (alterations in original) (citation omitted).

101. *See* Edelman & Doyle, *supra* note 73, at 415–16 ("The non-statutory labor exemption is a court-created exemption, resulting from judicial decisions to give aspects of collective bargaining agreements further immunity from antitrust law. The non-statutory exemption has an important place in sports law because players' associations (unions) collectively bargain with teams (employers) to form a league's collective bargaining agreement." (footnotes omitted)); *see generally* Marc Edelman, *In Defense of Sports Antitrust Law: A Response to Law Review Articles Calling for the Administrative Regulation of Commercial Sports*, 72 WASH. & LEE L. REV. ONLINE 210 (2015).

102. *See* Marc Edelman & Zev. J Eigen, *Should College Athletes Be Allowed to Unionize*, WALL ST. J. (Sept. 15, 2015, 10:01 PM), http://www.wsj.com/articles/should-college-athletes-be-allowed-to-unionize-1442368889.

103. *See id.*

104. *See id.*

law leads to a bifurcated system with some conferences moving back toward intramural football and others paying their athletes, those student-athletes that want the real student experience will have it, and those that are giving up part of their experience to make huge revenues for the university will get to share in the revenue. And if we move to a unionized model, college athletics will remain very profitable, but for the first time, the athletes will have a real and meaningful voice in the terms and conditions of their bargaining. Both these results create the right outcome under antitrust law, and both promote a general sense of fairness in college sports.

Antitrust law is foremost about economic efficiency and free markets. Labor law is foremost about collective bargaining and equity. But both solutions promote tangible change to the benefit of the college athletes—a stakeholder group that has long been silenced and underrepresented in the decision-making process of college sports. On the one hand, it is sad to see that the state of affairs in college football has come to the need for mass litigation against colleges and their organized trade association. But, on the other hand, this litigation perhaps has been a blessing. Alas, it is leading to the prospects for change in the college football marketplace, and a fairer overall system for all parties that are involved, most notably the so-called "student-athletes."