TOWARDS AN ECONOMIC THEORY OF AMATEURISM: THE NCAA, ANTITRUST, AND THE STUDENT-ATHLETE

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I. INTRODUCTION

If amateur athletics had its own 4-digit SIC code, it would count as a major sector of the economy. From children enrolled in Little League baseball to septuagenarians running half-marathons, millions of Americans devote countless hours to playing, watching, and administering amateur sports without financial remuneration. The tradition of amateur athletics is venerable. The modern Olympic movement touts the Olympic games of Ancient Greece as its forebearer. However, amateurism in sports is not well understood by economists, perhaps because the essence of amateurism is that the participants do not get paid. In intercollegiate sports, where student-athletes often receive financial aid, confusion and disagreement over the distinction between being paid to play and receiving financial aid have contributed to the controversy over whether student-athletes should be paid, and has made intercollegiate sports the object of antitrust litigation.

A. The NCAA

Most intercollegiate athletic competition in the United States is organized through The National Collegiate Athletics Association ("NCAA") and is governed by its rules. The NCAA's operative philosophy is that athletes are to be students and amateurs.[2] The NCAA expresses this in Article 1.3 of its constitution, which describes the organization's "Fundamental Policy," and Article 2.9, which describes the "Principle of Amateurism":

> 1.3.1 Basic Purpose. [*] The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.[3]
>
> 2.9 The Principle of Amateurism. [*] Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student

2 Under NCAA rules student-athletes are subject to a variety of academic eligibility requirements intended to ensure that student athletes are academically qualified for admission to their schools in the first place, that they are enrolled in *bona fide* degree programs where they are subject to the same academic requirements as other students, and that they are making progress towards their degrees.

3 *NCAA Division I Manual August 2016-17*, National Collegiate Athletic Association, Indianapolis, IN 2016-17, Article 1.3.1 (hereafter "2016-17 Manual"). The asterisks printed in sections of the NCAA constitution indicate to readers the voting procedures required for amendment of each section. Asterisks indicate that a particular provision is a "Dominant Provision," which is defined as: "Dominant provision—Legislation that is derived from the constitution in the 1988-89 Manual (the Manual format that was employed until the membership approved the revised format at the 1989 Convention). All such legislation is identified by an asterisk (*) and requires a two-thirds majority vote of the total membership (present and voting) for adoption or amendment." (2016-17 Manual, § III).

participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.[4]

To ensure that student-athletes are genuine amateurs, the NCAA has provisions intended to rule out "pay for play," i.e. to ensure that student-athletes are not being paid to compete. The rules do not forbid financial aid to student-athletes, who can receive financial aid towards their tuition, other educational expenses, and living expenses while enrolled as students. However, the amount of allowable aid is capped to ensure that financial aid does not become a backdoor means of paying student-athletes, thereby violating the NCAA's principle of amateurism. The current cap is, with some exceptions, the institutions' Cost of Attendance ("COA") as reported by each institution to the U.S. Department of Education for financial aid purposes generally. That is, the COA is determined by each school with respect to *all* its students, not just student-athletes. Schools that make or allow payments to student athletes in excess of allowable amounts are subject to sanctions that can include having student-athletes declared ineligible to compete, forfeiture of games, monetary fines, or suspension of whole programs.

B. The Monopsony Cartel Hypothesis

The conventional wisdom among some economists is that the NCAA rules limiting the amount that student-athletes can be paid are the machinations of a monopsonistic cartel whose purpose is to suppress the "wages" of athletes "hired" by schools to compete on their behalf.[5] According to this view, amateurism is a ploy to keep student-athletes from receiving a share of the value that their skill and their bodies produce for the sports programs in which they are an essential labor input.

The adherents of this view see the "market" for student-athlete services in simple terms: the universities and colleges that compete on the playing field are the *buyers* of athletic services and the young men and women who play sports are the *sellers*. By way of participation in the NCAA, the buyers have agreed on rules that cap the amount the sellers can be paid. Through the NCAA, the buyers monitor one another's behavior and have institutionalized processes for penalizing any buyer that exceeds the agreed-upon cap. Considered in this manner, the NCAA is reduced to a textbook example of a monopsony cartel: an agreement among otherwise horizontally competing buyers to suppress the price of a labor[6] input they all employ.

C. Questioning the Conventional Wisdom

There are, however, implications of the Monopsony Cartel Hypothesis that do not stand up to inspection. Among the implications, one is qualitative, another theoretical.

The qualitative implication is that student-athletes are heavily exploited, allowed only a minimal income that is just adequate for subsistence (or in the case of more extreme critics, not even adequate for subsistence). For example, in an article entitled "He Shouldn't Have to Eat Ramen," Kessler writes, "the average I-A student-athlete cannot subsist on a full grant-in-aid alone."[7] The author characterizes the practices of the NCAA and its member institutions as a "blatant and novel form of exploitation," that serves "the supposedly inherent good that is 'amateurism,'" and insists that "any justification for [the NCAA's practices] … is merely a ruse to maintain the current unfair economic distribution."[8]

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4 2016-17 Manual, Article 2.9.

5 Economists have expressed this opinion both in professional publications and in the popular press. For examples of the former see: Arthur A. Fleisher III, Brian L. Goff & Robert D. Tollison, *The National Collegiate Athletic Association: A Study in Cartel Behavior* (Chicago: University of Chicago Press, 1992), pp. 20-4; Armen A. Alchian & William Allen, *University Economics, 3rd ed.* (Belmont: Wadsworth Publishing Company, 1972), pp. 443-4; Edgar K. Browning & Mark A. Zupan, *Microeconomics Theory & Applications, 7th ed.* (New York: John Wiley & Sons, 2002), pp. 502-3; Lawrence M. Kahn, "Markets: Cartel Behavior and Amateurism in College Sports," *The Journal of Economic Perspectives* 21, no. 1 (2007): 209-26, p. 210; Brad R. Humphreys & Jane E. Ruseski, "Monitoring Cartel Behavior and Stability: Evidence from NCAA Football," *Southern Economic Journal* 75, no. 3 (2009): 720-35, p. 720; Robert W. Brown, "Measuring cartel rents in the college basketball player recruitment market," *Applied Economics* 26, no. 1 (1994): 27-34, p. 27; and Allen R. Sanderson & John J. Siegfried, "The Case for Paying College Athletes," *Journal of Economic Perspectives* 29, no. 1 (2015): 115-37, p. 119. For examples of the latter see Gary S. Becker, "College Athletes Should Get Paid What They are Worth," *Business Week*, September 30, 1985, p. 18; Gary S. Becker, "The NCAA: A Cartel in Sheepskin Clothing," *Business Week*, September 14, 1987, p. 24; and Robert Barro, "The Best Little Monopoly in America," *Business Week*, December 9, 2002, p. 22

6 Monopsony, the exercise of market power by a buyer or group of buyers isn't limited to labor markets, although labor markets are often used in textbook examples.

7 William O. Kessler, "He Shouldn't Have to Eat Ramen: A Modest Pay-For-Play Proposal for NCAA Student-Athletes Participating in Traditionally Profitable Sports," *Willamette Sports Law Journal*, 3 no. 1, (Spring 2006): 56-76, http://hdl.handle.net/10177/5582, last visited February 18, 2020 (hereafter, "Kessler"), p. 61.

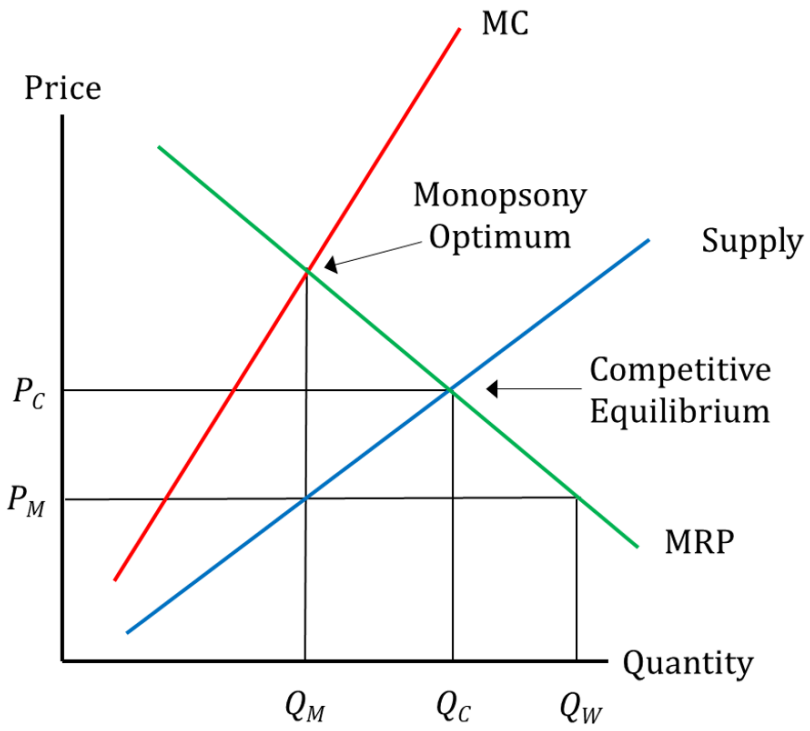
8 Kessler, p. 56.

One reason this characterization of student-athletes' meager living conditions does not stand up is that the amount of financial aid allowed under NCAA rules generally is similar to or better than the amount of financial aid provided to the broad population of students. Non-athlete students who work at the library or the cafeteria do not receive more aid than student-athletes, and they do not have the benefit of training tables, tutors, and other perks routinely provided to student-athletes.

Moreover, from an economic perspective, the financial aid to a student-athlete is not fully measured by the student's standard of living during the four years as a student. Financial aid provides the student-athlete with an opportunity to acquire an undergraduate degree – with all the economic returns this accumulation of human capital provides over a lifetime – at minimal or no expense to the athlete or the athlete's family. That is not a textbook example of penurious exploitation.

The theoretical implication of the Monopsony Cartel Hypothesis is that the number of student-athletes must be suppressed. This is an economic corollary to the proposition that the wages of the student-athletes have been suppressed. Both follow from the elementary economics of monopsony, illustrated in Figure 1 (and which, in similar form, can be found in virtually every undergraduate price theory textbook).

Figure 1



When the market for an input or factor of production is competitive, equilibrium occurs where the supply curve (shown in blue) of the input intersects the marginal revenue product ("MRP," shown in green),[9] which serves as the demand curve for the input. Thus, in Figure 1, the competitive equilibrium price is P_C and the competitive equilibrium quantity (volume) is Q_C.

By contrast, a monopsonist (or, in this example, a monopsonistic cartel) maximizes its profit by purchasing the monopsonized input only up to the point where the marginal cost of the next unit of input is equal to the monopsonist's marginal revenue product. For the monopsonist, the marginal cost of the input ("MC," shown in red) exceeds the price because the monopsonist is facing the upward sloping supply curve, so in order to purchase an additional unit of the input, the monopsonist has to be willing to pay an increased price not only for the incremental unit of input, but also for all the infra-marginal units of input (i.e. the units the monopsonist was buying already). The monopsonist's optimum occurs at quantity Q_M and the monopsonist pays price P_M. That is how the monopsonist increases its profit by suppressing the price it pays for the inputs it purchases. In the process of doing so, it also suppresses the volume of the monopsonized input purchased in the market.

9 The marginal revenue product of an input is the incremental revenue earned by the firm from purchasing an incremental unit of the input. The definition assumes, of course, that the input is used to produce additional output and that output is sold, which gives rise to the increment to revenue.

Under the conventional wisdom of the Monopsony Cartel Hypothesis, the input whose price (or wage) is allegedly suppressed is the student-athlete. But, along with the purported price suppression, the economic theory of monopsony would imply that fewer student-athletes are "hired," i.e. admitted to NCAA schools and fielded on teams in NCAA competition than would be the case absent the NCAA's amateurism rules. In other words, the conventional wisdom implies that if the NCAA's amateurism rules were lifted and competition for their services meant schools paid more to student-athletes than they currently receive, the volume of student-athletes playing for the schools would *increase*. That is, schools would field more players either by increasing the size of their teams or by fielding more teams. Among all the debates over the likely consequences of increasing payments to student-athletes, no one (to our knowledge) has seriously suggested that dropping the NCAA's amateurism rules and increasing payments to student-athletes will incentivize schools to increase the ranks of their student-athletes. However, if one accepts the argument that payments to student-athletes are too low because of a purported NCAA-engineered cartel, that is what economic theory implies. Namely, if the "price" paid by schools for student-athletes were to increase because the restrictions imposed by the purported monopsony cartel were dropped, schools would actually hire more, not fewer student-athletes.

The confusion disappears when one unpacks how a cartel actually works. Consider again Figure 1, which shows the effect of a monopsony cartel on price and volume. The competitive price and quantity P_C and Q_C are both greater than their monopsony-cartel counterparts, P_M and Q_M. The firms in the cartel have a collective incentive to participate in the cartel because monopsony equilibrium is more profitable for them. That is, each firm in the cartel earns greater profits in the monopsony cartel equilibrium than in the competitive alternative.

However, maintaining the cartel equilibrium requires discipline, because if all the other firms abide by cartel pricing, each individual firm has a private incentive to undermine the cartel. That is, if all its rivals adhere to the cartel price, an individual firm could offer suppliers a slightly better price than the cartel price. This would attract suppliers to the firm deviating from the monopsony price, which would make the offer profitable to the deviating firm but would reduce the profits of the other members of the cartel. Other members of the cartel would then need to increase their own prices to retain their share of the market. Cartels routinely worry about this problem, and successful cartels must have means of disciplining wayward members (or cheaters) who deviate from the cartel price in order to avoid unraveling of the cartel agreement. Proponents of the Monopsony Cartel Hypothesis point to the NCAA rules and disciplinary process as confirmation of their view.

What the cartel-proponents overlook is that the whole point of cartel discipline is to ensure that volume is suppressed. An upward-sloping supply curve means that the only way a monopsony cartel can maintain a low price is to enforce a reduced volume. Consider Figure 1 again. At the monopsony price (P_M) the supply that is forthcoming is Q_M. But when the price is P_M, firms would (absent the cartel agreement) like to purchase Q_W. That means the market is in a position that would (in the absence of cartel discipline) be described as excess demand. At the cartel price, the volume of supply that is forthcoming is less than the buying firms would prefer to buy (acting unilaterally) at that price if they were freed from the restrictions of the cartel.

Qualitatively, what would this situation look like in practice? On the supply side, it would mean that prospective athletes would be holding back their "supply," i.e. their willingness to enroll in NCAA schools as student-athletes, because the financial rewards for doing so are insufficient to make it attractive. On the demand side, it would mean that coaches and athletic directors would be lamenting the insufficiently small number of qualified athletes willing to play for their schools as student-athletes, and chafing against the "price limits" of the amateurism rules which prevent them from addressing the shortage of student-athletes by offering prospects more money.

This description bears no resemblance to the world of intercollegiate athletics, where far more potential student-athletes would like to play than there are available spots on a team, and where the problem for coaches and athletic directors is not finding enough players to fill a shortage but rather choosing among a large number of prospects willing and eager to play intercollegiate sports at the prevailing COA levels. To be sure, there is and will always be competition for the best players, but that observation does not span the gulf between what a cartelized market for student-athletes would look like and the current reality. In short, the conventional wisdom of the NCAA-as-Monopsony-Cartel does not square with the facts on the ground of intercollegiate athletics.

II. AMATEURISM

If the NCAA is not a monopsonistic cartel, that invites the question, why does the NCAA need rules limiting what its members can pay student-athletes? The answer lies in the nature of amateurism and how markets satisfy demand for non-professional sports, i.e. sports entertainment not offered by organizations such as the National Football League, the National Basketball Association, the National Hockey League and Major League Baseball.

A. Demand for Amateur Athletics

It is evident that there is demand for amateurism, especially as it relates to athletics. One need only consider the volume of resources expended on high school athletic programs, and amateur sports organizations like Little League baseball,[10] Pop Warner football[11] and others[12] to show the sizable demand for amateur athletics. Demand for amateur athletics encompasses both participant-demand, i.e. the desire to take part in amateur athletic competition, and spectator-demand, i.e. the desire to watch amateur athletic competition.[13]

B. Competition and Cooperation

In the world of athletics, the relationship between competition and cooperation is complex. On the one hand, athletes and teams compete in the games themselves. Here, collusion would be anathema to the values of athletic competition. On the other hand, cooperative activity is essential to organize athletic competition. The rules of play and the scheduling of contests must be established and agreed upon. If a series of contests are to be held with the collective results determining a championship, the scoring and evaluation of the outcomes of individual contests must be agreed upon. In addition, all parties must agree on who is eligible to compete.

Where the rules are concerned, it is often more important that all parties agree upon and understand a common standard than the precise details of what that standard is. Consider, for example, the NCAA rule governing the ball in baseball.

> The Ball
>
> SECTION 11. The ball is a sphere weighing not less than 5 nor more than 5¼ ounces avoirdupois and measuring not less than 9 inches nor more than 9½ inches in circumference. It shall be formed by yarn wound around a small core of rubber, cork or combination of both and covered by two pieces of white horsehide or cowhide tightly stitched together. The coefficient of restitution (COR)[14] of a baseball cannot exceed .555.[15]

This definition is very detailed. It specifies the materials from which the ball must be made and gives its weight within plus or minus 5 percent and its circumference within less than plus or minus 6 percent. It even specifies an upper limit on its coefficient of restitution, a measure of how "elastic" the ball is in a collision. The game of baseball would not be very much different if all parties agreed that it would be played with a

10 https://www.littleleague.org/, last visited February 20, 2020.

11 https://www.popwarner.com/, last visited February 20, 2020.

12 A cursory search of the internet reveals the existence of a wide range of organizations that are either established to promote amateur athletics in various sports or that include promotion of amateur athletics among their activities. Some examples are: U.S. Youth Soccer: https://www.usyouthsoccer.org/; USA Hockey: https://www.usahockey.com/youthhockey; U.S. Basketball: https://www.usab.com/youth/development.aspx; USA Track and Field: https://www.usatf.org/programs/youth; U.S. Figure Skating https://www.usfigureskating.org/; U.S. Sailing: https://www.ussailing.org; and the U.S. Equestrian Foundation: https://www.usef.org (All websites last visited 2/20/2020). Additionally, interest in amateur athletics spans a very wide range of competitive activities. "[A]mateur sport activities astonishingly include competitions as diverse as throwing bison dung, spitting cherry pits, running marathons, body building, motorcycle races, and sky diving." (Lada Helen V. Kurpis, Carl S. Bozman & Lynn R. Kahle, "Distinguishing between amateur sport participants and spectators: the List of Values approach," *International Journal of Sport Management and Marketing* 7, nos. 3/4 (2010): 190–201, DOI: 10.1504/IJSMM.2010.032550, p. 191).

13 Consider, by way of only one example, the thousands of participants *and spectators* who show up for local running events.

14 Greg Bernhardt, "What is the coefficient of restitution?" *Physics Forums*, July 24, 2014, https://www.physicsforums.com/threads/what-is-the-coefficient-of-restitution.763082/, last visited February 21, 2020.

15 National Collegiate Athletic Association, *2019 and 2020 NCAA Baseball Rules*, (Indianapolis, National Collegiate Athletic Association, October, 2018), p. 15 http://www.ncaapublications.com/productdownloads/BA20.pdf, last visited February 21, 2020, (hereafter, "NCAA Baseball Rules"). Bold in original.

6½ ounce ball or one that was 8¾ inches in circumference. However, players who have learned the game with balls meeting the rule described above would be thrown off (pun intended) by having to play with a ball that did not meet the expected specifications. In short, the game of baseball is more consistent, and therefore fairer, if all parties know that important parameters will remain consistent.[16]

The detail in which athletic organizations, both amateur and professional, specify their rules offers insight into the economic logic of the NCAA capping grant-in-aid and allowances for student-athletes. Athletics are about competition, and athletes and fans who appreciate competition set store on that competition being "fair," which means that all parties are clear on what the parameters of competition are to be. That accounts for the detail with which the rules are specified. The NCAA baseball rules are published in a 125-page document with sections specifying the size and shape of the playing field; the specification of game equipment (balls, bats, and gloves); the size and shape of home plate and the pitcher's mound; the roles of coaches, team managers, the scorer, the umpires, medical personnel; and the use of tobacco products. And this list goes on.[17] The compensation of student-athletes who play baseball at the intercollegiate level is no more and no less a part of all the other rules that define the sport of intercollegiate baseball. By way of contrast, Little League baseball and Major League Baseball have different rules within their organizations that define compensation and eligibility, just as they define other elements of how the game is played.

In short, athletic competition that will attract athletes and spectators requires rules that are sometimes complex. This means teams that compete on the field or court must cooperate organizationally in order to meet the preferences of other market constituents, such as spectators and advertisers.

C. The Constituencies

The entity (e.g. league, conference, or association) that organizes athletic competition faces a situation in which the participation of multiple constituencies is essential to the sustained competition on the court or field of play. The organization must bring these constituencies together, and in considering how to bring them together must consider the dependence of each constituency's willingness to participate on the participation of the other constituencies. For example, the willingness of a team to participate necessarily depends on the participation of other teams. Some athletes are likely to be attracted by the attention of fans, so their willingness to participate depends on the participation of fans. By the same token, spectator interest in watching contests will depend on the athletes participating and the teams or leagues of which they are a part.

III. MULTI-SIDED PLATFORMS

A. Network Externalities

This situation of inter-related demands is what economists call "network externalities," a term often used when discussing "platforms" where the effect of one group's participation in the platform affects the demand of other groups to participate in the same platform. An example of a platform outside the world of athletics is payment cards, where the willingness of cardholders to use cards depends on the willingness of merchants to accept them and *vice versa*.[18]

Markets in which platforms with two constituencies share network externalities are referred to as two-sided markets, an area that has received considerable attention in the literature since the early 2000s.[19] An important implication of two-sided market theory is that the man-

16 One gets a sense of how strongly athletes feel about things like specifications of the ball by considering the "Deflategate" controversy in the world of professional football. That controversy involved allegations that the New England Patriots and their quarterback, Tom Brady, knowingly used underinflated footballs in the American Football Conference Championship game against the Indianapolis Colts on January 15, 2015. For that offense the league fined the Patriots $1 million, took away two draft picks, and suspended Mr. Brady for four games. ("Deflategate Timeline: After 544 Days, Tom Brady Gives In," *ESPN*, https://www.espn.com/blog/new-england-patriots/post/_/id/4782561/timeline-of-events-for-deflategate-tom-brady, last visited February 21, 2020). Before the case was fully resolved it was heard in the Federal District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. The case finally ended when Mr. Brady decided not to appeal an adverse decision in the Court of Appeals to the Supreme Court.

17 NCAA Baseball Rules.

18 Other such platforms include auction houses and web-sites and computer operating systems.

19 For early descriptions of the literature see Jean-Charles Rochet & Jean Tirole, "Two-Sided Markets: An Overview," https://pdfs.semanticscholar.org/1181/ee3b92b-2d6c1107a5c899bd94575b0099c32.pdf, last visited February 23, 2020 and Jean Charles Rochet & Jean Tirole,"Two-Sided Markets: A Progress Report," *The RAND Journal of Economics* 35, no. 3 (2006): 645–67.

agers of the platform assign prices to each side of the platform with a view towards how those prices will affect one side's participation and how that participation will, in turn, affect the participation of the constituents on the other side of the platform. Two-sided platform pricing can look very different from pricing in conventional (one-sided) markets because the price-cost relationships often differ from what one would find in one-sided markets.

The same lesson applies with even more complexity to multi-sided platforms. Those who manage a multi-sided platform must determine the optimal pricing to each constituency served by the platform – with a view towards the effect of each constituent's participation on the demand of the other constituencies.

B. Amateur Athletics as a Multi-Sided Platform

The multi-sided platform model can be helpful in understanding the organization of amateur athletics. The various teams, the athletes, the prospective fans and advertisers make up the main constituents served by the platform, which is the organization administering competition. In the case of the NCAA, these roles correspond to the member schools, their teams, their non-athlete students, their alumni, and other potential fans. For schools in "big-time" competition, television broadcasters can be regarded as an additional constituency.

From an economic perspective, the NCAA is the organizing entity at the center of the platform for most intercollegiate athletic competition in the United States. It falls to the NCAA, then, to master the complexities of multi-sided platform pricing. As described earlier, the NCAA institutionalizes a strong emphasis on amateurism, i.e. on the idea that student-athletes are *bona fide* students who play the game as an avocation, not a profession. The NCAA's rules on amateurism are as detailed as the rules governing the conduct of a baseball game. Both sets of rules are important to the platform's sustainable equilibrium.

Based on economic logic, one would expect the NCAA to devote attention and effort (both of which are costly) to those aspects of the game that are consequential to the success of the association of schools and teams it is organizing. When the NCAA devotes time and attention to the size, weight, construction materials and coefficient of restitution of a baseball, it does so because ensuring consistency in the properties of a baseball will promote confidence among athletes and fans that NCAA-sanctioned competition in baseball is fair. By the same token, devoting detailed attention to the rules of eligibility for competition in the game will promote confidence that NCAA-sanctioned competition is fair. If one school in a game brings a team of genuine student-athletes who are working on degrees and meet their school's academic requirements but their opponent fields a team unconstrained by academic qualifications and whose members were recruited and paid to play, the contest will not be regarded as fair. This will reduce the demand for the contest by spectators and advertisers alike. Fairness aside, schools that genuinely want to include intercollegiate athletic competition in the experience of their *bona fide* students will not be able to compete with teams from a school that has professionalized athletics. The attention and effort that the NCAA devotes to ensuring amateurism serves to put an economist on notice that the rules are important to the NCAA's sustainable equilibrium.

C. A Theory of Amateur Athletics

Managing a multi-sided platform is an exercise in managing externalities. While network externalities must be managed to ensure participation from all constituencies, there are other externalities of which the platform manager (here, the NCAA) must be aware. Consider the position of an individual school. Even a school that recognizes the value of amateurism to the platform also will be aware of private incentives that tempt it to undermine amateurism. For an individual university or college, athletic success may bring tangible rewards in the form of increased contributions from alumni, increased visibility to prospective students, larger ticket sales, and enhanced prestige in the community.

Such a school might consider that the gains that could come from achieving athletic success by recruiting and paying "ringers" would outweigh the costs that the school would incur. That would more likely be the case if the cost of the damage done by professionalizing a team was borne not just by the team that did so, but also was borne in part by other schools with which the offending school competes. In this situation, the offending school exerts a negative externality on the other schools (and their constituencies) with which it competes on the court or field of play. Left unconstrained, individual schools would have an incentive to engage in too much of this activity, in the process creating a market failure in which the value of the platform as a whole is reduced and all constituencies are worse off in the resulting equilibrium.

From a platform perspective, the NCAA's amateurism eligibility rules are instituted to protect against this form of market failure. While the rules may superficially resemble cartel-restrictions on price competition, they serve a different objective – namely, the procompetitive purpose of

ensuring that the platform is able to compete. Network externalities and the theory of multi-sided platforms provide an analytic framework within which the economics of markets can explain the features of amateur athletic organizations.

IV. THE NCAA GRANT-IN-AID LITIGATION

It is instructive to consider how this economic analysis can be applied to the antitrust litigation that was brought against the NCAA, alleging that the NCAA and eleven athletic conferences operated a monopsonistic cartel. We are referring to *In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*. Because the Judge ruled against the NCAA in that case, it is instructive to compare the Judge's ruling with the ideas developed here. As an aside, this case is a different lawsuit than the *O'Bannon* case involving the NCAA that was tried before the same judge.[20]

A. The Price Effect

In the *GIA Merits* case, the Judge agreed with the Plaintiffs'[21] allegation that the NCAA constituted a cartel that suppressed the compensation of student-athletes.

> In a market free of the challenged restraints, competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result. Student-athletes would receive offers that would more closely match the value of their athletic services . . . This evidence shows that student-athletes are harmed by the challenged compensation limits, because these rules deprive them of compensation they would receive in the absence of the restraints.[22]

Not only did the Court conclude that the challenged practices were anticompetitive, it also accepted Plaintiffs' attribution of the anticompetitive effects to monopsony power.

Plaintiffs' experts' analyses also show that Defendants are able to artificially compress and limit student-athlete compensation as described above because they possess monopsony power in the relevant market.[23]

This part of the decision came in the first stage of the three-step rule of reason process in which it is Plaintiffs' burden to show that the challenged practices have an anticompetitive effect. If Plaintiffs meet that burden, then it is Defendants' burden in the second stage to demonstrate that the challenged practices have some procompetitive effect. If the Defendants meet that burden, then it becomes Plaintiffs' burden in the third stage to demonstrate that there are less restrictive means of achieving the same procompetitive effects.

The premise of the first part of the decision is that an anticompetitive effect is demonstrated by showing that prices (payments) to student-athletes are lower than they would be absent the challenged practices, which are the NCAA's amateurism rules. By such a standard, any cap on athletic scholarships would be deemed to have an anticompetitive effect unless it was superfluous, i.e., not binding. By definition, a rule that defines and enforces amateur status is a rule that limits the amount paid to an athlete.[24] As the Ninth Circuit Court of Appeals recognized in deciding an appeal of the earlier *O'Bannon* case, "not paying student-athletes is *precisely what makes them amateurs*."[25]

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20 *O'Bannon v. National Collegiate Athletic Association*, 7 F.Supp.3d 955 (2014). See also *Edward C. O'Bannon Jr., et al. v. National Collegiate Athletic Association,* 802 F.3d 1049 (9th Cir. 2015) (hereafter "*O'Bannon* Appeal"). One of the issues in the *O'Bannon* case was whether student-athletes could sell their Names, Images or Likenesses ("NILs") to, say, a video game, and retain their amateur status. The NIL issue has been in the news lately because the Governor of California recently signed a bill that would allow all athletes in California "to be compensated for use of their [NIL]" without fear of being punished by the NCAA, notwithstanding the NCAA's rules to the contrary. (Alan Blinder, "Paying College Athletes: Answers to Key Questions on New Law," *The New York Times*, https://nyti.ms/2nO3jQt, last visited February 27, 2020.) Additionally, news reports indicate that state lawmakers "in more than two dozen states" are expected to debate whether student-athletes should be able to profit from their NILs, and the U.S. Congress may take up the matter as well. (Alan Blinder, "After California Law, Statehouses Push to Expand Rights of College Athletes," *The New York Times*, https://nyti.ms/2sl7UMB, last visited February 23, 2020.

21 The case was brought on behalf of three classes of Plaintiffs: FBS football players, Division I Men's Basketball players, and Division I Women's Basketball players.

22 GIA Cap at 1068.

23 GIA Cap at 1068.

24 By "amount paid" we ignore the economic value of the human capital the student-athlete has received upon completion of a college degree.

25 *O'Bannon* Appeal at 1076, italics in original.

From an economic perspective, this approach is faulty because it misapprehends the meaning of anticompetitive effect. As a matter of economics, a restraint or practice is anticompetitive if it limits competition that would otherwise take place in a market. When a multi-sided platform sets prices so as to increase its volume over the platform, it is acting in a procompetitive fashion even if for one constituency those prices are high or low relative to prices for another constituency. When the platform includes multiple entities acting together, as is the case with intercollegiate athletics where the NCAA and universities and colleges combine to operate the platform, it is procompetitive to restrict schools' ability to gain privately by imposing negative externalities on other participants in the platform.

In other words, to relegate consideration of amateurism's procompetitive effects to the second stage of the rule of reason analysis is to make the mistake of imagining that there are distinct procompetitive and anticompetitive effects that can somehow be separated from one another. This kind of imagined bifurcation can encourage misleading conclusions. For example, in the Ninth Circuit's decision in the *O'Bannon* case, the Court of Appeals rejected an argument advanced by the NCAA that Plaintiffs in that case had not shown an anticompetitive effect because they had not shown that the challenged practices restricted output. The Court of Appeals rejected that argument, reasoning as follows:

> First, the NCAA's contention that the plaintiffs' claim fails because they did not show a decrease in output in the college education market is simply incorrect. Here, the NCAA argues that output in the college education market "consists of opportunities for student-athletes to participate in FBS football or Division I men's basketball," and it quotes the district court's finding that these opportunities have "increased steadily over time." See *O'Bannon*, 7 F.Supp.3d at 981. But this argument misses the mark. Although output reductions are one common kind of anticompetitive effect in antitrust cases, a "reduction in output is not the *only* measure of anticompetitive effect." Areeda & Hovenkamp ¶ 1503b (1) (emphasis added).
>
> The "combination[s] condemned by the [Sherman] Act" also include "price-fixing... by purchasers" even though "the persons specially injured ... are sellers, not customers or consumers." Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235, 68 S.Ct. 996, 92 L.Ed. 1328 (1948). At trial, the plaintiffs demonstrated that the NCAA's compensation rules have just this kind of anticompetitive effect: they fix the price of one component of the exchange between school and recruit, thereby precluding competition among schools with respect to that component.[26]

The Court was correct that reductions in *output* are not the *only* measure of anticompetitive effect. Anticompetitive effects also can be accomplished through reductions in quality or delaying of innovation. But the Court was incorrect to segue from that conclusion to a discussion of the effects of monopsony on price, and to conclude that this price effect was somehow separate from the effect of monopsony on quantity (or output).

As demonstrated earlier, the effects of monopsony on price and quantity are not two separate effects. They are, in fact, the same effect – movement along a supply curve. As illustrated in Figure 1, a monopsony achieves its effect by moving the market equilibrium down an upward-sloping supply curve. Doing so causes both price and quantity to fall, not because there are two separate effects. Rather, the observed change in price and the observed change in quantity are two symptoms of the same effect caused by the monopsonist's conduct. If a reduction in price were seen with no quantity effect or with a quantity effect that moved in the opposite direction, it would mean that something other than the exercise of monopsony power is going on. For a Court to accept a price reduction with no accompanying reduction in quantity as evidence of an anticompetitive monopsony is economics in error.

For this same reason when the District Court in the GIA litigation reasons that suppression of price is a sufficient basis to conclude that the challenged practices have a monopsonistic anticompetitive effect, the Court is mistaken because it is failing to understand the mechanism of monopsony.

B. Amateurism as Arbitrary or as Pretext

In addition to giving the procompetitive effect of amateurism short shrift in its analysis of the allegedly anticompetitive effects of the amateurism rules, the Court displayed skepticism with regard to the NCAA's commitment to amateurism. The Court reviewed a variety of payments in excess of the basic grant-in-aid that student-athletes can receive under various circumstances, and concluded:

26 *O'Bannon* Appeal at 1070-1.

> Yet this compensation, some of which is unrelated to education and some of which is provided in cash or a cash-equivalent, is not considered to be "pay" and student-athletes who receive it remain amateurs.
>
> These payments and benefits are, without a doubt, justifiable and well-deserved. They are relevant to the analysis of Defendants' consumer-demand procompetitive justification for two reasons. First, the rules that permit, limit, or forbid student athlete compensation and benefits do not follow any coherent definition of amateurism, including Defendants' proffered definition of no "pay for play," or even "pay." The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it.[27]

In other words, amateurism is whatever the NCAA says it is. That is supposed to be a withering criticism. But from an economic perspective it is hardly a criticism at all, because the rule is not unjustified or anticompetitive simply because it has some arbitrary features. After all, a baseball weighs between 5 and 5¼ ounces only because the NCAA says it does, and has a circumference of between 9 and 9½ inches, only because the NCAA says it does. Yet, nobody would suggest that the NCAA is insincere or engaging in pretext with respect to its rules for the size and shape of a baseball.

In the grant-in-aid litigation, both Plaintiffs and the Court noted changes in NCAA amateurism rules over time, although neither contended that those changes were themselves anticompetitive. The changes were adduced merely to suggest that the NCAA was insincere in its commitment to amateurism. However, those changes do not necessarily imply pretext or insincerity. Over time, the rules with respect to baseball bats have changed. Once all bats had to be wooden; now some non-wooden bats are permitted. This hardly means the NCAA was dishonest or pretextual with respect to its rules governing bats.

To switch examples from sports to potables, if the Coca Cola company wants to change the formula for Diet Coke and in the process change what it looks like and tastes like, it can do so – and still call it Diet Coke. In short, Coca Cola gets to define what Diet Coke is. In like fashion, the NCAA defines what the product (amateur intercollegiate athletics) is like. Who else should get to define the term if not the NCAA?

Similarly, when the Court in the GIA litigation decides, in effect, that NCAA amateurism rules are arbitrary,

> [S]ome of the challenged compensation limits may have some effect in preserving consumer demand to the extent that they serve to support the distinction between college sports and professional sports. That distinction cannot be based on student-athletes not receiving any compensation and benefits on top of grant-in-aid; this is because student-athletes currently can receive thousands or tens of thousands of dollars in such compensation, related and unrelated to education, while remaining NCAA amateurs.[28]

That criticism is insufficient to establish that the NCAA's commitment to amateurism is pretext for market power. After all, the size of the baseball is, to a degree, arbitrary, but the game requires that the size be well defined.

V. CONCLUSION

To characterize the NCAA as a monopsonistic cartel is too clever by a half. The economic theory of monopsony does not fit intercollegiate sports because the output effect that is necessary for the cartel hypothesis to be consistent with economic theory is conspicuous by its absence. In addition, the concept of economic exploitation does not apply when student-athletes receive not only capped grant-in-aid remuneration but also the human capital value of a college degree. For purposes of economic analysis, intercollegiate sports and amateur athletics generally are better viewed as multi-sided platforms. An agreement on the definition of amateurism that constrains payments to student-athletes makes economic sense for the operation of the platform in the same way that it makes economic sense for the colleges and universities who are members of the NCAA to agree on the characteristics of the equipment used on the court or field of play.

27 GIA Cap at 1074.

28 GIA Cap at 1082-3.

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