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Recommended Citation

Clark, Sherman J. "College Sports and the Antitrust Analysis of Mystique." *Washington and Lee Law Review Online* 71, no. 4 (2015): 215-229.

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College Sports and the Antitrust Analysis of Mystique

Sherman J. Clark*

Abstract

In this response to Marc Edelman's Article, 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 (2014), I highlight a set of conceptual issues that must be confronted if courts are to craft a coherent and stable body of law governing the NCAA's treatment of student-athletes. First, the value of the product at issue here—college sports—is intimately connected with the nature of the labor used to create it. Second, the nature of that value is amorphous, contingent, and greater than the sum of its parts. Third, the fairness arguments that drive much of the litigation in this area are based on tenuous assumptions about the relationship between the labor used to create the product and the value of the product.

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I have been asked to respond to Marc Edelman's Article¹ describing and commenting on the case of *O'Bannon v. NCAA*.² It is difficult to keep on top of the details of this ongoing litigation while retaining a sense of perspective, and Edelman is among just a handful of scholars who have been able to do so. Although I do not agree fully with Edelman's conclusions—particularly regarding the connection between antitrust and Title IX,³ the Article is a clear, accurate, and thoughtful description of the case. By way of response, therefore, rather than march step by step through the ground Edelman has so ably covered, I would like to take this opportunity to highlight a set of conceptual difficulties underlying this and related litigation—difficulties with which I believe that neither Edelman nor the courts have sufficiently come to terms.

The difficulties, all interconnected, are these. First, the value of the product at issue here—college sports—is intimately connected with the nature of the labor used to create it. Second, the nature of that value is amorphous, contingent, and greater than the sum of its parts. Third, the fairness arguments that motivate or at least inform litigation of this sort are arguably based on tenuous assumptions about the relationship between the labor used to create the product and the value of the product. In this brief Essay, I do not try to resolve these issues, although I do hope to offer some useful perspective. Rather, my aim is to bring to the fore a set of concerns that courts and commentators ought to acknowledge and address.

Litigating parties, given their particular litigation goals and strategic thinking, might not be inclined to address these issues at the necessary level of generality or with the requisite depth.

1. 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 (2014).

2. No. C-09-3329-CW, 2014 WL 3899815 (N.D. Cal. Aug. 8, 2014).

3. Edelman has, I believe, underestimated the Title IX compliance problems a school would generate for itself should it choose to take advantage of the freedom to offer men's football and basketball players a share of licensing revenues. While an analysis of that issue is beyond the scope of this Essay, there is no rule allowing schools to treat male athletes better than female athletes merely because the male athletes play the sports that earn the money used to afford the better treatment.

But we need not second-guess the parties' reasons for framing the issues as they do in order to recognize that the courts can and should look to the bigger picture. It will be difficult, if not impossible, to develop a coherent body of law in this area unless courts come to terms with the deeper conceptual problems inherent in the application of antitrust law to the National College Athletic Association's (NCAA) treatment of student-athletes. This will not be easy. However, the challenge presented by these cases is also an opportunity. Situations like this—in which the law as familiarly understood does not fit easily—facilitate, indeed force, us to rethink and deepen our familiar understandings. If the courts can confront the conceptual problems presented by these cases, the result may not only be a more coherent body of law governing the antitrust status of the NCAA, but also a deeper understanding of both antitrust law and the unique American institution of big-time college sports.

By way of background, as Edelman describes, § 1 of the Sherman Act does not prohibit every “contract, combination . . . or conspiracy in restraint of trade,” but bars only unreasonable restraints of trade.⁴ An unreasonable, and thus illegal, restraint is one that is anticompetitive in its net effect.⁵

Restraints that allow the creation of a product that would not exist otherwise are for that reason not anticompetitive in effect, and thus not unreasonable.⁶ This is true even if the restraints in question are of a sort that in other contexts might be anticompetitive. So, beneath the doctrinal complexity, the essential question for the courts is this: are the restraints imposed by the NCAA necessary to create and maintain this product? This question, difficult and complex in any context, is particularly problematic in the context of college sports for at least two reasons.

4. 15 U.S.C. § 1 (2012).

5. See *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (noting that “[e]very agreement concerning trade, every regulation of trade, restrains” and that restraints are only illegal when they are so anticompetitive as to “suppress or even destroy competition”).

6. See Thomas A. Pirano, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 827 (2000) (“The Sherman Act encouraged firms to compete aggressively by . . . developing new products . . .”).

First, the restraints that the NCAA has imposed are restraints on the nature of the labor used to create the product. NCAA members conspire to ensure that the product they collectively produce—college sports—is created by a particular form of low-cost labor—amateur student-athletes. Such restraints would in most cases violate the Sherman Act. As a general rule, antitrust defendants cannot justify restraints in a labor market by pointing to procompetitive effects in a separate product market.⁷ A group of manufacturing firms could not, for example, justify cooperative wage-fixing on the theory that it helps them make products more cheaply and thus compete more effectively against the manufacturers of other, similar products. Indeed, key antitrust opinions from a generation ago can be read as simply applying this principle to sports, suggesting that labor restraints in sports can never be justified on the grounds that they help the league compete better against other forms of entertainment.⁸

Recent opinions, however, including that of the United States Supreme Court in *American Needle, Inc. v. NFL*,⁹ have recognized that sports are different.¹⁰ These opinions have suggested that the anticompetitive effects of some labor restraints imposed by professional sports leagues should be balanced against the procompetitive effects of those restraints in a “closely related” product market.¹¹ This principle has not been well or coherently worked out by the courts, so it remains unclear what sorts of restraints might be justified by what sorts of procompetitive effects. In part, the lack of coherence and predictability in this area stems from the failure of courts to get to the heart of the

7. See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963) (noting the negative consequences of allowing anticompetitive effects in one market to be justified by precompetitive consequences in another).

8. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183–89 (D.C. Cir. 1978) (rejecting claims by the National Football League that the draft—a restraint on trade—was “procompetitive” in that it created greater parity between teams, which in turn led to more even and entertaining games).

9. 560 U.S. 183 (2010).

10. See, e.g., *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1120–24 (E.D. Cal. 2002) (discussing antitrust issues as they related to the Senior PGA Tour, now known as the Champions Tour).

11. See *Am. Needle*, 560 U.S. at 203 (stating that the Court recognizes competitive balance as a legitimate interest (citing *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117 (1984))).

matter. In particular, they have not made clear what sort of connection there should be between the labor and product markets in order to render appropriate the balancing of effects in the two.

Properly understood, the relevant question ought not simply be the closeness of the connection between the labor and product markets but rather the nature of that connection. At a minimum, a labor restraint should be considered sufficiently connected to the product market to justify the balancing of effects if the restraint is crucial to the creation of a product that would not exist otherwise. Recognizing this allows us to see that the principle that should guide this inquiry is one that applies more broadly, and with which antitrust courts do in fact have some experience. In the seminal case of *Broadcast Music v. Columbia Broadcasting System*,¹² for example, the Court recognized that an arrangement, which on its face appeared to be price-fixing, might yet be procompetitive because it made possible a product—blanket licenses allowing for the performance of a wide range of copyrighted works—that would not be possible otherwise.¹³ So, the essential question is not a new one. Rather, it is a matter of applying the principle to labor restraints. Do the restraints make possible the product?

In the context of sports leagues, there are two sorts of ways in which a labor restraint might be essential to the creation of the product. First, it might be necessary or important that the labor be distributed in a particular way—presumably with some degree of evenness. This idea is at the heart of all the competitive balance arguments made by cooperative sports enterprises in support of labor restriction. These arguments are tenuous, however, and often fail to justify restraints. It can appear that the organization making the argument has confused or conflated increased competition on the field with the increased economic competition that must be shown in order to justify an otherwise anticompetitive restraint. Thus, it can appear as though the enterprise is simply arguing that the restraints allow it to make

12. 441 U.S. 1 (1979).

13. See *id.* at 24 (ruling that this case was not an instance of price fixing because the blanket license did not mask anything).

better products—an argument that is of course foreclosed by *National Society of Professional Engineers v. United States*.¹⁴

The NCAA falls into this trap whenever it makes arguments about competitive balance and the like. Such arguments not only fail to justify the restraints in question, but they fail to highlight the crucial difference between college and professional sports, and thus obscure the underlying issues that most need to be illuminated.

In the context of college sports, the nature of the relationship between the labor and product is qualitatively different because the nature of the labor used to create the product is arguably essential to the nature and value of the product in a way not found in other contexts, including most professional sports. It is not simply the case that allowing defendants to collude in a labor market will allow them to produce better products. Rather, this is a situation—rare if not unique—in which the restrained nature of the labor market *is* the product. They are selling not just football and basketball games, but football and basketball games played by a certain sort of player.

A partial analogy might be to a firm selling furniture made by Amish craftsmen, marketing to people who admire and want to support the Amish lifestyle and who cherish the thought of sitting on furniture made by the people they so admire. Such a firm could certainly decide to employ or contract with only Amish furniture makers. The analogy is only partial, however, because such a firm could simply unilaterally decide to hire or contract with Amish craftsmen. The analogy fails to capture the necessity for cooperation which is at the heart of the difficulty in the context of college sports. There are few, if any, contexts other than college sports in which the nature of the labor is somehow inherent in the value of the product and where that particular form of labor, and thus that product, can be secured only through cooperation.

The precedent most closely on point might be a 2002 case involving the senior golf tour, *Toscano v. PGA Tour, Inc.*¹⁵ There,

14. 435 U.S. 679, 693–95 (1978) (enjoining a restraint designed to protect against subpar engineering because of “the legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services”).

15. 201 F. Supp. 2d 1106 (E.D. Cal. 2002).

the tour members agreed among themselves to manage entry into tournaments in ways that favored famous over-50 golfers, and thus limited the participation of some more skilled but less well-known golfers.¹⁶ The basic logic of the case was that the product offered by the senior tour was not just golf tournaments, or even golf tournaments for older players. Rather, the tour was to a large extent an old-timers event, appealing to fans' memories of their favorite players' former exploits.¹⁷ It was thus permissible to limit entry to players with former exploits for fans to remember.¹⁸

The court held that the restraints were not anticompetitive in economic effect, and opined: "Even if Toscano had provided evidence of significant anticompetitive effects, the defendants have amply demonstrated that the eligibility rules have a series of procompetitive justifications. The eligibility rules provide a product that otherwise would not exist and, therefore, they further consumer welfare."¹⁹ Labor could be restrained because it was the nature of the labor that made the product what it was.²⁰

Framing the issue in this way makes clear that in the context of college sports some restraints on labor must be necessary. If we want this product—games played by a certain sort of player—to exist, those producing it must be able to require that the games be played by that sort of player. And if cooperation is necessary to that end, then they must be permitted to cooperate. This does not, however, answer the more difficult question. Which restraints are truly necessary? What exactly makes a player the sort of player that people are willing to pay to see play?

This highlights the second and more fundamental difficulty inherent in these cases. The nature of the product—its value, its appeal, and its connection to the labor used to create it—is amorphous and difficult to pin down. That, in turn, makes it very

16. *Id.* at 1112.

17. *See id.* at 1113 ("The Tour provides an entertainment product in which primarily well known and popular senior golfers may compete against one another.").

18. *See id.* at 1126 (explaining that the restrictions on tournament entry were not unreasonable).

19. *Id.* at 1123.

20. *See id.* at 1126 (explaining that restraining the type of player to enter this tournament was acceptable because it was a part of the business model).

difficult to determine which of its features are essential to its creation and ongoing value.

What makes college sports valuable and appealing? At one level, college football and basketball are merely lower-level versions of games that are played at a much higher level by professional athletes. But if that were all they were, they would not be so popular and they would not be worth much money. Consider how few people watch NBA Development League games, which are played at a similar (if not higher) level than are college basketball games.²¹ Or think about how few people are interested in lower-level football leagues, which rarely last more than a few years, and which never make money.²²

So, why do millions of people watch college football and basketball? What is it that makes this product so much more appealing than seemingly similar, semi-professional sports? No one knows for sure. It is clearly some combination of tradition, amateurism, mythology, community spirit, nostalgia, idealism, and other intangible qualities. It would not be too much to describe it as a mystique.

Antitrust courts do not have much experience with the analysis of mystique. They have proven unwilling to wrestle with the question of how the various facets of college sports come together to produce the product capable of generating such revenue. Instead, courts tend to assess restraints serially, as they are challenged, in a way that makes it difficult to assess what the essential components are—and hard for the NCAA ever to prove

21. *Compare NBA D-League Achieves Record-Breaking Growth During 2013-14 Season*, NBA.COM (May 1, 2013), http://www.nba.com/dleague/news/nba_development_league_record_breaking_growth_2014_05_01.html (last visited Dec. 1, 2014) (stating that the total attendance for all teams in the 2013–14 NBA D-League season was 1,181,404) (on file with the Washington and Lee Law Review), *with* 2014 NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2014 NCAA MEN'S BASKETBALL ATTENDANCE (2014), http://fs.ncaa.org/Docs/stats/m_basketball_RB/Reports/attend/2014.pdf (providing that the University of North Carolina alone had a home basketball attendance of 324,458 in the 2013–14 season).

22. *See, e.g.*, Steve Johnson, *Tuesday-Morning Quarterbacking the Demise of the XFL*, CHI. TRIB. (May 15, 2001), http://articles.chicagotribune.com/2001-05-15/features/0105140260_1_vince-mcmahon-xfl-rival-networks (last visited Dec. 1, 2014) (discussing the failure of the XFL, a professional football league designed to emphasize entertainment) (on file with the Washington and Lee Law Review).

that any particular change will be the straw that breaks the camel's back.

The process began three decades ago in *NCAA v. Board of Regents of the University of Oklahoma & University of Georgia Athletic Association*;²³ but only Justice White, dissenting in that case, seemed to see the slippery slope for what it was.²⁴ The case involved a set of agreements to limit television broadcasts of college football games; when taken together, those agreements limited output and fixed the prices of television broadcast of games.²⁵ The court recognized this and rejected the NCAA's efforts to argue that the agreements were in various ways procompetitive.²⁶ Justice White, in dissent, disagreed with the court's analysis on several particular points, but his key concern seemed to be less about the reasoning in the case than about the consequences of the ruling.²⁷

The majority in *Board of Regents* seemed to assume that the ruling would leave untouched the ability of NCAA members legally to agree on such things as eligibility and amateurism requirements, which the court saw as necessary to preserve the nature of the product: "In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like. And the integrity of the 'product' cannot be preserved except by mutual agreement."²⁸ But Justice White realized that once antitrust scrutiny was applied to the NCAA, even as to something so seemingly far removed from the NCAA's central mission as TV contracts, subsequent

23. 468 U.S. 85 (1984).

24. *See id.* at 135–36 (White, J., dissenting) ("The collateral consequences of the spreading of regional and national appearances among a number of schools are many.").

25. *See id.* at 94 (majority opinion) (explaining that "[n]o member is permitted to make any sale of television rights except in accordance with the basic plan").

26. *See id.* at 120 ("[C]onsistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role.").

27. *See id.* at 128 (White, J., dissenting) (arguing that "unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements").

28. *Id.* at 102 (majority opinion).

challenges would call into question aspects of NCAA regulation more central to the continued survival of college sports.²⁹

The Seventh Circuit attempted to forestall this consequence in *Banks v. NCAA*,³⁰ a case challenging an NCAA rule prohibiting players from hiring agents.³¹ The court recognized that if that particular student-athlete eligibility requirement were made subject to antitrust scrutiny, it would be difficult or impossible to make principled determinations about which requirements are truly necessary to maintain the “character and quality” of college sports.³² So the court simply asserted, without much analysis, that there was no anticompetitive impact on any labor market, that NCAA members were “purchasers of labor” in their relationships with student-athletes, and that there was therefore no antitrust violation.³³ But judicial fiat was not sufficient to stop a slide down a slope this slippery.

The next step was *Law v. NCAA*,³⁴ in which the Tenth Circuit held that the NCAA was subject to antitrust scrutiny not only when its members were acting as sellers of a product but also as employers—in that case employers of coaches.³⁵ Accordingly, anticompetitive restraints in that labor market also violated the Sherman Act.³⁶ Still, the court seemed to assume, as did the NCAA, that this would not implicate student-athlete eligibility requirements.³⁷ Again, there was no warrant for that

29. *See id.* at 134 (White, J., dissenting) (“The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members.”).

30. 977 F.2d 1081 (7th Cir. 1992).

31. *See id.* at 1083 (describing a situation in which a player was denied reinstatement by the NCAA after entering the NFL draft).

32. *Id.* at 1089 (citing Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984)).

33. *Id.* at 1095.

34. 134 F.3d 1010 (10th Cir. 1998).

35. *See id.* at 1023 (describing the NCAA as failing to meet its burden of showing that “the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects”).

36. *See id.* at 1016 (“To prevail on a section 1 claim under the Sherman Act, the coaches needed to prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”).

37. *See id.* at 1021 (“In *Board of Regents* the Supreme Court recognized that certain horizontal restraints, such as the conditions of the contest and the eligibility of participants, are justifiable under the antitrust laws because they

assumption. Once the NCAA was subject to antitrust scrutiny as an employer, it was inevitable that student-athlete eligibility requirements would be called into question. And they were.

So here we are. The District Court in *O'Bannon* has held that there is no evidence that payments to college athletes of less than \$20,000 would harm consumer demand for college sports.³⁸ That is probably right. But if so, why not payments of \$30,000? Or \$50,000? Any line will be inherently arbitrary and unstable.

Nor is it hard to predict the next step—an antitrust challenge to academic-eligibility requirements. The *O'Bannon* court seems to assume that its ruling does not implicate NCAA rules requiring athletes to be full-time students; and on its face it does not. But the logic is inexorable. Is it truly essential to the character of college sports that players be full-time students? Would it really destroy the product if schools were permitted to allow part-time students to participate? Indeed, why require schools to require that players be students at all? It may seem obvious that academic-eligibility requirements are different—that, of course, schools must be permitted to agree on such matters. But to make that assumption would be to show the same lack of foresight and imagination evinced by the Supreme Court in *Board of Regents* and by the Tenth Circuit in *Law*.

Of course, courts could simply draw a line by fiat—declare that academic-eligibility requirements are not illegal; but again, the line will be arbitrary and the cases unpredictable. The essential problem is that it will be difficult or impossible for the NCAA to show that any one particular thing about who plays college sports is by itself essential. It is very hard to define the essential components of a mystique, and it will be impossible to do so as long as the components are addressed one by one as they arise in isolated cases challenged in litigation. Instead, if there is to be a coherent and stable body of law in this area, it will require that courts and commentators, aided perhaps by thoughtful economists and social scientists, look to the big picture and help

are necessary to create the product of competitive college sports.”).

38. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. C-09-3329-CW, 2014 WL 3899815, at *28 (N.D. Cal. Aug. 8, 2014) (“[T]he Court does not find these findings to be credible evidence that consumer demand for the NCAA’s product would decrease if student-athletes were permitted to receive compensations.”).

us figure this out. And, if it turns out that it is simply not possible for antitrust courts to figure out or articulate coherently which components of college sports are essential to preserving its value, and we nonetheless want that value preserved, we should consider a statutory exemption that would shield some portion of the enterprise from antitrust scrutiny.

Recognizing the amorphous nature of this product also sheds light on the fairness and exploitation arguments that accompany, if not motivate, much of this litigation. It is seen as unfair for colleges to make so much money when it is in some sense the players who are bringing in the money. But are they? Recall that what the players do—play lower-level versions of professional sports—would not be, and in fact is not, of interest or value outside of the unique context of college sports. The product—the thing that commands attention and thus generates the revenue—is in fact the amorphous mystique described above, which is generated and maintained by a larger set of institutions and traditions and practices of which any given player is just one inessential part. As to most players, to say that he deserves a cut because he brings in the money is analogous to saying that the driver of an armored car bringing deposits to a bank deserves a cut because he is the one bringing in the money.

Individual players seem to be, and feel that they are, particularly valuable because so much effort is spent on recruiting them. No one competes for armored car drivers. But here is what gets missed. The value of particular players, even most particularly talented players, is distributional rather than value producing. The allocation of talent impacts who wins more games, and, thus, which schools get a larger share of the revenue produced by the collective enterprise—through bowl game appearances, tournament bonuses, larger shares of broadcasting revenue, and the like. But the overall appeal and value of college sports does not depend on who wins games or on how the overall revenue is distributed among schools. Indeed, if there is any merit to the competitive-balance arguments made by the NCAA, particularly talented players may actually undercut the value of the enterprise.

Consider, by way of analogy, if NASCAR were to allow race teams to use different tires, and if the best tires were in short supply. Teams would spend tremendous money and energy

choosing and competing for better tires because slightly better tires can mean the difference in any given race. But it would be a mistake to conclude that having the best possible tires is crucial to the popularity and appeal of the collective endeavor. It is not. Indeed, NASCAR recognizes this and standardizes tires, discouraging collective expenditure on aspects of the sport with merely distributional rather than value-enhancing effects.³⁹ Because the appeal of college sports is based not on the absolute level of play, but on the mix of mystique and tradition described above, most players are like tires. Their particular talents may be distributionally important—thus, the effort spent recruiting them; but as to the overall value of the sport, they just need to be good enough and relatively evenly distributed.

I say “most players” because there are certainly rare and special players whose particular talents or personalities contribute to the overall appeal of, and, thus, the revenue generated by, college sports as a whole. The “Fab Five” at Michigan were an example—as, more recently, was “Johnny Football” at Texas A&M. Fairness suggests that such players share in the revenue that they as individuals help generate—or at least that they should be permitted to earn income in ways that do not undercut the viability of the larger endeavor through which they have that very earning capacity.

It would be difficult or impossible to determine which players have this individual impact on the appeal of college sports, and to what extent. However, simply recognizing the difficulty and significance of this question is important in evaluating the fairness arguments underpinning much of this litigation. The recognition suggests a potential, if partial, solution to the line-drawing problems faced by the courts: allow players to do paid third-party endorsements. Given a case providing the appropriate platform, the courts could rule that it is unnecessarily anticompetitive, and thus illegal, for the NCAA to collude to

39. I do not mean to suggest that the tire-restriction cases are on point as a matter of substantive antitrust law. Unlike the situation with student-athletes, there is no sense in which the particular nature of the tires is essential to the overall value of the sport. Thus, the legality of race-car tire restrictions hinges essentially on competitive-balance arguments, which arguments, as noted, are not at the heart of the NCAA’s best defense.

preclude member schools from allowing players to make commercials or sign memorabilia.

The district court in *O'Bannon* seems to have rejected this option, opining that “[a]llowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the ‘commercial exploitation’ of student-athletes.”⁴⁰ As Edelman notes, however, the court seems to have had little or no basis for this assertion.⁴¹ In fact, it is not at all clear that allowing student-athletes to do endorsements would cause undue difficulties. Moreover, such a ruling would provide a less arbitrary line. Schools would not be paying players at all, so courts would not be faced with the slippery slope of how much is too much.

Note also that the plaintiffs in *O'Bannon* did not seek such a remedy.⁴² And why not? Because there would be very little money to be made by most players through third-party endorsements. And why is that? Because most players are not, as individuals, the source of much of the interest generated by sports. What the plaintiffs would no doubt describe as the inadequacy of the remedy is itself evidence that the fairness logic underlying their claims is less strong than we might be inclined to believe.

This would, as I say, be just a partial solution because at least some high-profile players no doubt contribute to the overall appeal of not only their sport, but also their NCAA member schools. In addition to being permitted to do endorsements, the Fab Five or Johnny Football might with some justice claim to have been entitled to a share of the marketing and licensing revenue generated by Michigan, by Texas A&M, and by the NCAA as a whole—at least to the extent that that revenue had been augmented by the particular popularity of those players.

40. *O'Bannon*, 2014 WL 3899815, at *47.

41. See Edelman, *supra* note 1, at 2336 (noting that “much evidence at trial indicated that the NCAA itself does not always act in a manner to protect such exploitation”).

42. See *O'Bannon*, 2014 WL 3899815, at *1 (explaining that the plaintiffs only sought the right to receive “a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes’ names, images, and likeness in videogames, live game telecasts, and other footage”).

Still, although not a complete solution, allowing players to do endorsements would at least do three things. It would solve some of the fairness and exploitation problems. It would clarify the (limited) extent to which most players are in fact bringing in the money so as to deserve a cut. And it would provide a (relatively) stable stopping point on the slippery slope from *Board of Regents* to the end of big-time college sports.⁴³

43. In addition, it would not violate Title IX for schools simply to allow all players—male and female—to engage in a reasonable amount of third-party endorsements.